Y4.J89/2:C81/9

[COMMITTEE PRINT]

95TH CONGRESS
2d Session

SENATE

SOURCEBOOK ON CORPORATE IMAGE AND CORPORATE ADVOCACY ADVERTISING

COMPILED BY THE

SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE

OF THE

COMMITTEE ON THE JUDICIARY

OF THE

UNITED STATES SENATE

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U.S. GOVERNMENT PRINTING OFFICE
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Introduction

This Sourcebook on Corporate Image and Corporate Advocacy Advertising contains the basic documents relating to the Subcommittee's inquiry into this subject.

The Subcommittee inquiry focuses on the exercise of jurisdiction by and the degree of coordination among the Federal Trade Commission, Federal Communication Commission, and Internal Revenue Service with respect to corporate image and corporate advocacy advertising. The Administrative Practice and Procedure Subcommittee is conducting this investigation pursuant to its oversight jurisdiction over federal agency practices and procedures.

The three agencies which are the focus of the Subcommittee's investigation have limited statutory jurisdiction with respect to corporate image and corporate advocacy advertising. Under 15 U.S.C. 45, for example, the Federal Trade Commission may prohibit the dissemination of advertisements held to be unfair, false or misleading. The Federal Communications Commission has the responsibility to determine whether advertisements raise a "controversial issue of public importance" under its "fairness doctrine". Under section 162(e)(2)(B) of title 26, the Internal Revenue Service must deny claims for business expense deductions for any advertisement disseminated "in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums."

In determining the extent to which they can exercise jurisdiction over a particular advertisement, these three agencies must determine respectively whether the advertisement is protected by the First Amendment, whether it raises a controversial issue of public importance, or whether it is a business or lobbying expense. Explicitly or implicitly, each of these jurisdictional determinations is based on the First Amendment status of the advertisement. Therefore, the Subcommittee is exploring whether there should be coordination between the agencies to avoid making inconsistent determinations. For example, the I.R.S. may determine that an advertisement is part of a lobbying effort and that a business expense deduction may not be taken, while the Federal Trade Commission may consider the same advertisement as "commercial speech" with respect to which it may regulate truth and accuracy. Similarly, the I.R.S. might determine that an advertisement is not, in fact, part of a lobbying effort, and the Federal Communications Commission might find that the advertisement raises a controversial issue of public importance.

Each jurisdictional determination made with respect to a given advertisement must turn on the particular characteristics of the advertisement. Recent Supreme Court rulings on the First Amendment status of commercial speech have created some confusion about the

jurisdiction of these Federal agencies. It is clear from these documents, however, that each of these agencies still may exercise jurisdiction with respect to some corporate image and corporate advocacy advertisements. An advertiser cannot claim that the Supreme Court's recent decisions interpreting the Constitutional status of "Commercial Speech" preclude any of these agencies from exercising jurisdiction in an appropriate case.

The documents in this Sourcebook explore the nature and extent of corporate image and corporate advocacy advertising; the First Amendment status of commercial speech; Federal Trade Commission jurisdiction; Federal Communications Commission jurisdiction; and Internal Revenue Service jurisdiction. The Sourcebook also contains excerpts from an out-of-print hearing held on this general subject in 1974 by the Senate Commerce Committee. Whenever appropriate, these materials are printed in chronological order.

EXPENDITURES FOR CORPORATE ADVERTISING

Exhibit 1: 1970 Expenditures

1970 EXPENDITURES FOR CORPORATE* AND ASSOCIATION ADVERTISING

according to *National Advertising Investments*, published by Leading National Advertisers

	Corporate	*Association*	*Total*
Consumer Magazines ...	$ 78,168,000	$25,886,300	$104,054,300
Sunday Magazines	1,803,700	995,000	2,798,700
Network Television	39,147,800	21,786,800	60,934,600
Spot Television	27,884,300	15,075,800	42,960,100
Network Radio	1,675,100	1,548,400	3,223,500
Outdoor	868,400	5,464,700	6,333,100
Six Media Total	$154,036,000	$68,756,400	$222,792,400

Note that since these figures are for one-time rates, and do not take discounts into consideration, they must necessarily be higher than actual expenditures. It must also be considered that often it is difficult to determine accurately which ads are corporate, and some ads that advertisers characterize as corporate probably are not included.



* Leading National Advertisers and Publishers Information Bureau term corporate advertising, "general promotion advertising," and define it as advertising devoted primarily to selling the corporate personality, with its first objective going beyond the direct sale of a single product or service. To be classified as general promotion, they require an ad to fulfill one or more of the following qualifications:

- It must educate, inform, or impress the public regarding the company's policies, functions, facilities, objectives, ideals, and standards.
- It must build favorable opinion about the company by stressing the competence of the company's management, its scientific knowhow, manufacturing skills, technological progress and product improvements, and its contribution to social advancement and public welfare, and on the other hand, to offset unfavorable publicity and negative attitudes.
- It must build up the investment qualities of its securities, or improve the financial structure of the company.
- It must sell the company as a good place to work (and so is often designed to appeal to college graduates or to people of certain skills).

Source: These data, compiled by the *Public Relations Journal*, are extracted from *National Advertising Investments*, prepared and published by Leading National Advertisers (LNA), New York, N.Y. Data is collected by LNA for Publishers Information Bureau (magazines and supplements), Broadcast Advertising Reports (network and spot television and network radio), and the Institute of Outdoor Advertising.

1970 Leading General Promotion Advertisers

1. American Telephone & Telegraph Co.	$18,854,400
2. Standard Oil of New Jersey	6,777,600
3. Household Finance Corp.	4,467,000
4. Metropolitan Life Insurance Co.	3,984,500
5. Bell Telephone Systems	3,477,800
6. E. I. DuPont De Nemours	3,320,700
7. Prudential Insurance Co.	3,287,100
8. Atlantic Richfield Co.	3,007,300
9. General Electric Co.	2,667,200
10. Shell Oil Co.	2,611,500

1970 Leading Association Advertisers

1. Florida Citrus Commission	$5,427,900
2. Edison Electric Institute	3,535,600
3. Toyota Dealers Assn. Franchise	3,448,600
4. American Gas Assn.	3,206,900
5. Commonwealth of Puerto Rico	2,976,300
6. Assn. of American Railroads	2,820,300
7. Foundation for Full Service Banks	2,650,700
8. Florists Transworld Delivery Assn.	2,384,200
9. Investor Owned Electric Light & Power Cos.	2,346,400
10. Datsun Dealers Assn. Franchise	2,330,900

First Six-Month Expenditures for Association Advertising in Six Media Categories according to *National Advertising Investments*

	1970 January-June	1971 January-June	Change
Consumer Magazines	$12,540,800	$10,569,500	—
Sunday Magazines	666,900	201,600	—
Network Television	6,923,300	8,311,000	+
Spot Television	8,108,000	10,524,300	+
Network Radio	793,400	255,500	—
Outdoor	2,708,300	3,879,700	+
Six Media Total	$32,961,300	$39,397,400	+

Association ads in consumer magazines slipped a bit (from $12,540,800 to $10,569,500) the first six months of 1971 compared to the same period in 1970, but magazines still lead the other five media. Spot television came in a close second ($10,524,300), up briskly from the same period last year ($8,108,000). Both Sunday magazines and network radio show losses for the first half, while outdoor and network television gained. Association ads in all six media showed a gain for the period.

First Six-Month Combined Expenditures for General Promotion and Association Advertising in Six Media Categories according to *National Advertising Investments* Figures

	1970 January-June	1971 January-June	Change
General Promotion	$79,024,500	$74,114,600	—
Association Advertising	32,961,400	39,397,400	+
Total	$111,985,800	$113,512,000	+

Corporate advertising (general promotion plus association advertising) increased during the first six months of 1971 compared with the first half of 1970.

First Six-Month Expenditures for General Promotion Advertising in Six Media Categories

according to *National Advertising Investments*

	1970 January-June	1971 January-June	Change
Consumer Magazines	$38,858,800	$30,587,000	—
Sunday Magazines	208,300	281,200	+
Network Television	27,705,100	25,841,400	—
Spot Television	6,553,200	14,201,400	+
Network Radio	358,900	480,500	+
Outdoor	332,400	391,400	+
Six Media Total	$79,024,500	$74,114,600	—

Consumer magazines garner the lion's share of corporate ad dollars ($104,054,300), with network television next ($60,934,600), followed by spot television ($42,960,100) outdoor ($6,333,100), network radio ($3,223,500), and Sunday magazines ($2,798,700). Newspapers, spot radio, and the business (trade) press are not included.

Consumer magazine general promotion ad revenue declined the first half of 1971 compared to that period in 1970 (from $38,858,800 to $30,587,000), but retained its lead over the other five media. Network television declined slightly during the period, but spot television gained dramatically (from $6,553,300 to $14,201,400). Network radio and outdoor also made significant gains. General promotion ads in all six media showed a loss for the period.

First Half of 1971 Leading General Promotion Advertisers

1.	American Telephone & Telegraph Co.	$11,084,100
2.	Mobil Oil Corp.	4,384,400
3.	Standard Oil of New Jersey	3,795,300
4.	E. I. DuPont De Nemours	3,576,100
5.	Ford Motor Co.	2,818,300
6.	Metropolitan Life Insurance Co.	2,528,800
7.	General Motors Corp.	2,134,200
8.	Beneficial Corp.	1,982,600
9.	Household Finance Corp.	1,896,200
10.	Food Fair Stores Inc.	1,820,500

First Half of 1971 Leading Association Advertisers

1.	Florida Citrus Commission	$3,141,000
2.	Datsun Dealers Assn. Franchise	2,071,400
3.	American Gas Assn.	1,882,800
4.	Edison Electric Institute	1,314,500
5.	Toyota Dealers Assn. Franchise	1,211,500
6.	Savings & Loan Assns.	1,200,100
7.	Blue Cross-Blue Shield Plans	1,095,300
8.	Commonwealth of Puerto Rico	1,079,000
9.	Foundation for Full Service Banks	1,059,000
10.	Investor Owned Electric Light & Power Cos.	1,020,900

Exhibit 2: 1971 Expenditures

1970-71 EXPENDITURES FOR CORPORATE* AND ASSOCIATION ADVERTISING

Corporations and associations in 1971 put 23.4% more, for a total of $230,211,300, into advertising media for their corporate campaigns than they did the previous year ($222,792,400), but the only media chalking up more corporate ad dollars were network television, spot television, and network radio. All three of these media gained higher expenditures from corporations; associations only increased their budgets to spot television.

Leading the six media categories in corporate advertising dollars was consumer magazines at $88,227,000, down 15.3% from 1970 figures. Next came network television with $70,786,600, up 13.8% over 1970, then spot TV with $62,946,800, up 31.9%.

Outdoor advertising was fourth with $4,366,700 (down 31.7%), then network radio with $2,890,000 (down 10.3%), and last, Sunday newspaper magazines at $994,200 (down 64.2%).

Perhaps we should note that if network and spot television expenditures were lumped together, television would emerge not only as the medium garnering the increases, but also as the top corporate advertising medium, with $133,733,400. We must also point out that newspapers and business publications are not included in LNA reports.

1970-71 EXPENDITURES FOR CORPORATE AND ASSOCIATION ADVERTISING

	CORPORATE		ASSOCIATION		TOTAL	
	1971	1970	1971	1970	1971	1970
Consumer Magazines	$64,711,900	$78,168,000	$23,515,100	$25,886,300	$88,227,000	$104,054,300
Network Television	50,055,000	39,147,800	20,731,600	21,786,800	70,786,600	60,934,600
Spot Television	39,505,800	27,884,300	23,441,000	15,075,800	62,946,800	42,960,100
Outdoor	855,500	868,400	3,511,200	5,464,700	4,366,700	6,333,100
Network Radio	1,860,500	1,675,100	1,029,500	1,548,400	2,890,000	3,223,500
Sunday Magazines	587,100	1,803,700	407,100	995,000	994,200	2,798,700
6 Media Totals	$157,575,800	$154,036,000	$72,635,500	$68,756,400	$230,211,300	$222,792,400

Note that since these figures are for one-time rates, and do not take discounts into consideration, they must necessarily be higher than actual expenditures. It must also be considered that often it is difficult to determine accurately which ads are corporate, and some ads that advertisers characterize as corporate probably are not included.

Source: These data, compiled by the *Public Relations Journal*, are extracted from *National Advertising Investments*, prepared and published by Leading National Advertisers (LNA), New York, N. Y. Data is collected by LNA from Publishers Information Bureau (magazines and supplements), Broadcast Advertising Reports (network and spot television and network radio), and the Institute of Outdoor Advertising. National Advertising Investments report shows expenditures in six media by brand and is published semi-annually.

GENERAL PROMOTION (Corporate) ADVERTISING—JANUARY-DECEMBER 1971

American Telephone & Telegraph	19,827.2
Standard Oil of New Jersey	5,972.0
Bell Telephone Systems	5,580.3
E I Du Pont De Nemour and Company	5,261.8
Metropolitan Life Insurance Company	4,862.8
Ford Motor Company	4,613.1
Food Fair Stores Inc.	4,160.4
Household Finance Corporation	4,049.7
Beneficial Corporation	3,744.3
General Electric Company	3,428.1

ASSOCIATION ADVERTISING—JANUARY-DECEMBER 1971

Florida Orange Juice	4,968.6
Datsun Dealers Association	4,361.8
American Dairy Association	3,727.4
Puerto Rican Rums	2,763.0
American Petroleum Institute	2,711.5
Toyota Dealers Association	2,606.2
Foundation for Full Service Banks	2,319.8
Savings & Loan Association	2,205.0
Edison Electric Institute	2,174,9
Investor Owned Electric Light and Power Companies	2,126.7

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- It must educate, inform, or impress the public regarding the company's policies, functions, facilities, objectives, ideals, and standards.

- It must build favorable opinion about the company by stressing the competence of the company's management, its scientific knowhow, manufacturing skills, technological progress and product improvements, and its contribution to social advancement and public welfare, and on the other hand, to offset unfavorable publicity and negative attitudes.

- It must build up the investment qualities of its securities, or improve the financial structure of the company.

- It must sell the company as a good place to work (and so is often designed to appeal to college graduates or to people of certain skills).

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Exhibit 3: 1972 Expenditures

1971-72 EXPENDITURES FOR CORPORATE* AND ASSOCIATION ADVERTISING

Corporations and associations in 1972 put 16.2% more, for a total of $267,670,500, into advertising media for their corporate campaigns than they did the previous year ($230,211,300), with all media chalking up more corporate ad dollars. All media gained higher expenditures from corporations; associations increased their budgets to all media with the exception of consumer magazines.

Leading the six media categories in corporate advertising dollars was consumer magazines at $91,017,800, up 3.1% from 1971 figures. Next came network television with $88,184,100, up 24.4% over 1971, then spot TV with $73,573,900, up 16.8%.

Outdoor advertising was fourth with $7,397,400 (up 66.6%), then network radio with $6,048,200 (up 108%), and last Sunday newspaper magazines at $1,449,100 (up 44.7%).

Perhaps we should note that if network and spot television expenditures were lumped together, television would emerge as the top corporate advertising medium with $161,758,000. We must point out that newspapers and business publications are not included in LNA reports.

1971-72 EXPENDITURES FOR CORPORATE AND ASSOCIATION ADVERTISING

	CORPORATE		ASSOCIATION		TOTAL	
	1972	1971	1972	1971	1972	1971
Consumer Magazines	$68,258,600	$64,711,900	$22,759,200	$23,515,100	$91,017,800	$88,227,000
Network Television	64,074,700	50,055,000	24,109,400	20,731,600	88,184,100	70,786,600
Spot Television	41,788,800	39,505,800	31,785,100	23,441,000	73,573,900	62,946,800
Outdoor	2,124,100	855,500	5,273,300	3,511,200	7,397,400	4,366,700
Network Radio	4,828,900	1,860,500	1,219,300	1,029,500	6,048,200	2,890,000
Sunday Magazines	735,600	587,100	713,500	407,100	1,449,100	994,200
6 Media Totals	$181,810,700	$157,575,800	$85,859,800	$72,635,500	$267,670,500	$230,211,300

Note that since these figures are for one-time rates, and do not take discounts into consideration, they must necessarily be higher than actual expenditures. It must also be considered that often it is difficult to determine accurately which ads are corporate, and some ads that advertisers characterize as corporate probably are not included.

Source: These data are compiled exclusively for the *Public Relations Journal*, by *National Advertising Investments*, published by Leading National Advertisers (LNA), New York, N. Y. Data is collected by LNA from Publishers Information Bureau (magazines and supplements), Broadcast Advertising Reports (network and spot television and network radio), and the Institute of Outdoor Advertising. National Advertising Investments report shows expenditures in six media by brand and is published semi-annually.

JANUARY-DECEMBER 1972

TEN LEADING COMPANIES GENERAL PROMOTION (CORPORATE) ADVERTISING
LISTED IN DOLLAR RANK ORDER

Rank	Company	Total 6-Media	Magazines	Sunday Magazines	Network TV	Spot TV	Radio	Outdoor
1	American Telephone & Telegraph Company	19,616.1	5,939.7	—	13,485.9	51.3	139.2	—
2	Exxon Corporation	9,148.2	798.2	—	3,937.9	4,412.1	—	—
3	Ford Motor Company	5,849.7	2,085.8	292.5	2,830.5	139.3	496.4	5.2
4	General Motors Corporation	5,513.5	325.1	—	4,845.6	26.5	315.0	1.3
5	Metropolitan Life Insurance Company	4,889.8	1,082.1	—	3,807.7	—	—	—
6	Shell Oil Company	4,560.6	49.4	—	1,455.0	3,054.4	1.8	—
7	Beneficial Corporation	4,548.9	8.9	—	628.2	3,911.8	—	—
8	Texaco Inc.	4,132.1	433.2	—	3,425.7	246.4	26.8	—
9	Gulf Oil Corporation	3,929.2	93.4	—	3,735.3	100.5	—	—
10	Prudential Insurance Company of America	3,840.2	375.0	—	3,449.0	16.2	—	—
	Top 10 Total	66,028.3	11,190.8	292.5	41,600.8	11,958.5	979.2	6.5

JANUARY-DECEMBER 1972

TEN LEADING COMPANIES ASSOCIATION ADVERTISING
LISTED IN DOLLAR RANK ORDER

Rank	Company	Total 6-Media	Magazines	Sunday Magazines	Network TV	Spot TV	Radio	Outdoor
1	American Dairy Association	7,938.6	640.7	—	1,458.5	5,489.4	208.8	141.2
2	Florida Citrus Commission	6,167.8	1,109.3	72.0	4,844.1	142.4	—	—
3	General Motors Corporation Dealer Associations	4,387.1	32.2	—	—	3,980.6	—	374.3
4	American Gas Association	3,972.5	1,843.4	—	2,127.4	—	—	1.7
5	Blue Cross & Blue Shield	3,471.8	361.5	—	—	3,110.3	—	—
6	Ford Motor Co. Dealer Associations	3,451.0	21.6	—	—	1,934.0	—	1,495.4
7	California Milk Producers Advisory Board	3,381.7	174.1	—	54.1	2,347.9	—	805.6
8	Chrysler Corp. Dealer Associations	3,114.7	—	—	—	2,250.1	—	864.6
9	Savings & Loan Foundation Inc.	3,079.4	263.2	—	2,554.5	260.3	—	1.4
10	American Petroleum Institute	2,835.1	254.6	—	2,575.3	5.2	—	—
	Top 10 Total	41,799.7	4,700.6	72.0	13,613.9	19,520.2	208.8	684.2

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■ It must educate, inform, or impress the public regarding the company's policies, functions, facilities, objectives, ideals, and standards.

■ It must build favorable opinion about the company by stressing the competence of the company's management, its scientific knowhow, manufacturing skills, technological progress and product improvements, and its contribution to social advancement and public welfare, and on the other hand, to offset unfavorable publicity and negative attitudes.

■ It must build up the investment qualities of its securities, or improve the financial structure of the company.

■ It must sell the company as a good place to work (and so is often designed to appeal to college graduates or to people of certain skills).

Exhibit 4: 1973 Expenditures

1972-73 Expenditures for Corporate* and Association Advertising

A report on the Public Relations Journal's annual survey of corporate advertising.

Corporations and associations spent $317,309,100 on corporate advertising campaigns in 1973, 18.5 per cent more than the year before, according to LNA Multi-Media Services, published by Leading National Advertisers, New York. While association "image" advertising increased only .05 per cent, from $85,859,800 in 1972 to $90,331,600 in 1973, corporations' media expenditures for such advertising showed a dramatic increase: up 24.8 per cent, from $181,810,700 in 1972 to $226,977,500 in 1973.

Corporations increased their budgets for consumer and Sunday magazines, network and spot television, but spent less on radio and outdoor, LNA found. Associations increased their expenditures to Sunday magazines and spot television, but spent less with other media. Combined corporation and association LNA figures indicate that radio and outdoor garnered less corporate advertising campaign dollars than in 1972, while all other media showed gains. It's important to note that LNA does not include newspapers (although Sunday magazines are included) and business publications in its reports.

Leading the six media categories in total corporate advertising dollars for 1973 was consumer magazines, with $109,872,800, up 20.7 per cent over the previous year. Hot on magazines' heels was network television with $108,203,900, up 22.7 per cent.

Third was spot television with $86,378,300, up 17.4 per cent. (If network and spot television figures were combined, television would lead all media, with $194,582,200.)

Fourth in the struggle for total corporate campaign dollars was outdoor, with $6,277,900, down 15.1 per cent from 1972. Corporations trimmed their corporate outdoor budgets a whopping 33.9 per cent, from $2,124,100 to $1,403,900. Associations, which generally spend more "image" dollars with outdoor than corporations do, cut outdoor expenditures only .07 per cent, from $5,273,300 to $4,874,000.

Radio showed an important loss of 26.8 per cent, from $6,048,200 in 1972 to $4,421,300 in 1973. Associations cut their radio budgets only .07 per cent, from $1,219,300 in 1972 to $1,126,500 in 1973, but corporations cut back a drastic 31.7 per cent, from $4,828,900 in 1972 to $3,294,800 in 1973.

Sunday magazines, although taking in fewer corporate campaign dollars than any other LNA-reported media, showed the highest percentage gain of any in 1973. Combined corporate and association figures indicate that Sunday magazines gained a whopping 48.7 per cent, from $1,449,100 in 1972 to $2,154,900 in 1973. Associations increased their expenditures 39.6 per cent, from $713,500 to $996,700. Corporations jumped their Sunday magazine budgets a dramatic 57.5 per cent, from $735,600 to $1,158,200.

1972-73 Expenditures for Corporate and Association Advertising

	CORPORATE		ASSOCIATION		TOTAL	
	1973	1972	1973	1972	1973	1972
Consumer Magazines	$ 87,905,400	$ 68,258,600	$ 21,967,400	$ 22,759,200	$109,872,800	$ 91,017,800
Sunday Magazines	1,158,200	735,600	996,700	713,500	2,154,900	1,449,100
Network Television	84,517,900	64,074,700	23,686,000	24,109,400	108,203,900	88,184,100
Spot Television	48,697,300	41,788,800	37,681,000	31,785,100	86,378,300	73,573,900
Radio	3,294,800	4,828,900	1,126,500	1,219,300	4,421,300	6,048,200
Outdoor	1,403,900	2,124,100	4,874,000	5,273,300	6,277,900	7,397,400
6 Media Totals	$226,977,500	$181,810,700	$ 90,331,600	$ 85,859,800	$317,309,100	$267,670,500

Note that since these figures are for one-time rates, and do not take discounts into consideration, they must necessarily be higher than actual expenditures. It must also be considered that often it is difficult to determine accurately which ads are corporate, and some ads that advertisers characterize as corporate probably are not included.

Source: These data are compiled exclusively for the *Public Relations Journal*, by *LNA Multi-Media Services*, published by Leading National Advertisers (LNA), New York, N.Y. Data is collected by LNA from Publishers Information Bureau (magazines and supplements), Broadcast Advertising Reports (network and spot television and network radio), and the Institute of Outdoor Advertising. National Advertising Investments report shows expenditures in six media by brand and is published semi-annually.

JANUARY-DECEMBER 1973
TEN LEADING COMPANIES GENERAL PROMOTION (CORPORATE) ADVERTISING
LISTED IN DOLLAR RANK ORDER

	Total 6-Media	Magazines	Sunday Magazines	Network TV	Spot TV	Radio	Outdoor
American Telephone & Telegraph Co.*	$19,751.6	$ 4,545.2	------	$14,528.7	$ 43.3	$ 634.4	------
Exxon Corporation	13,699.9	1,708.8	------	7,934.5	4,056.6	------	------
International Business Machines Corp.	7,623.9	43.9	------	7,551.4	.9	27.7	------
General Motors Corporation	7,179.2	1,622.2	------	4,179.8	893.6	483.6	------
Texaco Inc.	6,275.4	396.8	------	4,713.6	795.6	369.4	------
Mobil Oil Corporation	4,916.2	341.8	------	4,517.3	57.1	------	------
Beneficial Corporation	4,874.7	9.6	------	1,125.7	3,739.4	------	------
Ford Motor Company	4,156.8	1,882.5	341.6	1,644.4	54.6	228.7	5.0
Atlantic Richfield Company	4,093.9	1,122.9	------	------	2,971.0	------	------
E.I. Du Pont De Nemours & Co., Inc.	4,057.2	------	------	4,054.2	2.2	------	.8
TOTAL TOP 10	$76,628.8	$11,673.7	$341.6	$50,249.6	$12,614.3	$1,743.8	$5.8

*John Howland, AT&T assistant vice president, stresses that LNA's figures for AT&T corporate advertising are too high, probably a result of duplication of figures, and the addition of dollars spent by other than the parent company. He kindly provided the *PR Journal* with the following breakdown of parent company AT&T's total national advertising expenditures for 1973: Magazines and newspapers—$11,178,500; network television—$5,325,246; spot television—$7,836,144; radio—$959,000; total—$25,298,890.

Martin Duffy, AT&T corporate advertising director, notes that this expenditure breaks down as follows: sales advertising—80%; Service Aid advertising (ex. AT&T's "Twenty Ways to Save Money" ad).—10%; corporate "image building" advertising—10%.

JANUARY-DECEMBER 1973
TEN LEADING COMPANIES ASSOCIATION ADVERTISING
LISTED IN DOLLAR RANK ORDER

	Total 6-Media	Magazines	Sunday Magazines	Network TV	Spot TV	Radio	Outdoor
American Dairy Association	$8,460.9	$ 703.5	$67.4	$ 1,000.3	$ 6,550.0	------	$ 130.7
General Motors Corp. Dealer Assns.	7,256.9	------	2.7	------	6,985.6	------	268.6
Florida Citrus Commission	6,988.5	410.6	17.3	5,799.6	598.2	162.8	------
American Gas Assn. Inc.	5,282.1	2,303.6	------	2,976.8	------	------	1.7
Ford Motor Co. Dealer Assns.	5,077.4	------	------	------	3,732	------	1,342.2
Blue Cross & Blue Shield Commissions	4,495.3	863.2	------	738.6	3,093.5	------	------
Savings & Loan Foundation Inc.	3,722.6	6.2	------	3,630.2	84.0	------	2.2
California Milk Producers Advisory Board	3,554.1	99.8	------	842.5	1,954.8	------	656.8
Chrysler Corp. Dealer Assns.	3,398.5	------	------	------	2,526.4	------	872.1
Toyo Kogyo Co. Ltd. Dealer Assns.	2,830.5	------	------	------	2,830.5	------	------
TOTAL TOP 10	$51,066.8	$4,187.0	$87.4	$14,788.0	$28,367.2	$162.8	$3,474.4

Leading National Advertisers and Publishers Information Bureau term corporate advertising, "general promotion advertising," and define it as advertising devoted primarily to selling the corporate personality, with its first objective going beyond the direct sale of a single product or service. To be classified as general promotion, they require an ad to fulfill one or more of the following qualifications:

It must educate, inform or impress the public regarding the company's policies, functions, facilities, objectives, ideals and standards.

It must build favorable opinion about the company by stressing the competence of the company's management, its scientific knowhow, manufacturing skills, technological progress and product improvements, and its contribution to social advancement and public welfare, and on the other hand, to offset unfavorable publicity and negative attitudes.

It must build up the investment qualities of its securities, or improve the financial structure of the company.

It must sell the company as a good place to work (and so is often designed to appeal to college graduates or to people of certain skills).

Exhibit 5: 1974 Expenditures

The price tag on '74 institutional advertising

Corporations and associations spent a combined total of $311.8 million on institutional advertising in 1974, 2 percent less than in 1973, according to the *Journal's* fifth annual survey of these expenditures based on figures provided by *LNA Multi-Media Services*, published by Leading National Advertisers.

Total association "image" advertising expenditures decreased 3 percent, from $90.3 million in 1973 to $87.5 million in 1974. Corporate media dollars for such advertising decreased 1 percent, from some $22.7 million in 1973 to $224.3 million in 1974.

Although corporate and association figures for 1974 indicate a drop from 1973, compared to the totals reported by LNA in 1970 (the first year of the *Journal* survey), corporate expenditures have increased 50 percent and association expenditures 27 percent over the five-year period.

The survey indicates that last year consumer magazines gained in corporate advertising over 1973, and that Sunday magazines and radio gained in association advertising. All other media registered losses. Note that LNA does not include newspapers (although Sunday magazines are included) and business publications in its reports. Consumer magazines also led the other media in total corporate budget allotments for the five-year period from 1970-74, with $401.3 million. Of the six media, Sunday magazines ranked lowest in total corporate "image" dollars spent over the five-year period. Radio ranked lowest for 1974, showing a substantial loss of 81 percent from 1973.

According to the survey, associations increased their 1974 radio budgets by 69 percent over 1973, the highest association percentage gain of reported media. Sunday magazines garnered 7 percent more association advertising dollars in 1974, while expenditures in the other categories dropped.

1970-74 Expenditures for Association Advertising
(in $ thousands)

	1970	1971	Percent chg.	1972	Percent chg.	1973	Percent chg.	1974	Percent chg.	Totals
Consumer magazines	$25,886.3	$23,515.1	(9%)	$22,759.2	(3%)	$21,967.4	(3%)	$21,174.7	(4%)	$115,302.7
Sunday magazines	995.0	407.1	(59%)	713.5	75%	996.7	40%	2,060.8	7%	5,173.1
Network television	21,786.8	20,731.6	(5%)	24,109.4	16%	23,686.0	(2%)	20,441.3	(14%)	110,755.1
Spot television	15,075.8	23,441.0	55%	31,785.1	36%	37,681.0	19%	37,236.5	(1%)	145,219.4
Radio	1,548.4	1,029.5	(34%)	1,219.3	18%	1,126.5	(8%)	1,899.5	69%	6,823.2
Outdoor	5,464.7	3,511.2	(36%)	5,273.3	5%	4,874.0	(8%)	4,670.1	(4%)	23,793.3
6 media totals	$70,757.0	$72,635.5	3%	$85,859.8	18%	$90,331.6	5%	$87,482.9	(3%)	$407,066.8

1970-74 Expenditures for Corporate Advertising
(in $ thousands)

	1970	1971	Percent chg.	1972	Percent chg.	1973	Percent chg.	1974	Percent chg.	Totals
Consumer magazines	$ 78,168.0	$ 64,711.9	(17%)	$ 68,258.6	5%	$ 87,905.4	29%	$102,231.0	16%	$401,274.9
Sunday magazines	1,803.7	587.1	(67%)	735.6	25%	1,158.2	57%	719.4	(38%)	5,004.0
Network television	39,147.8	50,055.0	28%	64,074.7	28%	84,517.9	32%	78,903.8	(7%)	316,699.2
Spot television	27,884.3	39,505.8	42%	41,788.8	6%	48,697.3	17%	40,708.0	(16%)	198,584.2
Radio	1,675.1	1,860.5	11%	4,828.9	160%	3,294.8	(32%)	611.2	(81%)	12,270.5
Outdoor	868.4	855.5	(1%)	2,124.1	148%	1,403.9	(34%)	1,162.8	(17%)	8,414.7
6 media totals	$149,547.3	$157,575.8	5%	$181,810.7	15%	$226,977.5	25%	$224,336.2	(1%)	$940,247.5

Note that since these figures are for one-time rates, and do not take discounts into consideration, they must necessarily be higher than actual expenditures. It must also be considered that often it is difficult to determine accurately which ads are corporate. Some advertisements that advertisers characterize as corporate probably are not included.

Source: These data are compiled exclusively for the *Public Relations Journal*, by *LNA Multi-Media Services*, published by Leading National Advertisers (LNA), New York, N.Y. Data are collected by LNA from Publishers Information Bureau (Magazines and supplements), Broadcast Advertising Reports (network and spot television and network radio), and the Institute of Outdoor Advertising. National Advertising Investments report shows expenditures in six media by brand and is published semi-annually.

Ten Leading Companies—General Promotion (Corporate) Advertising

January-December 1974—Listed in Dollar Rank Order
(In $ thousands)

	Total 6 Media	Magazines	Sunday Magazines	Network TV	Spot TV	Radio	Outdoor
American Telephone & Telegraph Co.	$22,565.9	$ 6,601.5	----	$15,901.7	$ 62.7	----	----
Exxon Corp.	13,558.0	3,020.2	----	10,369.9	143.3	$ 24.6	----
General Motors Corp.	7,725.3	4,014.2	----	3,143.6	368.4	199.1	----
Shell Oil Co.	6,881.4	1,899.8	----	4,923.3	58.3	----	----
Texaco Inc.	6,684.6	1,946.6	----	4,259.2	446.3	32.5	----
Phillips Petroleum Co.	6,280.2	1,308.8	----	423.6	4,547.8	----	----
General Electric Co.	6,172.3	1,252.5	----	4,278.7	641.1	----	----
Mobil Oil Corp.	5,310.1	1,610.7	----	3,688.5	7.6	3.3	----
E.I. DuPont De Nemours & Co., Inc.	5,105.7	----	----	5,105.1	----	----	$ .6
International Telephone & Telegraph Corp.	5,078.3	819.8	----	3,834.9	423.6	----	----
Total	$86,361.6	$22,474.1	----	$55,928.5	$6,699.1	$259.5	$ .6

Ten Leading Companies Association Advertising

January-December 1974—Listed in Dollar Rank Order
(In $ thousands)

	Total 6 Media	Magazines	Sunday Magazines	Network TV	Spot TV	Radio	Outdoor
American Dairy Assn.	$ 8,269.7	$ 411.8	$430.1	----	$ 7,236.2	----	$ 191.6
American Gas Assn., Inc.	4,868.7	2,370.4	----	$2,496.5	----	----	1.8
California Milk Producers Advisory Board	4,458.6	46.2	182.4	400.0	3,198.8	----	631.2
Ford Motor Co. Dealer Assns.	4,361.7	9.5	----	----	2,951.8	----	1,400.4
Blue Cross & Blue Shield Commissions	4,323.8	793.6	----	534.0	2,995.2	----	1.0
Savings & Loan Foundation, Inc.	4,143.7	----	----	3,856.2	282.8	----	4.7
Chrysler Corp. Dealer Assns.	3,336.3	----	----	----	2,801.2	----	535.1
Florists Transworld Delivery Assn.	3,247.6	183.6	----	2,871.9	141.4	$ 49.5	1.2
Commonwealth of Puerto Rico	3,110.9	3,051.7	----	----	----	----	59.2
Institute of Life Insurance	2,784.5	1,282.2	----	1,502.3	----	----	----
Total	$42,905.0	$8,149.0	$ 612.5	$11,660.9	$19,607.4	$ 49.5	$2,826.2

Leading National Advertisers and Publishers Information Bureau term corporate advertising "general promotion advertising" and define it as advertising devoted primarily to selling the corporate personality, with its first objective going beyond the direct sale of a single product or service. To be classified as general promotion, they require an ad to fulfill one or more of the following qualifications:

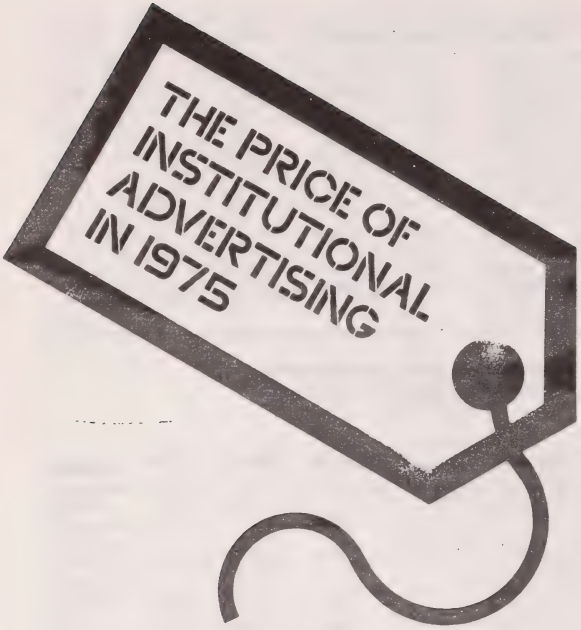
It must educate, inform or impress the public regarding the company's policies, functions, facilities, objectives, ideals and standards.

It must build favorable opinion about the company by stressing the competence of the company's management, its scientific knowhow, manufacturing skills, technological progress and product improvements, and its contribution to social advancement and public welfare, and on the other hand, to offset unfavorable publicity and negative attitudes.

It must build up the investment qualities of its securities, or improve the financial structure of the company.

It must sell the company as a good place to work (and so is often designed to appeal to college graduates or to people of certain skills).

Exhibit 6: 1975 Expenditures



U.S. corporations and associations spent a combined total of $305.4 million on institutional advertising in six major media in 1975, 2 percent less than in 1974, according to the *Journal's* sixth annual survey of these expenditures.

Corporate institutional advertising was cut by 6 percent last year, following a 1 percent decrease the previous year. Association advertising *increased* 9 percent in 1975, following a 3 percent cut in 1974.

Although the combined figures for corporate and association advertising indicate a drop of 2 percent for 1975, corporate institutional advertising expenditures have increased 40.5 percent since 1970 (the first year of the *Journal* survey) and association outlays have increased 34.6 percent during the same period.

The survey, as recorded in the following tables, shows that corporate institutional advertising was off in 1975 in consumer magazines, network television, and outdoor advertising; up in Sunday magazine supplements, spot TV and radio (the largest increase with 47 percent). Association advertising was off last year in Sunday magazines, radio and outdoor advertising, up in consumer magazines, network TV, and spot TV. The largest increase for associations was in network television.

In dollar outlays, corporations spent more last year in consumer magazines, followed by network TV. Associations spent more in spot TV, followed at a considerable distance by network TV and consumer magazines.

Over the six-year period of the survey, corporations have registered their most dramatic increase in the use of Sunday magazines. This medium is showing a significant comeback with a 2 percent gain in 1975 following a 38 percent drop in 1974. Associations also have had their sharpest increase over the six-year period in Sunday magazines, although expenditures in this medium were off last year by 23 percent.

Other tables below show the six-media expenditures of the 10 leading corporations and associations for 1975. Exxon has replaced American Telephone & Telegraph as the top institutional advertising spender among the corporations, while the American Dairy Association remains number one among association spenders.

Data for the survey are compiled exclusively for the *Journal* by LNA Multi-Media Services, published by Leading National Advertisers (New York). Data are collected by LNA from Publishers Information Bureau (magazines and supplements), Broadcast Advertising Reports, and the Institute of Outdoor Advertising. National Advertising Investments report shows expenditures in six media by brand and is published semi-annually. Expenditures for magazines and newspaper Sunday supplements are summarized by LNA from the PIB Magazine Advertising Analysis. Spot TV expenditures are determined from monitoring 260 stations in 75 top markets. Outdoor advertising expenditures represent national poster and paint advertising in plant operator markets of over 100,000 population. Since figures are for one-time rates, and do not take discounts into consideration, they must necessarily be higher than actual expenditures. It must also be considered that it is often difficult to determine accurately which advertisements are institutional. Some ads that advertisers characterize as institutional probably are not included.

1970-75 Expenditures for Corporate Advertising (in $ thousands)

	1970	1971	Percent chg.	1972	Percent chg.	1973	Percent chg.	1974	Percent chg.	1975	Percent chg.
Consumer magazines	$78,168.0	$64,711.9	(17%)	$68,258.6	5%	$87,905.4	29%	$102,231.0	16%	$88,961.0	(13%)
Sunday magazines	1,803.7	587.1	(67%)	735.6	25%	1,158.2	57%	719.4	(38%)	735.7	2%
Network television	39,147.8	50,055.0	28%	64,074.7	28%	84,517.9	32%	78,903.8	(7%)	72,485.1	(8%)
Spot television	27,884.3	39,505.8	42%	41,788.8	6%	48,697.3	17%	40,708.0	(16%)	46,337.4	14%
Radio	1,675.1	1,860.5	11%	4,828.9	160%	3,294.8	(32%)	611.2	(81%)	900.5	47%
Outdoor	868.4	855.5	(1%)	2,124.1	148%	1,403.9	(34%)	1,162.8	(17%)	710.9	(39%)
6 media totals	$149,547.3	$157,575.8	5%	$181,810.7	15%	$226,977.5	25%	$224,336.2	(1%)	$210,130.6	(6%)

1970-75 Expenditures for Association Advertising (in $ thousands)

	1970	1971	Percent chg.	1972	Percent chg.	1973	Percent chg.	1974	Percent chg.	1975	Percent chg.
Consumer magazines	$25,886.3	$23,515.1	(9%)	$22,759.2	(3%)	$21,967.4	(3%)	$21,174.7	(4%)	$22,110.4	4%
Sunday magazines	995.0	407.1	(59%)	713.5	75%	996.7	40%	2,060.8	7%	1,579.7	(23%)
Network television	21,786.8	20,731.6	(5%)	24,109.4	16%	23,686.0	(2%)	20,441.3	(14%)	26,320.8	29%
Spot television	15,075.8	23,441.0	55%	31,785.1	36%	37,681.0	19%	37,236.5	(1%)	40,474.3	9%
Radio	1,548.4	1,029.5	(34%)	1,219.3	18%	1,126.5	(8%)	1,899.5	69%	1,740.1	(8%)
Outdoor	5,464.7	3,511.2	(36%)	5,273.3	5%	4,874.0	(8%)	4,670.1	(4%)	2,996.6	(36%)
6 media totals	$70,757.0	$72,635.5	3%	$85,859.8	18%	$90,331.6	5%	$87,482.9	(3%)	$95,221.9	9%

Ten Leading General Promotion (Corporate) Advertisers
January-December 1975—Listed in Dollar Rank Order (in $ thousands)

	6 Media Total	Consumer Magazines	Sunday Magazines	Network TV	Spot TV	Radio	Outdoor
Exxon Corp.	$18,616.5	$ 4,448.3	--	$12,307.7	$1,560.3	$300.2	--
American Telephone & Telegraph Co.	11,872.7	4,635.0	--	7,141.0	33.5	63.2	--
Phillips Petroleum Co.	8,143.0	1,833.0	--	4,771.6	1,538.4	-	--
International Business Machines Corp.	5,982.5	2,230.6	$12.2	3,292.6	447.1	--	--
Mobil Oil Corp.	5,612.3	2,335.1	--	3,269.6	7.6	--	--
Shell Oil Co.	5,268.9	119.4	--	5,096.0	53.5	--	--
Texaco Inc.	5,137.0	1,165.5	--	3,017.0	954.5	--	--
General Electric Co.	4,480.5	1,228.1	--	2,996.4	255.8	--	$0.2
Standard Oil Co. of Indiana	4,298.4	308.0	--	--	3,990.4	--	--
International Telephone & Telegraph Corp.	4,294.8	579.4	--	2,529.0	1,186.4	--	--
Total	$73,706.6	$18,882.4	$12.2	$44,420.9	$10,027.5	$363.4	$0.2

Ten Leading Association Advertisers
January-December 1975—Listed in Dollar Rank Order (in $ thousands)

	6 Media Total	Consumer Magazines	Sunday Magazines	Network TV	Spot TV	Radio	Outdoor
American Dairy Assn.	$8,825.1	$ 368.2	$433.8		$ 7,860.3	--	$ 162.8
Florida Citrus Commission	8,195.3	--	--	$ 6,970.8	985.8	$237.6	1.1
Ford Motor Co. Dealer Assns.	4,645.9	--	--	--	3,830.5	--	815.4
General Motors Corp. Dealer Assns.	4,557.3	4.7	--	--	4,222.4	--	330.2
Blue Cross & Blue Shield Assns.	4,332.0	288.4	--	--	4,043.6	--	--
California Milk Producers Advisory Board	4,211.1	27.2	435.6	709.3	3,039.0	--	--
Savings & Loan Foundation Inc.	4,206.9	51.8	--	4,023.5	126.9	--	4.7
Institute of Life Insurance	3,705.3	325.0	--	3,380.3	--	--	--
American Gas Assn. Inc.	3,684.1	2,305.1	--	1,377.0	--	--	2.0
Commonwealth of Puerto Rico	3,088.7	3,088.7	--	--	--	--	--
Total	$49,451.7	$6,459.1	$869.4	$16,460.9	$24,108.5	$237.6	$1,316.2

Exhibit 7: 1976 Expenditures



Company "corporate" advertising in Sunday supplements soared an incredible 750.4 percent in 1976, continuing a pattern of dramatic fluctuations. Conversely, association advertising in this medium continued to decline, dropping 53.9 percent after falling off 23 points in 1975.

These figures are revealed by the *Journal*'s seventh annual survey of corporate advertising expenditures, which also shows that U.S. corporations and associations spent a combined total of $410.4 million in six major media in 1976, 34.4 percent more than in 1975.

In addition, corporations and associations separately spent considerably more on corporate advertising in 1976. Survey shows that corporate advertisers' expenditures were up 39.3 percent in 1976, following a 6 percent cut in 1975. Association expenditures increased 23.6 percent, following a 9 percent rise in 1975.

Since 1970 (first year of the *Journal* survey), corporation expenditures have jumped 95.7 percent; association expenditures have increased 66.4 percent.

The survey, recorded in the following tables, shows that corporation advertising was up in 1976 in all six media. In addition to Sunday magazines, association advertising was off in radio (down 32.7 percent, following a 47 percent gain in 1975). Sharpest increase for associations was in spot TV.

In dollar outlays, corporations continue to spend the bulk of their corporate advertising funds in consumer magazines and network TV. As in 1975, associations spent more in spot TV, followed at a considerable distance by network TV and consumer magazines.

Other tables show six-media expenditures of the 10 leading corporation and association advertisers for 1976. Exxon remained the top spender among corporations, while Florida Citrus Commission replaced American Dairy Association as number one among association spenders. General Motors, not on the top 10 list in 1975, ranked third in 1976. Toyota Dealers Assns. is a new addition to the leading association advertisers list.

Data for the survey are compiled exclusively for the *Journal* by LNA Multi-Media Services, published by Leading National Advertisers (New York). Data are collected by LNA from Publishers Information Bureau (magazines and supplements), Broadcast Advertising Reports, and the Institute of Outdoor Advertising. National Advertising Investments report shows expenditures in six media by brand and is published semi-annually.

Expenditures for magazines and newspaper Sunday supplements are summarized by LNA from the PIB Magazine Advertising Analysis. Spot TV expenditures are determined from monitoring 260 stations in 75 top markets. Outdoor advertising expenditures represent national poster and paint advertising in plant operator markets of over 100,000 population.

Since figures are for one-time rates, and do not take discounts into consideration, they must necessarily be higher than actual expenditures. It must also be considered that it is often difficult to determine accurately which advertisements are corporate. Some ads that advertisers characterize as corporate probably are not included. ■

Peg Dardenne

1970-1976 Expenditures for Company Advertising (in $ thousands)

	1970	1971	Percent Change	1972	Percent Change	1973	Percent Change	1974	Percent Change	1975	Percent Change	1976	Percent Change
Consumer magazines	$78,168.0	$64,711.9	(17%)	$68,258.6	5%	$87,905.4	29%	$102,231.0	16%	88,961.0	(13%)	$115,750.4	30.1%
Sunday magazines	1,803.7	587.1	(67%)	735.6	25%	1,158.2	57%	719.4	(38%)	735.7	2%	6,256.7	750.4%
Network television	39,147.8	50,055.0	28%	64,074.7	28%	84,517.9	32%	78,903.8	(7%)	72,485.1	(8%)	104,971.7	44.8%
Spot television	27,884.3	39,505.8	42%	41,788.8	6%	48,697.3	17%	40,708.0	(16%)	46,337.4	14%	63,697.9	37.5%
Radio	1,675.1	1,860.5	11%	4,828.9	160%	3,294.8	(32%)	611.2	(81%)	900.5	47%	1,236.6	37.3%
Outdoor	868.4	855.5	(1%)	2,124.1	148%	1,403.9	(34%)	1,162.8	(17%)	710.9	(39%)	811.6	14.2%
6 media totals	$149,547.3	$157,575.8	5%	$181,810.7	15%	$226,977.5	25%	$224,336.2	(1%)	$210,130.6	(6%)	$292,724.9	39.3%

1970-1976 Expenditures for Association Advertising (in $ thousands)

	1970	1971	Percent Change	1972	Percent Change	1973	Percent Change	1974	Percent Change	1975	Percent Change	1976	Percent Change
Consumer magazines	$25,886.3	$23,515.1	(9%)	$22,759.2	(3%)	$21,967.4	(3%)	$21,174.7	(4%)	$22,110.4	4%	$22,490.9	1.7%
Sunday magazines	995.0	407.1	(59%)	713.5	75%	996.7	40%	2,060.8	7%	1,579.7	(23%)	729.0	(53.9%)
Network television	21,786.8	20,731.6	(5%)	24,109.4	16%	23,686.0	(2%)	20,441.3	(14%)	26,320.8	29%	33,763.2	28.3%
Spot television	15,075.8	23,441.0	55%	31,785.1	36%	37,681.0	19%	37,236.5	(1%)	40,474.3	9%	56,427.7	39.4%
Radio	1,548.4	1,029.5	(34%)	1,219.3	18%	1,126.5	(8%)	1,899.5	69%	1,740.1	(8%)	1,171.4	(32.7%)
Outdoor	5,464.7	3,511.2	(36%)	5,273.3	5%	4,874.0	(8%)	4,670.1	(4%)	2,996.6	(36%)	3,135.3	4.6%
6 media totals	$70,757.0	$72,635.5	3%	$85,859.8	18%	$90,331.6	5%	$87,482.9	(3%)	$95,221.9	9%	$117,717.5	23.6%

Ten Leading Company Advertisers
January-December 1976—Listed in Dollar Rank Order (in $ thousands)

	6 Media Total	Consumer Magazines	Sunday Magazines	Network TV	Spot TV	Radio	Outdoor
Exxon Corporation	$20,712.0	$3,721.6	—	$13,356.9	$3,633.5	—	—
American Telephone & Telegraph Company	13,285.0	4,503.0	—	8,435.0	347.0	—	—
General Motors Corporation	10,826.6	1,538.2	$1,502.4	3,836.9	3,873.9	—	$75.2
Shell Oil Company	9,655.9	2,609.3	—	6,869.7	176.9	—	—
Phillips Petroleum Company	8,486.7	1,585.1	—	4,327.5	2,574.1	—	—
Texaco, Inc.	8,188.1	559.5	—	6,548.8	1,070.4	$9.4	—
International Business Machines Corporation	7,673.0	2,756.0	13.2	4,724.6	179.2	—	—
Standard Oil Company of California	6,448.3	5.9	—	—	6,442.4	—	—
Mobil Corporation	6,263.6	504.0	2,646.0	2,878.2	235.4	—	—
Standard Oil Company of Indiana	6,195.5	670.6	—	—	5,524.9	—	—
Totals	$97,734.7	$18,453.2	$4,161.6	$50,977.6	$24,057.7	$9.4	$75.2

Ten Leading Association Advertisers
January-December 1976—Listed in Dollar Rank Order (in $ thousands)

	6 Media Total	Consumer Magazines	Sunday Magazines	Network TV	Spot TV	Radio	Outdoor
Florida Citrus Commission	$11,133.3	—	—	$7,152.3	$3,981.0	—	—
General Motors Corp. Dealer Associations	11,069.5	$24.4	—	—	10,682.3	—	$362.8
American Dairy Association	8,903.2	59.6	—	1,260.7	7,446.6	$40.8	95.5
Ford Motor Company Dealer Associations	6,829.9	—	—	—	5,893.8	—	936.1
American Gas Association Inc.	6,199.4	2,842.0	—	2,832.3	525.0	—	0.1
California Milk Producers Advisory Board	5,645.3	—	$31.8	1,201.8	4,411.7	—	—
Blue Cross & Blue Shield Associations	4,827.3	705.9	—	578.4	3,543.0	—	—
Commonwealth of Puerto Rico	4,662.0	4,640.3	21.7	—	—	—	—
Savings & Loan Foundation, Inc.	4,572.7	—	—	4,446.2	121.6	—	4.9
Toyota Motor Co. Ltd. Dealer Associations	3,791.8	—	—	—	3,677.9	—	113.9
Totals	$67,634.4	$8,272.2	$53.5	$17,471.7	$40,282.9	$40.8	$1,513.3

CASE STUDIES ON CORPORATE ADVERTISING

Exhibit 8: Case Study—ITT

ITT's APPROACH TO CORPORATE ADVERTISING

BY E. J. GERRITY, JR.

Organization and standards for control are as essential as creativity in developing corporate advertising that is more than the big boast.

In the field of advertising much has been written about how to effectively use advertising to accomplish communications objectives. The difficulty, it seems, lies not so much in learning how to create advertising but in first finding a precise method for organizing the advertising function in such a way so that it will work for all types and sizes of companies. Only then can effective advertising be produced.

ITT has developed an internal communications system which succeeds in generating the type of advertising which accomplishes communications objectives.

We are an international corporation with 200 principal companies in 93 countries and sales outlets in 37 others. Included in the corporation's diverse international activities is the marketing of consumer, business and industrial products in such fields as food, hotels, community development, transportation, publishing, education, lawn care, computer applications, insurance, finance, money management, minerals, forest products, industrial components and industrial products and controls.



U. S. corporate ad features ITT's "open door" executive recruitment policies and practices, especially in relation to minority groups and women, to insure a continuity of skilled managers equal in every way to the demands of the future.

• *Strong central management* — Cooperation between line and staff management is fundamental to our operation. One of our ground rules is that any member of ITT World Headquarters management has the right to deal directly with any member of management in an operating unit on matters relating to the scope of his own responsibilities or assignment.

Within this flexible framework, a strong central management group at headquarters continuously monitors the operating units to help identify opportunities for improvement.

This concept is implemented by using several sources of review and

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Sample global corporate ad features ITT communications system installed in Lufthansa's new Cologne headquarters. The ad will appear in leading publications internationally in English, Spanish, Portuguese, Italian, French, German and Chinese.

information on major issues, and by maintaining a flexible staff of specialists and generalists who can assist an operating unit if it is confronted with a large or unusual opportunity or problem.

The World Headquarters corporate relations and advertising department is one of a number of corporate staffs which operates within this framework.

• *Global responsibilities*—How does a company involved in so many marketing activities and with such a variety of products and services use advertising to achieve its corporate communications objectives?

We have learned how to plan, coordinate, and control advertising functions based on the strong central management concept. The corporation's worldwide advertising function in New York has established corporate-wide standards of quality, accounting procedures, graphic guidelines, and a self-appraisal program that is used by our advertising people throughout the world. The appraisal standards are such that they can be used by any company within ITT to meet its special needs.

The New York based advertising group directs and monitors activities in Europe, the Middle East and Africa, Latin America, and in the Far East and Pacific. It is headed by a director of advertising and sales promotion who reports to my office.

The ITT headquarters advertising group also monitors the efforts of over 80 advertising agencies and is responsible for trade shows, graphics, brochures, product and corporate advertising and other activities related to corporate and product communications.

• *"Management must manage" policy*—One of the methods used to implement a successful advertising program at ITT is to have a minimum of red tape. At the corporate level the advertising director and his staff know that once a program is approved by my office they can start working on it.

Their projects seldom get bogged down in time-consuming meetings or stalled because of the traveling commitments, illness or whatever of one individual. Harold Geneen, ITT's chairman and president, believes that "management must manage" and that is why the day-to-day organizational and strategy responsibilities are left to the headquarters advertising section.

To manage effectively, the advertising man's job functions must be clearly defined. For example, in ITT headquarters the deputy director, advertising and sales promotion is responsible for the administration of the World Headquarters advertising section. He assists the director of advertising and sales promotion in the supervision of almost $90 million in ITT domestic and international advertising.

His responsibilities include evaluating the structure and effectiveness of unit advertising departments, selecting ad agencies and hiring new unit ad managers and indoctrinating them in ITT policies, procedures and standards.

Each advertising man on the headquarters staff has his job function just as clearly defined as does the deputy director. Keeping the complexity of the corporation's involvements in proper focus does not mean, as might be expected, a staff of hundreds of managers at World Headquarters. Instead, there is a seven-man staff which supervises the global operation.

They include the director, advertising and sales promotion; deputy director, advertising and sales promotion; manager, consumer advertising and sales promotion services; manager, advertising and sales promotion services—Latin America; manager, sales promotion services; administrator, sales promotion services; and manager, special projects.

• *Standards for control*—The minimum amount of management manpower at the advertising management level at World Headquarters reinforces Mr. Geneen's "management must manage" policy. And it can work for any size company providing that managers have standards for control.

Without standards for control, advertising will not in a significant way accomplish communications objectives. Even with knowledgeable and sophisticated advertising and marketing men on staff and with a cooperative and innovative top management, advertising managers and their subordinates must have standards for control.

Our units use the ITT Standard Business Planning Guide to prepare their annual advertising plan. The Guide contains information about the mission of the advertising function, problems, measurable goals, strategy to be used and supportive data.

One section in the Guide includes statements on the benefits which will accrue from using a certain advertis-

Another global corporate ad used to communicate ITT's capabilities in its traditional business of telecommunications and electronics in Europe, the Middle East, Africa, Latin America, and the Far East and Pacific.

ing strategy, attitudes to be conveyed to target audiences and reasons why people buy or fail to buy the key ideas.

In addition to the Business Planning Guide several supplemental manuals further strengthen the Corporation's advertising programs.They include:

• *Manual of Accounts* in which all ITT advertising budgets are reported by classification in line with corporate definitions such as research, print product advertising, direct mail, etc.

• *Standard Practices Manual* in which correct policy and procedures from top management having to do with advertising are explained.

• *Guidelines for Advertising* communicates graphic and copy standards for the development of effective advertisements and collateral-material.

• *Advertising Grid Program* is for the self-appraisal of the performance of advertising and sales promotion programs and personnel of ITT's field units.

• *Monthly Progress Reports* which follow a format starting with major achievements, danger items, problem areas, current activities and future activities.

• *Proper organization*—Not to be overlooked in the ITT program is people-to-people contact which can stimulate advertising men through an exchange of ideas and updating of company policies and procedures. This is accomplished annually at separate two-day meetings attended by advertising managers from the appropriate ITT area, as well as smaller regional meetings.

The first step then to producing effective advertising is proper organization. From there will emerge the type of corporate advertising that will achieve communications objectives.

Next to organization, top management wants a communications plan integrated into the total communications effort. When such a plan is presented with each aspect of the communications program tied in to the company's marketing objectives, management is more apt to approve and support it.

Once a company has established its organizational network and a system of communicating policies and procedures to our advertising people in the field and the agencies involved, then the advertising department at the group or unit level can proceed with the development of advertising. The advertising we produce at ITT is based on thorough and tested research of each market—surveys, managers reports, attitude studies, economic statistics, government activities, environmental and social issues. This time-saving preparation is performed so that each advertising program reaches the corporation's publics effectively and economically.

Each corporate advertising program is reviewed not only in terms of the corporate marketing objectives but also by the impact each ad will have on the geographic areas the company serves.

ITT's advertising has had to keep pace with the corporation's continued expansion and resultant involvement with thousands of local communities —domestic and foreign. Recently we have implemented some of the most successful advertising in our corporation's history and it reflects ITT's sensitivity to the needs of the areas and people we serve. Three campaigns are used here to illustrate how we use corporate advertising in different geographic areas to achieve specific communications objectives.

• *Global Campaign* — In early 1969, our corporation launched a Global Advertising Campaign designed to help dilute claims by our telecommunications competitors abroad that because of our diversification activities, ITT was relegating the marketing of telecommunications systems and equipment to a secondary or tertiary position.

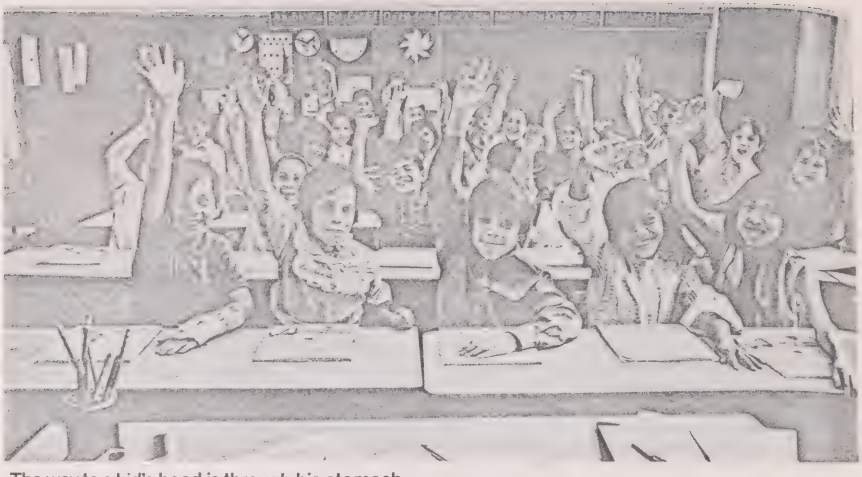
Virtually overnight this Gobal Campaign offset competitive allegations; and it continues to meet its objectives:

- To reaffirm ITT's international leadership in telecommunications and advanced electronics (and related services);
- To document ITT's interest in the cultural activities of those countries in which it does business.

Since art is communication in its highest form—understood and used universally to express man's ambitions, ideals, attitudes and beliefs—we turned to fine arts for our illustrations.

Each work of art is specially commissioned from an artist who is a citizen of the country in which the project or system featured in the advertisement is located.

The artist interprets in his own way the project or system; and his brief comments are included in the



U. S. corporate ad, directed to government officials, minority groups, businessmen and other audiences, features ITT's efforts, coordinated with the Department of Agriculture, to develop nutritious foods for children in schools, day care centers and Head Start programs, through Continental Baking subsidiary.

advertisement featuring his work.

Each global advertisement appears in major international publications throughout the world in English, Italian, German, Spanish, Portuguese, French and Chinese; and each reaches an audience in excess of 17,500,000.

The color global advertisements shown here are a sampling of those developed and released to date. In addition to paintings, we have commissioned a tapestry, sculptures and a stained glass work.

We have commissioned artists in 24 countries worldwide. Without exception, members of foreign government agencies important to us in the marketing of telecommunications have all reacted very favorably to this campaign concept, particularly to our demonstrated interest in a member of their artistic community.

In addition, each artist without exception has reported that his career has enjoyed a major change for the better once the advertisement featuring his work appears.

Research has documented the fact that the quantifiable goals originally set down for this campaign were too modest.

• *U.S. Campaign*—In 1972, our U.S. corporate advertising was designed to communicate the positive values and policies of the corporation in a climate of public concern.

The objectives detailed here were selected in full recognition of both the events of 1971 and the insights received from the 1971 U.S. and Global Corporate Research programs.

Our broad objectives for 1972 are:

- To strengthen the recognition and awareness of ITT which presently exists among informed Americans, and to generate this same response among those not yet exposed to our communications efforts.
- To gain ready acceptance of, and appreciation for, ITT as a valuable and beneficial business enterprise.
- To position the corporation as a major company actively engaged in meeting its environmental and social responsibilities.

- To establish that the management of ITT is thoroughly dedicated to the systematic training and promotion of qualified executives, to insure a continuity of skilled managers equal in every way to the demands of the future.

The broad objectives were subsequently translated into specific, measurable goals.

Our U.S. campaign utilizes black-and-white spreads and one-page adaptations. These run in major publications directed to the business, professional and financial communities, government at all levels, educators, employees, investors, and minority groups.

Wherever possible, a direct relationship is established between our corporation's beneficial contributions to both the economy and our society on one hand and, on the other, the role of ITT's innovative management practices and financial resources as they are applied to each of these four basic strengths of the corporation: management, financial acumen, social responsibility, economies of size (or multi-nationality).

- *Latin America Campaign*—Our Latin American corporate advertising, also handled from World Headquarters, is designed to communicate to target audiences in certain countries the facts concerning ITT's many, varied and sizable contributions to the area's development.

The campaign is also designed to generate favorable attitudes toward ITT, with particular emphasis on our corporation's being a well-managed and socially responsible corporate citizen wherever it operates.

In addition, the campaign is meant to increase target audience awareness that ITT is the largest manufacturer in Latin America of telecommunications equipment, with proper emphasis placed on quality, reliability and modernity.

Special advertising emphasis is placed in Argentina, Brazil, Mexico, Peru and Venezuela. And about 80 per cent of media weight is concentrated in the major cities in these countries; featured are local or national subjects that lend themselves to the further development of a positive corporate image.

Media include four internationally circulated publications through which

(Continued on page 42)



To document the many contributions made to local economies, ITT ran this ad—one of a series—in Latin America in English, Spanish and Portuguese.



This Far East and Pacific corporate ad links up ITT's regional capabilities with the objectives of the global art campaign. It will appear in leading Asian business publications, expanding on the copy theme in the color global ad on page 36.

ads in English, Spanish and Portuguese reach government officials, business executives, communicators, scientists, technical leaders, educators, and ITT employees and distributors.

• *Corporate ads recruit, too*—One of the most important advertising challenges at ITT has to do with the recruitment of new managers and other executives.

In 1959, ITT launched what is perhaps the most comprehensive program of planned growth in the history of American business. ITT advertising played an important role in this program; and the results have been excellent.

The importance of recruitment is confirmed by our corporation's constant need for superior manpower. (Today we employ 400,000 men and women, worldwide.) Therefore, recruitment is always a considered factor in all ITT product and corporate advertising—whether global, regional, national or local.

• *Worldwide success*—ITT's worldwide corporate advertising has been successful because the advertising function is organized, sets attainable communications objectives and measurable goals, and then uses effective creative advertising strategies to accomplish them.

The success of the creative approach used in the ITT campaign featuring the art of international artists, for example, was based on an advertising plan in which the element of risk was reduced to a minimum through the use of guidelines.

Advertising creative guidelines are included in the ITT Graphic Standards Manual and show how to establish identification systems.

Some people—especially creative people—might object to the so-called rigidity of guidelines. But guidelines don't mean that all communications should look alike. The idea to run the ads featuring fine art was unique to ITT yet the basic layout and style conformed to the corporation's guidelines on advertising formats.

What is also achieved through guidelines is flexibility and versatility—the essence of an effective identification system. The system must, however, express the basic attributes of the company in the time-enduring elements that stand for the company: in trademarks, nomenclature, typefaces, formats, and so forth.

Our policies concerning advertising leave little to chance yet do not stifle the creative process. Our advertising people know they are directly responsible for a variety of communications functions and they make their own decisions based on their knowledge of their unit marketing objectives.

ITT corporate advertising reflects the understanding we have garnered from years of experience in dealing with diverse and complicated markets. In doing so, we have been able to use corporate advertising coupled with a variety of other communication strategies to help achieve the corporation's overall communications objectives.

Needham, Harper & Steers in New York City is the advertising agency for four U.S. and global corporate advertising campaigns, and Gardner Advertising Company, same city, handles our Latin America corporate advertising. □

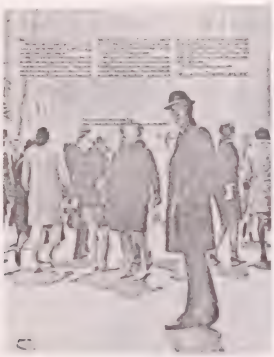
Exhibit 9: Case Study—Tenneco



TENNECO CHEMICALS

. . . "Raising The Level Of Awareness"

The Company:
Tenneco Chemicals, Inc.
Serving the chemical process industry with a wide variety of chemicals, ranging from basic raw materials to nearly finished products, Tenneco Chemicals is an important producer in the areas of plastics, naval stores, coatings chemicals, petrochemicals, packaging materials, colors and dyestuffs, and paper processing chemicals.



The Problem:
Tenneco Chemicals, Inc., a division of Tenneco Inc. (formerly Tennessee Gas Transmission Co.), was a new corporate entity, the result of many mergers and acquisitions among smaller and older firms. Many of these mergers were carried out within a three year period. Thus the company had a fuzzy, indistinct image. Many people confused Tenneco Chemicals with its parent company, Tenneco Inc. or Tennessee Gas Transmission Co. The problem was to raise the level of awareness of TCI and its major product lines among the management, purchasing officials and technical staffs of present and potential customers.

Strategy:
In June 1967 a direct mail, bench mark attitude study showed that chemical purchasing agents and industry executives had an inadequate idea of the size of Tenneco Chemicals and its major product lines. In some additional private interviews with a number of trade publication editors, it was found that they, too, lacked a good understanding of what the Company was, so fast had the mergers and acquisitions occurred. The Company immediately launched an informative four-color corporate campaign addressed to chemical management and purchasing agents. The campaign ran for 15 months and was followed by a second direct mail attitude survey.

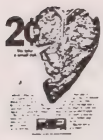
The Result:
The second survey of purchasing agents and executives recorded an increase of **over 22%** in the proportion of responses stating that respondents were familiar with company, its reputation and its products. Tenneco Chemicals which placed third in recognition among a field of five competitors in June 1967, landed in first place among the same competitors in the August 1968 study.

Based on these successes, and under the direction of Donald K. Beyer, TCI's manager of public relations and advertising, the corporate advertising program was shifted to Phase 2. "Now that we had established the recognition factor, the next logical step was to start positioning ourselves as an innovator in the chemical industry," he says. "That series of corporate ads has also been highly successful." Mr. Beyer reports. "And we are just about to embark on Phase 3."

Commenting on his dual role as both public relations and advertising man for Tenneco Chemicals, he says . . . "Both PR and advertising have the same ultimate objectives: to communicate a message to audiences ranging from general to very specific. And while I'm well aware of the believability and validity of PR's editorial approach, I must confess that it's comforting to know that, at least in the case of an ad, you can guarantee your management where it will appear, when it will appear, and exactly what it will say!"

That says it for corporate advertising! □

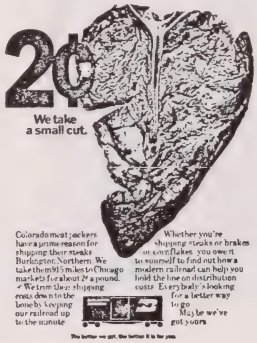
Exhibit 10: Case Study—Burlington Northern



BURLINGTON NORTHERN . . . *"Setting the Record Straight"*

MOST AMERICANS think of their railroads in terms of passenger trains. They are convinced railroads don't (or didn't, depending upon the individuals familiarity with the advent of Amtrak) want passengers to ride trains. They believe railroads are old-fashioned and their managements incompetent, at best, and quite possibly dishonest. They also seem to think rail managements are not overly concerned with the best interests of the public.

The facts tell otherwise. Railroads are pretty much divorced from the passenger business; their ability to carry enormous volumes of freight with just a few diesel locomotives on a very narrow roadbed contributes to the cause of clean air and provident land use; that the goods they carry (foodstuffs, clothing, etc.) cost often only a fraction that of sending a letter the same distance is another plus for the industry.



Railroads really are on the side of the angels!

Yet the industry has a bad image, and it's steadily worsening.

If most of the nation sees railroading as an amorphous Penn Central, what should the healthy roads do to set the record straight?

Burlington Northern, which was formed in 1970 by the merger of four western railroads, conducts a public communications program using advertising and conventional public relations disciplines.

BN's current television and print advertising represents the results of more than a decade of experimenting with the receptivity of the public to messages concerning basic freight information.

The theme of the ads go to the heart of what railroading really is about: the low cost-per-unit for shipping helps keep down prices for items consumers need and use.

Tests made of consumer groups on the advertising messages provided heartening evidence that the public did indeed get the message, in spite of any preconceptions originally held about railroads.

Burlington Northern readily concedes that ads for a highly complex subject such as freight transportation cannot be expected to make a professional traffic manager reach for his telephone to route his next shipment via BN, but the company believes advertising may assist its sales and marketing representatives to the extent a shipper is likely to welcome a salesman by commenting—favorably, they trust,—on BN advertising he may have seen the previous evening.

Realizing that sales are unlikely to result from advertising (although there are exceptions) BN focuses its advertising effort on the need to achieve public understanding of why a railroad exists. The company sees education and understanding as the primary goal of its advertising.

While Burlington Northern's communications goals reflect a desire for corporate identification—and indeed survival—there is a broader interest involved. For if because of lack of public confidence the railroads of the U.S. are denied necessary support, and as a result are nationalized by forces that see government ownership as a panacea to all problems, the causes of private enterprise in a nation famed for entrepreneurs will suffer a grievous blow.

Its passing will be far more significant than the loss of the steam locomotive whistle in the night. □

Exhibit 11: Case Study—Liberty Mutual



LIBERTY MUTUAL . . . *"A History of Concern"*

IN 1971, AFTER eight years of primarily using television commercials, Liberty Mutual Insurance Company expanded its advertising to a print media program.

At that time, the insurance industry, as did other businesses, came under increasing criticism. Consumers, regulatory authorities and the general public were beginning to seriously question what insurance companies were doing to fulfill their social responsibility to their policyholders and society as a whole. Could they justify their existence solely on the basis of collecting premiums and settling losses? Liberty felt not, and wanted to express its history of concern with people and commitment to solving human problems.

The company wanted its corporate image to reflect its pioneering efforts in the fields of automotive safety, industrial hygiene, pollution and noise control, rehabilitation and driver education. Things the company had been doing for years, before it became fashionable to do so. According to James F. Lynn, assistant vice president and director of advertising, "Rather than talking about new programs or ones we plan to do in the future, we wanted to tell people what we have already done in safety and accident control. We'd already been there and felt it was time to tell our story."

The theme for that story—"We're fighting for your life"—was developed in conjunction with the company's advertising agency, Batten, Barton, Durstine & Osborne, Inc. A series of five ads highlights the company's contributions to "helping people live safer more secure lives." To indicate its rehabilitation services, one ad displays the mechanical arm they helped develop—the first of its kind for above elbow amputees. Another one indicates its continuing research geared to making automobiles themselves safer, which they began in 1951. The nationwide use of a mobile classroom to teach people decision driving tactics and its skid control school that teaches people how to handle deadly skids are illustrated in two others. The fifth ad points out the extensive work the company has been doing since 1934 in environmental health and industrial air pollution. It now has one of the largest environmental health services facilities of any company in the U.S.



The objective of Liberty's corporate advertising campaign is to demonstrate its history of social commitment, not to sell insurance. To reach opinion makers, business leaders and concerned consumers the company has run the campaign in national magazines since last September, including the **New Yorker, U. S. News & World Report, Fortune, Newsweek, Sports Illustrated** and **Time.**

Liberty shared top honors with State Farm Insurance for corporate advertising awarded this year by the Insurance Advertising Conference. "But," says Lynn, "the feedback we are getting from our policyholders and the general public means even more to us." The ads have generated interest in the company's programs and requests to participate in them. Individuals have contacted the company seeking help for their personal problems. Government agencies, regulatory authorities, and national and local publications have asked for information for reports,studies and articles. All of which, of course, helps portray Liberty's corporate image. □

Exhibit 12: Case Study—Sperry Rand

SPERRY RAND . . .



"Extending Man's Natural Capabilities Through Technology"

SPERRY RAND CORPORATION was founded in 1955 when the Sperry Corporation and Remington Rand were merged. Sperry's first corporate advertising program started late in 1967. The basis for the program, and its direction, came from the results of a series of attitude and awareness studies conducted among audiences important to the corporation.

These studies, continued at regular intervals, have given shape and direction to two phases of Sperry's continuing corporate communications program.

One important objective of the first advertising program was to establish stronger identification for the company's major corporate divisions and the diverse businesses in which they are engaged.

Research showed that our Phase One advertising was solving the general familiarity problem. It was making the corporation's diversity and types of business more familiar to the public.

But the success of one campaign created motivation for another. Because that same research showed that the corporation was obliged not only to display all its divisions, but was also obliged to show the relationship among the divisions, and between the divisions and the parent company. In effect, to show that Sperry was indeed more than merely the sum of many parts.

The objective then became to show Sperry as it in fact is: a unified, well-managed and far-seeing manufacturer of industrial and commercial products, each of which shares the common objective of dramatically extending man's natural capabilities through technology.

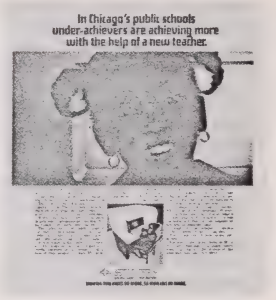
Our advertising is intended to show how each of our divisions in its own special way contributes to a single corporate purpose: Making machines do more, so man can do more.

Sperry's corporate advertising is marketing oriented: The principal audiences for the advertising are present and prospective customers and investors. A major objective of the program is to communicate the existence of total corporate capabilities—to demonstrate that Sperry is a unique corporation—in the extraordinary range of highest caliber engineering expertise and experience in the application of electronic, electrical, electromechanical and hydraulic technologies that lets Sperry take an original and practical engineering and service approach to problem solving.

The corporate program is intended to serve as a sort of "umbrella" for divisional advertising on a worldwide scale.

To better relate the corporation and the division in the advertising, a number of changes are being made in the corporate identity program.

Although we are still officially the Sperry Rand Corporation, many people have always called us simply "Sperry." We're going along with this common usage and calling ourselves Sperry.



The advertising program has been implemented both in print and television. A group of general audience and business magazines which are read regularly, or often, by businessmen is used.

Television programs that statistically are very popular with businessmen are also used.

By learning more about ourselves, and especially by learning what we look like from the outside, we have been able to generate corporate advertising that seems to work both ways—to add luster to the corporation through its products, to enhance products by establishing their corporate origins, and to make our target audience think well of us in both respects. □

Exhibit 13: Case Study—Chrysler Motors



CHRYSLER MOTORS . . . *"Building on a Heritage of Strength."*

THERE ARE THREE basic directions for corporate advertising: to tell what the company has done for the consumer; to project the image, size and diversity of the company, and to verbalize the companys social conscience.

We choose to follow the first course for a variety of reasons.

Consumers were becoming more sophisticated. They sought help in determining the difference between brands, and why they should choose one over another.

We believed (and still do) that the most effective advertising is that which limits itself to a single message. Reader-attention, or the time-span of a radio or TV commercial, is too short to sell/explain both a product and an engineering story. We split our campaigns: corporate ads described engineering features, and when the divisional ads referred to these features the mention was stronger.

The corporate ads were designed to build an umbrella image of engineering excellence, while the division ads would concentrate on brand identity.

The campaign banner for corporate was "Extra Care in Engineering". It was based on the concrete facts of our engineering developments, not on vague promises, or generalities.

The print ads and radio spots were pre-tested for concept acceptance and post-tested for readership and awareness levels. This is standard procedure with us. The ads communicated well.

As our budget would not allow dominance in alll media, nor special messages to each public, yet demanded national coverage, we targeted our publics quite specifically. We concentrated on major markets and upon multi-car households.

The bulk of the budget was assigned to spot radio in the top 25 markets. The opening month of saturation radio raised the public level of awareness by 49 percent.

Magazines supplemented the radio effort.

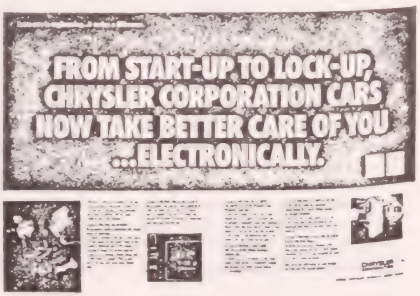
By April 1971 our research showed that the association of "Extra Care in Engineering" and Chrysler had increased 126 per cent over our August benchmark.

As the ads ran we continued our consumer measurements. More and more people identified Chrysler Corporation as the firm which takes "Extra Care in Engineering." We were building on a heritage of strength, but even we were surprised by the new awareness and interest which were recorded.

We feel that the job of corporate advertising is really more important than it was only two years ago. We must continue to assert that there *is* a difference in our cars and thus build a greater acceptance for the brands our dealers sell.

We've extended our banner to emphasize what we believe is indeed a very strong difference: "Extra Care in Engineering . . . It Makes a Difference." Pretesting showed that the new banner line was preferred by 73 percent of the respondents.

Ours is not a typical, institutional, advertising campaign. It is the strong supporting cast which helps our individual brand advertising be more effective. It builds on our heritage of engineering leadership, and bespeaks our commitment to a continuing excellence which we call "Extra Care in Engineering." □



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Exhibit 14: Case Study—State Farm



STATE FARM INSURANCE COMPANIES . . . *"Responding to a Need"*

DRUG DEATHS. Prison reform. Wiretapping Street crime. Gun control. Urban decay. Busing. Abortion. We are bombarded with an endless parade of social problems in need of solving, causes crying for attention. They push and shove for headlines only to be replaced by newer, more urgent problems. The trouble is that the old problems don't go away. At least not many of them.

Now there's an organized attempt to solve one of our most lethal social problems, one which has long since failed to excite the headline writers and the public. Messages that call attention to drunk driving have never been very effective in reaching those who take a civilized social drink once in a while before getting behind the wheel.

But drunk drivers aren't civilized. Every year they kill close to 30,000 people. When the U. S. Department of Transportation attacked the problem in a serious way, they found that the killers can be identified—and rather precisely. Some of them are social drinkers who don't have the good sense to know when they've had too much. But most are problem drinkers. People with a chronic need for alcohol. They've probably been arrested before for DWI (driving while intoxicated), Drunk and Disorderly or the like. Their problem may be known to local social agencies. Or they may have been treated in local hospitals.

The Department of Transportation is targeting an attack on the problem drinker through its Alcohol Safety Action Program. A.S.A.P. is government shorthand for doing something now. The something is a string of action programs across the country where a variety of countermeasures are being demonstrated, measured and evaluated.

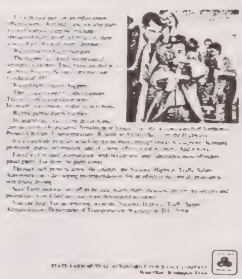
These countermeasures are aimed at identifying and apprehending the problem drinker, making sure his case is handled properly by the courts, seeing that he is brought into treatment, and keeping him off the road until that treatment is effective.

State Farm Mutual Automobile Insurance Company, the nation's largest auto insurer, supports this program because if every drunk driver were taken off the road, the number of highway deaths and injuries would be dramatically reduced. That could mean lower insurance rates. But mostly, the waste of human resources would be stopped.

In constructing a public service advertising campaign in support of the DOT program, State Farm and our advertising agency, Needham, Harper & Steers Advertising, Inc., decided to see firsthand what was being done in the places where A.S.A.P.'s are being conducted.

We talked to the project directors, law enforcement officers, social workers and judges. And we came away impressed that something very important is indeed being done.

Vermont is tossing a party for drunk drivers.



Out of this firsthand experience, an advertising campaign was created that dramatically communicates that (1) drunk drivers kill, (2) the government has a program to keep them off the road, (3) it's working, and (4) State Farm is behind it. It invites concerned people to ask Washington how they can get a program like this in their town. These ads are appearing in **Time, U. S. News and World Report, Reader's Digest** and **Forbes** this year.

Each of the A.S.A.P.'s demonstrates a number of countermeasures. We've chosen not to catalogue them in our ads but rather to focus on one measure which dramatically personifies the program.

This summer the Department of Transportation issued a report evaluating the effectiveness of the first eight of the thirty-five A.S.A.P.'s currently funded by the government. The report concluded that ". . . if with the catalytic effect of an ASAP, every state could implement a comprehensive alcohol countermeasure program throughout its territory as effective as the first eight appear to have been then we might look forward to achieving an annual national savings of nearly 5,000 lives."

The ads are aimed primarily at state and local officials and concerned citizens who can influence the establishment of such programs in their communities.

State Farm hopes that our sponsorship of this campaign will help put an end to the senseless slaughter on the highways. It's advertising that we feel is responsive to society's needs and we're proud to play a part. □

Exhibit 15: Case Study—Metropolitan Life



METROPOLITAN LIFE . . . *"Our Business Is Life"*

THE METROPOLITAN LIFE Insurance Company's new ad campaign for national TV and consumer magazines continues to use the theme adopted in 1970: **We sell life insurance. But our business is life.** Obviously, it works.

According to the company's ad people, the new campaign projects Metropolitan Life as a top leader in life and health insurance, and annuities. In other words, it's the "company to buy from" and consumers couldn't do better than to deal with one of the more than 27,000 people in its field sales force across the United States and in Canada.

As a result, Metropolitan reports that its sales force is already getting a greater feeling of self-awareness, one of the campaign's chief objectives. On a series of TV messages,members of the sales force are depicted as full-time, well-trained, reliable life insurance advisors who, in addition to doing a thorough, professional job of selling insurance, help people while off the job in (actual) community activities. The messages say, in effect, that people come first with a Metropolitan representative; he is a good person to do business with because, to him, helping people is more than a job.

So the over-all impression consumers get is that Metropolitan Life is a company vitally interested in individuals and families when it comes to assuring their financial future on the one hand, and a company of professionals who substantially contribute to the needs of their respective communities on the other.

Initially, the "our business is life" theme (developed with Young & Rubicam) projected the company as no Johnny-come-lately in matters of social concern. The initial TV messages and print ads featured the company's active concern with high infant mortality, diphtheria, the need for visiting nurse programs, etc. Now the company's magazine ads and TV messages have addressed themselves to "new" concerns facing communities today: Drug Education, V.D., Learning Disabilities, and Day Care.

Metropolitan Life implements it's advertising messages by selecting



media with audiences whose characteristics coincide with the company's major marketing objectives, such as reaching a large number of heads of households, ages 18-34, who are better-educated, higher-income prospects. The company also selects media which Metropolitan representatives themselves feel will help make a favorable impression on prospects.

At present, Metropolitan's TV messages appear each week on ABC-TV's NFL Monday Night Football program. In addition, the company has a scatter plan of 30-second TV spot messages on top-rated prime time NBC-TV shows, including "Sunday Mystery Movie," "Night Gallery," "The Wednesday Night Movie," "Search," and "Emergency."

Magazines on the consumer ad schedule are: **Life, Time, Newsweek, Sports Illustrated, Reader's Digest, U.S. News and World Report,** and **National Geographic.**

To measure the campaign's effectiveness, the company is using its own ad research people, Young & Rubicam's public attitude and marketing study programs, and studies conducted by independent specialists. So far, very good!

A feedback device that's proving to be a major plus for Metropolitan in more ways than one is the offering of special booklets in their social concern print ads. For example, the ad on drug education offers "To Parents/About Drugs." To date more than one million copies have been distributed free to consumers on request. The company's magazine ads on V D. and Learning Disabilities, also offering free booklets, have received strong response, too.

Such yardsticks, together with the close liaison between Metropolitan's advertising department and its marketing and field management, corporate communications, and other key departments, fosters a flexible approach toward the national advertising program. With such flexibility, Metropolitan and Young & Rubicam are sensitive to any signs that might call for change. So far Metropolitan Life reports no changes anticipated. □

Exhibit 16: Case Study—Trans Union



TRANS UNION . . . *"Getting the Most for Communications Dollars"*



AFTER 77 YEARS established recognition as Union Tank Car Company, the corporation created a new name, Trans Union Corporation, in 1969.

Recognizing that our affiliates' products and services enjoyed excellent recognition and reputation, however, we enlisted their support in our "image" campaign. Advertising, sales promotion, public relations and marketing managers at each member company were briefed on how they could help the corporate effort by incorporating strong Trans Union identification into their ads, publicity, labels, sales literature, trade show exhibits and products. A detailed corporate identity manual was prepared to facilitate uniformity in their individual efforts.

On the other side of the coin, the corporate campaign was structured to provide marketing support for the affiliates while building "image" for Trans Union.

The advertising campaign developed by Marsteller documented the new diversified image of Trans Union by featuring at least three separate divisions per ad. Marketing support for the featured affiliates was provided by copy and illustrations describing products and services that were most important to their individual sales objectives.

Publicity provided another simple, but effective, means of adapting affiliate marketing communications to corporate "image" building. The same releases announcing significant product and technological improvements to affiliate's vertical markets were adapted for Trans Union announcement to horizontal and financial media.

Phase Two of our total communications effort also involved the establishment of another new corporate name. Selected to unify Trans Union's eight water and waste treatment affiliates under a single corporate umbrella, Ecodyne Corporation was established as a wholly owned subsidiary.

Since each Ecodyne affiliate ranked as a leader in its specific market, their recognition and reputations formed the foundation of the new "image" building effort.

Drawing on the affiliates' technological leadership and long list of satisfied customers, an intensive technical feature and case history article program was begun. Within 18 months, this publicity effort produced over 100 major placements. In every case, the articles built recognition for Ecodyne while promoting affiliate products.

These traditional public relations techniques were augmented by a program to acquaint key editors with Ecodyne and its major role in the fast growing water pollution control field.

Corporate advertising support for Ecodyne included two distinct programs. First, was the inclusion of Ecodyne products and customers in the Trans Union **Wall Street Journal** campaign. Second, the theme from the Trans Union advertising was adapted to a series of Ecodyne advertisements in horizontal and selected vertical trade media to complement affiliate space programs.

Further corporate support for the total communication effort on behalf of Ecodyne also was provided in the Trans Union annual report.

The 18-month Ecodyne total communications effort culminated with a public offering of the water pollution control company's stock.

The third phase of Trans Union's ongoing total communication program involves the simultaneous effort to create corporate identities and strengthen the marketing efforts of emerging affiliate groups such Trans Union Land Development, Trans Union Leasing and the Transportation Group.

Using the same techniques that proved successful in earlier phases, the current total communication program is coordinating advertising and public relations support from Trans Union with the marketing, sales promotion and advertising efforts of the individual affiliates. □

Ecodyne has 12,389 installations helping manufacturers manage their water.

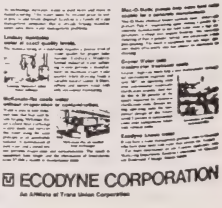


Exhibit 17: Case Study—North American Rockwell



NORTH AMERICAN ROCKWELL . . . *"Identify, Identify, Identify"*

ON SEPTEMBER 22, 1967 North American Aviation, Inc., a giant in aerospace, and Rockwell-Standard Corporation, a major automotive and industrial products company, merged to form North American Rockwell Corporation (NR).

Here was a new company with a new name.

On that day in 1967, NR's public relations and advertising staff was faced with a problem of monumental proportions. We had to inform the public that there was no longer a North American Aviation nor a Rockwell-Standard. But, more importantly, we had to tell the story of a new corporation, North American Rockwell.

We needed a corporate advertising and identity program addressed to our principal publics.

We embarked upon a three-year corporate advertising campaign to identify, identify, identify.

An initial campaign used the "posinon" approach of a "positive, inferential, nonstatement." That was "When North American Rockwell Does Something . . . North American Rockwell Does It Well."

In keeping with the identity approach, a new corporate symbol was designed, and used prominently in the signature of each ad.

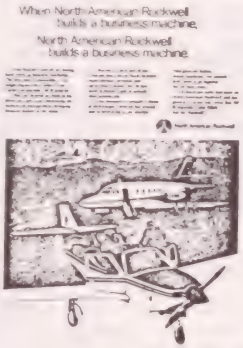
To complement these "posinon" ads which ran in major news and financial magazines, we initiated a "scatter" ad program in the **Wall Street Journal.** These identified NR and its primary capabilities in three ads.

In late 1971, as we found that our identity campaign was succeeding, we determined it was time to place more emphasis on developing our corporate image.

The first step was to find a theme, a slogan that conveyed the strengths of North American Rockwell.

Since NR's principal thrust from the beginning was the transfer of technology from aerospace and electronics to the commercial activities of the automotive and industrial products markets, we had a natural starting point.

After months of discussion and reviewing hundreds of suggestions, we and our advertising agency arrived at the slogan which is the focal point of our 1972 campaign. "North American Rockwell—Where Science Gets Down to Business."

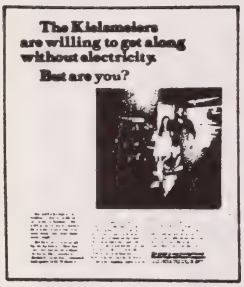


While continuing with our print schedule, we initiated a series of television commercials in July which run during evening news programs in twelve major markets from New York to Los Angeles. These emphasize the company's broad range of capabilities centering around our new slogan. □

Exhibit 18: Case Study—Utilities

Demarketing Power: Utility Companies Explain the Energy Crisis

BY ROBERT M. SPRINGER, JR.



SO MUCH TO DO, so little time," "Is anybody listening?," "To have or to have not," "The Gap." Do any of these ad headlines sound familiar? They should, because they are just a few of the many energy shortage-related corporate advertisements appearing in the New York *Times* and other leading newspapers in the past year. The nation's major energy producers are investing heavily in corporate advertising to awaken public interest in the power shortage, as the shadows of the crisis begin to lengthen.

Analysis of the public relations and publicity efforts of thirty of the leading power utility companies discloses that the majority of these companies are engaged in extensive programs to alert their publics to problems which can be expected as fuel supplies become less plentiful. These programs appear to be built around three major themes, all interrelated, and all designed, in various ways, to ease the burden of expected shortages. Of the 30 companies investigated, there were none which had not taken action in at least one of these three major areas, and most had been involved in all three.

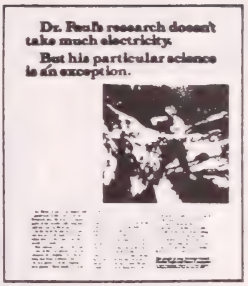
The first of the major programs advanced by the privately-owned power utilities is one to prepare the public for increased rates. Since these rate increases are normally subject to approval by regulatory commissions, which, in turn, are at least partially responsive to the public will, gaining public understanding of the underlying reasons for the increases is of paramount importance. A second major theme is power conservation. Most utility companies now have at least some power conservation programs, and a few have very effective large-scale campaigns designed to encourage the public to conserve power. The third theme is the publicity given to the development of new sources of power. Of these new sources of power, nuclear power appears to be getting the most coverage, particularly the nuclear "breeder" reactor, which may be the most promising long-range development. Many utility companies also have made extensive progress in educating their customers on environmental matters; and environmental aspects are often included in discussions of other problems, for example, the adverse environmental aspects of high sulphur coal as a reason for using low sulphur coal, which, in turn, affects consumer rates.

With regard to rate increases, it is expected that power costs to the consumer will go up at the rate of from 5 to 10 per cent a year, for at least the next fifteen years.[1] The reasons are simple and basic. The first, and

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ROBERT M. SPRINGER, JR. *is associate professor-marketing, Loyola University, New Orleans, Louisiana.*

The second reason for cost increases grows out of concern for the environment. The inexpensive oil and coal fuels used by the power utilities in the past were often high in sulphur content and other pollutants. Reduction of the volume of undesirable gases discharged into the atmosphere may necessitate the use of higher grade, and thus more expensive fuels.



DEMARKETING POWER *(Continued from page 32)*

probably most important, is that the nation is beginning to run short of easily and inexpensively obtainable fossil fuels. Although there are still large reserves of fuel remaining in this country, they are either harder to recover, or are low-grade and require more costly processing. The second reason for cost increases grows out of concern for the environment. The inexpensive oil and coal fuels used by the power utilities in the past were often high in sulphur content and other pollutants. Reduction of the volume of undesirable gases discharged into the atmosphere may necessitate the use of higher grade, and thus more expensive fuels. Other methods of treating gases, such as air-cleaning filters, precipitators, and scrubbers, are also expensive. Strip-mining, an economical way to obtain coal, but damaging to the environment, has been restricted in a number of areas. Limitations on strip-mining will increase coal prices, since other sources, such as deep mines, are more expensive. Coal prices have been further pushed up by costly mining safety measures required by recent laws, and by miners' pension funds. Finally, the overall inflation in our economy is reflected in higher costs of labor and materials. The costs of building new power plants, for example, has gone up more than 35 per cent since 1966.[3]

Most of the power utilities are taking a cautious, well-reasoned approach in explaining the need for rate increases. Rate increases are, of course, a very unpopular subject with the consuming public, particularly when the increases are made by a monopoly, and there is no alternative source of supply. A typical explanation of the requirement for increases was given in a pamphlet distributed in 1972 by the Pacific Gas and Electric Company. In this pamphlet, John F. Bonner, company president, is quoted as saying, "Higher energy rates are inevitable. There is no other way the job can be done. . . . The piper must be paid, and the dancers to his tune in this context are the consumers—everybody at home, on the farm, in labor, in the schoolhouse, laboratory, and library."

ASSOCIATIONS ACTIVE

Utility trade associations also have been active in explaining the need for higher rates. The Investor-Owned Electric and Power Companies, a loose association of utility companies, sponsored a two-page ad in a recent issue of *Reader's Digest* with the caption, "Do electric rates have to keep going up?" The question was answered in the affirmative, of course, "Electric rates must go up. . . . It is obvious . . . that our costs will continue to climb. . . . This inevitably means increases in electric rates. We ask for your understanding of this inescapable fact." An article in an earlier issue of the *Reader's Digest* by Ralph Kinney Bennett said it another way, ". . . the immediate prospects in the power crisis are for less reliable service, higher bills, and possible rationing in some areas."[3]

One of the most innovative methods for obtaining public understanding of the reasons for higher rates was a TV series of commercials sponsored by the Philadelphia Electric Company in 1972. According to T. H. Mooney, Manager of the Public Information Department, the series was designed to "open a line of communications between ourselves and our customers." The series, put on in May, 1972, starred TV actor Leslie Nielsen, and customers of the company. The series covered not only rate increases, but blackouts, nuclear power, and pollution as well.

The technique used in the two-minute commercials sponsored by Philadelphia Electric was about 20 seconds of critical comment by the company's customers, followed by 140 seconds of explanation of what the company was doing about each problem. Leslie Nielsen did most of the explaining in an informal, objective, and frank manner, not attempting to hide or cover up, but admitting that problems did exist. Typical cus-

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DEMARKETING POWER . . . *(Continued from page 34)*

tomer comments which led off the commercials included, "I don't want to pay any more, no matter what, unless I see something more for my money," and "I'll be using candles after this (latest rate increase)." Explanations by Nielsen pointed out that the company was facing a 45 per cent increase in construction costs in Philadelphia, higher interest rates, and a higher cost of low-pollution fuels.

How effective was the campaign? The total cost amounted to approximately $350,000—$250,000 for air time and $100,000 for the cost of the show. Two research studies were done to evaluate effectiveness—one by Behavior Systems, Inc., (BSI), and the other by Wittreich Associates, Inc. The results of these research efforts were overwhelmingly positive. The BSI study showed that nearly two-thirds of the 1.2 million families in the five county marketing area saw one or more of the TV messages, and that 84 per cent of those who responded to questions regarding the commercials agreed with the steps Philadelphia Electric is taking to solve its problems. The Wittreich study, which evaluated attitude change, indicated that 24 per cent of all customers moved from a negative to positive attitude regarding Philadelphia Electric's position on such important issues as rate increases, pollution, and nuclear power. This degree of attitude change was considered by Wittreich to be highly successful in comparison with other attitude change campaigns.[4]

CONSERVATION ACTIVITIES

At least eighty-one investor-owned electrical utility companies have begun power conservation activities of one kind or other, according to a list compiled by the Edison Electrical Institute early in 1973. Others in the energy field, including a number of the major oil companies and appliance manufacturers, are encouraging conservation. Many state regulatory commissions have joined the Federal Government in calling for strong energy conservation measures.

In terms of dollars spent and results achieved, public relations campaigns conducted by Northeast Utilities in New England and Consolidated Edison in New York are among the most impressive. Both these companies early realized the implications of the squeeze brought about by increasing demand and reduced resources. In 1969 Northeast Utilities abandoned promotional advertising aimed directly at the customer, and in 1971 undertook an informational advertising program designed to encourage wise use of electricity. According to E. F. Sturgeon, an official of the company, advertising expenditures amounted to approximately $500,000 in 1971, $900,000 in 1972, and will be approximately $500,000 in 1973. This effort has been largely devoted to communicating to consumers, shareholders, opinion leaders, and others through a large-scale institutional advertising campaign. Unfortunately, there has been some criticism of the extent of this public relations effort and the state legislature currently is considering measures to limit such expenditures.[5]

The magnitude and scope of the Consolidated Edison conservation program in New York is truly impressive. At the end of 1970, Consolidated Edison cancelled its sales promotion efforts and disbanded its sales force. In 1971 it began a vigorous "Save-A-Watt" program, which involved expenditure of $485,000 in 1971 and $270,000 in 1972, according to Charles Wagner, manager of corporate communications. The "Save-A-Watt" campaign has been in many respects a model public re-

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lations program. It was well-planned, and used each communications medium to its best advantage. The program was launched by Mayor Lindsay in May 1971 at a City Hall press conference, in which the mayor praised the program, calling it "a precedent-setting initiative by a major utility." The mayor, the county executive, and many other New York City and Westchester officials taped "Save-A-Watt" messages which were later broadcast by radio and TV stations as public service announcements.

Other methods used to spread the conservation message in the "Save-A-Watt" campaign were advertisements in English and Spanish newspapers, TV spot announcements, press kits, buttons, posters, stickers for light switches, and mailed bill enclosures. One of the most effective techniques employed was the appearance of company representatives at informal talk shows. "Save-A-Watt" cartoons appeared in the *New Yorker* and other magazines, '100,000 copies of a "Save-A-Watt Game" were distributed,' and customers were asked to pass a "Save-A-Watt Test."

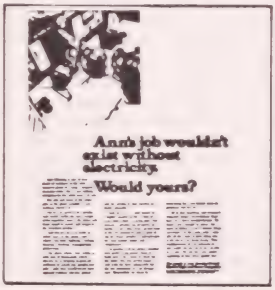
The "Save-A-Watt" campaign generated widespread interest throughout the United States and abroad. The company has provided advice and assistance to other utility organizations interested in mounting similar campaigns. In 1971 and 1972 thousands of posters, leaflets, stickers, buttons, press kits, and other material were distributed to individuals and groups who wrote or telephoned from around the nation.

How effective was the "Save-A-Watt" campaign as an energy conservation effort? Were its effects, if any, temporary, or were there long-range benefits? Consolidated Edison considers that the program was effective, and the expenditure of resources was worth the result. In a summary statement, the company reported that peak demand for power during and after the program was lowered markedly—by about 400,000 kilowatts—and that summertime consumption was reduced by about 300 million kilowatt hours. It is too early to evaluate the long-term results of the program, but it is expected to have at least some residual effect. Consolidated Edison has been cited for its conservation efforts by a number of organizations, including the Sierra Club, Consumer Action Now, and the Department of the Interior.[6]

ENERGY RESEARCH

The third major area emphasized by many power utility companies in their public relations programs is progress in new developments in energy research. They generally tend to be somewhat cautious in predicting the impact of new sources of energy, probably to avoid creating false optimism and unwarranted hopes. The new developments include coal gasification, "breeder" nuclear reactors, nuclear fusion, tidal energy, wind power, solar energy, and geothermal power. In addition, of course, there are experiments in obtaining conventional fuels from new sources, such as oil shale and tars. Although some of these developments look very promising, none appear to offer any short-range hope of averting power shortages.

Investor-owned Electric Light and Power Companies, the previously mentioned association of utility companies, has engaged in extensive public relations advertising to create public understanding of the potential of power research and development. Typical ads sponsored by these companies are titled, "What's being done by the electric companies to help with the fuel shortage?," "We're trying to take the smoke out of smokestacks," "Liquid . . . Gas . . ., or Solid. Which is the coal of the future?" "Why should any more nuclear power plants be built now?" and the companies' two page ad in a recent *Reader's Digest*, "Do electrical rates have to keep going up?" This *Reader's Digest* ad warned, "Research and development in these new methods of (power) generation will require billions of dollars in the years directly ahead of us."[7]



Much of the public relations work done in connection with nuclear power plants, which are probably the most promising of the energy research and development possibilities, is designed to counteract fears of the danger of nuclear explosion or damage to the environment. A recent mailing to all customers of the Louisiana Power and Light Company points out that nuclear energy is a safe method of generating power, as demonstrated by experience with operating nuclear power plants, both commercial and US Navy: "It's a fact: there has never been a radiation accident affecting the public in the entire history of our U.S. nuclear power generating plants or our nuclear navy . . . (this includes) 23 nuclear generating plants and 106 nuclear powered ships. . . ."

The Tennessee Valley Authority (TVA), one of the nation's largest power producers, is pioneering the construction of the first full-scale "breeder" nuclear reactor in the United States. The project, which is scheduled for completion in 1980, is being accomplished in conjunction with the Commonwealth Edison Company, and in cooperation with the Atomic Energy Commission and the national electric utility industry. The successful completion of this project will be a major breakthrough in power development, since the "breeder" reactor actually manufactures more fuel than it uses as it produces energy.

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DEMARKETING POWER *(Continued from page 40)*

It is of great importance that this project have full public support, and the TVA has distributed literature describing the "breeder" reactor. This literature emphasizes the advantages of the "breeder" reactor, including its safety and environmental protection features.[8]

The Pacific Gas and Electric Company, faced with criticism of proposed new nuclear power plants from environmentalists and others, has distributed a pamphlet by Sherman L. Sibley, chairman of the board and chief executive officer, designed to counteract these arguments. The pamphlet also attempts to correct false information and rumors regarding nuclear power plants: "Some critics contend that the thermal effect of returning condenser cooling water (from the nuclear reactor) to the ocean is always harmful. Don't you believe it . . . cooling systems can be designed so that they do not significantly affect the marine life," and, "There is a myth circulating that the location of power plants along the coast would require a plant every six to eight miles by 1990 . . . this is nonsense, but the fable continues. . . ."

There are, of course, many other examples of active public relations work by the power utility companies. Only a few of the many utility public relations campaigns conducted in recent years have been discussed. Many of the smaller companies with limited budgets, in particular, have presented highly effective and imaginative programs.

What does the future hold for the public relations practitioner in the power utility business? The next few years are certain to bring him great challenges. As the demand for energy increases, and the inexpensive energy sources decrease, the public in many places will suffer from either higher energy rates or curtailed service, or both. The American public has never been known to suffer in silence, and without explanation. It will be the responsibility of the public relations practitioner to insure that consumers fully understand all factors involved. An informed public can be of great assistance in solving the energy problem; an ignorant public, on the other hand, could hamper and delay progress toward overcoming the adverse effects of the situation. □

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1. Ralph Kinney Bennett, "Why We Have a Fuel and Power Shortage," *Reader's Digest*, January 1971, p. 77.
2. Investor-Owned Electric Light and Power Companies, "Do Electric Rates Have to Keep Going Up," *Reader's Digest*, May 1973, pp. 220-221
3. Bennett, *Op. Cit.*, p. 77.
4. Personal letter, T. H. Money, Manager, Public Relations Department, Philadelphia Electric Company, to the author, March 16, 1972.
5. Personal letter, E. F. Sturgeon, Northeast Utilities Service Company, Hartford, Connecticut, to the author, March 19, 1973.
6. Personal letter, Charles H. Wagner, Jr., Manager of Corporate Communications, Consolidated Edison Company of New York, to the author, March 13, 1973.
7. Personal letter, Mr. Rosen, N. W. Ayer & Sons, Incorporated, New York, New York, to the author.
8. Personal letter, Paul L. Evans, Director of Information, Tennessee Valley Authority, to the author, April 9, 1973.

Exhibit 19: Case Study—U.S. Steel

CORPORATE ADVERTISING
CASE HISTORIES

U.S. STEEL—"We're Involved"

BY WILLIAM W. COOK

THREE YEARS ago, those responsible for U.S. Steel's corporate advertising program wrestled with the sticky problem of how to get across the fact that the nation's largest steel producer is concerned with issues that go far beyond merely making and selling steel. Granted, U.S. Steel must never forget that it's in business to produce and sell goods and services in a way that will yield a reasonable return on its shareholders' investment. Recognizing this, how can it convey the idea that at the same time it's made up of people who care about other people, on and off the job, and tell of the contribution that U.S. Steel's products and services make toward improving the quality of life in America?

In pursuit of that elusive goal, conferences were held among representatives of U.S. Steel's commercial advertising department, public relations, the finance chairman's office, and the company's advertising agency, Compton Advertising. From these sessions emerged the slogan that was to become the theme of U.S. Steel's current corporate advertising program: "We're Involved."

Since then, ads in national magazines, in newspapers, and on television and radio in U.S. Steel's plant cities have featured such themes as the company's contribution to medicine by an affiliate helping to develop a titanium heart valve, to science by using its million-volt electron microscope to study moon rocks, and to agriculture through its farm products and services. Ads featuring the "We're Involved" theme have helped to drive home to customers, employees, thought leaders, the financial community, and plant city residents that U.S. Steel is progressive, that it provides useful and socially beneficial products and services, and that it is determined to meet its responsibilities to the people who depend upon it as a supplier, employer, financial investment, and neighbor in the cities where it has plants.

The results on the whole have been gratifying. So much so, in fact, that when it was decided earlier this year that the new thrust of U.S. Steel's corporate advertising in 1973-74 would be on the broad theme of productivity, it was agreed that the messages would continue to feature "We're Involved."

The theme of productivity was chosen after much soul-searching. The company and agency are keenly aware that it's a controversial issue requiring delicate handling. To most people, productivity means using manpower and machines more effectively and eliminating inefficient work habits—in short, working "smarter." But to some it carries the negative

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WILLIAM W. COOK, *PRSA Accredited is director-Public Communications Services, United States Steel Corporation, Pittsburgh, Pennsylvania.*

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connotation of the sweatshop, of laying off people—concepts which the ads must help to dispel.

Those who guide U.S. Steel's advertising program are convinced that the theme of productivity far transcends the interest of a single company or industry—that, in fact, it may well be the most crucial issue facing the nation. Confronted by fierce competition from overseas, inflation, and erosion of the traditional work ethic, business and industry are, in a very real sense, fighting for America's economic survival. It was felt that in this situation, U.S. Steel has a unique opportunity to assume a position of leadership on an issue which will not only help its own cause, but also serve the interests of labor, government, education—all the institutions that make up our industrial democracy.

In U.S. Steel's new campaign, certain messages on television and radio, and in newspapers reaching large numbers of employees, will describe efforts by the company as a whole, and by individuals at all levels inside it, to improve U.S. Steel's own productivity. They will also show how its products and services help others, particularly customers, to improve theirs. Some ads will seek to explain in readily understandable terms the elements that go to make up productivity. In terms of industry, these will include not only the vital element of labor's input, but also the important roles played by management efforts and capital investment.

Other messages will deal with productivity in broader terms and show how the concept is by no means limited to industrial output.

Another element of the campaign will be a series of two-page ads in national magazines such as *Time, Newsweek, U.S. News & World Report, Fortune* and *Sports Illustrated*. These will feature statements by national figures who are recognized leaders in such fields as industry, labor and banking. The final paragraph or two of each ad will carry a brief message telling how U.S. Steel is working to improve its own productivity.

The national TV campaign is to run from October through December with a series of spots in evening programs hosted by leading news commentators on the three major networks. On completion of the national schedule, TV will continue to be utilized through messages on local news and sports programs through June in selected cities. Also, in many areas where plants are located, particularly those with heavy concentrations of customers, locally oriented radio spots are to begin in October and continue through June. Ads in newspapers serving plant areas will also tell the productivity story from the local angle.

In addition to messages in national and local media, mailings, audio-visual presentations, and other avenues of communication are being used to bring the productivity story home to customers, employees, thought leaders and others whose support is needed.

A key element in U.S. Steel's decision to feature productivity in its new

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By looking at them as markets for problem-solving ideas.

"Hot" issues are the ones that get talked about most. At U.S. Steel, the idea is to do something about them. Along the way, there are products and services to be sold that can solve many of the problems others just talk about. Here's a sprinkling, off the top:

Auto Safety

U.S. Steel doesn't make cars but does make useful suggestions. One of the latest is a new gas tank design that increases safety on impact, and reduces fuel tank emissions to zero. Another is a bumper design using steel cable that substantially exceeds Federal impact guidelines. Ideas like these are available for use by automotive customers.

Environment

In the past 6 years, U.S. Steel has spent or authorized over $300 million for facilities to prevent the discharge of pollutants into the air and water. Included are the complex control facilities needed to remove over 99.5% of the particulates generated by the Q-BOP steelmaking furnace (a European steelmaking process developed for large-scale production by U.S. Steel). Continuing efforts are being undertaken to control coke oven emissions (the industry's most technologically difficult pollution abatement problem). Much of these new technologies, among others, are being marketed through a U.S. Steel subsidiary, USS Engineers and Consultants, Inc.

Taxes

There is little any one company can do about the tax burden other than to suggest ways to alleviate it. One of U.S. Steel's ideas is the use of USS COR-TEN Steel in short-span bridges. COR-TEN can be used bare, unpainted, because it protects itself against corrosion. If the thousands of city, county, state and federal short-span bridges being built these days were all bare COR-TEN, not a taxpayer dollar would be required for "paintenance."

USS and COR-TEN are registered trademarks.

Waste Management

Recently, U.S. Steel introduced the USS ROLL-A-WASTE system, a new and efficient idea in solid waste collection. The system consists of a tough, high-density polyethylene wheeled container with a capacity of 82 gallons, combined with a hydraulic lift that speeds truck loading and totally eliminates manual lifting.

It makes residential trash collection easier, more economical and more sanitary than ever before, for both municipal governments and private contractors.

Energy

In helping to relieve the energy crisis, a factor will be the importation of liquid natural gas and crude oil. In this area, U.S. Steel is active in marketing technology and materials for cryogenic tanks for shipboard and land based facilities, as well as materials for the super-tankers and LNG carriers.

At Walt Disney World, a fleet of special land and water vehicles is powered by compressed natural gas contained in USS cylinders over 8 feet long, and made from a single piece of steel without welds or seams.

U.S. Steel is devoting considerable attention to the impending energy crisis in other areas as well, and can contribute to the solution by greater utilization of its extensive coal reserves, and by changing the pattern of energy consumption in steelmaking. One program is aimed at the development of a process that can convert previously unusable coals, having high sulphur and ash content, to usable coke.

Summed up, no other steel company brings more application development experience to the marketplace. Particularly when there are problems to be solved. United States Steel, Pittsburgh, Pa. 15230.

USS **We're involved.**

(Continued from page 48)

communications program was the experimental negotiating agreement reached earlier this year between ten major steel companies and the United Steelworkers of America under which there will be no general strike in the industry when the current contract expires in mid-1974 and for at least the next three years. It was the last general steel strike in 1959 which enabled foreign producers to gain a firm foothold in domestic markets, and hedge-buying against periodic strike threats has permitted further inroads since then.

Earlier this year, thousands of employees of U.S. Steel and of other domestic producers saw a movie entitled, "Where's Joe?". The missing Joe symbolized the men whose chances for a job in American steel vanished because of foreign competition stimulated in part by the chaotic feast-and-famine conditions brought about by hedge-buying. The film suggested that the way to fight back was to think and act more competitively—again, to work "smarter."

Efforts to increase productivity encompass far more than mere communications, of course. The investment of $3.7 billion over the past seven years to build more productive facilities has put U.S. Steel in a better position than ever before to provide leadership in this field. Employees and customers have never been more receptive to messages about productivity, nor able to perceive their own enlightened self-interest reflected in them more clearly.

So it would seem that the time is right for the productivity messages to which U.S. Steel is currently committed. There remains, of course, the question of how effectively this sensitive, complex subject can be dealt with through the medium of corporate advertising and what the net impact of this ambitious undertaking will be.

The answer won't be known until next year. Meanwhile, those responsible for U.S. Steel's communications have set themselves a challenging goal, and the progress of their efforts is sure to be watched with gathering interest across the nation. □

Exhibit 20: Case Study—RCA

CORPORATE ADVERTISING
CASE HISTORIES
RCA

RCA—"The Electronic Way"

BY D. L. ALLIGOOD

IN A SPAN of just 10 years, RCA has doubled in size with annual revenues of $4 billion. During this period, its business activities have extended into new areas, in part, through the acquisition of Hertz, Banquet Foods, Coronet Industries, Cushman & Wakefield and Random House. And although the RCA name has always been synonymous with electronics, the very success of this diversification has alerted us to the need for clarifying our corporate image.

• *What is RCA and where is it going?*—Despite the changes introduced to broaden the company's business base thereby extending its range of products and markets, the fundamental character of RCA remains the same—a world leader in electronics, continuing to pioneer in the development of new frontiers in electronics and communications. RCA is uniquely positioned at the approaches of a new electronics age—an age when electronics will solve problems and perform services it has never been able to do before.

RCA built its reputation as a pioneer by creating large new industries and markets—radio in the 1920's and 30's, black-and-white television in the 1930's and 40's, and color TV in the 1950's and 60's. What about the future?

In his address to shareholders at the 1973 annual meeting, Robert W. Sarnoff, RCA chairman and chief executive officer, said:

> "Leadership today is achieved through advancing by steps that generate new uses of electronics, replace outmoded technologies, and create 'sub-industries' that alter or build upon existing systems and services. The important advances are represented by such examples as home video recording and playback systems that supplement existing TV service, and new solid-state circuitry for use in cars, watches, and automatic controls.
>
> "This means an evolutionary extension of electronics into virtually every aspect of life at home and at work. It means a multitude of new businesses for the electronics industry, and the addition of new products and applications to maturing businesses that have provided much of its volume and profit in the past.
>
> "In the vernacular, RCA is where the action is. Major innovations are now on the way in our consumer operations, our solid-state business, our global and domestic communications services, and our government and commercial systems."

The domestic market for electronic goods and services was approximately $33 billion in 1972. Pro-

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D. L. ALLIGOOD *is director, corporate advertising, RCA Corporation, New York City.*

RCA (Continued from page 43)

jecting current growth rates and technological trends, it is expected to exceed $44 billion by 1975, and to reach nearly $63 billion by 1980.

All this served to guide us in the development of our major new corporate advertising campaign for 1973—a campaign created for and directed to the nation's opinion leaders with special emphasis on influential members of the business/financial community. It comprises the basic and major portion of our corporate advertising program. We do have a supplemental community affairs campaign that will be covered later.

• *General Business—"The Electronic Way"*—"RCA—The Electronic Way" is the theme adopted for our major corporate advertising campaign. Created by J. Walter Thompson Co. in New York, the campaign utilizes a combination of handsome four-color spreads and single pages in national magazines.

The advertisements in this new series provide examples of how new electronic systems and products produced by RCA today are helping to make life more enjoyable, safer, cleaner and more rewarding for all Americans, and what this may presage for tomorrow. For example, one ad in the series highlights the growing contributions of electronic systems in the automotive industry and shows how electronics can help make the automobile of tomorrow safer and more efficient through such improvements as electronic anti-skid systems and electronic fuel control.

OTHER SUBJECTS

Other subjects covered in the campaign deal with our building management system for skyscrapers, hospitals and other building complexes; "Videovoice" (a device that transmits pictures on ordinary telephone lines) and its applications in medicine, education and business; plus others dealing with the impact of high technology developments in weather, communications and earth resources management satellites, lasers, and solid-state technology.

Several different ad subjects are scheduled simultaneously in order to generate a cumulative effect demonstrating how trends in the electronically-based information industry today point to steady and rapid development of large new markets—in precisely those areas of business and technology where RCA excels.

The advertisements are planned on a year-round basis, in major business magazines, plus a select group of special audience publications. All media are selected on the basis of how effective they are in delivering advertising messages to our target audience and the degree of receptivity to the RCA corporate message generated through their editorial environment.

The magazine schedule is augmented by periodic insertions in major business and financial newspapers. These full page black-and-white ads are usually keyed to significant business accomplishments, scientific breakthroughs, and other newsworthy events. For example, one ad in this series dealt with our sale of earth station satellite communications equipment to The People's Republic of China last year, while another reproduced the letter to

(Please turn page)

RCA (Continued from page 51)

shareholders from our 1972 Annual Report, reflecting RCA's growth in sales and profits and the favorable outlook for the future.

While it is too soon to ascertain the results of this year's campaign through research, initial reaction both inside and outside the company has been positive. Nevertheless, we will continue to monitor our program with an eye to keeping it fresh, informative and above all, consistent with our corporate communications goals.

• *Community Affairs Campaign—Most Unusual*—Our current community affairs campaign reflects RCA's efforts to open economic opportunities to black people and to Spanish-speaking Americans and represents what we feel to be a most original approach to planning, developing and implementing programs specifically directed to these groups. Three factors set this effort apart from all others:

First, the campaign is handled by UniWorld Group, Inc., a black-owned and operated advertising agency in New York City.

UniWorld was selected from a group of eight black advertising firms to create and place community affairs advertising for RCA beginning 1973. UniWorld was chosen because it had demonstrated its marketing insight into all levels of the black market.

UniWorld is totally responsible to the corporation for its programs (copy, production, media placement, etc.) on a direct basis—not subject to review by other RCA agencies as is the case in some other advertiser/black agency relationships.

Secondly, the current campaign mirrors the broad-gauge nature of the corporation's goals as related to minority group people.

In the past, our minority markets advertising carried one message only: "We are an equal opportunity employer." Today, we are still an equal opportunity employer, of course, but we interpret the spirit of that pledge to go beyond fair employment practices. We want minority group people to know what kind of company RCA is—a business institution concerned with the significant issues and problems of minority communities. And we want minority group people to know what RCA is doing to help alleviate some of the most pressing problems in these communities.

Thus through UniWorld, we instituted a print and broadcast effort tailored to the black and Hispanic communities that encourages growth and development of minority group business enterprise, and invites minority group supplier involvement with RCA.

And this brings us to the third factor that establishes our program as unique—the advertising itself.

In print, ethnic appeal magazines and newspapers are utilized for the presentation of special copy addressed to businessmen and suppliers. In these ads we offer a booklet, "Doing Business With RCA" to help minority vendors learn about RCA's supplier needs and how to go about making their own products and services known to us. The ads headlined, "You'd Be Surprised At What We Buy," are unusual in that they contain a straightforward copy approach with no attempt to label them as "black" ads. Of course in Spanish-language newspapers they are in

(Continued on page 54)



RCA *(Continued from page 52)*

Spanish, but the copy approach and illustrations remain the same. In other words, in this instance, the medium becomes the message. These ads become black or Hispanic because they appear in black and Hispanic media.

To date, we have received almost 200 responses from coast to coast. All the more encouraging in view of RCA's internal efforts to expand opportunities for women, about one-third of these can be identified as coming from women.

For radio, UniWorld produces the "RCA Minority Forum," a series of 3-minute, twice daily programs on black and Spanish-language stations during the summer months in eleven key markets. As our announcer says:

> This program was brought to you by RCA in the interest of the need for *every* American to achieve full economic potential . . . and in recognition of the varied and *new* economic philosophies in minority communities. At RCA new ideas are just as important as new products. And meeting the challenge of tomorrow is what we are doing today. We do more than just make color TV. RCA.

The programs feature the actual voices of outstanding black and Hispanic leaders offering their views on minority business development, education and social progress.

Indications that the series has struck a responsive chord, particularly in the black community, is evidenced by the extensive coverage in black newspapers quoting some of the comments made by our guest speakers.

In addition to the press coverage, the program has been praised by civic leaders, and at this writing, a major airline is considering use of the series as a feature of its cross country in-flight entertainment.

As in most instances of community affairs advertising, the size and scope of the program is relatively small compared to our overall efforts directed to general business. However, in terms of the quality of output and results to date, the program is proving to be a most efficient way to publicly demonstrate commitments in the area of corporate social responsibility.

The two campaigns, one directed to general business and the other to community affairs, constitute the bulk of our corporate advertising program for RCA. They are the results of the combined efforts of many talented and experienced people all working together to produce effective advertising—advertising that gives vivid expression to the realities that RCA's policies and prospects represent. □

Exhibit 21: Case Study—Texaco

CORPORATE ADVERTISING
CASE HISTORIES

TEXACO

TEXACO—"Putting Aesop to Work"

BY KERRYN KING

WHEN TEXACO WAS founded by a group of enterprising, forward-looking men back when our century was only two years old, their objective was certainly not to urge the company's customers to restrict their use of petroleum products.

But urging customers to use less of its principal product—gasoline—is exactly what Texaco is doing in 1973, in print media and on radio and television. The company believes that these efforts at persuasion are in the public interest and are mandated by an insufficiency of crude oil on the one hand and an insufficiency of refining capacity on the other.

These two scarcities, which in their causes are interlinked, are part of a broader problem that is sometimes too dramatically termed an energy crisis but is definitely an energy shortage of unpredictable duration. It is perhaps the one problem that those forward-looking founders of Texaco did not foresee.

They foresaw very clearly a rising demand for petroleum products (today crude oil and natural gas supply almost 78 per cent of our nation's energy requirements, and in a single hour the United States consumes more than 30 million gallons of oil). But they didn't foresee that certain trends would converge nearly three quarters of a century later to bring about unprecedented conditions that would make it extremely difficult—and perhaps at times impossible—to satisfy that demand.

Those conditions are present today, and they explain why Texaco is trying to foster an economical use of its product, especially gasoline, by the public.

We have produced and aired six corporate television messages on conservation that have so far been seen by millions of television viewers of golf, tennis, and football events. Moreover, on November 27, at 8:00 p.m. (EST), Texaco will present on the ABC television network a one-hour special inaugurating the Texaco American Heritage Series which commemorates the nation's bicentennial. During this program, three specially prepared television commercials will deliver important messages on the energy situation.

These television messages on gasoline conservation were created for Texaco by Benton & Bowles. One is an inspired adaptation of Aesop's fable about the tortoise and the hare (see photo sequences on page 57). It drives home the point that the motorist who drives at high speed and makes jackrabbit starts wastes gasoline. The actors are a 140-year-old Peruvian tortoise and a wild hare. The Chicago *Sun-Times* called this television commercial one of the

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KERRYN KING, *PRSA Accredited, is senior vice president for Public Affairs of Texaco Inc., New York, New York.*

TEXACO (Continued from page 44)

"cleverest, most ingratiating commercials ever produced for TV . . . a beautifully photographed parable. . . ."

Other television messages by Texaco have given specific tips on saving gasoline under varying conditions. One characterizes the driver himself —meaning his own sound judgment —as an economy factor, and "*you* don't cost a penny extra."

In July and August we ran two four-color pages—"Texaco introduces a fantastic new mileage ingredient. You" and "The Texaco Gasoline Economy Test"—in *The Atlantic Harper's, National Review, Newsweek, The New Yorker, Sports Illustrated, Time,* and *U.S. News & World Report.* These print messages, too, give specific suggestions on how to reduce consumption of gasoline, recommending such measures as avoiding jackrabbit starts, warming up slowly, and anticipating stops.

For fall and winter Texaco is concentrating on television and print messages on the conservation of heating fuel. During the summer—the peak motoring season—the product in short supply was gasoline.

On one hand, the public was told by critics of the oil industry that the shortage had been contrived by the oil companies, and, on the other, they saw or heard statements by those same companies showing pretty convincingly that the shortage was indeed real.

People have been told by industry critics that the shortage is practically over and yet many have seen evidence at their local service stations that it is not over.

To questions raised both by the consumers and by the independent businessmen who operate service stations, Texaco can give some straight, factual answers. Let me summarize a few of the questions and answers.

• *Why is there a gasoline shortage?* —Principally, for two basic reasons: *First,* gasoline consumption in the United States has gone up faster than anyone predicted because more cars are on the road—and, on the average, the new ones are getting lower mileage than any new cars in years.

Second, the supply has been unable to keep up with demand due mainly to dwindling reserves of crude oil and to a shortage of refining capacity in the United States.

• *Why is there not enough refining capacity?*—A major factor delaying new refinery construction has been the uncertainty about supplies of crude oil from abroad as U.S. production of crude oil was leveling off. Construction of new refining capacity was halted in large part because of the uncertain long-range availability of crude oil stocks in either adequate quantity or acceptable quality. When the Government adopted new import policies in April, 1973, it was possible to plan for new refining capacity. However, there is a serious question of the availability of adequate low-sulphur crude oil commencing in the latter part of this year.

At Texaco, our refineries have been running at full available capac-

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ity. And we've been able to keep deliveries of gasoline generally at the same high levels as last year, to the thousands of independent businessmen who operate Texaco stations. We are planning to increase the capacity of our Louisiana refinery from 145,000 to 345,000 barrels a day, and studying additional refinery expansions elsewhere.

• *Did anyone foresee the extent of gasoline shortages and energy demands?*—It was not possible to foresee the sudden and sweeping changes in our way of life or the huge increases in energy consumption that have occurred in the last 18 to 24 months. People have been buying new cars at unprecedented rates. And automobile manufacturers have been required to install more and more gasoline-consuming equipment.

To illustrate: In 1964, the United States used 4.4 million barrels of gasoline a day. By 1972, we were using 6.4 million barrels a day. That's an increase in consumption of almost 50 per cent in less than 10 years.

• *Why is so much oil being used instead of coal to generate electric power? Wouldn't there be more oil for home heating if the nation's coal supplies were used more?*—Programs to improve air quality have severely reduced coal consumption by utilities and industry. Certainly, no one questions the need to work for cleaner air. Since 1970, Texaco has included environmental messages in its corporate advertising program. Appearing both in print and on television, they acquaint the public with Texaco's conscientious efforts to protect the air, water, and land wherever it conducts its operations, anywhere in the world. "We're here to help clean up America's air" and "We look at every ship we build from the ocean's point of view" express typical themes.



• *Isn't there also a shortage of natural gas in addition to gasoline and heating oil?*—Yes, there is a very real shortage of natural gas—perhaps even greater than the shortage of gasoline and home heating oil.

Natural gas is just one part of the complicated energy supply picture. Since hydrocarbon fuels, gas, coal, and oil are interchangeable in varying degrees, shortages in one fuel may lead to use of substitute fuels. If this increased demand cannot be satisfied by increased supply, new shortages occur.

PUBLIC GOT THE STORY

In 1954, the price of natural gas produced for interstate shipments was controlled, and has been held to low and unrealistic levels ever since. As a result, consumers used up natural gas and turned away from other fuels, such as coal. Eventually artificial price control seriously damaged the earnings of the industry and the search for new supplies was curtailed. Reserves began to decline as demand continued to soar and not enough new sources could be discovered or developed. The regulated price also encouraged wasteful use when other less valuable fuels could have served better.

It would appear that Texaco's corporate advertising on the subject of energy shortages—along with similar messages from other companies—did get the story to the public, inasmuch as July and August, the peak motoring season, saw a less-than-expected increase in gasoline consumption.

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TEXACO *(Continued)*

There was a slower rate of increase than in previous summers while at the same time there was a great increase in the number of automobiles on the road. This would seem to indicate the effectiveness of our efforts in the media to alert the public to the problem. Such efforts, incidentally, are consonant with the President's call, in his messages to the Congress last April and more recently, for the development of what he termed a national energy conservation ethic.

As an undeniable national problem, the energy shortage can and indeed must be solved. But as an event unique in the history of the nation's production of energy, it is not only a problem but a turning point. The long-term solution will not be a restoration of pre-crisis conditions, but a new accommodation to the realities of the availability and the true costs of energy.

In the meantime, it is necessary for all Americans to be sensitive to the exigencies of the energy problem, and sensible in their use of the nation's limited energy reserves. □

Exhibit 22: Case Study—A. T. & T.

CORPORATE ADVERTISING
CASE HISTORIES

AT&T—"We Hear You"

BY WALT CANNON

A FEW YEARS AGO, AT&T published a series of advertisements with the theme line, "To communicate is the beginning of understanding." It would be a mild overstatement to say that this phrase crowded "The real thing" or "Pepsi's got a lot to give" out of public consciousness. But in its realm of corporate advertising, it made a mark.

At the time, the primary purpose of the campaign was to try to bring the Bell System and the public—particularly the younger public—closer together. By suggesting gently that the reader "Reach out for someone" or "At least talk to each other", we were trying to say that AT&T wasn't a heartless, soul-less, totally self-centered corporation, but a company with a serious concern for individuals and an awareness of our responsibilities beyond telephone service.

The campaign was well received and reprinted widely, and it helped personalize and humanize our company. But during that period and the period immediately following, some influences were at work in the U.S. that caused us to shift to corporate advertising that would help solve some of our specific business problems. We would still be seeking "understanding" but in a totally different sense.

The influences I'm referring to are painfully familiar to anyone involved in public relations, because they are similar in kind to problems many businesses face today.

The quality of our service had slipped in some areas. Understandably, this created some severe public criticism, because we had failed to meet the expectations of our consumers. So we set out to let them know that no effort would be spared to bring service back to accustomed standards.

Our costs had risen sharply, creating a need for increased rates in some of the Bell System Associated Companies. So we tried to help consumers understand the relation between our costs and their rates.

The volume of investment money needed for a capital-intensive business like ours was extremely high and was increasing substantially year by year. For example, in 1972 the Bell System spent about 8.3 billion dollars to expand, improve, replace or relocate facilities. This year, that figure is in excess of nine billion. We wanted consumers to be aware of that fact.

And while all of these factors were at work, consumerism was on the

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WALT CANNON *is assistant vice president for Advertising, Films and CCTV, AT&T, New York City.*

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rise. Consumers were becoming increasingly frustrated by what they considered to be a corporation's unwillingness to listen to consumer reactions and respond positively to them.

In the early 70s, of course, consumerism wasn't new. And it certainly wasn't a new influence in our business. We had always been conscious of the need to pay attention to consumers' opinions and desires and had conducted attitude studies for years to keep us informed. From the earliest days of our business, it had been a basic principle that every consumer had the right to the best possible service at the lowest possible price. We had been especially conscious of this right, perhaps, because of our privilege of providing telephone service exclusively in our service areas. Now it was time in our corporate advertising once again to establish a dialog with consumers that would remind them of all these things.

Historically we have attempted in the Bell System—both in Associated Company advertising and AT&T's—to treat current corporate concerns in our informative advertising. Subjects and manner of presentation have varied, depending on immediate needs. By 1970, it was apparent the need was for detailed, straightforward messages on subjects in which consumers had expressed the greatest interest and concern.

Research conducted at the time revealed those attributes of a corporation thought to be most important by the general public. They were reliability, fairness to employees of all races, the quality of the company's products, good value in the company's products or service, honesty in advertising and a sincere concern about customers, including how customers could make their feelings known to the company.

While AT&T, in most cases, proved to be well above the average of other companies studied, we still fell far short of ideal performance in the judgment of consumers. This research helped us establish priorities in subjects to be treated in our corporate advertising in magazines in the early 1970s.

High on the list was a review of our record treatment of employees of all races and both sexes.

TALKED QUALITY

We also began to talk about rising costs and their inevitable effect on rates. But at the same time we reminded consumers that telephone service was still a far better value than most things they had to buy.

We talked about quality, reliability and innovation in our products and services.

We talked about our continuing need to grow so we could continue to serve consumers in the superior manner they had come to take for granted.

And we tried to find new ways to reassure our customers that we were really in tune with their desires and needs and doing everything we could to respond to them constructively.

To this end, in 1972, we searched for a phrase that would state this aim simply and memorably.

We developed hundreds of prospective lines, finally shortening the list to five:

"Person to person."
"Keeping in touch."
"Providing the service you're due."
"We're answering."
"We hear you."

After testing the lines in eight Bell System cities, we selected "We hear you" as the line that best met our objectives and registered most clearly with the public.

We began to include the line prominently in a new series of advertisements of a page-plus-a-column format that played the themes of good value, good service and positive response to consumer needs.

And in one of the advertisements, we were very specific about who in the Bell System "hears" you. We pointed out that more than 37,000 service representatives have that as their primary responsibility. They are the channel through which consumers make their feelings known to our company in more than 12 million calls a month.

AT&T messages like these have been appearing in print throughout 1972 and 1973. They make up a national backdrop of advertising in support of the Associated Company efforts in their own service areas. And many of the Associated Companies schedule corporate advertising on some of these same themes. For example, several stress value by reminding consumers of the biggest bargains

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available in telephone service. In some areas with large Spanish-speaking populations, even bilingual messages are distributed.

We also "hear" and respond to consumer needs that go beyond the mechanics and cost of phone service. We have attempted, for example, to show how parents can teach their children to use the telephone in emergencies.

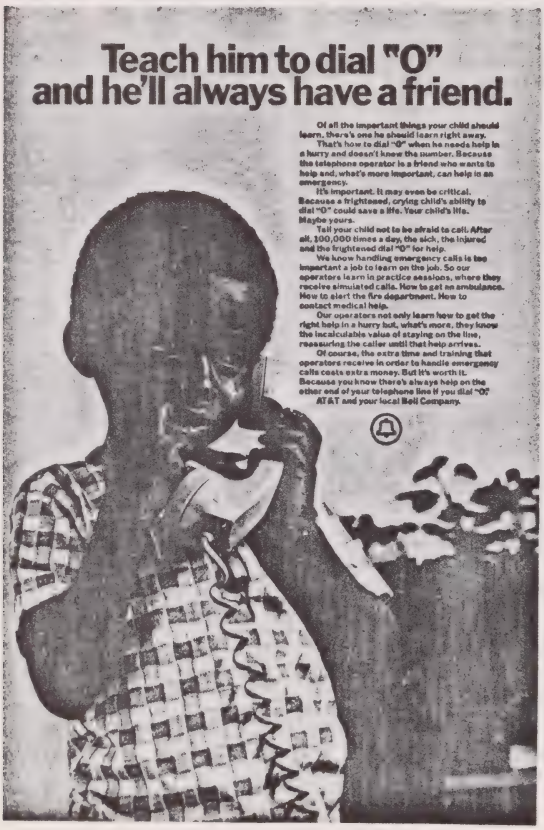
Many of the messages we treat in our corporate advertising in print are also covered in broadcast media. Since the early days of radio, then later in television, we have tried to make a contribution to the quality of programming itself by sponsoring shows of taste and enduring merit, as well as many of broad popular appeal.

In recent or current television programs on the Bell System Family Theatre, we have featured concerts by distinguished musical artists, such as Jascha Heifetz. We have scheduled original drama, such as "Jane Eyre" and "The Red Pony." In October, we featured "Peggy Fleming in Russia", the first television entertainment special to be produced in the Soviet Union.

The program mix we have been able to establish has brought us a large audience for our commercial messages over a broad demographic range. Sole sponsorship has given us greater impact and sponsor identification. And the overall quality of our programming has earned for us extra public relations benefits.

Our own programs have also permitted us to use commercials of any length. Given the complexity of some of the stories we wish to tell, this is a decided plus. For example, this year in "The Red Pony" show, John deButts, chairman of the board of AT&T, delivered a four-minute message explaining in a graphic way where the consumer's dollar for telephone service goes. This is information consumers have a right to know, because their dollars provide the facilities we need to serve them.

"It's very simple," Mr. deButts said. "To serve, we must build. And to build, we must earn. We know that you want service that's there and ready when you are. And that's the kind of service we are determined to provide. In short, 'We Hear You'."



WAYS TO SAVE

And our hearing and the consumer's understanding of our response is essential if we are to provide the quality of service Mr. deButts is talking about. It's obvious that a consumer who *understands* a company's offer and its problems can be served more efficiently. And if he can be served more efficiently, he can be served more cheaply, and this can be a factor in keeping his rates as low as possible.

For example, it is in the consumer's interest to understand he will save money if he dials direct rather than go through an operator. That lowers our costs, so we can afford to give him a lower rate.

Similarly, he can save money if he understands about low-rate periods for long distance calls. Leveling out the peaks and valleys of demand on the network lets us use the network more efficiently.

He will ultimately save money if he and other consumers limit calls to

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directory assistance; because the lower we can keep our costs, the lower we can keep our rates.

He may ultimately save money—and he will certainly enjoy better service—if he knows whom to call in the phone company to get the kind of service he wants. The more satisfied the consumer, the more smoothly we can run our business.

UNDERSTANDING HELPS

Finally, it is in the consumer's interest if he understands why we must raise rates in some areas and why we must conduct business in certain ways for the benefit of everyone. Consumers have every right to question what we do, and should have every opportunity to make their feelings known. But the more readily we can help them understand, the lower we can keep our costs and their rates.

Thus AT&T continues in its present corporate advertising, as it has for many years, to communicate information about itself in an effort to achieve understanding. Because through understanding comes better service.

We'll continue to let the consumer know "we hear you." We'll continue to let him know, in words and actions, "we're answering." We're determined to serve him well. □

Exhibit 23: Case Study—Alcoa

CORPORATE ADVERTISING
CASE HISTORIES

Alcoa: "Focusing on The Issues"

ADVERTISING and public relations are among the many resources used by Alcoa to help accomplish specific company objectives.

While most of Alcoa's advertising falls into the industrial or consumer product category, corporate advertising does account for a significant portion of the advertising budget. The underlying purpose for Alcoa's present corporate program is to focus on issues or attitudes which can have a significant influence upon the company. Right now, we are all living in an energy-sensitive environment.

Attitude studies have indicated that the above-average American has little knowledge of the aluminum industry. While he may identify the industry as a relatively large consumer of energy, he is receptive to the premise that many aluminum applications can, indeed, save energy. He is simply not knowledgeable about them. Given this situation, a clear opportunity emerges to relate the positive advantages and the essential nature of aluminum along with its energy-saving characteristics. Against this need, advertising objectives and a communications strategy were prepared by the advertising and public relations departments and approved by management late last year. These are the objectives:

A. Establish and reinforce in the minds of America's most influential publics that aluminum products are vital to our economy and way of life.
B. Develop a sharp sense of awareness among these publics that these very uses of aluminum also contribute to the conservation of energy.

To accomplish these objectives, the advertisements talk about and show applications of aluminum which people are interested in and can identify with their lives in a meaningful way. They communicate the fundamental role of aluminum in our life style and the many ways in which it helps save energy and conserve our resources. They illustrate the insulative, reflective and conductive properties of aluminum; show how its unique weight/strength ratio makes it vital in airplanes and essential in the transportation of goods; how less weight in a car means better gas mileage; and how the high scrap value and ease of recycling permits us to

[*Please Turn Page*]



Your next can of beer may have been a Coors can that was a Falstaff can that was a Carling can.



reuse it again and again and again.

The audience for Alcoa's program was to be small enough to be effectively reached with the budget available for this purpose. It had to be defined by characteristics which could also be used in selecting media which provided the most efficient coverage of this audience. Information from both the Simmons and TGI readership studies provided the basis for the audience definition. In addition to many other questions about magazine reading habits, they ask their respondents about their involvement in extracurricular activities. The question goes something like this: "Have you within the past year—

A. Voted in an election?
B. Written something that was published?
C. Actively worked for a political party?
D. Written to an elected official?
E. Taken an active part in a local civic issue?
F. Addressed a public meeting?
G. Written a letter to an editor?"

With the exception of the claim of having voted in an election, the rest of these characteristics or psychographics described an audience that is more active than the average. Alcoa's audience was then defined to include all adults who claim to have done *two or more* of the above things within the past two years, excluding voting in an election. The research data indicates that the size of this audience is approximately 24 million adults. Cross checks with other sources suggest that the indicated size of the audience is correct. While this constituted the target audience, it was felt that within the target audience some people might be more active than others and that this would likely be a function of income and education, although not necessarily. Based on this arbitrary assumption, a screen was applied to determine how many of the 24 million also resided in households with annual income exceeding $15,000. This numbers approximately 11 million. The audience was then further refined to determine, of the 11 million, how many also attended or graduated from college—and this numbers about 6 million. It was then concluded that while the target audience remained 24 million, irrespective of demographics, the inner segments of that audience were perhaps even more important as a target group and the highest possible reach and frequency should be

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ALCOA
[continued from page 34]

achieved in this area with the available budget.

Making use of an agonizing number of computer runs with different magazine combinations, a media mix was produced which provided an 85 percent coverage of the prime target audience with a frequency of 10 impressions; a reach of 96 percent of the 11 million with a frequency of 12.4 impressions; and 98.7 percent of the 6 million with a frequency of 15.2 impressions.

Having now defined the audience and determined the best media mix to reach it with an effective frequency level, we then turned to the question of how do we measure the accomplishment of our objective. An attitude and awareness study was clearly needed. But to be useful, this had to be an attitude and awareness study made soley within the target audience. Original research in this area proved to be the only acceptable answer. A research firm was hired to identify and interview a nationally projectable sample of adult Americans who precisely fit the target audience characteristics. They made 2277 long distance telephone screening interviews to identify qualified respondents and conducted 400 full-length interviews. In addition to these interviews, they also conducted 100 interviews with adults who had none of the target audience psychographic characteristics. The latter group was designed to serve as a control group and to help determine attitudinal differences between the target audience and the public at large. In both groups, the interviews were divided equally between male and female. Since this study was completed prior to the appearance of any of the ads in the corporate series, a follow-up study after a period of some 15-18 months can measure any change in attitudes and awareness as a result of the advertising program. Although there is little data to support the premise that a 15-18 month time frame is the correct one, it is our best judgment that based on our reach and frequency, we should achieve tangible results within this period of time.

ALSO USING TV

In addition to the use of print media to carry on this campaign, Alcoa is also using television. For the most part television, while an extremely effective medium, delivers large and diverse audiences which makes it very expensive if your target is more selective. There are exceptions to this, however, in the area of special programming. Programs like "Meet the Press," "Face the Nation" and "Issues and Answers" attract small but loyal audiences of 2-3 million adults at a very low cost per thousand. "Issues and Answers" was selected to augment the print schedule because it has a high percentage of viewers who precisely fit our audience characteristics. In subsequent research to measure changes in attitudes and awareness within the target audience, additional questions will be introduced to determine to what extent the use of television commercials may have helped in achieving the communications objective. This can be done through separate tabulations for heavy viewers, light viewers and nonviewers.

The final point with respect to Alcoa's program or any other corporate program would be to stress the importance of presenting the communication in terms that can be perceived as meaningful and important to the individual within any given audience. As with any other ad on any other subject, to be effective, the ad must offer information which the reader or viewer regards as important or significant to him. □

—Blair R. Gettig
Manager of
Advertising

Exhibit 24: Case Study—Weyerhaeuser

Weyerhaeuser Company: Explaining Conservation Concepts

THIS CAMPAIGN has not only aided conservation and the efficient use of our timberlands, but has dramatized the importance of regarding trees as crops to be scientifically planted and harvested, thus protecting this country against any future exhaustion of its invaluable timber resources."

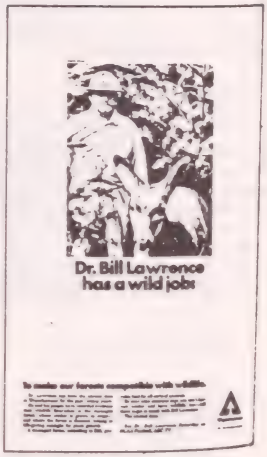
That's what *Saturday Review of Literature* said in judging a Weyerhaeuser ad to be the most distinguished public-interest advertisement of 1956. By that time, the campaign was in its fifth year, a result of Weyerhaeuser public affairs department in Tacoma working with Cole & Weber, a Pacific Northwest advertising agency.

Self-interest as well as public interest was certainly behind this highly successful communications effort. By the 1950's, lack of understanding was becoming a serious threat to private forest management, as pressure was increasing to have all timber cutting in the hands of the government—or at least have all forestry and logging practices prescribed by the Forest Service.

Realizing that the public didn't know what private industry was doing in the way of modern forestry and improved wood utilization, Weyerhaeuser Company took the lead in telling the public what was really happening on privately owned forests.

The aggressive communication program featuring the "wildlife"

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WEYERHAEUSER
[*continued from page 34*]

paintings was inaugurated in 1952. Some of America's top wildlife artists such as Fred Ludekens, Stan Galli and Jack Dumas illustrated the ads. First magazines used were the *Saturday Evening Post, Farm Journal* and *U.S. News.* Others later included *Look, Time, Sports Illustrated, Newsweek, Reader's Digest, Atlantic, Harper's,* and *Saturday Review.* A newspaper advertising campaign in plant communities also followed this "wildlife" theme at one stage. And the illustrations were adapted for calendars, playing cards and other collateral materials and helped convince people that private industry was concerned about American forests. In addition, the ads communicated to the public that logging does not destroy wildlife, but works in partnership with nature as most wildlife flourishes on modern tree farms.

This series of ads continued until 1967 and made many friends for the company. It also served as a base for product advertising, but, most importantly, established Weyerhaeuser Company as conservation minded and undoubtedly added to its recognition and stature.

By the 1960's, Weyerhaeuser's emphasis had shifted from a once wood products oriented organization to an integrated forest products industry that also manufactured and marketed pulp, paper and consumer packaging and was engaged in real estate and insurance activities.

A "capabilities" campaign in the *Wall Street Journal* and other publications told of this diversification as it related to the forest base.

Then research indicated that the Weyerhaeuser story could be told effectively by way of national television, so the company changed emphasis from print to television. First commercials showed its "capabilities" in forestry and products.

Since then the company has advertised on NCAA football, ABC's Wide World of Sports, NBC's First Tuesday, a special called The Unexplained, the 1972 Summer Olympics, now back with NCAA football and NFL Monday Night football.

As the 14 Weyerhaeuser commercials are shown throughout this football season, the theme and objectives parallel the "wildlife" ads started more than two decades ago: that the company is a good steward of its 5.7 million acres of land while providing leadership in forestry research, regeneration and utilization programs. Just as in the early 1950's, the messages depict the many benefits of the forest, including how private forests are a habitat for wildlife and a place for recreation.

And, like the ads of the earlier era, these commercials have won praise from viewers and awards from judges for successfully conveying concepts through a medium best known for selling products and services. □

—Richard E. Londgren
Manager of Advertising and Communication Services.

Exhibit 25: Case Study—AMC

AMC: "We back them better because we build them better."

CORPORATE ADVERTISING? Some call it an expensive exercise in introspection; others a valuable addition to a corporation's total communications objectives.

Like many useful tools, it's all in how you use it.

American Motors' corporate efforts represent more than just an addition to its product advertising. For AMC corporate advertising is the central focus of the total advertising program.

Thanks to the company's exclusive Buyer Protection Plan.

AMC believes that before you can create truly effective corporate advertising, you must start with a basic recognition of consumer needs. And it was just such basic recognition of an unmet need on the part of the car-buying consumer that led to the development of the AMC Buyer Protection Plan, along with the corporate advertising that has successfully promoted it.

Back in early 1971, AMC was faced with a declining penetration in a growing car market. Its management decided the answer was to create a unique consumer-oriented point of difference that would serve to switch loyal owners from GM, Ford or Chrysler to AMC.

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AMC: WE BACK THEM BETTER...
[*continued from page 36*]

A tall order. Especially since the task force assigned to the project had just *nine months* to come up with a program and get it before the consumer.

The first step was to sit down and really talk with consumers to find out what bugged them the most. Not surprisingly, the playback showed people wanted a really reliable, trouble-free, quality automobile. They wanted this car to be backed by an unconditional guarantee, with better servicing, loaner car availability and a means of resolving problems quickly. But they also had serious doubt that Detroit either would not or could not provide such an automobile.

This credibility gap played a large part in the program AMC developed. The components of the plan were simple: Manufacture a car with improved product quality and back it with a 12-month, 12,000 mile unconditional guarantee. Make available a loaner car for the customer to drive when his car had to be left at the dealer's for overnight warranty service. And create a direct hot line to Detroit to assist in customer-factory communications.

This was and is the basis of AMC's successful Buyer Protection Plan, which has been the cornerstone of the company's strong resurgence. For the 1974 model year, AMC passenger car sales were up 4.5 per cent compared with the general industry decline of 20 per cent. More important, the "conquest" rate—the acquisition of new customers—is the highest in the industry for the subcompact Gremlin, closely followed by the Hornet in the compact category.

The feedback from AMC car buyers shows the corporate commitment to customer satisfaction is working at the retail level. A recent independent study of owner attitudes by Boston College found more American Motors customers reporting satisfaction with their warranty protection and service than buyers of any other make. According to the survey, 68 per cent of AMC buyers said that the Buyer Protection Plan was either very or extremely important in their purchase decision.

The responsibility for creating believable advertising to promote the plan falls to AMC's agency, Cunningham & Walsh. The commercial with the four cars on lifts is a good example of how the Buyer Protection Plan is merchandised on TV. The print advertising program also underscores buyer benefits measured against competition. This is corporate advertising AMC-style, not an addition to the basic program, but a consumer-oriented approach relecting the total philosophy of American Motors management. □

—Gene Swaim
Director Public Relations

Exhibit 26: Case Study—Union Pacific Railroad

Union Pacific Railroad: "We Can Handle It"

Public relations techniques combined with a sound advertising program have provided an effective program for Union Pacific Railroad—motivation and productivity is the result.

The underlying theme stresses people and performance.

Two years ago the railroad suffered an 18-day work stoppage, the worst strike in its history. Amtrak had taken over the passenger service and employment was declining because of modernization and centralization of work forces brought about by computer-induced work flow. Mechanical facilities were changing, causing the dislocation of jobs and operating runs of train crews were lengthened which meant that families were moved and whole communities with historic railroad backgrounds were being dislocated.

Change and training was the order of the day for many employes and all of this brought about a malaise and unsettled feeling in every level of the company structure. We knew our railroad was one of the leaders in profitability, that we had a management team of transportation professionals. Also that the motive

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UNION PACIFIC

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power and rolling stock was the best and most modern in the industry—what was needed was a rallying cry, a polishing to that old family spirit the railroad enjoyed decades ago.

The slogan came through "We can handle it" offered to us by Bozell & Jacobs, the new ad agency we had just brought on to handle our program. With the slogan came a catchy tune "A Great Big Rollin' Railroad" which we decided to use as part of our commercials.

The jingle moved our ad campaign into television where we had never been before.

The format is built around ads showing one or more workers on the job, relating the significance of their work to the whole function of the company. Newspapers, radio and television were selected to maintain the effort in on-line communities where the largest concentration of employes work. Regardless of the medium, each ad is signed with "WE CAN HANDLE IT—the Union Pacific Railroad people."

The campaign was kicked off by a letter mailed from our president to each employee enclosing badges and bumper stickers which were reinforced by banners and posters in work areas. A flexible record of the song was tipped into the company publication, to our knowledge the first time this had ever been done.

Our reasoning for expecting this campaign to provide motivation to our employes goes as follows: We made a positive statement from management about our employes. We selected the major hometown communications media to carry the message to the employes, their families, their peers and leaders of their business community. The reason for going into general circulation media with this program was to let the employe know how important we consider him to be, but at the same time to let his family, friends and business acquaintances know too. This was expected to build his pride in himself and his association with the company, and in a subtle way, to set a standard of performance for him to work to.

It wasn't long before the "We can handle it" stickers showed up on lunch boxes, forklift trucks and other pieces of equipment. The slogan became a catch phrase amongst employes on the telephone and on the railroad yard radio—it was spoken as a matter of pride.

To support the ad campaign, our public relations efforts were directed toward featuring working people in magazine and newspaper articles. Our people worked with newspaper editors along the line to feature train crews, in the locomotives and on the caboose, as well as track workers. Whether it was a busy job or a lonely job, it made good copy and the employes enjoyed seeing themselves and their fellow workmen in print.

We produced an extravagant five-screen multi-media production based on the efforts of the railroad and the people that do the work and showed it all over the system, wherever we could get the employes together. Along with the rousing tune which we included in the production, it really gets the adrenaline flowing and has never failed to win applause and plaudits from the employes. It is also a good vehicle for addresses before civic groups in the towns along our line. Officers' speeches are keyed to presenting the efforts of the employes in the job the railroad is doing.

What about results? We have had requests for thousands of the records of the tune. . .many of them from people outside the railroad. Our program has been adopted for study in communication schools at several universities in the West.

It is difficult to measure morale, but from communication with our employes and letters from shippers we know the program is working. Motivation and productivity is more easily recognized.

Union Pacific ended 1973 with the highest net income of any railroad in the United States. . .last year we hauled 58.5 billion ton-miles of freight, the highest mark in history. □

—Edwin C. Schafer
General Director of Public Relations and Advertising

Exhibit 27: Case Study—Kennecott

Kennecott Copper: "Mining is Beautiful"

The status quo is no longer acceptable," said B.B. Smith upon taking over the reins as general manager of Kennecott's Utah Copper Division two years ago.

Addressing his first staff meeting, he qualified those remarks by stressing that any standard operating practice or procedure in existence for five years would be evaluated before being continued. The time was at hand for management and line employees to recognize that ignoring "change" and bowing to apathy would impair the division's needs to be productive and competitive.

The operation had been taking its lumps from environmentalists and preservationists who would like to shut

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KENNECOTT COPPER...

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us down. The environmental impact was generating negativism at an alarming rate and the frequency of related news reports and editorials was inexorably forcing the public relations function into a defensive position. This impact was obscuring the economic, civic and social contributions the division had been making to the community for more than a half-century. Our public relations posture and communications credibility were becoming shaky. Indeed, something was needed to offset derogatory attitudes and expression from media, the public and, to some extent, our own employees.

Public relations had to get off the defensive. We were in no position to compromise with management or the public; rather, we needed a new, aggressive thrust.

Smith's "challenge" induced a re-examination of our basic assets, which often escape one's mind, much like "being too close to the forest to see the trees." Looking "within ourselves," we found inspiration in two old adages: "Accentuate the positive, eliminate the negative;" "The best defense is a good offense." The values were there and they were real. But, where was imagination?

It was beautiful. It was inspiring. It was also shocking. So, we said it: "Mining is Beautiful!"

Beauty is in the eye of the beholder. We are often too involved, too entrenched in our own thinking, too shortsighted to see, to understand, to feel what makes activities worthwhile. A natural resource industry is basic to the material welfare of the country; and its people, who provide meaningful service, deserve recognition. In addition to producing copper, company management has been proving by deed that it is fulfilling social responsibilities, especially environmental as a priority objective.

"Mining is Beautiful" presented a bold challenge and once my staff and agency got thinking about it, they caught the spirit and grasped the potential for conveying a multitude of messages to change concepts and opinions to the contrary, while reinforcing those supporting this operation. Here was a theme that could achieve a new understanding of this, the largest private enterprise in Utah; a thrust that would appeal to the emotions as contrasted to the nuts and bolts approach which has sometimes in the past been used. Underlying the emotional appeal is a subliminal level that lingers long after the impactive shock of the blatant headline.

"Mining is Beautiful" was planned to pay off in job enrichment. Supportive copy and visuals were designed to provoke thought and generate movements. We had a virgin opportunity to awaken our internal and external publics, particularly those who were polarized against our business as anything but "beautiful." Here were three words that were indeed provocative. They were calculated to generate that most important element of any advertising or communications campaign—attention!

I had the opportunity to present the theme in late 1973 at a meeting of my fellow public relations associates of Kennecott, followed by a presentation of proposed newspaper ads, TV story boards and radio commerical audition tapes to Smith and his staff in early 1974. Collectively, my staff and agency prefaced the presentation with: "Mr. Smith, this is our answer to your challenge of change."

On July 30, the first "Mining is Beautiful" advertisement appeared in the state's five dailies and 52 weeklies. The ad, in four colors, portrayed an oil painting of the Bingham Canyon Mine, circa 1910, in contrast to an actual photograph of the mine as it is today and offered free copies of the reproductions. Within 10 days over 600 written requests came in (and they're still coming). Much to our surprise, there were but seven negative responses, two critical letters to the editor (in The Salt Lake *Tribune*) and three nasty (who ya kiddin'!) editorials in the student newspaper of the University of Utah. In short, we miscalculated our pro-con ratio reaction by some 43%. Needless to say, we didn't mind making that bad a judgment.

Since the initial ad, four additional "Mining is Beautiful" productions have appeared (through September).

Reaction to date continues most favorable, and not wishing to prejudge the merit of this campaign, I will close this report with some excerpts from a recent front-page editorial by Publisher Jim Cornwell in the *Eagle-Advertiser*, which serves some of our largest suburban communities:

> "After nearly 30 years of newspapering, we've sometimes felt nothing people could say or do would surprise us. Take, for instance, the case of Kennecott Copper. It's currently engaged in a public relations campaign built around 'Mining is Beautiful.' A recent release described the beauty of the 'melting pot' of racial backgrounds evident in the thousands who comprise Kennecott's labor force. The beauty, of course, is that this is so typical of our country itself—diverse races and creeds brought together by a common goal and enjoying together the blessings of this great nation. If it were possible to transfer that mountain of copper elsewhere, dozens of areas would be vying to have Kennecott Copper in their backyards, contributing to their betterment...all-in-all we're fortunate such a firm exists in our midst." (Beautiful!) □

K.E. Kefauver
Communications Director

Exhibit 28: Case Study—A. T. & T.

AT&T's Quest for Public Understanding

Noel L. Griese

In 1908 American Telephone & Telegraph Company commissioned N.W. Ayer & Son advertising agency to launch what has become the oldest continuous corporate advertising program in America. That program, which began with five pioneering ads, continues without interruption to the present, and Ayer and AT&T have one of the oldest agency-client relationships in the nation.

The man who authorized the beginning of AT&T's corporate advertising was Theodore N. Vail, a pioneer American industrialist unique in his time for having a sense of social responsibility.

Born in 1845, the son of an ironworker turned Iowa farmer, Mr. Vail built his first successful career helping to improve the U.S. Postal Service after the Civil War. Starting as a railroad mail clerk with the Union Pacific on the western frontier, he quickly showed a genius for providing improved service to users of the mail. By his early thirties, he had risen to the number two position in the Postal Service.

In 1878, dissatisfied with political pressures on the Post Office, the 33-year-old Vail resigned to become general manager of the fledging Bell Telephone Company, a predecessor of AT&T. In the next nine years, he helped fend off attempts by Western Union and others to infringe on the Bell patents, organized a number of Bell licensees in cities around the country, and supervised early development of long distance telephony.

Having been passed over for the presidency of the American Bell Telephone Company, which had become parent company of the Bell System, Mr. Vail resigned in 1887. By then, however, he had made a fortune investing in Bell System securities, which he lost in a scheme to warm homes and offices with superheated water. Subsequently, he made a new fortune developing public utilities in Argentina.

In 1889-1900, AT&T, incorporated in New York, absorbed the assets of American Bell and became parent company of the Bell System, and in 1902, Mr. Vail returned to the Bell System as a director of AT&T.

By 1903, then President Frederick P. Fish was working on the problem of public relations. He initiated a policy of peacefully absorbing competitors into the Bell System instead of destroying them. He sought to build good will through continuous wooing of the public through employee courtesy and efficiency and rapid response to complaints. In addition, he hired what was probably America's first public relations agency, the Publicity Bureau of Boston, to represent AT&T in the court of public opinion.

Measurable success

Insofar as public opinion can be measured by newspaper comment, Mr. Fish apparently had some success. James D. Ellsworth, who handled the AT&T account for the Publicity Bureau from 1903 to 1907, says he saw newspaper clippings gathered from around the nation change from 90 percent unfavorable to AT&T in 1903 to only 20 percent in 1907.

In 1906-1907, J.P. Morgan captured control of AT&T from the Boston financiers who had owned it since the 1870s. In April 1907, two Boston directors of AT&T resigned from the company's executive committee and were replaced by Morgan men. A few weeks later, Mr. Fish resigned as president and was replaced by Mr. Vail, then 61, who had been representing Morgan on the AT&T board.

Mr. Vail moved quickly to strengthen the public relations policies that his predecessor had begun. His first annual report, published in March 1908, was entitled "Public Relations." He fired the Publicity Bureau for dishonesty, but hired AT&T Account Executive Ellsworth as a "special agent" to help Bell licensees refine their advertising.

In the early summer of 1908, Mr. Vail authorized N.W. Ayer, then the nation's oldest and largest advertising agency, to launch a national campaign to persuade the American public that AT&T provided excellent service, that its rates were fair, and above all, that the telephone industry could serve the public best if it was a monopoly.

Mr. Vail dreamed of AT&T controlling the telephone and telegraph industries in America—of a system in which any telephone could be connected with any other, nearby or distant, and in which the telegraph office was no further away than the nearest telephone.

To accomplish his dream, Mr. Vail knew he had to change public opinion. Although Americans accepted the Post Office and utilities, such as natural gas distribution and street traction companies, as monopolies, many favored competition in the telephone business.

According to George Griswold Jr. of AT&T, it was S.A. Conover of N.W. Ayer who convinced Mr. Vail that mass circulation magazines were the best platform for the sort of persuasive advertising effort Mr. Vail had in mind, and that Ayer was the best agency to handle the job.

Ayer decided to try a series of advertisements "that would sink deep into the hearts of all classes of people who use the telephone—giving them facts, and explaining all the problems that are experienced in running a big telephone company in any part of the country."

First ad in 1908

The first of the five ads prepared and placed by Ayer for AT&T, "Twenty Million Voices" [*figure 1*], appeared from late June to August, 1908. The institutional nature of the ad is immediately apparent. Copy clearly says the purpose of the ad and others to follow "is not to get more subscribers," and makes a strong plea for the public to accept the telephone industry as a monopoly like the postal service.

While the first ad was running, Mr. Vail made a trip west. There, probably in Denver, he appears to have become miffed because someone at a party did not know what AT&T was. He returned with orders that future ads prominently display the AT&T name and "bell in a circle" logo.

The second ad in the AT&T series, "The Telephone's Burden" [*figure 2*], reproduced from the Ayer copy books, did not appear in magazines quite as depicted. The telephone pole artwork was deleted to make room at the top of the ad for a Bell seal and the AT&T name—the same clumsy art that appears at the top of the third ad, "Fair Rates" [*figure 3*]. By insisting on more prominent display of the AT&T name, Mr. Vail deserves some credit for development of the corporate identity ad.

The fourth ad in the series, "One Policy, One System, Universal Service" [*figure 4*], was slated to appear at the time of a national presidential election. Trust busting was popular in 1908, and some AT&T executives feared the ad might be used by politicians to argue against the AT&T trust.

Mr. Ellsworth laid the objections before the AT&T president who asked, "Are the statements in the advertisement true?" Mr. Ellsworth replied that they were. "Very well, then," Mr. Vail ordered, "let's print it and beat them to it."

[*continued on page 36*]

Figure 1

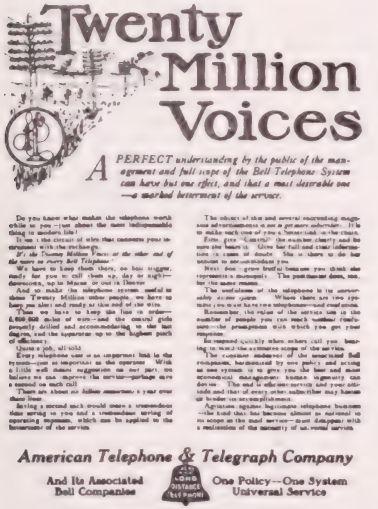


Figure 2



Figure 3



Figure 4

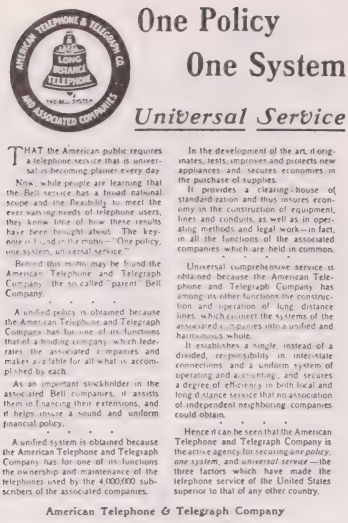


Figure 5



The ad headline became a frequently repeated slogan in Bell System advertising until 1926, by which time AT&T dominated the telephone business in America and the slogan was dropped by the company and nearly all its subsidiaries.

By the time the "One Policy" ad appeared, Ayer artists had refined the Bell seal at the top so that it was graphically more pleasing and less distracting. By the time the fifth ad appeared, Ayer artists had incorporated the Bell seal into headline art in most pleasing and least distracting manner. The fifth ad, "From Door-knocker Days to the Bell" [*figure 5*], appeared in December 1908.

Readership poll conducted

In 1929, AT&T commissioned the J. David Houser organization to conduct a poll in Pittsburgh aimed at finding out if people read the ads, and if those who read them developed more favorable attitudes toward AT&T. Arthur Page, who became AT&T public relations vice president in 1927 (and probably the first true corporate public relations vice president in America), was pleased with the results; readership was much higher than he had expected.

In 1940, AT&T corporate advertising was extended from magazines to radio when AT&T authorized N.W. Ayer to begin production of the Bell Telephone Hour, a weekly network broadcast featuring music inclined toward the semiclassical. In 1948, Ayer began experimenting with television for AT&T and by the 1950s, the Telephone Hour was being "simulcast" on radio and television.

AT&T today ranks as one of the nation's largest investors in corporate advertising. In 1975, AT&T spent $12,388,000 (not including buys by Western Electric and other Bell System subsidiaries) on the genre.

Of the $12.4 million spent by AT&T on corporate advertising in 1975, $7,106,100 was spent on broadcast buys ($121,900 for radio, the rest for television, especially for production of the Bell System Family Theater and commercials on it), and $5,281,900 was spent on advertising in magazines and nationally distributed newspapers.

What began as a modest, pioneering effort in 1908 has become a multi-million dollar program. And, thanks largely to Mr. Vail, AT&T's program has made significant contributions to the development of corporate advertising.

Mr. Griese is an assistant professor of public relations, University of Georgia School of Journalism. Previously, he worked for Illinois Bell Telephone.

Exhibit 29: Case Study—Trans Alaska Pipeline

TRANS ALASKA PIPELINE: CLASSIC PR DILEMMA

Jack R. Nowling

By George Bernard Shaw's reckoning, there are two tragedies in life. One is not getting your heart's desire. The other is getting it. On those terms, how would you rate Bob Miller's state of mind these days? He directs public relations for the trans Alaska pipeline.

You could say, not without justifiable envy, that handling public relations for history's biggest privately financed construction project, and one of the most talked-about and controversial, must be just about the most exciting job of its kind anywhere.

In the next breath, radiating honest relief, you could say you wouldn't have that guy's headaches for all the, well, oil in Alaska.

As chief public relations man for a project that ranks among the biggest running business and energy news stories of them all, Nebraska-born Robert L. Miller finds himself split right down the middle. It's a full-time job just keeping a rein on the legion of contractors and suppliers who naturally want to promote their own part in the $7.7 billion job. But it also takes a full measure of time and wits to encourage balanced, fair-minded press coverage of the nation's most dramatic energy development in generations.

If you spend any time at all browsing through trade journals serving the construction industry and allied fields, you may already have concluded that just about everybody in the business has a piece of the Alaska pipeline action. In a glut of advertisements and four-color annual report covers, scores of companies are extolling their contributions to the project—participation that runs the gamut from highly sophisticated heavy machinery to nutritious meals for pipeline workers.

That's one side of Bob Miller's dilemma—riding herd on self-promoting activities of a sizable slice of the U.S. industrial community, with everyone patting himself on the back for doing what he gets paid to do.

But the other side, in many ways, is even more worrisome to the tall, urbane, and generally unflappable director of public affairs for the Alyeska Pipeline Service Co., the company responsible for designing, building and operating the 800-mile pipeline spanning the nation's largest state. Every time he turns around, his employer is getting hit with another sensational accusation—despoiling the environment, attracting criminal elements, ripping off Alaska's taxpayers. You name it and Alyeska gets blamed for it.

Much of 1976 was devoted to picking up the pieces flung asunder in a running battle on welding practices. Several Federal departments, and a gaggle of Congressional sleuths, threw themselves into the fray, forcing Mr. Miller to spend much of his time preparing special press portfolios, Congressional testimony and public statements to shed light on his company's side of the story. The press, of course, followed the matter in exquisite detail, covering every charge no matter how frivolous or unsubstantiated.

How Miller sees his job

Bob Miller, who learned the hard lessons of media relations as press secretary to a former governor of Alaska, following a stint as a political writer, sees his job this way:

"Every reporter who hits town these days is looking for the story nobody else has covered. In the past 18 months or so, we have been visited by upwards of 1,300 working newsmen—and still they come looking for a scoop. All right, maybe that's the nature of the business.

"But you've got to scratch your head when a prominent columnist goes on nationwide TV to report the theft of 10 miles of 48-inch-diameter steel pipe, and only hours after the whole thing was carefully explained to him. It was simply a paperwork mixup, but it was made to appear that someone had pirated a few hundred truckloads of steel pipe.

"Then somebody in the Justice Department leaks a memo to the effect that theft and fraudulent billings on the project were costing Alyeska up to $1 billion. You could steal all 800 miles of pipe, and toss in our 30 construction camps, and you'd still fall short of a billion dollars.

"I consider myself a professional journalist; I've spent most of my working life as a newsman. Perhaps that's why I'm shocked by the way that much of the press covers the trans Alaska pipeline story."

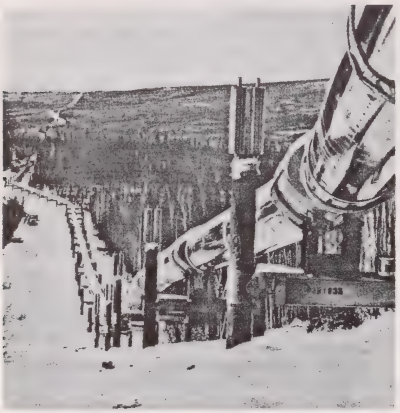
Bob Miller and his boss, E.L. Patton, president of Alyeska, concede without hesitation that the massive project means Alaska will never be the same again. There have been social and economic disruptions—inevitable when you plunk down a transient population of more than 20,000 in the middle of a state with only 375,000 established residents. That is comparable to introducing, in a single stroke, a new population element exceeding half a million into New York or California. It cannot be done without hassles.

But now the pipeline is virtually completed, with start-up of operations due by August. The pipeliners will soon be gone, leaving only a handful to operate the highly automated system that will pump at least 1.2 million barrels of oil every day into the American economic mainstream.

That's when the real fun begins for the state of Alaska and its communities and the newly created regional native corporations. When the oil starts flowing, so do the taxes and royalties: hundreds of millions of dollars for schools, hospitals, parks, roads, and whatever else Alaska's leaders decide to spend it on.



The Tanana River bridge for the trans Alaska pipeline was completed in 1976. The 48-inch-diameter pipeline is supported by cables suspended from the 170-foot-high towers on either side of the river. The crossing, about 75 miles south of Fairbanks, spans 1,200 feet.



The gravel and insulation workpad underlying the pipeline on Alaska's North Slope near Pump Station 3 prevents degradation of subsurface permafrost.

Meanwhile, Mr. Miller and his small but expert staff are coping simultaneously with the tide of ballyhoo flowing from vendors and contractors and the hyped-up headlines emanating from a skeptical press. And sometimes the press is hostile, insisting on treating the pipeline as something more than a massive construction project.

Promotion guidelines

In the case of contractors and others seeking to piggyback the pipeline's prominence, Mr. Miller has set up guidelines aimed at assuring that ads and other materials—including pipeline-related news releases—are accurate, complete and timely. To achieve this, he insists on approving in advance all pipeline information issued by contractors, subcontractors and suppliers, who number in the hundreds.

Ads and news releases must be submitted for review 30 days in advance. For technical papers to be published or given verbally to professional societies, 60-days advance approval is required.

In return, Alyeska's public affairs office pulls out all stops to cooperate when contractors send their public relations people, photographers, and camera crews to construction camps and work sites for on-the-spot coverage.

Mr. Miller also opens his own voluminous photo and film files to the visiting public relations person, arranges briefings and interviews with management, and assigns members of his staff to make sure the visitor sees what he came to see.

It's not a fool-proof system, of course; some companies have simply ignored the clearance procedures. Mr. Miller realizes it is virtually impossible to monitor everything that everybody with a pipeline connection wants to say in their own behalf. His comment, "We couldn't keep up with it if we had twice the staff."

However, those who play fast and loose with the rules soon learn not to expect continued VIP treatment from Alyeska's public affairs department. And members of the press soon discover that they cannot satisfactorily cover the story of the pipeline on their own.

"This is, first and foremost, a construction project," Bob Miller explains. "Nobody, newsmen or otherwise, ever gets unlimited access to a construction project; it just isn't done. For one thing, the insurance companies wouldn't permit it. A construction job is hard-hat country; you can't just stroll around seeing the sights."

Personal escort for newsmen

Still, some reporters raise objections when they learn that visits to pipeline property are not permitted unless someone from Alyeska's public affairs office goes along. This chore

usually falls to Beverly Ward, a former journalism teacher, who logs up to 4,000 air miles a week escorting the visiting press to points along the pipeline route.

Normally, Ms. Ward has four writers in tow on one-day jaunts—but not always. She recalls spending weeks preparing a complicated itinerary and precise schedule for a group of 114 journalists. After a few stops, however, it became a case of "if you've seen one pipeline, you've seen 'em all." The entire body of newsmen turned tail and fled to Point Barrow to talk to the Eskimos.

Bob Miller describes the pipeline's basic press relations this way: "If a working journalist shows up in Anchorage and wants to see the pipeline, we will make sure he does." That goes for anyone carrying a press card, from the unknown free-lancer digging up a yarn for *Iron and Steel Engineer* to the network TV anchor man.

Having accumulated some 25,000 hours of media relations time in 1976, the Alyeska public affairs office is already geared up for another long season. Now that the construction job is virtually over and oil will soon be flowing, the rush for a look at the finished product is likely to start in April when the harsh Alaskan winter subsides.

Besides seeing to the needs of visiting newsmen, the public affairs staff also generates a heavy outflow of news and public information materials. As of the end of 1976, Miller's office had produced nearly 700 press releases, 11 editions of a basic press portfolio, 10 issues of a slick, four-color quarterly journal, two half-hour films with a third nearly ready, almost 30 newsclips for TV, half a dozen film strips, and a regularly updated 30-minute slide presentation with script.

And none of this output reflects the work of public relations representatives employed by the eight oil companies taking part in the Alyeska consortium, nor public relations activities undertaken by the project's contractors and vendors, nor the programs undertaken individually by the news bureaus. Bob Miller figures that someday, when the shouting is over, he may sit down and try to determine just how much public relations work was mobilized by the pipeline project.

Dilemma remains

There remains, meanwhile, his slippery dilemma: holding the ardor of enthusiastic associates to tolerable levels, while achieving a realistic public understanding of the project through the news media.

Pondering this formidable mission, he recently offered these observations: "Perhaps it's only human nature to use the pipeline project as a scapegoat for everything that anybody thinks is wrong in Alaska today. As targets go, we are a sitting duck; you can't exactly camouflage 20,000 workers and a project that runs from one end of America's largest state to the other.



Miller: "Every reporter who hits town these days is looking for the story nobody else has covered...they still come looking for a scoop."

"True, we have created unavoidable problems for Alaska, and we regret it. But during a difficult economic period we have also created many job opportunities for Alaskans, some of them from impoverished native villages. And we are creating for the entire state of Alaska an unprecedented resource from which it will derive untold revenues to help every Alaskan achieve a better life—revenues that will continue rolling in long after those who built the pipeline have packed and gone.

"We'd like to think that someday the pipeline project will be evaluated in terms of the long-range benefits it produced, and not on the basis of temporary problems and dislocations." Mr. Miller concluded, "When the pipeline is completed, America will be stronger—and I can't think of a better epilogue." ■

Since this article was prepared, Mr. Miller resigned to devote his time to other interests. He has been succeeded by E.F. [Manny] Livaudais, a 20-year veteran of the oil industry and a specialist in government affairs.

Mr. Nowling, APR, is president of Nowling & Co., Inc., New York, and a senior associate of Carlson, Rockey & Associates, Inc., part of the Rockey Companies.

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Exhibit 30: Case Study—Rockwell International



Rockwell International

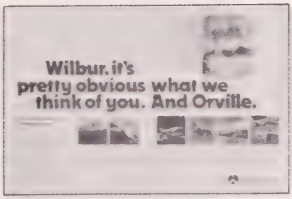
How does a company with 120,000 employees, $5 billion in sales, and products ranging from home workshop power tools to space vehicles communicate a clear, but simple, corporate identity? Rockwell International's answer can be found, in part, in six words, "...where science gets down to business."

Actually, the Rockwell corporate story began in 1968 when North American Aviation and Rockwell Standard, two major companies that go back to the early part of the century, merged to form North American Rockwell. As Jack Laffin, Rockwell's director of corporate communications, tells it, "We had a big job in seating the North American Rockwell name. And in 1973, just as we got the momentum going, we realized that our name was restricting growth, so we changed it to Rockwell International. (Today, a fifth of the company's sales is outside North America.) Of course, this meant beginning all over again with our corporate communications."

Science gets down to business with a new campaign.

Well, not quite all over again. Rockwell had entered the television advertising arena in the summer of 1972 with spokesman E.G. Marshall. When the name change was made, Rockwell maintained four connecting links: "We kept our symbol, type face,

Madison Avenue Magazine 43



spokesman... and our slogan." Referring to the last, Mr. Laffin adds with soft-spoken enthusiasm, "Our slogan was a joint effort with our corporate agency, Campbell-Ewald, Detroit. It ties everything together and helps people understand that we are different from most companies.

Simply stated, Rockwell is involved in five fields: automotive (Rockwell is the largest sub-contractor to the automobile industry); electronics (digital computers); utility and industrial (flow control and liquid measurement devices); aerospace (from 4-passenger sport planes to spacecraft); and consumer products. The acquisition of the Admiral Co. in Chicago put them in the TV and appliance field, and Rockwell is a leading manufacturer of power tools and calculators.

That "difference" Jack Laffin refers to and the element linking all of the company's divisions, is technology. "Our objective has been to grow by acquiring companies that allow us to transfer the technology we've learned, primarily through aerospace, into some capability of that company." Mr. Laffin illustrates the difficulty of getting across the total Rockwell picture: "At one time, we were so well known for aerospace that we had to hold a press conference to let our publics know that that's not all we are!

In order to identify the company as a technological leader and clarify its major business areas, a new campaign has been launched using a creatively married print and television strategy. Borrowing from history to provide a sharper focus on Rockwell's advances of today, each commercial and 4-color, double-page spread features a little known scientific innovator. For instance, Monsieur Cugnot, who built the first self-propelled road vehicle, is used to point up Rockwell's strides in the transportation area. Mr. Laffin explains the concept. "What we've tried to do is show the technological development and say here's a man who pioneered in the automotive area and now look where we at Rockwell International are in the science of transportation. We use that as a base to talk about our advances and we'll follow this theme with communications, electronics and our other major business areas."

We ask Mr. Laffin about the choice of E.G. Marshall as the conveyer of the Rockwell message. "We wanted someone who would lend dignity and credibility." Research, in the form of verbatim playbacks from people who had seen the commercials, confirmed their choice. As Mr. Laffin recalls, "It sounded as if I'd written them myself! People said, 'I like E.G. Marshall because he seems very businesslike.' 'When E.G. Marshall says something, I believe it.'

Mr. Laffin comments on the challenge of figuring media weights, noting particularly the increasing television rates. "In the beginning, it was all print, then heavy toward print and now we've pretty well divided our dollar expenditure between print and television. We use TV to give motion and extend our reach, but we feel the two go hand-in-hand."

The new campaign targets high-level opinion molders in the business, government and financial communities. "We're using a print schedule that reaches opinion leaders through the newsweeklies. We're also in business magazines to zero in on business leaders and the financial community. With the added dimension of tele-



John Laffin is responsible for all of Rockwell's corporate identity, advertising and communications services. He began his career after graduating from USC in 1956 at the Northrop Corp. where he developed the company's domestic and international advertising campaigns. In 1960 he joined North American Aviation (a predecessor of Rockwell International) and was named Rockwell's director of corporate communications in 1971. Mr. Laffin is a director of the BPA and a member of the Assoc. of National Advertisers and the International Advertising Assoc.

vision, we reach all of those publics and the consumer audience as well." For over three years, Rockwell's TV choice has been the *Today Show*. "You might say we've taken some leadership as far as corporate advertising on the *Today Show*. We feel that audience is very important to us and we get a lot of feed back from it." In addition, Rockwell buys the late evening news on key market stations "because executives who watch TV tend to watch then." The company also takes a more direct approach to specific subjects through small space ads in *The Wall Street Journal*. "This has been our most successful campaign from an inquiry standpoint. With one or two sentences on the back page of every Wednesday's edition, we generate hundreds of requests for our annual report. And he notes the gratifying results of research conducted in 1971 and 1973 among all requesters of the Rockwell annual report saying, "Half of all the people we measured said they took some positive action as a result of reading our annual report. To me this is an impressive measure of corporate advertising. We were not only informing, we were enticing people to ask more about the company." Mr. Laffin further extols the benefits of research. "Due to the benchmark we established in 1968, we can go back and gauge whether or not we're reaching our audiences, with which message and how we compare with our major competition."

Although each Rockwell division has its own budget and product marketing-oriented campaign, final approval rests at the corporate level. Mr. Laffin personally reviews some 1,500 print ads and two dozen commercials at the proof stage in order to make changes from a corporate policy standpoint. "I don't get involved in media choices or creative," he says. "I look for continuity." The over-all corporate communications program takes a 12%-15% chunk of the total Rockwell International advertising budget and corporate advertising comprises about half of that. "I tend not to give dollar figures but it amounts to a few million dollars a year based on what our objectives are and how they fit in with the total picture." (TvB figures for the first half of '76 show $719,700 for magazines, $312,400 for network TV, and $62,400 for spot.) Mr. Laffin emphasizes, "Advertising forms an excellent base because it's one way to ensure that your message gets across the way you

want. But it's only one element of a broad communications program which includes well planned publicity; corporate newspapers, magazines and films; annual reports; trade shows, etc. The key is to coordinate." Coordination is also the key to making maximum use of those precious media dollars. "We use three different ad agencies throughout the company but I require all divisions to coordinate advertising schedules with Campbell-Ewald, our 'master' agency. At any moment I can see what each division is doing."

Jack Laffin displays a deep concern regarding the importance of making the business voice understood. "There are organizations such as the Chamber of Commerce based in Washington, the Business Council, etc., which do present the business viewpoint. We, as a company, participate in all of them, and support them with funds, people and time. This begins at the chairman of the board level and works on down. I'm involved in at least half a dozen communications organizations worldwide. It's kind of like a doctor giving time at a clinic." As far as "misunderstandings" about business, Mr. Laffin takes a strong stand. "We, in the business world, have not taken enough time or given adequate attention to communicating the benefits and role of business. That is most definitely one of the objectives of our new campaign. We're using the corporate advertising format to play a role in communicating some of the benfits of business and we encourage other companies to do the same. I compliment Textron on the leadership they've taken in this area." He concludes almost incredulously, "A lot of people don't respect the tremendous job business has in just working with and motivating people. At Rockwell we have 120,000 employees. When you think about it, it's almost a big city." MADISON™

Exhibit 31: Case Study—St. Regis

ST REGIS

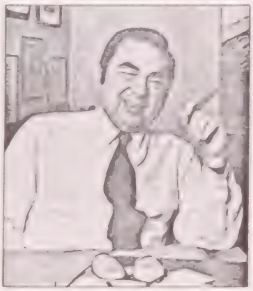
It's 8:30 a.m. on a rainy winter morning. Mickey Biondo, St. Regis Paper Company's vice president—marketing, lights a cigar, sips his coffee and settles back. "To understand where St. Regis is today," he says, "let me give you some background." Mr. Biondo, a compelling storyteller, launches a precis of St. Regis's past.

"It all began for St. Regis about 10 years ago. We had just come through a decade of explosive growth. From the mid-50s to the mid-60s the company tripled in size. We used to joke about it. Every Monday morning we'd come into the office and say 'Who did we acquire over the weekend?' But by the mid-60s we came to the realization that we didn't have any identity. So we did what most companies do, we brought in the professionals. We went to Lippincott & Margulies, hence the St. Regis logo. So, we paid $250,000, or whatever, and we had a new image. But we really didn't because nobody knew us. Finally, the board of directors said, 'Hey, there's a thing called advertising!' (I'm being facetious but it was damn near that bad.)" Mr. Biondo pauses to relight the cigar. "Well, what was the obvious thing for a paper company to do but revert to the forest." St. Regis came out with the Man and Nature print campaign which ran for 5 or 6 years, and used some of the finest botanical art ever commissioned. Because of the educational nature of this advertising, the reprint demand, particularly from schools, is still in the millions.

On with the story. "The first time people saw our logo they learned a little about us but, more important, they came to associate the name St. Regis with those fellows who really love trees."

> The image shifts: From forest guardian to product leadership.

In the late 1960s an environmental consciousness began to emerge. "The ecologists crawled out of the woodwork and suddenly the fact that we were the custodian of 5 million acres of trees was regarded differently. People said, 'Hey, what are you doing cutting down trees?' " St. Regis made the shift to what Mr. Biondo terms their "advocacy period." "We got out of Bambi's forest which was lovely and nice, into telling the story that we are professionals. We talked about what it's like to manage a forest. We tackled a lot of volatile subjects, but our approach was low key, not a la Mobil where they come right out and it's war." Meanwhile, back at the company, there were some changes taking place. "This huge, conglomeratized mix of businesses began to take shape in a marketing sense. We did some research to find out how we were perceived and, lo and behold, we discovered that no one really knew us." St. Regis decided on a transition out of the heavily forest-oriented perception.



Michael Biondo joined St. Regis Paper Co. in 1953. During his first 12 years with the company, he held various sales and sales management positions and in 1965 he was appointed director of marketing, Bag Packaging Division; then corporate director of marketing in 1969 and was elected to his present post, v.p., marketing in 1972. Mr. Biondo received his B.A. from Adelphi College and has served as a trustee of the Center for Marketing Communications in Princeton, N.J.

"About a year and a half ago, we decided the name of the game is survival. Research was telling us that we were market leaders: the world's largest producers of multi-wall bags; leading producers of flexible packaging in this country; no one is even a close second in the magazine paper field. Here we were with number one market position in many areas and we were not being perceived as a leader. We decided to move forward and emerge as the market leader in our business."

With their agency, Cunningham & Walsh, St. Regis developed an interlocked TV/print campaign dramatizing the amazing strengths inherent in the company's paper and packaging materials. "Our current campaign is targeted at the buying influences: our customers,



the financial and business communities, to develop a total appreciation for what the commitment at St. Regis is in terms of our ability to relate technology to market needs." The advertising employs excitement, a touch of humor and... expensive production. In one commercial and 4-color, double-page print ad (there are five in the series) a 2½-ton Rolls Royce Corniche is shown driving over a bridge made entirely of St. Regis Corrugated paper. In another, a charging bull attempts (without success) to break through two thin sheets of St. Regis plastic film. Mr. Biondo's enthusiasm for the campaign is unrestrained. "Talking to the general public via television and then targeting our buying influences in print has been a designed strategy. Someone sees our commercials and they're full of sex, brimstone and fire and then picks up a magazine with the print version of the same ad and they reinforce each other beautifully." On the print end, St. Regis gets into a much more technical discourse. "The letters we get show that people really read what we're saying. It says something for advertising not being a totally useless ingredient in our lifestyle. Good advertising can be beneficial as a learning experience and in effecting change."

Mr. Biondo stresses the importance of the creative product. "We have one of the most outstanding creative teams in the business working on our account. Our campaigns have won award after award but, more importantly, we've been able to make the transition from the early days while maintaining creative excellence. That's been a vital part of our success. We've been out front all the way. We were talking about the forest and the importance of our ecology long before everyone started screaming about it. One of the reasons we abandoned the total tree-oriented mood was because we began to see every forest products company doing what we were doing." But St. Regis hasn't entirely left the tree behind. "Tunnel," a beautifully executed 60-second spot, documents the company's environmental concerns.

The all-important tag-line is the essence of the St. Regis message: "Serving man and nature to the benefit of both." Mr. Biondo explains, "It's a statement of corporate purpose. It conveys responsibility. It says the tree is going to serve you, too, and that's what our products are all about. We're going to hang in on it, and strengthen it all the way. To us, it's *that* good."

As in the past two years, St. Regis will go the sports route in '77 with *ABC*'s *Wide World of Sports*. In print they'll stick with *Newsweek E, Time B, Forbes, Business Week*, and there's a new addition, *Sports Illustrated*. "We think sports is a great vehicle."

According to Mr. Biondo, the total budget (including all communications efforts from advertising to sales promotion to annual reports, coupled with the divisions' expenditures) amounts to between $3-4 million. "We scrutinize these expenditures very carefully and if we weren't getting the payback in terms of awareness perception and recognition of what we're all about, we wouldn't be spending the money." And he continues with a look of delight: "The awareness curve as a result of this campaign is almost a vertical line—straight up. We diligently research what we're doing, in terms of awareness and the effectiveness of the creative strategy."

Before our conversation ends, Mickey Biondo reemphasizes the importance of the educational value of the campaign. "We want people to learn something as a result of our advertising. I think it is essential for corporate advertising to be a learning experience as well as a marketing message. We're seeking to be unique in a marketing sense within our industry, therefore our advertising has to be, too. And the net result, we hope, will be to sell more of our products and be better understood." MADISON

Exhibit 32: Case Study—AMF

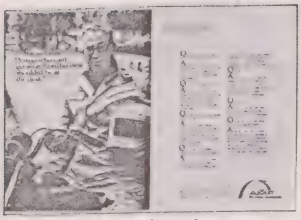
AMF

AMF could hardly pick a better spokesman than Eldon Fox. He has the healthy outdoor look of someone who spends his leisure time actively. (In point of fact, he's a golfing enthusiast who shoots in the high 80's.) From his sunny office in the AMF White Plains headquarters, the company's corporate vice president—public affairs, reflects on the development of the AMF image "In 1968 when Rodney Gott became chairman, he knew we had a bad image. Security analysts had told us that we were known for bowling and for bombs, so he decided to get out of the ordnance business." With AMF bowling as a starting point, through years of careful acquisition, the company assembled a roster of quality leisure product names including: Harley-Davidson, Head, Hatteras, Voit, Ben Hogan and Alcort.

The leisure leader 'activates' its corporate image.

Although AMF's business is now divided 65%/35%, leisure/industrial, and despite management's long-range desire to achieve a 50/50 balance through beefing up the industrial end, their current corporate campaign focuses on their leisure strength only. Mr Fox outlines the reasons behind this decision. "Through research we discovered that business people didn't understand our industrial side. (AMF manufactures automated machinery, electronic/electrical and other industrial and governmental products.) We felt that if we could perk up people's consciousness through our leisure time products, the quality image would carry over to their estimation of our industrial areas."

Launched in March 1976, the campaign was conceived and executed by AMF's agency (since Nov. 1975), Benton & Bowles. The objective is double-edged: First, to establish awareness of AMF as a leisure company in a leader-



ship position; and second, to encourage people to participate in some form of recreation, paving the way for AMF sales. Mr. Fox elaborates. "In 1973 Mr. Gott made a speech in Hawaii about the 'leisure ethic' concept. We believe that active leisure has become an increasingly important aspect of people's daily lives; that leisure time should be as well spent as work time. From that base, Benton & Bowles developed the AMF theme: 'We make weekends.' "

Mr. Fox stresses the importance of the chief executive's role in setting the tone for the company's image, an aspect that sets corporate advertising apart from its product advertising cousin. "A lot of people don't recognize the fact that corporate advertising basically reflects the attitudes of the chief executive of the company. After all, he is the one ultimately responsible for the corporate image. You can't delegate that. Our advertising wouldn't be out there if he didn't think this was the way to go."

Creative decisions are difficult to come by. And AMF made an unusual choice for corporate advertising by employing vivid animation and a lighthearted, entertaining tone. The AMF commercials playfully nudge the viewer out of his armchair saying, "Don't sit around on your leisure time. Recreate, exhilerate!" Lorraine Reid, recently appointed staff vice president—public relations and advertising, is, herself, an active sports participant whose two sons are introducing her to the thrills of motorcross. She explains the reasons behind the ani.nation choice. "The agency felt it was the best technique to exhibit the sunny, happy feeling we wanted to get across. One of the big problems of corporate advertising is that it gathers unto itself a pompous air. We wanted to avoid that. Also, it's a technique designed to really stop the viewer." It is clear in talking with Mr. Fox that AMF had felt some dissatisfaction in getting their intent, their advertising and their product to mesh. "In the past our efforts were more in the nature of trying to find ourselves in the medium and we were never too happy with the results. Benton & Bowles clarified our message considerably." Satisfied with the current campaign, Ms. Reid adds with an eye to the future, "We'll keep freshening the commercials with additions to the pool and doing research to see how well they are wearing. But certainly we'll run these commercials through 1977."

The bulk of AMF's corporate advertising budget goes into television. Don Fox reviews their shaky beginnings in the medium. "In 1971 at the recommendation of both our agency (Fuller, Smith & Ross, at that time) and our chairman, we made our television debut on a one-time special, aired in 10 cities and targeted at the business community." Mr. Fox shakes his head. "Frankly, I thought it was a lousy idea. We weren't ready to spend that kind of money and nothing really happened as a result. Our chairman, however, was enamoured with the idea of TV and thought we should go into full sponsorship." From there, AMF took a giant leap and sponsored two Bob Hope specials (1972-73) and *Of Thee I Sing*, starring Caroll O'Connor, which was tied into the 1972 elections. "Some of us were convinced, however, that our natural audience was the sports viewer. And in 1973, through FS&R, we bought the first half-hour of *ABC*'s *Wide World of Sports*." AMF has stuck with sports ever since, the only difference being that now instead of sponsorship, they buy spots. Mr. Fox expresses pleasure with both the quality and the numbers of the sports audience. "It's given us a major boost."



As v.p.—public affairs, Eldon Fox directs AMF's corporate public and government relations, advertising, promotion and creative services. He is also president of the AMF Foudation. Before joining AMF in 1969, Mr. Fox worked on both the client and agency side for Young & Rubicam, Honeywell, the Ford Motor Co.'s Edsel Division (where he was advertising and sales promotion manager of the Edsel line), BBDO and the Bendix Corp. Mr. Fox lives with his wife in Chappaqua, NY

Although each double-page ad carries the AMF 4-color rainbow and logo plus the "We make weekends" tag, the print campaign takes a different tack, another area where AMF doesn't follow the hard-and-fast ground rules of corporate advertising. Well-known personalities, such as Malcolm Forbes, James Mitchener and Charles Schulz, are pictured pursuing their favorite forms of recreation (to wit: Malcom Forbes on his AMF Harley-Davidson motorcycle), and touting such endorsements of active leisure as Mitchener's "A man who drops out of recreation after an active youth is committing slow suicide." AMF's media choices include *Newsweek*, *Forbes*, *Black Enterprise* and *Sports Illustrated*.

The TV/print ratio at the corporate level is about 80%/20%. And the total corporate communications effort, including a corporate newspaper which goes to their 30,000 domestic employees, annual reports, exhibit coordination, press acitivites and sales promotion as well as advertising, is backed by a budget of over $3 million. Mr. Fox feels it provides adequate support. "We cut back in 1975, increased in 1976 and we'll hold at this level." AMF's over-all advertising budget, encompassing product advertising for all divisions, is $21 million.

Ms. Reid talks about intensifying the company's research activities. "Once we've achieved a certain level of awareness, we'll get into measuring the rub-off that our corporate advertising has on our brand names." But Mr. Fox concludes with a satisfied smile, "Since we began researching awareness in 1971, the figures have jumped from 40% to over 70%."

From a small print campaign in 1969 to major budget and media use in 1977, AMF's corporate image-building efforts have taken a sometimes unsure but always innovative path. Combining trend-bucking techniques and a defiance of the stuffy corporate atmosphere, AMF's current campaign also provides the plus of laying the groundwork for its divisions' sales. It seems clear that the people at AMF take the "leisure ethic" seriously. They're not sitting around on their leisure time, in fact, they're not sitting around at all. MADISON

Exhibit 33: Case Study—Bethlehem Steel

Bethlehem Steel Corp.

Advocacy advertisers target the individuals: The news is—it works

Criticisms of corporate advertising abound. The most controversial subject of this category, of course, is advocacy advertising, business's "populist" voice. Robert S. Marker, chairman of the executive committee of Needham, Harper and Steers, has noted that "corporate managements often use this kind of advertising to vent their angers, not to inform their publics, and their objectives are murky. Their knowledge of their audience is in error. Their budgets are either too small for large problems, or too large for small problems. The copy is indistinct, the media plan incestuous, and the measurements of results too emotional. Some of these campaigns are totally useless."

William Latshaw, manager of advertising for Bethlehem Steel Corporation, put it another way at the Fortune Corporate Communications Seminar last year: "If you don't know where you're goin', any road will get you there." Bethlehem Steel should know. It is one of the most able advocacy advertisers. And



that in itself is surprising because the company has only been in the field for a scant two years. It's hard to say whether the steel giant was pushed, jumped or fell into the category. But, by now, the media execs at Bethlehem Steel have been through the eye of the storm and can deservedly claim some expertise in the subject. With their experiences, they feel they could probably write a text on the subject. Moreover, their printout on advocacy advertising runs counter to the prevalent canards. Citing book, chapter and verse, feisty Francis Cronin, Bethlehem's production and media director, tells us plainly: "Advocacy advertising works."

It had better. When you're put in the squeeze and have to explain why and where it hurts, simple and direct communication can be the first step toward ensuring a less tortured future. And as anyone who has read newspapers over the past several years knows, the domestic steel industry is in deep trouble. Competition from foreign producers is

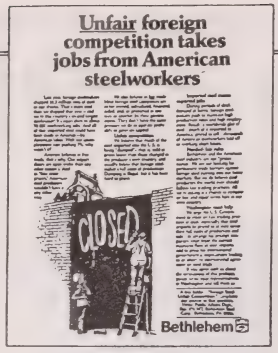
Madison Avenue Magazine

intense and the costs of reinvestment in this capital-and-labor-intensive industry are formidable. Bethlehem Steel, until recently, suffered one disastrous quarter after another. Facilities were closed down, workers laid off and the company's financial position put in doubt. Bethlehem lost nearly $500 million in revenues last year, topping the list of Fortune "500" ailers.

Because so much of the steel industry's problems are related to tax, capital formation, federal regulatory and foreign trade matters, these are the lifeline issues for Bethlehem Steel. "Our primary goal in our advocacy campaign," explains Mr. Cronin, "is to establish a leadership position in the steel industry by coming out pro or con on these questions. At the same time, we want to impact Washington. Today, Washington is it. But, even there, we're not simply trying to reach and influence Congressmen, we're also interested in the influential audience that conceivably might react favorably to the issues we've defined." It is a lean campaign that he is describing. One with a budget in the neighborhood of $2 million. One that is carefully targeted and methodically researched. And one that Mr. Cronin believes has added some needed perspective to some of the unilateral judgments emanating from the nation's capital.

What Bethlehem Steel has been able to do is identify its interests and mobilize its executive and creative talent behind those interests. Six issue areas are of principal concern: capital formation, environment, energy supply, foreign trade, overregulation of business and business concentration. These core themes are the grist for its print campaign, which runs in *The New York Times, The Wall Street Journal, Newsweek, Sports Illustrated, Time, Smithsonian, U.S. News & World Report, Atlantic* and others.

Once the formats for discussion were decided upon, the company felt it should establish critical benchmarks to determine the efficacy of the ads. To do this, Bethlehem Steel turned to its agency, Van Brunt and Company, and the agency's associate, Richard Manville Research. They helped study a host of publications, their



readerships and reader awareness of and attitudes toward the steel firm. Initially, Mr. Cronin reports, awareness was low. "Sometimes the figures shook us up a bit. For example, if you get figures that say 14% of the audience knows that you're advertising—that's my audience, not the total magazine audience—you get shook up a bit. But we did a study after our ads on foreign imports ran and the percentages went up into the fifties. Then we did some other measurements prior to and after our pieces on plant closings and layoffs. Awareness was still up, which means that people were reading it." Mr. Cronin tells us, with obvious delight, that when the media department (the company prepares all its advertising in-house) ran a series on the energy crisis that included a blank space for readers to write down their own ideas and send them to the President, the response was overwhelming. "It projected out to about 200,000 letters," he relates. "According to our measures, of the 7% who agreed with our point of view, about 5% wrote to Carter. The first week alone there were 5,000 letters."

He also stresses the importance of advocacy advertising as an effective means of corporate speech. "Corporations don't vote. And even though we employ over 90,000 people, even those figures are insignificant. Putting all our budget behind lobbying wouldn't do it either. It's simply a matter of reaching the people who count. We've narrowed that down for our purposes to an audience of about two million. My estimates are that they have incomes between $24,000 and $64,000, some college, are job professionals and are either politically active or otherwise involved in their communities. And another thing, if I'm advertising in a *Sports Illustrated*, a *Time* or a *Smithsonian* to reach these people, I'm not excluding the others who read those magazines. So while I put my money against my desired target, I'll also get a better return on my money." But, the affable executive admits, money is not the test of advocacy efforts. "Most of this advertising is non-deductible. So, if it's costing us a million dollars, then on top of that it's costing us another 48% in taxes. But we feel so strongly about this that it's worth the extra costs." And, he adds somberly, with Bethlehem's cost-consciousness, even holding a media budget steady is a huge victory.

Mr. Cronin is quick to point out that his company never professes to have all the answers to these thorny economic and foreign trade issues. "All we're saying is that our point of view ought to be considered. And our problems are not unique. Other corporations face the task of raising huge amounts of capital for reinvestment."

Does he feel that media treatment of the steel industry has become fairer because of the public communications campaign? "Unquestionably. For instance, we had the editors of *Time* in a while back to talk to them about the issues. You could see when they walked into the room that they felt they were going to get the Bethlehem Steel party line. But they were quite changed when they left. The meeting must have had a great effect upon them because when the ax fell—when we announced our closings—they called us up on the phone for comments and said, 'Jesus! You guys weren't kidding!' " The upshot, Mr. Cronin notes, is that "they realize we don't have two heads."

Mr. Cronin also has some straight-talking reactions to the U.S. Senate Subcommittee's move against corporate advertising. "Suppose they do cut it off. Then how are we ever going to communicate our views to the public? This is no slap at the media, but an ad can go anywhere and frequently. You'd have to run an article four or five times in a magazine before people would read it once."

When asked what he would do if he had a bigger budget to work with, Mr. Cronin replies: "I wouldn't run more space. Right now I'm sitting with a 6-time or 7-time frequency to the audience I want to reach. That gives me about 98% saturation. But if I had my wishes, I'd possibly go more into radio, because TV costs too much and the Fairness Doctrine is an obstacle. You could probably buy more radio without having to worry much about Fairness Doctrine problems. Direct mail is another interesting approach that we use now on a modest scale."

He also comments that outdoor has proven to be a useful approach. Here, he mentions what may well be the outdoor coup of 1977. "When we were running our ads dealing with imported steel, we began looking for outdoor spots in Washington, D.C. Well, we finally found one. Purely by happenstance, it was right across from the guys considering this issue. The copy read: 'Foreign steel steals jobs.' How's that for those government officials' thought for the day?" Now that's effective advertising! Perhaps even Mr. Marker would agree.

In May, Bethlehem Steel's new advocacy campaign broke. The double-page series of ads is an integrated effort keyed into the concept of interlocking problems Questions of over-regulation, energy conservation, environmental protection and fair play to steel trade are presented as individual pieces of a puzzle. Each issue area receives separate ad treatment and is illustrated as one segment of the puzzle. A fifth consummatory ad puts them all in perspective. The clever, eye-catching graphics cement the through-line theme and may well garner yet another "most read" award. *Iron Age* recently bestowed upon the company just such an award for its 1977 campaign. Though honors of this sort are certainly not part of the goal plan, they serve as reassuring validation of a campaign's strategy and execution. MADISON

Exhibit 34: Case Study—Kellogg Company

Kellogg Company

Beset by critics on several fronts, the company stands firm on its nutrition education platform.

Just ask the millions of kids who devour them. Yes indeed, Fruit Loops are good. They're colorful, crunchy and sweet, so what else could a kid want from his breakfast? Not much. But the Kellogg Company of Battle Creek, Michigan wants to convey a selling message that's even more vital to its own continued good health in the age of consumerism: Fruit Loops and other ready-to-eat cereals, when served with milk, dish up a goodly portion of vitamins and minerals.

In 1884, Will Kellogg and his brother invented the corn flake in an attempt to develop healthy, easy-to-digest foods for patients at the famed Battle Creek Sanitarium. In 1906, Will Kellogg launched his own cereal company. Dr. Gary Costley, vice president and assistant to the president of Kellogg, tells us that the company has stressed the importance of good eating habits ever since its inception 72 years ago. But in the early Seventies, consumer advocates began voicing concern about the sugar levels in pre-sweetened cereals and other children's foods. In response to these complaints, cereal companies, in 1973, commenced media campaigns—largely in print—to document the wholesome qualities of ready-to-eat cereals. Dr. Costley, who joined Kellogg as director of nutrition in 1970, calls this aspect of Kellogg's total advertising package "as close to the line as you can get between product advertising and issue advertising. These are product ads, but they serve a dual purpose. First, to sell product. Second, to point out the nutritional value our products have."



Dr. Gary Costley is vice president and assistant to the president of Kellogg Company. He joined the firm as nutrition director in 1970 and was promoted to vice president of public affairs in 1975. Dr. Costley graduated from Oregon State University, where he received a B.S. and M.S. in nutrition/physiology and a Ph.D. in nutrition/biochemistry.

In addition to its media advertising, in 1975 the company launched a rather unique activity that, to management's surprise, provoked some questions concerning Kellogg's motives. This effort, "Stick Up For Breakfast," was an educational program conducted in the Washington, D.C. public schools. Working with local teachers, the intent was to make nutrition education more interesting. "Unfortunately," recalls Dr. Costley, "we were criticized by a *Washington Post* reporter who happened to believe that the Kellogg Company couldn't do anything that wasn't sinister. Most of the criticism said that our products weren't any good—the teaching module or techniques, themselves, weren't the object of criticism." But three years after the fact, Dr. Costley believes the headaches of the original Washington program were worthwhile. A teaching module titled "Energize at Sunrise" has since been developed and encompasses much of the



information from the original "Stick Up For Breakfast" program. "It's not an attackable program," says Dr. Costley of the games, worksheets and other tools which comprise the project. "In fact, there's so little Kellogg identification in the material that our marketing people look at it and say, 'What are we doing?'" Also, the program is being promoted on a school-by-school basis, thus deflecting any possible opposition to school board participation.

Does the low profile in the teaching program evoke complaints from stockholders who may wonder why Kellogg should involve itself in educational campaigns? "Not at all," says Dr. Costley. "If we could get every kid in America to eat breakfast, we would be expanding the existing market. This is a major effort, but in the scope of a one-and-one-half-billion-dollar company, it's not that major. And it fits in fine with the broad mix of advertising we do. In the long run, all advertising is done to sell product. While some people may flinch because our almost singular goal is to make a profit, until someone tells us there's something wrong with being successful, that will continue to be our goal."

Over several years of being involved in the nutrition controversy, Kellogg has generally opted not to confront their critics with head-on advertising. A notable exception occurred in November 1977 when a double-truck ad ran in *The New York Times, The Wall Street Journal* and seven major metropolitan newspapers. Headlined, "A Statement From Kellogg Company On The Nutritional Value Of Ready-Sweetened Cereals," the ad aggressively answered Kellogg's critics by presenting thorough data about children's eating habits, sugar consumption and similar issues. What provoked the unprecedented maneuver? As Dr. Costley sees it, "A number of issues were coming together on advertising to children and the nutritional value of cereals. Many things were being said by the media and the government about our products that weren't true, so we decided to go public with our facts. Quite frankly, we had grown weary of everybody taking what we considered cheap shots at our products without having to defend their positions with any data."

While that issue ad was a one-shot arrow aimed at a narrowly defined target, the current consumer print campaign strongly emphasizes Kellogg's long history of nutritional involvement. Eleven newspapers and six magazines including *National Geographic, Nutrition Today* and *Time* carry the four-color ads prepared by Kellogg's agency, Leo Burnett U.S.A. All detail the vitamin and mineral story and sport such headlines as: "We made health food long before it became a fad;" "A good breakfast doesn't have to be high in cholesterol;" and "If hundreds of American kids didn't get a decent breakfast, it would be a serious thing. Actually there are millions."

While buffeting the slings and arrows of vociferous nutritionalists and finding the right strategy, execution and media to convey the Kellogg message, more threatening clouds have been gathering on the advertising horizon—namely, the federal government's proposed ban on advertising to children. Although it will not affect the largely print corporate/product ads, this company—as well as all those whose market target is children—will have to do some heavy revamping of strategies. To all this Dr. Costley gives this forthright response: "We think the whole thing is silly. On its face, the government's proposal is ridiculous. Its premise is that products advertised to children are bad. As far as children's cereals are involved, it's not an advertising issue, it's a product issue. It concerns the question, 'Is consumption of the product by children good or bad?' That's the real issue. As it relates to us, it makes no sense. The government has come very close to conceding that in their draft. They've carved out this nifty little exception to get around products that are relatively high in sugar content but do not cause tooth decay. That's really a hidden way to say ready-to-eat breakfast cereals. They know, or I think they know, that we have very good data to show that these products do not promote tooth decay in children. If they've listened to what we've told them, the government should know that the sugar content in one serving of one of these products is no higher than that of an orange. The sugar in cereals is not inferior or superior to the sugar in an orange—it's just the same. That refined sugar is any different from natural sugar is biochemical nonsense created by lawyers and the Congress." It's that disputed biochemistry question that is at the core of the controversy, Kellogg believes.

Dr. Costley declares that, from Kellogg's point of view, "the FTC is in for one very long fight" on the advertising-to-children issue. He concedes that the agency has the necessary authority to act against any advertising that it finds is false, misleading or unfair. So, in the FTC's reticence to impeach the cereal companies, he sniffs a weak case: "Why don't they just move in against us? It's interesting that throughout all of this, they've continually referred to 10 or 12 ads as examples of hideous behavior. So why haven't they filed a complaint? Under the new Moss-Magnuson Amendment to the FTC Act, they'd establish a precedent that would have the same effect as a rule. The whole issue touches the very heart of the First Amendment, because what the government is really saying is that they're going to decide *what* can be communicated to *whom*."

And, he adds, "Do we really want to set a precedent like that?" Yet, the controversy remains. If the government *can* regulate advertising content, why not those ads aimed at its most susceptible audience? Kellogg, certainly, with its strong leadership in this area will help clarify this matter in its presentations to the government as well as to the consumer public.

MADISON

Exhibit 35: Case Study—Shell Oil

Shell Oil Company

The long-range plan: Go to the public to shine a tarnished image.

In that slippery business of drilling for and delivering oil, petroleum giants these days—eight of the top '78 Fortune "500" are oil companies—find themselves in the precarious position of having to roll huge rocks up tall hills, Capitol Hill in Washington, D.C., for one. The consumer and public conscience is another. To make things worse, years of indifference to these governmental and voting audiences have all but obliterated the natural footholds. "Big Oil" (if there is such a shibboleth) has created its own devilishly intractable slippery slope. The verities and presumptions accorded other businesses no longer seem to apply. Divestiture has been in the air—a seasonal squall—for a number of years. The congressional corridors feel its mercurial pressures, Houston its cold, harsh winds. Furthermore, the business community itself can no longer be regarded as a hip-pocket ally. Business people cannot easily forgive the industry that caused the profit motive to be tarnished with the term "obscene."

Perhaps no industry in modern memory has faced a more desperate public relations or communications problem. Clarity has been rubbed clean of its distinct edges. Who knows what fact or fantasy lies behind public-interest complaints or proposed legislative remedies? Which way to go if you're an oil company with an urgent story to tell and little time to tell it in?

One route is evidently that of Mobil, which has cleverly leased a pulpit voice on the editorial pages of the Sunday supplements, *The New York Times* and *The Wall Street Journal*. Its almost theological dissents on matters of public policy and law add excitement and true partisanship to the national energy debate. At the same time, Mobil shrewdly pours oil on the troubled waters of its right to exist by playing Medici to public television and the cultured, decision-making establishment. Who can hate an aesthete?



John Haines is a 19-year veteran at the Shell Oil Company. The current manager of consumer advertising spent the last seven years as advertising manager and, previously held executive positions in the retail marketing area. Mr. Haines holds a B.S. in Business Administration from Memphis State University. He and his wife, Fran, live in Houston, and are the parents of two daughters.

Shell Oil suggests another path. If Exxon wishes to be known as the Perry and Amundsen of oil exploration, and Mobil the Thomas Aquinas of industry gospel, Shell has staked out its solid claim as the democratic companion of the common man, defined as the vast auto-driving public. It is the company that is always on hand for help and guidance; whose messages are portable, compact and can go along with you in your glove compartment. For Shell, number 14 on the Fortune "500" list with revenues exceeding $10 billion, answers to pragmatic consumer problems speak louder than japes and gibes.

Since 1976, the Houston-based oil firm—ably assisted by Ogilvy & Mather, has been running a remarkable corporate campaign aimed at seeding the great grass-roots with good reasons for seeing in Shell a good corporate citizen and a quality brand name. Its theme is "Come to Shell for Answers." Its mode is direct and immediate contact with the consumer (and voting) public. Its spirit is positive and upbeat.

John Haines, the engaging and earnest manager of consumer relations at Shell, doesn't dissimulate. He knows that the oil companies have a lot of explaining to do. But he doesn't shrink from the challenge. "Shell has made a commitment to being a consumer-oriented company. We're not at war with the consumers. In fact, we know many of these groups and their leaders, and we're trying to understand what their desires are and how best to accommodate their concerns about big business, big oil and other related issues. Shell is really trying to be responsive to the consumer's needs and demands."

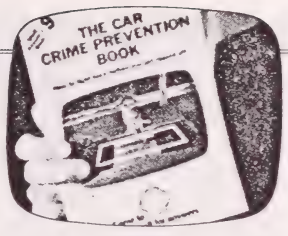
The mechanics, alone, of this campaign are staggering. Devise, write, print and distribute over 460,000,000 eight-page booklets that deal with the practical problems of car ownership. The series, he notes, "has created an unprecedented opportunity for Shell to interact directly with the public, consumer groups, government bodies (some pamphlets were prepared in cooperation with federal agencies) and educators. We have set ourselves on a course of trying to convince the public that we want to help them spend their money in a wise manner so that they can get the most out of their automobiles."

There is a sense of logical completeness and elegance to the company's approach. "The automobile is the common denominator," says Mr. Haines. "Almost all voters drive cars, and we'd like to make this field an area of perceived expertise by Shell." That accounts for the massiveness of the undertaking. The booklets have been promoted via network and spot television as well as radio and national magazines. The broadcast media create awareness and solicit inquiries. The

national magazines are used as carrier vehicles. Booklets have been advertised or bound into such publications as: *Readers' Digest, Time, U.S. News & World Report, Psychology Today, Book Digest, People, Ebony, Better Homes & Gardens, Family Circle, Ladies' Home Journal* and *Good Housekeeping*. "If you wanted to lay all the books we've distributed end to end, they would circle the world eight times. We have probably printed and disseminated more books than Random House."

The object has been never to promise without delivering: "Our research showed us initially, that the lack of esteem and credibility of the oil companies was so low that the public would not believe anything we'd say. The most interesting part about our campaign is that the reader is immediately benefited." The advertising, in fact, is inseparable from the goodwill and information the reader finds when he opens his magazine.

Response has been gratifying, Mr. Haines relates. "We've only received about 25 negative letters out of a total of over 500,000. In addition, research indicates that there's high awareness of the program—55% on an unaided basis." Correlatively, there has been a noticeable improvement in public attitudes toward Shell, for which Mr. Haines gives part of the credit to the "Answer Book" series. "Our method is to create a favorable climate among the broad base of the population so that when a specific



Car Thief

issue comes up, there aren't any built-in hatreds or biases toward the company. We think if we wait until the issue gets to Washington, it's too late. The people in Washington respond to their constituents' desires. And if those people are saying, 'Don't let those oil companies do anything,' legislators will respond to that. If we, at least, have people who will listen to us, then we have a chance to accomplish what we want to do."

There's a carry-over effect upon the Shell dealers, Mr. Haines adds. "When the campaign first started, some of our 18,000 dealers thought it would be short-lived. But after two years, the dealers—like the public—are now convinced that we are serious about providing information. And they, too, have been feeding back to us helpful hints and consumer comments. In the last six months, they've warmed to the series and have consequently become more actively involved with it."

Last year's media expenditures for television and magazines totaled in excess of $11 million. The current schedule, Mr. Haines informs us, will be reduced slightly. "This year we're only using network TV, some spot and national magazines." Determination of the magazine schedules is a joint, Shell/Ogilvy & Mather task. "We work it on an efficiency basis, trying to reach as many people as we can with as few dollars as possible. We eliminate some magazines we'd like to be in simply because they physically cannot carry our eight-page insert books. And some others have specific policies against inserts." While Mr. Haines admits that he has no guarantees beyond next year's budget to ensure the continuance of the current campaign, he believes strongly that it has helped Shell's image enormously. "Our plan here is to recommend to management that we keep it going at least through '79."

Necessarily, changing the minds of the public is a slow and painstaking process. Dispelling myths takes conscientious and patient attention. And Shell has, in a sense, taken the hard route. By not simply targeting the influentials, and going to the mat daily with the automotive problems of car-owning America, Shell is counting on a growing political and economic payoff. The premise is that the company that is no stranger to the public can be no enemy. It's gambling on change through going out into the fields and lending a hand. It's the apolitical advertising of a good citizen.

MADISON

Exhibit 36: Case Study—Singer

Singer Company

The "spacey" campaign that repositions the sewing machine company as a broad-based galaxy.

The Singer Company may well possess one of the most valuable properties in the corporate world: a good name. But here's the rub: The vast majority of people associate the name "Singer" solely with sewing machines. But the truth is that the new couch your neighbor just bought might well be Singer-made, or maybe the last power tool you purchased at Sears. Thus, Singer's immediate task is to tell consumers that the venerable sewing machine manufacturer is a widely diversified and technology-oriented corporation. And considering that air conditioning/heating equipment, educational tools and aerospace and marine systems are all products of Singer's three operating divisions, the assignment at hand is of sizable magnitude.

MADISON AVENUE visited Larry Mihlon, vice president of corporate relations, to discover the story behind Singer's newly evolving corporate image. The rangy, affable executive begins by filling us in on the company's origins and development. Precious few are unaware



Larry Mihlon joined Singer as vice president of corporate relations in March 1978. Before that he served as vice president of public affairs for United Brands Company. He was president of Communications Programs International from 1973 to 1975. Prior to heading that firm he held various positions with Exxon Corporation for nine years, including manager of corporate communications and director of public relations for Exxon Chemical U.S.A.

that it was Issac Singer who created the first practical sewing machine in 1850, but there's a lesser known innovation, says Mr. Mihlon, that contributed mightily to the fledgling company's growth. "Singer became known as the first company to offer installment buying, the method of selling which was largely responsible for the enormous impact that the sewing machine had on both industrial and marketing history." By the late 1860s, Singer machines were marketed internationally. The company's leadership position was firmly entrenched for the next 100 years, until the Japanese became heavily involved in the manufacturing and exporting of sewing machines. The threat was intensified, however, by the fact that Sears was a major customer for Japanese sewing machines.

While the Japanese continued their marketing march on the rest of the world, Singer searched for new avenues of expansion. In the '60s, for example, Singer absorbed several companies into its corporate fold. One such prize was General Precision and Equipment Company, a leader in high technology electronics and controls operations for the aerospace industry. "This was one of the most important and intelligent acquisitions the company ever made," observes Mr. Mihlon. Unfortunately, not all of the diversification efforts were as successful. By 1974, the company had over-diversified and found it difficult to manage some of the businesses which were unfamiliar and posed problems. As a result, Singer suffered losses of $470,000,000 in 1974-1975. Then, in 1976, Joseph Flavin, a longtime Xerox man, assumed the presidency and proceeded to restructure the company. Only two years under Mr. Flavin's stewardship, the corporation is happy to report that debt reduction is ahead of schedule.

The credibility of our company is as high as it's ever been," Mr. Mihlon declares, "and that's because we're disarmingly candid in the way we talk about ourselves. We've volunteered a lot of information that many people never expected us to volunteer. Obviously, it was essential to establish a credibility base in the body politic before we started telling people that we are much more—as an entire company—than they thought we were. Now, we're in a position to address the broader marketplace and all of our audiences including the financial community, government and so-called 'opinion leaders.' It's heady stuff, but a lot of older and middle-aged people are truly concerned about what the Singer Company—that they know and recognize—is doing. Our job is to transfer that loyalty to a company that is much more than a manufacturer of sewing machines." And with 86,000 employees swelling their ranks, improved internal communications is a priority, too.

Last year, Singer's top management agreed that the time was right to find an advertising agency to help spread the corporate word. After running elimination heats for the account, Young & Rubicam emerged as the top choice. "They won our business for several very good reasons," Mr. Mihlon informs. "Very important to us, the agency has tremendous global scope and understanding. Their people perceived our problems very clearly and really did their homework." Together, Singer and its agency set out to investigate what the company was and what it wanted to become. "We realized that everything we said about ourselves would, in effect, become the truth of the company. Everyone agreed that whatever we were going to do had to be executed with understated elegance to reflect the quality image Singer had had throughout its history. We didn't want to shout, scream or be strident in any way." Nine months were spent on research and other preparatory steps before the first in a series of six print ads appeared in magazines and newspapers in early April of this year.

The first ad, headlined "Traffic Jams Expected In Space By 1985," details the role Singer plays in supplying guidance systems for spacecraft. The black-and-white ad informs readers that the crew for America's first manned space shuttle, the Enterprise, is training in a simulator made by Singer's Link Division. A subsequent corporate message tackles the theme of inner space, involving Singer's furniture manufacturing capabilities. The concept behind the entire campaign is that Singer is associated with trends and concepts that should ensure a successful American future. "Most important," Larry Mihlon summarizes, "we're investing in the Singer name by showing our growth areas. Even to continue selling sewing machines in the mature market, we must emphasize our technology scope. After all, when someone buys a Chevrolet car, they're also buying the General Motors name that stands behind it." *The Wall Street Journal*, *Fortune*, and *The New Yorker* are among the 12 publications to run Singer ads in 1978. And by year's end, Mr. Mihlon hopes to be extending Singer's reach by adding television to the mix. Singer's over-all advertising ex-



penditures reached $60 million last year, but details for the corporate campaign budget are guarded.

However, given the proposed venture into TV, one would have to conclude that the project, thus far, is getting high corporate marks and the budget will be bolstered commensurately.

The Singer vice president clearly believes that every corporation has not only the right but the obligation to communicate information about pertinent issues in the public domain. Yet, he reminds us: "Those companies who use corporate advertising to discuss issues are obliged to look at both sides. If a company truly believes its point of view is right, it shouldn't be afraid to reveal any information that's important." In his opinion, the print and broadcast media should devise ways to provide a means of response for groups who oppose certain corporate messages. In an optimistic tone, he concludes that, "I can't believe that in a country like ours there is not a solution to this problem that does not require legislation." Meanwhile, Singer will continue to ply its own efforts directed at communicating the golden thread that links its protean operating structure. MADISON™

Exhibit 37: Case Study—American Bankers Association

American Bankers Association

Institutional advertising that takes the "institution" out of banking.

It's the first or fifteenth of the month, and usually that means it's payday for millions of Americans. On this happy occasion, commercial banks are crowded during lunchtime hours. Impatient people, repeating a familiar routine, wait on line to deposit checks and withdraw cash for the weekend ahead. But is that all there is to commercial banking? Of course not, but that's how millions of people perceive the sphere of its activities. The American Bankers Association, a nonprofit organization, is determined to broaden that limited picture by illustrating the far wider scope of the financial community's social involvement. And in its latest television campaign, the ABA takes to the air with its most high-powered promotion to date of this message.

Aided by their agency of five years, Leo Burnett U.S.A., the American Bankers Association is making its money-conscious audience cognizant that bankers do more than count other people's money. Kenneth DeCesare, national advertising manager for the group, details the association's position: "In reality, we are in the public sector as a service organization because we invest money in communities to build houses and parks and support other projects. Unfortunately, many people aren't aware of this. Consumers think of banks on a retail level, but often don't realize other ways in which banks affect their lives."



Kenneth DeCesare, national advertising manager of the American Bankers Association. Before joining the association five years ago as assistant director of advertising, he worked in a similar position for the American Gas Association. Mr. DeCesare graduated from Pace University in 1962.

Based in Washington, D.C., the American Bankers Association is a 102-year-old organization working to "enhance the image of bankers and banks so that they can serve the public effectively," defines Mr. DeCesare. Ranging in size from the smallest bank in Anytown, USA to the mammoth Bank of America, the ABA's 13,000 member banks support association lobbying, advertising and other united efforts through assessed dues, paid on a sliding-scale basis. Regardless of size, Mr. DeCesare emphasizes that every bank tends its public image



"Premix"

meticulously, and it seems they've all done an impressive job of it. According to a recent survey sponsored by *U.S. News & World Report*, banks are runners-up in a popularity contest among companies and institutions in the big business world.

Titled "The Study of American Opinion," the survey is based on responses from nearly 5,900 household heads. The study concludes that, while business fares well in some areas, it "still hasn't convinced the public it cares about the consumer, the environment or pollution." Over-all, the report adds, "Another area where business has not rated well is in communicating with customers, the general public, employees and stockholders." The clear exceptions were banks, which won the second highest approval rating (39%) from those queried. (Placing first were the airlines with a 52% score). Commercial banks again ranked second to the airlines in the category entitled "provides enough product information." Savings-and-loan associations, banks' major competitors, placed third in both categories. That neck-and-neck positioning is significant, since the American Bankers Association is aggressively lobbying on several competitive questions between banks and other financial institutions including savings-and-loan associations, mutual savings banks and credit unions. For example: savings and loan associations, by law, can offer five-and-one-quarter percent interest on passbook savings, while commercial banks are restricted to five percent.

At a time when millions are skeptical of big business, why have banks maintained such a high degree of trust and respect? Most significantly, Mr. DeCesare points out, is that people tend to relate to their branch banks on a personal, one-to-one level. If a man goes to the same bank for 10 years, he's likely to see it as "his" bank, not as part of a huge banking brigade. It's uncertain whether the Bert Lance episode has diminished the credibility of the industry. Understandably, many bankers feared for their public posture, but Mr. DeCesare maintains there's no evidence of consumer cynicism: "No research exists on this point either way. But if people believe that the average banker is like Bert Lance, it will show up sooner or later." Interestingly, "These feelings haven't been indicated in the *U.S. News & World Report* study or in others, where bankers always rate very well."

Aiming to inform bank customers between the ages of 25 and 49 about the full-service concept, the association will spend more than $4,000,000 on television advertising this year. The medium is favored by association executives and the membership alike for its obvious cost efficiencies. This concerted campaign supplements the $465,000,000 spent annually on advertising by individual commercial banks. The American Bankers Association exerts little effort to reach business and government. Rather, clarifies Mr. DeCesare, "that's the job of the banks themselves. When I look through an issue of *Fortune*, it sometimes seems that half the advertising is from banks."

Running on CBS, the campaign is geared toward a dual audience. The association believes that football (including sponsorship of the Superbowl) is the surest way to reach men, primetime to target women and specials to lure the upper-demographic viewers. "Basically, we're just trying to employ good television," summarizes Ken DeCesare. And because the campaign strives to portray banking in a wholesome, family light, "we're not by any means involved in any of the action or violent shows." The significant message in each of the four commercials is that full-service banks help people. Ed Gilbert of the successful ABC series "The Hardy Boys" is spokesman. As narrator, he is first heard while speaking from inside a bank vault. As the camera shoots into the vault, a community scene is depicted and one of four stories is told. Each commercial features real people relating true stories about how their local bank helped them fulfill a goal. In one case, a Vermont man recounts that his bank helped him finance the invention of a heart resuscitator. In another, a young couple informs viewers that, with the aid of their bank, they started a small but thriving chain of retail stores.

This group of commercials was launched early this year, replacing similar ones that were three years old. As a rule, the ABA has no rigid schedule as to when it's time to retire old ads and develop new ones. Mr. DeCesare states this is "because it's very difficult to tell when ads are worn-out as institutional commercials. It's not like selling a product, where, if it doesn't move off the shelf you figure there might be something wrong with your advertising."

Taking the pulse of bank customers for the association is the job of Communicus, Inc., a California-based research firm. Early in the year, they conduct 20-minute interviews with 800 customers to learn their opinions and attitudes about banks. At year's end, the same group is re-interviewed. At that time, researchers show the first eight seconds of the commercials, the most generic part. After it's determined how many people have seen the TV ads, explains Mr. DeCesare, "we determine how the commercials have affected their feelings about banking, whether it's positive or negative." After four years of using this technique, the American Bankers Association is pleased with both the method and the results. Significantly, claims Ken DeCesare, "between 80% and 90% of those surveyed believe that the banking industry is investing money in the community, and therefore, should be considered as private industry—not subject to government control."

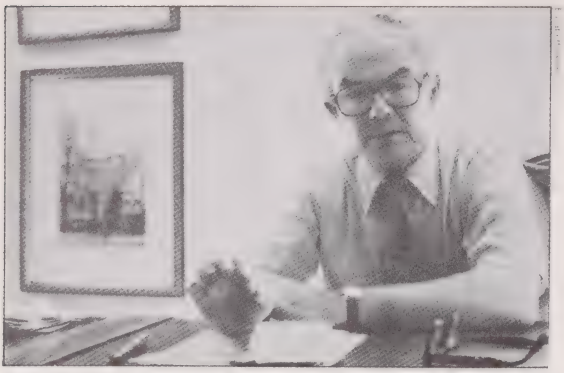
Like its fellow institutional advertisers, the association wrestles with an elusive penetration problem. As Mr. DeCesare explains: "Education is a much more difficult job than product-selling. If it takes three exposures to motivate someone to buy a specific brand of soap, for example, it takes six exposures for the institutional message to penetrate and be understood." But

to the association's advantage, he asserts, a historical approach is never used. "Many institutional advertisers take a 'Thomas Jefferson' tack, and that can turn people off. We feel that our commercials are more personal and easier to relate to since ordinary people are featured. Consumers can easily identify with these commercials, since people relate to other people." And when it comes to the individual's relationship with the local bank, that's the most fertile interest. MADISON

Exhibit 38: Case Study—A. T. &T.

American Telephone and Telegraph Company

Where building upon the solid foundation of quality gets communication priority.



Emery Westfall joined the Bell System in 1957 as an advertising assistant for Ohio Bell Telephone Company, and served in a variety of positions before he was appointed director of corporate advertising for AT&T in 1976. A graduate of Bowling Green State University, Mr. Westfall lives with his wife and two daughters in Chatham, New Jersey

If ever there was a time for the cumulative effects of 70 years of corporate advertising to pay off for the American Telephone and Telegraph Company, the time is now. Troubled by governmental and competitive challenges, the omnipresent utility is counting on its highly visible corporate communications efforts to soften any challenges to its right to lead the telecommunications industry. Eschewing an advocacy posture, the company has chosen to reinforce consumer loyalty and trust by focusing on its undisputed contribution to modern technology (they practically invented it) and dedicated service to its customers. Emery Westfall, the company's energetic director of corporate advertising, tackles the task with self-assurance.

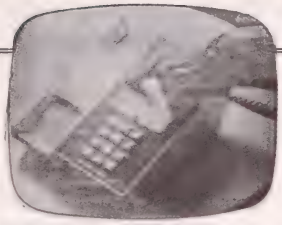
The American Telephone and Telegraph Company placed its first corporate ad in 1908, yet the message has changed little through the years. The company's *raison d'etre* is best summarized by its descriptive slogan: "The Bell System. People using technology to help keep down costs and improve service—keeping your phone system the best in the world." Mr. Westfall explains that this is the historic thread of all of AT&T's public messages. "We've always based our corporate advertising on the earliest philosophy of the corporation, and we've always tried to avoid overcomplicating the issues." However, dedication to simplicity and demonstration of excellence may be insufficient insulation from an increasingly tangled web of regulatory pressures. For now, though, confrontations—at least in the company's advertising efforts—are on the back burner.

Top-of-mind today for AT&T and its able corporate marketing navigator is to further embellish its image as the supplier of good service. But how does one define service? Eager to cite a classic case, Mr. Westfall shows us a picture of a telephone company employee trudging across the countryside during the blizzard of 1888, checking to make sure all phone lines were intact and in service—quite an effort. But discounting natural disasters, how does the public, today, judge its phone service? Efficiency is the key criterion, according to Emery Westfall. "Our objective is to achieve zero defects. It's an impossible goal, but a good one to strive for." While he admits most people don't think of the phone system except when their monthly bill arrives, he believes that, "when pressed to the wall, most people don't think Bell is pretty good; they think it's damn good."

Thus assured that AT&T customers appear to be content with the utility's performance, we turn to

the inevitable question of the FCC's challenge on its "ownership" of the telecommunications marketplace. The AT&T veteran responds with confidence: "As your local phone company, (19 regional operating companies nationwide) we're a monopoly, right? So, in a curious and positive way, the public is stuck with us and we're stuck with them. It's a curious kind of wedding—one that demands a corporation that keeps delivering to the satisfaction of a huge majority of the American public at a quality and price level they seem to like." The advertising pro sidesteps the question of competition, when he comments, "I think the public wants AT&T to have just a little bit of competition around, since that's what the American business system is all about." In fact, AT&T is striving to get the issue on the legislative agenda. The Bell System and other telephone companies have asked Congress to debate and clarify the over-all telecommunications policy of the country. "To whom should it be entrusted?" asks Mr. Westfall "Our general thesis is that the public should be allowed to decide for themselves through their political representatives." The telephone industry expects the issue to be raised in the current session of Congress. Despite the imminence of the question, AT&T management has never discussed its position on marketplace competition in its advertising. As Mr. Westfall sees it, "There are other places where that topic should be raised." In any case, should the issue ever emerge from the regulatory labyrinth and be opened up for public debate, the company's confidence in a favorable outcome is probably not misplaced. Its years of persuasive people-oriented advertising have built up enough strong feelings about the company to hopefully enlist grass-roots support of its activities.

As befits a company committed to excellence—and which has the wherewithal to support that commitment—AT&T, in addition to its regular media advertising, also gets involved with that rarefied vechicle, program sponsorship. At the core of AT&T's corporate advertising—and a special source of pride for Mr. Westfall—is "The Bell System Family Theater." "We have a very



Touchmatic

closely defined idea of the types of shows that should be associated with the Bell System. Several years ago we commissioned an outside consultant to find out what public, private and parochial schools were teaching in their literature classes. We were then able to determine what titles were replicated across that spectrum. The result included such works as *Our Town, The Yearling,* and *Captains Courageous.* "And let's face it," he smiles, "it's great to have a pre-sold audience. A lot of people will watch a show like *Our Town* just to see if it will be performed better than the last time they saw it." Most telling of all, he believes, is that the scrupulous selection of programs once again reinforces AT&T's commitment to quality.

Up until mid-1976, AT&T's television commercials were showcased only in the company-sponsored shows. Since then, coverage has broadened to include partial sponsorship of mostly family hour and weekend sports programming during the weeks preceding "The Bell System Family Theater." As a result of the stepped-up television emphasis, magazine and newspaper ads will account for only 25% of the $11,000,000 to $12,000,000 corporate advertising budget for this year. Regardless of the medium employed, the intent is unwavering. Above all, AT&T wants to illustrate how new technology and services keep the Bell System's phones ringing more frequently than anyone else's. An effort to humanize the huge company is evidenced in several commercials, especially one called "Touchmatic." Prepared by the corporation's advertising agency of 70 years, N W Ayer ABH International, it focuses on the touchmatic phone which allows people to reach frequently called numbers just by pushing one button. As the commercial opens, a small group of people are sitting around a table learning about the innovation. Each group member talks about the person he or she would like to be able to reach quickly, and the telephone technique is demonstrated. Before the familiar Bell System logo appears, the AT&T spokesman says, "It's a way to bring people together with the touch of a button."

The Touchmatic commercial is a corporate one, ingeniously, it could easily be mistaken for a new product sales pitch by the viewer unversed in the subtle differences that separate advertising intents. For Emery Westfall, however, there is no ambiguity about how the commercial should be classified. He explains that he uses items like the Touchmatic phone to illustrate AT&T's scope of technology—not to sell product. "I never ask for the order," he declares. "That job belongs on the other side of the house." Though departmentally separate, the over-all marketing goals have a symbiotic effect. Such is the case with the highly successful "Feelings" campaign which promotes the use of long distance. "I happen to think that 'Feelings' works great as a corporate campaign, too. I applaud every effective AT&T ad, because each is part of one good package." From a strictly corporate vantage point, the technology theme will be continued until at least 1981.

As one of the largest corporations in the world, Mr. Westfall asserts, AT&T bears an obligation—as well as a right, to participate in corporate advertising. "I know some people question corporate advertising simply because it's associated with the word 'image'—and that's ridiculous. If it were disallowed, would that mean we'd be forbidden from providing information about the emergency '911' telephone service? After all, that certainly cannot be considered sales advertising." Mr. Westfall, a man who takes great pride in his company and his work, looks forward to the ever-increasing challenges of corporate advertising. "We have a story to tell," he reminds us. "And most importantly, we simply have to keep proving that we're responsible and worthy of the trust we hold." MADISON

ORGANIZATION AND PURPOSES OF CORPORATE ADVERTISING

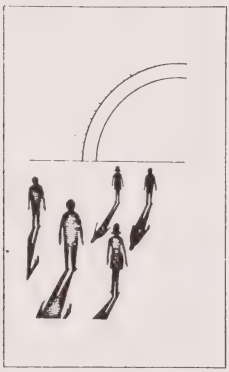
Exhibit 39: 1971 Survey

HOW PUBLIC RELATIONS EXECUTIVES VIEW THEIR IMAGE ADVERTISING ROLES

A report of the results of the *Journal's* survey of 130 corporate advertisers

Public relations departments of the top corporate and association advertisers are deeply involved with corporate advertising — originating the concept, generating or influencing the advertising copy theme, and selecting the media in which it will appear. Most leading companies establish a separate budget for such advertising, and PR executives don't see any slackening of those budgets at least through 1972.

Of the *Journal* survey questionaires sent to public relations



Is there a separate budget established for corporate advertising?

	Replies	Percentage
YES	91	69.16
NO	36	27.36
NOT STATED	3	2.28

Is the public relations department involved in selecting the media in which your corporate advertising will appear?

	Replies	Percentage
YES	99	75.24
NO	23	17.48
NOT STATED	8	6.08

To what degree?

Recommend media	54	41.04
Specify the media	32	24.32
Approve the media	51	38.76

NOTE: Adds to more than 100 per cent because some respondents gave multiple answers.

Will your 1971 expenditures for corporate advertising be more/less/about the same as 1970?

	Replies	Percentage
MORE	35	26.60
LESS	30	22.80
SAME	57	43.32
NOT STATED	8	6.08

Do you anticipate that your company's corporate advertising expenditures will be more/less/about the same in 1972?

	Replies	Percentage
MORE	40	30.40
LESS	15	11.40
SAME	66	50.16
NOT STATED	9	6.84

By approximately what per cent?
Of the respondents who indicated "more" or "less" the following increases/decreases were reported:

MORE (40)

Replies	*Per cent increase*	*Per-centage*
5	0-9%	12.50
14	10-19%	35.00
6	20-29%	15.00
2	30-39%	5.00
1	50-59%	2.50
4	100 & over %	10.00
8	no answers	20.00

LESS (15)

Replies	*Per cent increase*	*Per-centage*
1	0-9%	6.66
3	10-19%	19.98
3	50-59%	19.98
8	no answers	53.28

Is the public relations department involved in your company's corporate advertising program?

	Replies	Percentage
YES	113	86.92
NO	12	9.23
NOT STATED	5	3.84
	130	100.00

In what department does the concept for a corporate advertising program originate?

	Replies	Percentage
PR Department	86	65.36
Advertising Agency	23	17.48
Product Sales Department	1	.76
Advertising Department	40	30.40
PR Counseling Firm	15	11.40
Top Management	19	14.44
Other	4	3.04

NOTE: Adds to more than 100 per cent because some respondents gave multiple answers.

To what extent does the public relations department generate the theme for the corporate advertising copy?

	Replies	Percentage
Initiate	61	46.36
Influence	67	50.92
Approve	35	26.60
Not At All	13	9.88

NOTE: Adds to more than 100 per cent because some respondents gave multiple answers.

executives at 265 of the leading 1970 corporate and association advertisers (as determined by Leading National Advertisers, New York), 130 responded. More than 87 per cent of the respondents noted that their departments were involved in corporate campaigns, and more than 65 per cent that their departments originated the concepts for such advertising. More than 46 per cent said that their departments generated the theme for the corporate ad copy, more than half that their departments influenced the copy theme, and more than 26 per cent that public relations approved the copy theme.

MEDIA CHOICES

When it comes to the media in which their corporate advertising will appear, more than 75 per cent said the public relations department is involved in the selection, and of those, 41 per cent recommend media, 24 per cent specify the media to be used, and 39 per cent must approve of the media schedule.

Audience characteristics play a major role in determining the placement of corporate advertising, with influence in the business-financial community being an important consideration, the *Journal* survey showed. In most cases, editorial content and quality also are of prime concern in selecting a setting for the corporate message.

Almost 70 per cent of the respondents said that their company has a separate budget for corporate advertising, 43 per cent that their corporate ad budgets will remain at the 1970 level in 1971 (26 per cent that it would increase, and 23 per cent that it would decline); and 50 per cent that budgets would remain at 1970 levels through 1972 (30 per cent that it would increase, and 11 per cent that it would decline).

The primary objective of the corporate ad programs of 35 per cent of the respondents is to im-

prove consumer relations, while 26 per cent noted their primary objective is to improve stockholder-financial relations, 20 per cent to improve product sales, 9 per cent to improve trade relations, and 8 per cent to improve government relations. ☐

By approximately what per cent?
Of the respondents who indicated "more" or "less," the following increases/decreases were reported:

MORE (35)			LESS (30)		
Replies	*Per cent increase*	*Percentage*	*Replies*	*Per cent increase*	*Percentage*
5	0-9%	14.25	5	20-29%	16.65
12	10-19%	34.20	2	30-39%	6.66
4	20-29%	11.40	1	40-49%	3.33
2	30-39%	5.70	4	50-59%	13.32
5	50-59%	14.25	1	90-99%	3.33
1	90-99%	2.85	2	100 & over %	6.66
5	100 & over %	14.25	15	no answer	49.95
1	no answer	2.85			

What is the primary objective(s) of your corporate advertising program. (Please indicate order of importance by numbering 1, 2, 3, etc., if your program has more than one objective.)

———Improve consumer relations
———Improve trade relations (suppliers, industry)
———Improve government relations
———Improve stockholder/financial relations
———Increase product sales

Replies	*Percentage*	*Prime Objective*
46	34.96	Improve consumer relations
34	25.84	Improve stockholder/financial relations
27	20.52	Improve product sales
12	9.12	Improve trade relations
11	8.36	Improve government relations
130	100.00	

Exhibit 40: 1972 Survey

ARE PUBLIC RELATIONS EXECUTIVES BECOMING MORE INVOLVED WITH CORPORATE ADVERTISING?

A report on the Public Relations Journal's annual survey of corporate advertising.

MOST TOP CORPORATIONS and association advertisers assign responsibility for their increasingly important corporate advertising to the public relations department. Corporate public relations executives, with their awareness of their corporations' problems, strengths, and needs in relating to the public, build the concept of the corporate ad campaign, produce or strongly influence the advertising copy theme, and select the media in which it will be presented to the public.

Separating the corporate advertising budget from other ad budgets has proved effective in most companies, and PR executives say that 1972 budgets remained about the same as last year's, or increased. A few declined. Projections for 1973 indicate that more companies will increase corporate ad budgets, many will remain steady, and a smaller percentage than this year are comtemplating decreases.

Of the Journal's questionnaires sent to public relations executives at 125 of the leading 1971 corporate and association advertisers (as deter-

Is the public relations department involved in your company's corporate advertising program?

	Replies	Percentage
YES	85	95.5
NO	3	3.3
NOT STATED	1	1.2
	89	100.0

In what department does the concept for a corporate advertising program originate?

	Replies	Percentage
PR Department	64	71.9
Advertising Department	21	23.5
Advertising Agency	19	21.4
Top Management	14	15.7
Product Sales Department	2	2.2
PR Counseling Firm	4	4.4
Other	4	4.4

NOTE Adds to more than 100 per cent because some respondents gave multiple answers.

To what extent does the public relations department generate the theme for the corporate advertising copy?

	Replies	Percentage
Initiate	53	59.5
Influence	46	51.4
Approve	25	28.0
Not At All	2	2.2

NOTE Adds to more than 100 per cent because some respondents gave multiple answers.

mined by Leading National Advertisers Inc., New York), 89 responded.

More than 95 percent of the respondents noted that their departments were involved in corporate advertising campaigns, and nearly 72 percent report that their departments originated the concepts for such advertising. More than 59 percent said that their departments generated the theme for the corporate ad copy, more than half that their departments influenced the copy theme, and 28 percent that public relations approved the copy theme.

MEDIA CHOICES

When it comes to the media in which their corporate advertising will appear, nearly 85 percent said the public relations department is involved in the selection, and of those 42 percent recommended media, 28 percent specify the media to be used, and 32 percent must approve of the media schedule.

Audience characteristics play a major role in determining the placement of corporate advertising, with influence in the business-financial community being an important consideration, the Journal survey showed. In most cases, editorial content and quality also are of prime concern in selecting a setting for the corporate message.

Almost 84 percent of the respondents said that their company has a separate budget for corporate advertising, 44 percent that their corporate ad budgets will remain at the 1971 level in 1972 (42 percent that it would increase, and, about 8 percent that it would decline); and 46 percent that budgets would remain at 1972 levels through 1973 (43 percent that it would increase, and about 7 percent that it would decline).

The primary objective of the corporate ad programs of 32 percent of the respondents is to improve consumer relations, while 24 percent noted their primary objective is to improve stockholder-financial relations, 20 percent to improve product sales, 9 percent to improve trade relations, and 11 percent to improve government relations. □

Is there a separate budget established for corporate advertising?

	Replies	Percentage
YES	74	83.2
NO	15	16.8
NOT STATED	0	—

Is the public relations department involved in selecting the media in which your corporate advertising will appear?

	Replies	Percentage
YES	75	84.4
NO	10	11.2
NOT STATED	4	4.4

To what degree?

Recommend media	38	42.0
Specify the media	26	28.0
Approve the media	29	32.1

NOTE: Adds to more than 100 per cent because some respondents gave multiple answers.

Will your 1972 expenditures for corporate advertising be more/less/about the same as 1971?

	Replies	Percentage
MORE	38	42.6
LESS	7	7.8
SAME	40	44.4
NOT STATED	4	4.5

Do you anticipate that your company's corporate advertising expenditures will be more/less/about the same in 1973?

	Replies	Percentage
MORE	39	43.7
LESS	6	6.7
SAME	41	46.2
NOT STATED	3	3.3

What is the primary objective(s) of your corporate advertising program. (Please indicate order of importance by numbering 1, 2, 3, etc. if your program has more than one objective.)

Prime Objective	*Replies*	*Percentage*
Improve consumer relations	28	31.5
Improve stockholder/financial relations	22	23.5
Improve product sales	17	19.2
Improve trade relations	8	8.9
Improve government relations	10	11.4
Not stated	4	4.4

NOTE: Adds to more than 100 per cent because some respondents gave multiple answers.

Exhibit 41: 1973 Survey

ARE PUBLIC RELATIONS EXECUTIVES BECOMING MORE INVOLVED WITH CORPORATE ADVERTISING?

A report on the Public Relations Journal's annual survey of corporate advertising.

THE PUBLIC RELATIONS departments of major corporations and associations are an influential factor in corporate advertising programs, according to results of the third annual *Journal* survey.

Two hundred of the leading 1972 corporate and association advertisers (as determined by Leading National Advertisers, Inc., New York) were surveyed in this latest *Journal* poll with 118 respondents.

Public relations executives control the many important aspects of the corporate advertising program beginning with creating the corporate advertising concept through initiating and influencing the corporate advertising copy theme and to selection of media.

The survey shows that most companies continue to have a separate corporate advertising budget, with public relations executives reporting that 1973 expenditures remained on a level with 1972 with a few budgets declining. 41% increased advertising investments.

When asked to project corporate advertising expenditures for 1974, the practitioners indicated that outlays would be about the same as '73 in most cases, with some companies

Is the public relations department involved in your company's corporate advertising program?

	Replies	Percentage
Yes	103	87
No	14	12
Not Stated	1	1
	118	100

In what department does the concept for a corporate advertising program originate?

	Replies	Percentage
PR Department	84	71
Ad Agency	27	23
Product Sales Department	5	4
Advertising Department	37	31
PR Counseling Firm	3	2
Top Management	24	20
Other	7	6

NOTE: Adds to more than 100 per cent because some respondents gave multiple

increasing and a few contemplating decreases (9%).

More than 85 percent of the respondents noted that their departments were involved in corporate advertising campaigns, and 71 percent report that their departments originated the concepts for such advertising. 50 percent said that their departments generated the theme for the corporate ad copy, 48 percent that their departments influenced the copy theme, and 40 percent that public relations approved the copy theme.

MEDIA CHOICES

When it comes to the media in which their corporate advertising will appear, 76 percent said the public relations department is involved in the selection, and of those 36 percent recommended media, 26 percent specify the media to be used, and 41 percent must approve of the media schedule.

Audience characteristics play a major role in determining the placement of corporate advertising, with influence in the business-financial community being an important consideration, the *Journal* survey showed. In most cases, editorial content and quality also are of prime concern in selecting a setting for the corporate message.

More than 80 percent of the respondents said that their company has a separate budget for corporate advertising, 43 percent that their corporate ad budgets will remain at the 1972 level in 1973 (41 percent that it would increase, and 11 percent that it would decline); and 48 percent that budgets would remain at 1973 levels through 1974 (36 percent that it would increase, and about 9 percent that it would decline).

The primary objective of the corporate ad programs of 55 percent of the respondents is to improve consumer relations, while 64 percent noted their primary objective is to improve stockholder-financial relations, 47 percent to improve product sales, 46 percent to improve trade relations, and 32 percent to improve government relations. □

To what extent does the public relations department generate the theme for the corporate advertising copy?

	Replies	Percentage
Initiate	60	50
Influence	57	48
Approve	47	40
Not at All	11	9

NOTE: Adds to more than 100 per cent because some respondents gave multiple answers.

Is there a separate budget established for corporate advertising?

	Replies	Percentage
Yes	95	81
No	20	17
Not Stated	3	2

Is the public relations department involved in selecting the media in which your corporate advertising will appear?

	Replies	Percentage
Yes	90	76
No	25	21
Not Stated	3	2
To What Degree?		
Recommend Media	43	36
Specify the Media	31	26
Approve the Media	48	41

NOTE: Adds to more than 100 per cent because some respondents gave multiple answers.

Will your 1973 expenditures for corporate advertising be more/less/about the same as in 1972?

	Replies	Percentage
More	48	41
Less	13	11
About the Same	51	43
Not Stated	6	5

Do you anticipate that your company's corporate advertising expenditures will be more/less/about the same in 1974?

	Replies	Percentage
More	42	36
Less	10	9
About the Same	57	48
Not Stated	9	7

What is the primary objective(s) of your corporate advertising program? (Please indicate order of importance by numbering 1,2,3, etc., if your program has more than one objective.)

Prime Objective	Replies	Percentage
Improve consumer relations	65	55
Improve trade relations (supplies, industry)	54	46
Improve government relations	38	32
Improve stockholder/financial relations	75	64
Increase product sales	56	47

NOTE: Adds to more than 100 per cent because some respondents gave multiple answers.

Exhibit 42: 1974 Survey

Are Public Relations Executives Becoming More Involved With Corporate Advertising?

More Involvement with Theme and Media Selection

The public relations departments of major corporations and associations are becoming increasingly involved with corporate advertising, the *Public Relations Journal* finds. One hundred of the leading 1973 corporate and association advertisers (as determined by Leading National Advertisers Inc., New York) were surveyed in the *Journal's* fourth annual poll, and seventy replied.

The survey shows that public relations executives continue to control—and with increased responsibility—the many important aspects of corporate advertising programs. More public relations departments are "involved with corporate advertising"—94 percent in 1973 compared with 87 percent the year before. More of the surveyed advertisers are establishing separate budgets for corporate campaigns—92 percent during 1973 as compared with 81 percent the previous year; slightly more of them reported bigger corporate ad budgets during 1973 (44 percent compared with 41 percent in 1972); dramatically fewer. .08 percent compared with 11 percent, reported their companies' corporate ad expenditures to be smaller in 1973 than they were in 1972. Looking ahead to 1974 total dollars for corporate campaigns, 41 percent (compared with 36 percent last year) of the respondents noted that their budgets will be larger than the year before, and only .05 percent (compared with 9 percent last year) indicated their expenditures will be smaller.

The *PR Journal's* survey indicates that advertising agencies are becoming more involved in originating campaign concepts—34 percent of the respondents noted such ad agency participation, compared with 23 percent the previous year. At the same time, 67 percent indicated such concepts originate in the corporate public relations department, a drop compared with the 71 percent reported the prior year.

As for the campaign theme, 62 percent of the respondents (compared with only 50 percent in 1972) say the public relations department "initiates" this aspect, 55 percent (compared with a lower 48 percent) "influence" it, and 37 percent (compared with 40 percent) "approve" it. The 9 percent "not at all" involved with creating the theme in 1972 dropped to 4 percent in 1973.

More Are Selecting Media

Corporate communicators' responsibility in the area of media selection has increased dramatically. In making decisions about what media will carry their corporate ads, 85 percent said the public relations department is "involved" in the selection, a jump from 76 percent the previous year. Of that 85 percent, 48 percent (compared with only 36 percent the year before) "recommend media," 40 percent (compared with only 26 percent) "specify," and a whopping 61 percent (compared with 41 percent) "approve" media plans. Where last year's survey noted 21 percent of the respondents said their public relations departments were not involved in media selection, this year that number eroded to 1 percent.

The primary objective of the corporate ad programs of 47 percent of the respondents is to "improve consumer relations," down from 55 percent in 1972. Fifty-eight percent noted their primary objective is to improve stockholder-financial relations, down from 64 percent the year before. "Improving product sales" as the prime objective dropped to 38 percent in 1973, compared with 47 percent; and "improving trade relations" went down to 40 percent from 46 percent. "Improving government relations remained at 32 percent. With all these decreases, where is the increased interest? Twenty-seven percent indicated the their prime objective was "other" than any of the above, a choice not given respondents in previous survey years. The slight drop in prime importance in all the other categories would seem to indicate that the "other" category encompasses objectives now given primary status over other years' "prime" objectives. Examples offered in the survey's "other" category were "employee relations, plant town and community relations, improve corporate image and reputation, public acceptance, communicate energy information."

—*Audrey Allen*

Public Relations Journal

Annual Survey of Corporate Advertising

1974

Where does the concept for a corporate advertising program originate?

	Replies	Percentage
Ad Agency	24	34
Advertising Department	23	32
PR Counseling Firm	5	.07
PR Department	47	67
Product Sales Department	2	.02
Top Management	16	22
Other	1	---

NOTE: Adds to more than 100 percent because some respondents gave multiple answers.

Is the public relations department involved in your company's corporate advertising program?

	Replies	Percentage
Yes	66	94
No	3	.04
Not Stated	1	.02
	70	100

To what extent does the public relations department generate the theme for the corporate advertising copy?

	Replies	Percentage
Initiate	44	62
Influence	39	55
Approve	26	37
Not at All	3	4

NOTE: Adds to more than 100 percent because some respondents gave multiple answers.

Is there a separate budget established for corporate advertising?

	Replies	Percentage
Yes	65	92
No	5	7
Not Stated	0	---

Is the public relations department involved in selecting media in which your corporate advertising will appear?

	Replies	Percentage
Yes	60	85
No	7	1
Not Stated	3	.04
To What Degree?		
Recommend Media	29	48
Specify the Media	24	40
Approve the Media	37	61

NOTE: Adds to more than 100 percent because some respondents gave multiple answers.

Are your 1974 expenditures for corporate advertising more/less/about the same as in 1973?

	Replies	Percentage
More	31	44
Less	6	.08
About the Same	31	44
Not Stated	2	.02

By approximately what Percent?

	Replies	Percentage
0 to 20%	15	21
20 to 40%	5	.07
40 to 60%	2	.02
60 to 80%	2	.02
80 to 100%	2	.02
Not Stated	44	62

Do you anticipate that your company's corporate advertising expenditures will be more/less/about the same in 1975?

	Replies	Percentage
More	29	41
Less	4	.05
About the Same	34	48
Not Stated	3	.04

By approximately what Percent?

	Replies	Percentage
0 to 20%	16	22
20 to 40%	7	1
40 to 60%	3	.04
60 to 80%	---	---
80 to 100%	---	---
Not Stated	44	62

What characteristics do you look for in the media in which you place your corporate advertising?

Answers generally tended toward audience demographics and quality. Responses are listed in order of answers given:

Audience characteristics and activity, nature and quality (15)
Characteristics and quality of editorial/programming (11)
Specific audience demographics
Financial/Business Readership, editorial quality
Upscale management audience, industry finance, government
Plant and office city citizens largely; some ethnic audiences
Credibility, geographic coverage
Financial community—influence—customers reach of business executives and Wall St. influences

What is the primary objective(s) of your corporate advertising program? (Please indicate order of importance by numbering 1,2,3, etc., if your program has more than one objective).

	Replies	Percentage
Improve consumer relations	33	47
Improve trade relations (suppliers, industry)	28	40
Improve government relations	23	32
Improve stockholder/financial relations	41	58
Increase product sales (Product oriented)	27	38
Other (e.g. employee relations, plant town and community relations, improve corporate image and reputation, public acceptance, communicate energy information	19	27

NOTE: Adds to more than 100 percent because some respondents gave multiple answers.

Exhibit 43: 1975 Survey

How companies are using corporate advertising

An A.N.A. survey of member companies reveals interesting facts about their advertising objectives and practices *by* Harry L. Darling

It is apparent that there is a strong resurgence in the use of corporate advertising. I say resurgence because in my 20 years in advertising, the interest and activity in corporate has waxed and waned mightily. Even the names applied to the phenomenon have been tentative and quarrelsome—image, institutional, good will, identity, umbrella—and, more recently, advocacy and issue-directed. No one is thoroughly happy with "corporate advertising" as a description—but no one has yet come up with a more meaningful or acceptable term.

But, thanks to some of the pressures on business and to an apparent decline in the efficacy of publicity and other types of communications in the face of a press and public at best disinterested and at worst antagonistic, the use of corporate advertising as a communications alternative seems to be at its highest level since World War II (when it was the only game in town).

In planning the 1975 A.N.A. Corporate Advertising Workshop, the committee decided that there were several interesting areas about which relatively little is known, and that the major corporations in A.N.A. would be a prime source for sounding. One key objective was to find out how companies *themselves* define corporate advertising. Do they, in fact, always distinguish it as such from the other advertising they do?

A questionnaire was developed and some interesting findings were generated. I will just highlight the most obvious—and offer some between-the-lines conjecture on what the figures might mean.

A thing one learns during a good number of years of peering over the shoulders of corporations through surveys of this sort is that what isn't said is sometimes as important as what is—and that who says it may tell you even more. Market researchers call this latter "source effect." So I'd be remiss if I didn't remind you that a high percentage of our respondents were advertising and marketing people. You may well see some contrasts in what they say with the views expressed by, say, public relations people in other recent surveys on this subject.

Questionnaire to A.N.A. members

We mailed the questionnaire to 292 A.N.A. member corporations and 190 companies (65 percent) responded. We defined corporate advertising, for this purpose, quite simply: "paid advertising messages directed at any of a variety of company objectives that go *beyond* the sale of products and services."

The first question asked whether or not the company had run what the *respondent considered to be* corporate advertising programs during the years 1971 through 1975. And we learned something interesting immediately.... corporate advertising cannot always be identified through the eye of the beholder. We found that 114 used corporate advertising during this period; 76 did not.

Among the non-users were a number of programs that others, myself included, would call corporate. I feel sure that these were genuine judgments, but I also wonder if there is another factor at work here. The nomenclature of "corporate" is often avoided for strategic reasons within a company. Corporate or image advertising still has a non-productive sound to many top and marketing management people. Perhaps that is as much our fault, as communicators, as it is theirs.

This is illustrated by a definition I heard recently: "A successful corporate advertising program is one that the board of directors sees as projecting a favorable company image and the marketing department considers hard product sell." Perhaps that's a reason we see more "marketing umbrella" campaigns—those attempting to achieve both corporate *and* sales objectives. In these tight money times, the economic efficiency of this kind of double-duty program—perhaps replacing some brand-by-brand promotion—can be a strong motivator.

What kinds of companies do and don't use corporate? We classified the respondents in eight broad product and service categories. As you could expect, a high proportion of the non-users (80 percent) are in the consumer package or durable goods business. Among the diversified companies, most have corporate programs. [*See table next page.*]

I will return to the non-users later on. But for now, the statistical base becomes the 114 users. You will note some slight variations in the base, as all 114 did not answer all questions.

What did these companies spend for corporate in the last year they had a program?

Amount	No. of companies
Under $500,000	34
$500,000 to $1,000,000	23
$1 to $2,000,000	13
$2 to $5,000,000	14
Over $5,000,000	13

MR. DARLING *is vice president of the Association of National Advertisers, Inc. [New York]. This article is based on Mr. Darling's presentation at the A.N.A. Corporate Advertising Workshop in March.*

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Who Uses Corporate?

Product & Service Classification	Total	Did Not Use
Consumer package goods	61	46
Consumer durable goods	24	15
Consumer services (travel, insurance, financial)	17	3
Diversified consumer/business/industrial	37	6
Diversified business/industrial	18	0
Basic materials (metals, paper, glass, chemicals)	13	3
Petroleum	15	0
Limited line business/industrial	6	3

To see what kind of sample we had, we did a rough estimate of total dollars by taking the mid-point of each class and multiplying. For the over $5 million, we used a rather conservative $8 million average. I say conservative because many of these companies are quite substantial corporate advertisers. The total was about $200 million.

How are corporate programs funded? Most, not unexpectedly, by separate corporate budgets. Probably of small importance—except that it does eliminate certain corporate in-fighting. All corporate expenditures must come ultimately from income generated by the business units, whether the allocation is direct or indirect.

Funded by separate corporate budget	84
Funded by allocation to business units	19
Funded by combination of above	4

There are many guesstimates floating around as to what total amount is spent annually in the United States for this type of advertising. These are guesses, I submit, because a third party made the decision on what was and what wasn't corporate. We've already seen the dangers in that. And most seem—to me at least—highly inflated. That may be source effect again, as many of them come from our hopeful media friends. But the Leading National Advertisers estimate of about $1 billion for corporate advertising annually seems to be at least credible. If so, our sample, with expenditures of $200 million, represents a healthy 20 percent or so of that total. [*See also PRJ Annual Survey of Advertising Expenditures, page 36.*]

Continuity of use

The continuity of use was pretty good, it appears, particularly in the uncertain times of the years covered and with the unfortunately easy access to corporate advertising funds when profits need a hypo. Perhaps more company managers are recognizing what good communications people have tried to tell them for years—that if the objectives of the program are important and sound, it takes time and consistency to achieve them. And, if they are *not* important enough to stick with, every dollar spent is sheer waste. Let's hope the self-defeating on-and-off pattern of the past is gone forever!

Years used	No. of companies	
All 5 years	55	51%
4 years	14	13%
3 years	15	14%
2 years	17	15%
1 year	8	7%
Used in 3 or more *consecutive* years	80	72%

What about the objectives of these 114 major programs? We made an effort to identify six reasonably distinct objectives. We must have been somewhat successful, since several respondents checked them *all* as their primary objective. That at least reminds us of the importance—and the difficulty—of establishing clear and specific objectives for this kind of advertising. Somehow I'm not so sure those particular companies have attainable ones.

We had two columns in this section on objectives: one to check what was a primary objective; the other for secondary objectives of the major

[*Continued on page 28*]

Objectives of Major Corporate Program (Base — 114 respondents)

No. 1. Designed to enhance or maintain the company's reputation or goodwill among specific public or business audiences

	Companies	
A primary objective	46	40%
A secondary objective	35	31%
Total mentions	81	71%

No. 2. Designed to establish or maintain level of awareness of company name and nature of business

	Companies	
A primary objective	34	30%
A secondary objective	33	29%
Total mentions	67	59%

No. 3. Designed to provide a unified and supportive marketing approach (umbrella) for a combination of present and future products and services

	Companies	
A primary objective	21	19%
A secondary objective	25	21%
Total mentions	46	40%

No. 4. Designed to educate audience on subjects of importance to company's future (e.g. profits, free enterprise, economics, etc.)

	Companies	
A primary objective	22	19.4%
A secondary objective	22	19.4%
Total mentions	44	39%

No. 5. Designed to establish the company's concern for environmental or social issues

	Companies	
A primary objective	12	10%
A secondary objective	25	21%
Total mentions	37	31%

No. 6. Designed to bring about a change in specific attitudes of the audience toward the company or its products

	Companies	
A primary objective	30	26%
A secondary objective	35	31%
Total mentions	65	57%

corporate campaign.

Our sixth objective was, in retrospect, probably out of context with the others. Since a basic function of any communication must be the changing of attitudes in some way, the overlap of this to the others is apparent. Education, for example, does sometimes result in a change of attitude or belief....at least that is our hope.

All told, however, 84 percent of the 114 could live with one, or at most two, of these six as primary objectives.

Target audiences identified

Who were the primary and secondary *target audiences* for the major programs? Relatively few are reaching for Nirvana—the entire population. Most are after specific segments: up-scale economic or education demographics, the "movers and shakers," social and consumer activists, government or political segments, etc. The brackets around two targets—the total business and financial communities—are to point out that these were highly duplicative. Most who checked one also checked the other as either a primary or secondary target. This makes sense, and is borne out in the media pattern they use.

Target Audience

Audience	Primary target	Secondary target
Entire population	13	9
Large segment of population	29	10
Limited segment of population	36	26
Total business community	36	23
Investors/Financial community	34	27
Plant communities/Employees	6	28
Others	6	3
	160*	126*

*Some respondents listed multiple audiences

Note the number who list plant communities and employees as secondary target audiences. There is a growing awareness of the importance of this audience to the corporation. A prime example is U.S. Steel's excellent productivity campaign which has major objectives among these audiences.

What media are used? All of them, and in various mixes, as the table below shows.

Media Used
(97 Respondents)

Media	No. of companies
Business magazines	72
Specialized newspapers (e.g. WSJ)	61
General magazines	49
Network television	35
General newspapers	28
Spot television	25
Radio-regional or local	21
Direct mail	12
Other (exhibits, outdoor, PBS)	7
Radio - national	4

Regarding television, we also asked about national vs. regional or local use; 26 respondents used it nationally; 17 regionally or locally. There were, of course, several who used both.

A comment on one medium listed under "Others:" three respondents mentioned Public Broadcasting Service underwriting. Not unusual, and there are other respondents who do underwrite, but did not list it. It's a healthy sign to see that some people have shaken the hang-up about paid vs. "free" publicity and are calling this what it is—advertising, sans company commercials.

Just under one-half used print media only. Over half of those used only business-directed print (magazines and/or specialized newspapers like the *Wall Street Journal*). This tallies well with the 30-plus whose target audiences were limited to business or financial. It might have been interesting to know—but we didn't ask—what were considered to be specialized newspapers. The *Washington Post*, for example? Perhaps the *New York Times*?

As a reminder that our respondents include many large corporate advertisers, 42 used both print and broadcast media, and 20 used at least four of the different media listed.

Media Mix Practices

Media	No. of companies
Print media only	50
Business print media only	29
Broadcast media only	5
Both print and broadcast	42
Used four or more media	20

Measuring objectives

Do these companies research their corporate advertising? The first question asked on this subject had interesting nuances. "Are your corporate advertising objectives specific enough to be measured?" Thirty were candid enough to say "no" or "don't know." Among the latter, comments ranged from "debatable" to "doubtful" to "1/3 Yes—2/3 No!" Don't be misled by 84 yeses for each of the first two questions: 16 of those who said their objectives are *not* specific enough, are doing research. The research frequency is relatively high for most.

Evaluation of Effectiveness

Are your corporate advertising objectives specific enough to be measured as to effectiveness?

Yes—84 No—23
Don't know—7

Have you conducted such research?

Yes—84 No—30

If yes, how frequently is it conducted?

Continuously	28
Annually	21
Bi-annually	12
Irregularly	10
No answer	13

We also asked what *kinds* of research were used. The answers were so diverse and scattered that it was not possible to quantify them. As you'd expect, however, there was a wide variety. Among those mentioned most were attitude and awareness studies, telephone and personal interviews,

various syndicated tracking services, ad pre- and post-tests, ad readership studies such as Starch, etc. Most used several kinds of research.

The last section of the survey dealt with the company departments involved in communications decisions and in planning and executing corporate advertising, and, importantly, with the corporate structure within which these departments report.

Department That Plans & Implements Corporate Ad Program (Base — 108 respondents)

	No. of Companies
Advertising (or corporate advertising)	51
Marketing or marketing services	14
Public relations & Advertising	8
Public relations	8
Communications (or corporate communications)	8
Miscellaneous (public affairs, etc.)	9

The data does indicate two things which I believe are significant. First, a continuation of a trend we first identified in 1969 for more of these companies to have broad-based communications-oriented departments reporting to the CEO or other senior management. Sixty percent of the user category reported such a department as the home for the corporate advertising function. Given the tenor of our times, and the many-faceted communications needs this presents to business, there is apparently growing management awareness that company communications is a total function—and a top management responsibility.

Where there is no such communications/central, nearly half of the 43 companies have the corporate advertising activity reporting to marketing. This practice is even more pronounced among the 76 non-user respondents who also were asked to fill out this part of the questionnaire. Sixty-six listed a department which would presumedly handle corporate advertising if or when it was used. Of these, 47 (71 percent) reported to, or were a part of, the company's marketing department. The majority of the consumer goods companies are in this latter category.

Positioning of Department

1) Is part of a broader Communications Department 65 (60% of respondents)

Title of head of broader department:

V.P. (Director)—Public or corporate affairs	17
V.P. (Director)—Communications or corporate communications	16
V.P. (Director)—Public Relations & Advertising	9
V.P. (Director)—Public relations	9
Marketing titles	3
Miscellaneous	4

Corporate officer to whom department head reports:

CEO (president/chairman)	36
Executive vice president	8
Vice president—marketing	6
Vice president—public affairs	6
Vice president—administration	4
Miscellaneous	5

2) Is *not* part of a broader Communications Department 43 (40% of respondents)

Corporate officer to whom department head reports:

Vice president—Marketing or marketing services	20
CEO (president/chairman)	13
Executive, senior or group vice president	10

Since communications responsiveness to the consumer and government demands being made on this type of company is so integral a part of marketing for well-managed companies in these industries, this orientation is to be expected. Compared to our 1969 study, marketing management *is* more involved in all communications decisions for such companies in 1975.

Exhibit 44: 1976 Survey



HOW TOP EXECUTIVES VIEW CORPORATE ADVERTISING

William S. Sachs and Joseph Chasin

The volume of corporate advertising has risen markedly in recent years. It is currently estimated at close to a billion dollars annually. But because of its subordinate position to the direct promotion of products and services, surprisingly little is known about this form of paid communication—what is expected of it, who can use it best, how does it work?

To get opinions and, hopefully, answers to some of these questions, we surveyed top management of *Fortune's* 500. The study, sponsored by *National Geographic* magazine, dealt with four related areas:

Attitudes as to potential benefits of corporate advertising.

Themes deemed most appropriate for corporate advertising.

"Target audiences"—major groups to which these themes should be directed.

Evaluation by survey respondents of editorial content of magazines that are potential carriers of corporate advertising.

Our sample, encompassing a probability design, was determined by established research procedures. As a result of two mailouts, we received a combined total of 618 usable questionnaires—a completion rate of some 55 percent among the initially selected respondents.

Major findings

Regardless of product line, sales volume or ad dollars spent, top management generally regards corporate advertising most favorably. When asked if corporate advertising would benefit their particular company, the overwhelming majority of executives answered in the affirmative.

Are Corporate Ads Highly Regarded?

Yes	72%
No	25%
No opinion	3%

The preponderance of favorable attitudes is surprising in view of the fact that the influences of corporate advertising are long term and subtle, that a measurable payoff is embarassingly absent. The oft repeated assertion by ad men that the need to "educate" management is like "beating a dead horse" is a shopworn expression out of phase with the times. Practitioners no longer face an unsympathetic or uninformed management. Rather, current conflicts, when they exist, arise from a sophisticated management's understandable insistence on greater efficiency from campaigns.

This is evidenced by management's contention that some corporations can use corporate advertising to better advantage than others, depending upon the products marketed.

Who Benefits Most?

Corporate advertising can benefit a company selling:	Percent of all executives	Management of companies whose main product line is: Consumer goods	Producer goods	Both equal
High-priced consumer goods	79%	74%	84%	73%
Packaged goods	61%	51%	67%	68%
Industrial products	72%	72%	72%	64%
Base	618	234	249	105

The above tabulation shows that in the opinion of 79 percent of respondents, companies most likely to benefit from corporate advertising are manufacturers of highpriced consumer goods. Here, purchase frequency is relatively low, demand can be deferred and, in varying degrees, consumer choice is a considered one. Search activities and comparison shopping may also characterize consumer behavior.

For the most part, products are differentiated by physical attributes, and service is an integral part of a transaction. Under such circumstances, it becomes quite obvious that non-product advertising can play an important role in the marketing effort.

But executives also feel, though to a lesser extent, that corporate advertising would benefit such diverse lines as industrial products (72 percent) and package goods (61 percent). In the former field, where purchase decisions are highly rational, advertising serves primarily as an aid to the sales force. In the latter field, where buying is often "impulsive," advertising becomes persuasive, intended to pre-sell and make transactions routine. But the fact that corporate advertising is seen as a potential benefit to such varied marketing situations testifies to its flexibility, usage for different

purposes, and capacity for diverse creative treatment.

The existence of an interplay between attitudes and experience is virtually a truism, and holds for the upper echelons of the business world. Executives in companies marketing producer goods, for example, are more favorably inclined to corporate advertising than their counterparts whose main concern is consumer goods.

Prime targets

Executives in all types of companies—consumer goods and industrial products, large and small advertisers—see the "public at large" as the most important single group to which corporate advertising should be directed. Some 76 percent of respondents favor this all-pervasive, ubiquitous public as an apt target audience. However, there may be certain qualifiers as to the definition of public at large.

How Targets Rank

Target Audience	Percent Favoring Target
Employees	23%
Financial community	46%
Opinion leaders	37%
Government officials	20%
Public at large	76%
Stockholders	29%
Trade (distributors, wholesalers, agents, etc.)	32%
Base	618

The large number of multiple mentions suggests management's keen awareness that a major corporation must deal with many publics. Consequently, there are secondary target audiences. The most important is the financial community.

Major theme preferences

As there are many publics, so there are many options in the way a corporation can project itself. It may talk about its policies, its philosophy, its operations, etc. Since, in the eyes of management, corporate advertising is closely related to marketing, objectives are linked to products. This is shown in the following tabulation of executives' responses to the question: "...what themes do you think are most appropriate and should be stressed?"

How Themes Rank

Theme	Percent of Affirmative Responses
Ecological concerns	29%
Corporate leadership	38%
Company philosophy	50%
Quality products/services	75%
Public issues	28%
R & D	48%
Corp. growth/profits	26%
Other	4%
Base	618

The large majority of respondents (75 percent) saw the most appropriate theme as one emphasizing "quality of products and services." But here the near unanimity ended. Disagreement as to other themes was substantial, depending upon a company's product line and sales volume.

Theme Preferences by Product Line and Sales Volume

	Percent of executives in companies with...			
	Main Product line in:		Sales volume of:	
Theme	Consumer goods	Producer goods	More than $2.5 billion	Less than $2.5 billion
Ecology	33%	28%	26%	30%
Corp. leadership	33%	42%	38%	38%
Co. philosophy	54%	47%	45%	51%
Product quality	78%	75%	64%	79%
Public issues	30%	23%	35%	25%
R&D	50%	41%	38%	44%
Corp. growth	19%	31%	25%	27%
Other	2%	4%	6%	3%

Executives of companies featuring producer goods, where service is highly important to successful marketing, are more apt to stress corporate leadership and growth in their corporate advertising. They are less inclined to stress research and development, not because it is less vital to their operations, but because the technological aspects manifest themselves in the level and quality of service. Corporate leadership and available resources are criteria by which prospective customers assess a company's ability and willingness to perform.

Companies with sales greater than $2.5 billion, though still favoring the product quality theme above all others, are less prone than those with sales below $2.5 billion to emphasize it (64 percent vs 79 percent). The reasons are less compelling. The sales volume is ample testimony to product superiority and service quality. Smaller companies, with smaller ad budgets, may also place higher priorities on brand support.

The largest companies are also more inclined to discuss public issues in their corporate advertising. Since this elite group is more heavily represented by the major oil companies, 19 in all, and include the three leading auto manufacturers, it can hardly shun public issues. With divestiture legislation pending for oil companies, and monopoly investigations hanging over auto companies, corporate operations have indeed become public issues.

[*Continued on page 22*]



Evaluation of editorial content

Executives were asked to evaluate the editorial content of magazines that are potential carriers of corporate advertising. This assessment was made on five counts with respondents indicating for each publication whether they think the editorial package is educational for the reader, objective and unbiased in its outlook, prestigious as an information source, of high quality and interesting.

	Percent who thought magazine is:				
General Magazines	**Educational**	**Objective**	**Prestigious**	**High quality**	**Interesting**
National Geographic	69%	40%	44%	62%	47%
Playboy	3%	3%		2%	30%
Reader's Digest	35%	24%	7%	19%	57%
Newsweeklies					
Newsweek	33%	18%	4%	18%	55%
Sports Illustrated	12%	10%	7%	19%	64%
Time	35%	12%	22%	19%	62%
U.S. News & World Report	35%	33%	22%	29%	44%
Business Magazines					
Business Week	42%	34%	21%	45%	50%
Forbes	30%	22%	30%	38%	56%
Fortune	43%	32%	67%	68%	45%

Executives were evidently highly selective in their evaluations. Opinions varied widely, both as to comparisons of media vehicles or magazine categories, and as to individual attributes in particular publications.

From a social point of view, there is no evidence of business exerting influence on editorial policy by virtue of corporate advertising. For example, executives were highly critical of newsweeklies as to their objectivity, editorial quality and prestige. Yet, there is no observable relationship between the volume of corporate advertising and management's views of a medium's editorial content. Quite the contrary, the relationship might even be inverse.

From an advertising point of view, the implications are less clear. Management's opinions are not necessarily those of a medium's audience. Besides, little is known about the relationships between the reception of a commercial message and the media environment in which it is transmitted. Only recently have major advertisers and their agencies shown a serious concern with problems of this nature. Their investigations, a long way from being conclusive, have dealt primarily with product advertising, and have been directed mainly to questions of violence on TV. But there is little doubt that as knowledge increases, the issue of media effects on commercial content and audience reception of commercial messages will take on a greater importance for corporate advertising in the years ahead.

Dr. Sachs and Dr. Chasin are associated with the College of Business Administration, St. John's University, Jamaica, NY.

Exhibit 45: 1976 Survey

HOW PR EXECUTIVES SHAPE CORPORATE ADVERTISING

Public relations departments in major corporations and associations continue to be involved significantly in conceiving, executing and placing institutional advertising. These findings were revealed in the *Journal's* fifth annual poll of 100 leading institutional advertisers (corporate and association) based on 1975 expenditures supplied by Leading National Advertisers, Inc.

The survey, based on 68 replies, shows that public relations executives continue to control—and with increased responsibility—the conception, theme, budget and media selection for institutional advertising. However, compared with the fourth annual survey, published in the November, 1974 *Journal* (there was no survey last year), there has been very little change in public relations involvement in institutional advertising during the past two years.

Public relations departments continue to be the principal originator of the *concepts* for institutional advertising by almost two to one over ad agencies and advertising departments. Public relations *involvement* in institutional advertising programs also continues to be high, receiving a 94 percent "yes" vote from survey respondents as it did in the 1974 survey.

Some 97 percent of respondents indicated that there is a separate budget for institutional advertising, compared to 92 percent in 1974.

Involved in media selection

Public relations still has the primary voice in selecting media for institutional advertising. Eighty-nine percent of respondents indicated that they are involved in media selection; 31 percent said they recommend media; 25 percent said they specify media. The 1974 figures were 85 percent for involvement, 32 percent for recommending, 26 percent for specifying.

To the question, "Are your 1976 expenditures more/less/about the same as in 1975?", 17 percent indicated more; 26 percent indicated about the same. The figures were both 44 percent in the 1974 survey.

Looking ahead, respondents are a bit more optimistic than they were in 1974. Some 46 percent see 1977 institutional advertising expenditures as being more than in 1976; 47 percent see it remaining about the same. In 1974, the figures were 41 percent and 48 percent respectively.

The final question of the survey asked respondents to rank the primary objectives of their institutional advertising programs. Responses to this vary somewhat from those in 1974. This year, improving stockholder/financial relations ranked first (24%), followed by improving consumer relations (18%), improving government relations (17%), and increasing product sales (16%). In 1974, the rankings were: improving stockholder/financial relations (24%); improving consumer relations (19%); improving trade relations (16%); and increasing product sales (16%). It is interesting to note that the category "Other" drew a 11 percent response as a primary objective (11 percent in 1974), even though this category included employee and community relations—two areas of major concern to public relations practitioners at the present time.

Where does the concept for an institutional advertising program originate?

	Replies	Percent
Ad agency	23	20.2
Advertising department	22	19.3
PR counseling firm	6	5.3
PR department	46	40.4
Product sales department	1	0.8
Top management	16	14.0

Is the public relations department involved in your institutional advertising program?

	Replies	Percent
Yes	64	94.1
No	3	4.4
Not stated	1	1.5

To what extent does the public relations department generate the theme for the advertising copy?

	Replies	Percent
Initiate	45	40.2
Influence	36	32.1
Approve	27	24.1
Not at all	4	3.6

Is there a separate budget established for institutional advertising?

	Replies	Percent
Yes	66	97.1
No	2	2.9
Not stated	0	—

Is the public relations department involved in selecting media?

	Replies	Percent
Yes	61	89.7
No	5	7.4
Not stated	2	2.9
To what degree?		
Recommend media	28	31.5
Specify media	23	25.8
Approve media	38	42.7

Are your 1976 expenditures for institutional advertising more/less/about the same as in 1975?

	Replies	Percent
More	10	17.2
Less	28	48.3
About the same	15	25.9
Not stated	5	8.6

Do you anticipate that your institutional advertising expenditures will be more/less/about the same in 1977?

	Replies	Percent
More	31	45.6
Less	2	2.9
About the same	32	47.1
Not stated	3	4.4

By Approximately What Percent?

	Replies	Percent
0 to 20%	14	20.6
20 to 40%	20	29.4
40 to 60%	5	7.3
60 to 80%	....	....
80 to 100%	1	1.5
Not stated	28	41.2

What characteristics do you look for in the media in which you place your institutional advertising?

[Answers generally tended toward audience demographics and quality. Responses are listed in order of answers given]

Audience characteristics and activity, nature and quality
Characteristics and quality of editorial/programming
Specific audience demographics
Financial/business readership, editorial quality
Upscale management audience, industry, finance, government
Plant and office city citizens largely; some ethnic audiences
Credibility, geographic coverage
Financial community—influence—customers reach of business executives and Wall St. influences

What is the primary objective (s) of your institutional advertising program? (Please indicate order of importance by numbering 1, 2, 3, etc., if your program has more than one objective.)

	Replies	Percent
Improve stockholder/financial relations	40	23.7
Improve consumer relations	30	17.8
Improve government relations	29	17.2
Increase product sales (product oriented)	27	15.9
Improve trade relations (suppliers, industry)	24	14.2
Other (e.g. employee relations, plant town and community relations, improve corporate image and reputation, public acceptance, communicate energy information	19	11.2

Exhibit 46: 1977 Survey

PUBLIC RELATIONS' ROLE IN CORPORATE ADVERTISING

Public relations professionals continue to play a major role in shaping corporate advertising policies and practices, according to the *Journal's* sixth annual poll of 100 leading corporate advertisers (company and association), based on 1976 expenditures supplied by Leading National Advertisers, Inc.

The survey, based on 74 replies, revealed that public relations executives continue to be involved significantly in the conception, theme, budget and media selection for corporate advertising. However, compared to last year's survey [*November, page 32*], there has been very little change in the degree of public relations involvement.

Public relations departments remained the principal originator of the *concepts* for corporate advertising, outscoring advertising agencies and advertising departments combined, 66.2 percent to 52.6 percent. Public relations involvement in corporate advertising programs also continued high, receiving a 92 percent "yes" response from survey respondents, although this represented an insignificant drop of two points from last year's survey.

Public relations practitioners also remained the principal voice in media selection. Eighty-five percent of respondents indicated they are involved in this function to various degrees. Almost 38 percent said they recommended media, over 39 percent said they specified media, and over half indicated they approved media.

Ad expenditures increased

Corporate advertising expenditures for 1977 increased substantially over 1976, according to respondents. Close to 38 percent indicated increased expenditures, while only 17.2 percent of respondents to the 1976 survey said their expenditures increased over the year before. [*See also page 22.*]

Likewise, asked if next year's expenditures would be more, less, or the same, 62.2 percent indicated more, compared to 45.6 percent of respondents to the 1976 survey. Most of those who estimated the percent of increase for 1978 felt that spending would jump somewhere between 20 percent and 40 percent. Some 21 percent indicated an expected increase of up to 20 percent. These projected increases pretty much paralleled last year's estimates, although those who expected a better than 40 percent rise in the year ahead increased noticeably.

Characteristics practitioners look for in media used for corporate advertising remained the same as last year and primary objectives maintained the same relative ranking. It should be noted that under "other" objectives, respondents included as major the presentation of the corporation's ideas on current social issues. This grouping as a whole ranked third among primary objectives this year, while last year it ran a poor sixth with a score of only 11.2 percent. Although it is impossible to determine from survey results what effect the presentation of ideas on social issues had on the significant jump in the importance of this group, one can conclude from other available information that this trend in corporate advertising is substantial and that it accounts for a sizable share of corporate advertising dollars. ■

Where does the concept for a corporate advertising program originate?

	Replies	Percent*
Advertising agency	20	27.0
Advertising department	19	25.6
PR counseling firm	9	12.1
PR department	49	66.2
Product sales department	2	2.7
Top management	17	22.9

Is the public relations department involved in your corporate advertising program?

	Replies	Percent
Yes	68	91.9
No	4	5.4
Not stated	2	2.7

To what extent does the public relations department generate the theme for the advertising copy?

	Replies	Percent*
Initiates	51	68.9
Influences	37	50.0
Approves	27	36.5
Not at all	5	6.7

Is there a separate budget for corporate advertising?

	Replies	Percent
Yes	69	93.2
No	5	6.8
Not stated	0	—

Is the public relations department involved in selecting media?

	Replies	Percent*
Yes	63	85.1
No	7	9.4
Not stated	4	5.4
To what degree?		
Recommends media	28	37.8
Specifies media	29	39.2
Approves media	38	51.4

Are your 1977 expenditures for corporate advertising more/less/about the same as in 1976?

	Replies	Percent
More	28	37.8
Less	22	29.7
About the same	17	23.0
Not stated	7	9.5

Do you anticipate that your corporate advertising expenditures will be more/less/about the same in 1978?

	Replies	Percent*
More	46	62.2
Less	4	5.4
About the same	20	27.0
Not stated	4	5.4
By approximately what percent?		
0 to 20%	16	21.6
20 to 40%	22	29.7
40 to 60%	7	9.5
60 to 80%	3	4.1
80 to 100%	1	1.4
Not stated	25	33.8

What characteristics do you look for in the media in which you place your corporate advertising?

[Answers generally tended toward audience demographics and quality. Responses are listed in order of answers given.]

Audience characteristics and activity, nature and quality
Characteristics and quality of editorial/programming
Specific audience demographics
Financial/business readership, editorial quality
Upscale management audience, industry, finance, government
Plant and office city citizens largely; some ethnic audiences
Credibility, geographic coverage
Financial community—influence—customers reach of business executives and Wall Street influences

What is the primary objective(s) of your corporate advertising program? (Please indicate order of importance by numbering 1, 2, 3, etc., if your program has more than one objective.)

	Replies	Percent*
Improve stockholder/financial relations	40	54.1
Improve consumer relations	30	40.5
Improve government relations	29	39.2
Increase product sales (product oriented)	21	28.4
Improve trade relations (suppliers, industry)	20	27.0
Other, (e.g., employee relations, plant town and community relations, improve corporate "image" and reputation. Major among other: to present corporation's ideas on current social issues, gain public acceptance, communicate energy information	29	39.2

**Adds to more than 100 percent because some respondents gave multiple answers.*

Exhibit 47: 1977 Survey

How Companies Evaluate Their Corporate Advertising

William S. Sachs *and* Joseph Chasin

As corporate advertising budgets continue to grow, managements are insisting on knowing what is being accomplished for the expenditure.

This means evaluation: comparing intended action with performance; objectives with results. To determine the extent of this evaluation, we conducted a study, sponsored by *National Geographic* magazine, to ascertain: extent of corporate advertising; what is being evaluated; how assessment is done; and who does the monitoring.

The study was carried out among the 500 largest manufacturing companies, ranked by sales, and the 175 largest service-type organizations, ranked by value of assets. The latter included banks, utilities and companies in transportation, insurance and finance. After two mailings to executives responsible for corporate advertising in these companies, 358 usable returns were received for a completion rate of 53 percent.

Who uses corporate advertising?

Among the companies responding, some 58 percent ran corporate advertising from 1972 to 1976. But there were notable differences. Primary determinants turned out to be product line and size of company.

		Percent by major product line		
Ran corporate advertising 1972-1976	Percent of all Cos.	Consumer Prods.	Industrial Prods.	Services
Yes	58	35	66	61
No	42	65	34	39
Base	358	78	169	111

The above tabulation shows the importance of product line. Almost two-thirds of companies whose mainstay was industrial products or service functions engaged in corporate advertising during the period. In contrast, two-thirds of consumer goods manufacturers abstained.

The broad consumer goods category, of course, is not uniform. And neither were advertising practices.

A close analysis of survey returns strongly indicates packaged goods companies do relatively less corporate advertising than the average consumer goods producer. This is understandable. Since items are low-priced, product advertising is heavily relied upon to generate sales, and brands are often disassociated from companies.

On the other hand, diversified companies marketing high-ticket items seem more prone to make use of corporate advertising. Consumer purchase frequency in these fields is low, and company reputation is a decided factor in a purchase decision.

The next tabulation shows the effect of size in the manufacturing sector. Firms doing an annual business of $1 billion or more had a much higher incidence of corporate advertising than smaller companies—70 percent versus 46 percent.

		Percent of companies by annual sales volume	
Ran corporate advertising 1972-1976	Percent of all Mfg. companies	$1 billion or more	Less than $1 billion
Yes	57	70	46
No	43	30	54
Base	247	111	136

An ongoing activity

Corporate advertising was an ongoing activity for the majority of its users. It was done regularly, year after year, without abrupt stops and starts.

	Percent of Mfg. Cos.			
Years used	Percent of all Cos.	Sales of $1 billion or more	Sales of less than $1 billion	Service Inds.
Five years	54	58	43	60
Four years	6	6	3	8
Three years	18	17	14	16
Two years	16	15	21	11
One year	8	4	19	5

As the above table indicates, manufacturing firms in the $1 billion or more category had more continuity in their corporate campaigns than smaller companies. Service industries, representing the largest firms of their kind, had advertising usage patterns similar to those of the biggest manufacturers.

On the whole, management has come to recognize that corporate advertising requires time, patience and continuity. These activities, when evaluated, are regarded as long-term efforts by executives responsible for them. Some 27 percent thought their programs capable of being assessed on a short-term basis. The vast majority, however, felt more comfortable with long-term evaluations.

	Evaluation can be made on a . . .	
Executive opinion	Short-term basis	Long-term basis
Yes	27%	73%
No	34%	10%
Not sure	29%	10%
Varies by campaign	10%	8%

Not only is corporate advertising regarded as long-term, calling for a steady, uninterrupted effort to be effective, its assessment is also tending to become an ongoing activity. Of all companies that engaged in corporate advertising during the past five years, only 17 percent made no attempt to evaluate it. The overwhelming majority, 83 percent, reported having done some probing into the effectiveness of their programs. And almost half of all corporate advertisers, 48 percent, depicted monitoring as something akin to "standard operating procedure," taking place on a fairly regular basis. Neither sales volume, product line, nor size of ad budgets had any effect on frequency of, or approach to, monitoring operations, most of which were performed yearly or semi-annually. The frequency with which corporate advertising is evaluated is shown in the following table.

Frequency of monitoring	Percent of all corporate advertisers
Regular basis	48
Selective basis, individual programs	35
Did not monitor	17
Base	208

How monitoring is done

Evaluations of corporate advertising rely most heavily upon market research. This approach was used by 90 percent of companies that assessed their corporate communications in mass media. But there were other important considerations.

Sources of information used	Percent of companies assessing corporate advertising
Market research	90
Letters from public	49
Officers' opinions in own company	48
Feedback from sales force	38
Comments in media	23
Stock prices	11
Sales, shipments, billings	5
Other	2
Base	173

Almost half the executives interviewed said opinions of corporate officers were an important factor in overall evaluation. In part, this reflects a natural inclination of admen and public relations people to have their managements approve of their work, which, in turn, leads to "inside selling."

But the importance of officers' opinions is far more basic than that. It is in keeping with a growing tendency to have those in

charge of corporate communications report directly to the chief executive. In effect, this puts the responsibility for corporate advertising squarely on the shoulders of top management. Moreover, since letters from the public, feedback from sales personnel, and comments in media all influence the opinions of senior management, they also become significant in evaluations of corporate campaigns.

What is monitored?

"What" is also the key to "why." If we know what is monitored, we can determine the objectives of a campaign, its purpose, its whys and wherefores.

Corporate advertisers measure several things simultaneously, which implies multiple objectives. Though corporate advertising by definition does not directly promote output, the most common measurements are closely related to companies' products and services. This is seen in the following table.

Type of measurement	Percent of use
Awareness of company/products	80
Company "image"	76
Recall of advertising	75
Changes in attitudes towards company/products	71
Number of inquiries, requests for brochures	47
Changes in attitudes towards point of view expressed	32
Sales, orders	7

Corporate "image" is a vague term that encompasses a wide range of perceptions. Executives were asked to define exactly what sort of images were being measured.

Type of image	Percent of companies measuring corporate image
Reputation	81
Innovative company	76
Leadership	70
Superior management	61
Diversified company	50
Growth	44
Social responsibility	42
Size of company	32

Basically, there were three types of images. In order of importance these were related to: products and services; operational and financial performance; and environment.

The most frequently researched image was company reputation, an attribute associated with products and services. Innovation, ranking second, is also related to a company's output.

Leadership is somewhat ambiguous. It can refer to output, as being the first to come out with a new product or service. Or it can connote financial primacy. A company with a major share of market is often thought of as being the leader in its field.

But items such as superior management, diversification, growth and company size refer to managerial and financial performance. The objective of such images is to make a favorable impression on the business and financial communities.

Who does the monitoring?

Primary responsibility for monitoring rests with market research firms. Their efforts are supplemented by advertising agencies, which concentrate on copy testing and small-scale studies to explore appropriate themes. Companies themselves are also engaged in monitoring, mainly by analyzing inquiries, requests for brochures and annual reports, and the like. The dominant role of market research firms has been strengthened by the exodus of ad agencies from the research field during the recession of 1974-1975.

Monitoring performed by	Percent of companies monitoring
Market research firm	77
Advertising agency	33
Company itself	30
Syndicated purchase	15
Other	3
Base	154

To determine how monitoring activities affected decisions, executives among corporate advertisers were asked about actions taken as a result of evaluative programs.

Action taken	Percent of companies monitoring
Modified advertising content	75
Changed media schedule	55
Increased ad expenditure	48
Decreased ad expenditure	19
Terminated campaign	20
Base	173

The most likely outcome of evaluation was a modification in the advertising program—its copy or media. A change in copy treatment can often lead to a change in media, such as a switch from TV to print or *vice versa*. But since agencies recommend media on the basis of cost-per-thousand audience [*See also, "Target Group Research: New Tool for Advocacy Advertising," page 28.*], it is difficult to understand how monitoring could have led to changes in media vehicles only, unless the target audiences were not properly designated to begin with. Unfortunately, this line of inquiry was not pursued further in the study.

More often than not, research led to increased rather than decreased expenditures. But 19 percent of companies reported they had at some time terminated a campaign as the result of research findings.

Problem areas

Executives were also asked what they considered the major problems confronting corporate advertising.

Major problem	Percent of corporate advertisers
Measurement of effectiveness	26
Creativity	24
Setting objectives	14
Budget appropriations	8
Of little value to company	7
Environmental restrictions or hostility	7
Media selection	6
Internal organization	5
No comment	31
Base	206

Two problems were paramount. The first was that of measurement. Despite the widespread use of market research, there was general dissatisfaction with its results. The numerous speeches and articles by researchers, on how their "scientific methods" can reduce risks and lead to better decisions, are seen, for the most part, as a plethora of unfulfilled promises.

The second major problem is the perennial one of creativity, the *raison d'être* of advertising agencies. In the judgment of advertisers, creative performance left much to be desired.

These problems, like corporate advertising itself, are likely to be long-term. Creative talent is in short supply and no relief is in sight. As long as companies insist on "state of mind" evaluations, research cannot escape the vagaries of surveys and the inexactness of attempts to probe human psyches. Yet, the industry must find ways out of this dilemma, for the problems of creativity and measurement are the greatest impediments to the growth of corporate advertising. ■

Dr. Sachs and Dr. Chasin are associated with the College of Business Administration, St. John's University, Jamaica, NY.

PUBLICATIONS AND ARTICLES ON CORPORATE ADVERTISING

Exhibit 48: "Crosscurrents, 1972"



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"Business Needs to do a Better Job of Explaining Itself" by Max Ways. Reprinted from FORTUNE, September, 1972.

"Trends in Public Attitudes Toward Business and the Free Enterprise System," Thomas W. Benham, President, Opinion Research Organization.

INTRODUCTION

The degree of our dependence on communication is still not appreciated. People talk as if communication were the grease that lubricates the social machine. Rather, it is the nuts and bolts and welds that hold the machine together, that make it a machine and not a random collection of parts looking for a unity. Communication in our society isn't the frosting on the cake; it's the cake.

Max Ways, FORTUNE

Recently, FORTUNE had the privilege of sponsoring a wide-ranging exploration of corporate communications, an updating on the state of the art. In attendance was a representative group of over 40 key corporate communications practitioners.

They exchanged ideas, demonstrated their current activities and, at the same time, looked ahead to the shape and substance of corporate communications in the future. Filling in the landscape of problems, portents, and opportunities were spokesmen from government, law, corporate management, from advertising agencies, public relations, research, and finance.

What took place during the three days of the FORTUNE Corporate Communications Seminar was a lively interplay of opinion and information stimulated by the participants themselves. FORTUNE provided the place and format; they conducted the program and were responsible for all that evolved which was revealing and useful. In a very real sense, the audience was the message.

And the message was quite clear. Today's corporate communications strategist is experienced, sophisticated, and very much attuned to the complex challenges which face his company and all of U.S. business. Paradoxically, his concerns, as expressed during the seminar, made an interesting parallel with those expressed by the critics of business and advertising: credibility, responsibility, involvement, truth.

His commitment to these principles is no less fervent than that of those who see business as a social or economic villain. It is, however, tempered by the realities of, and responsibility for, corporate profitability and performance. Without them, none of the social and economic agenda that business has indeed set forth for itself can be accomplished.

As Robert C. Myers, director of marketing, United States Steel Corporation put it:

When we say "We're Involved," we mean just that. We neither mean nor imply that we are singularly responsible for the creation of the nation's real or imagined ills, or singularly responsible for their correction. This includes pollution, minority hiring, Phase II, balance of payments or whatever you want to regard as corporate responsibility.

We promise only that we are in it, even as are all other groups or, for that matter, those who cast themselves in the role of concerned individuals. We also promise to the limit of our resources, which obviously are not limitless, that we will do what we can about things, no less as a matter of principle, but no more for obvious reasons.

So we promise, we hope, nothing more than believability, no gaudy brave new worlds of fantasy, no gaudy visions which we could conjure up but could neither support nor deliver, nor reports of corporate elixirs patently unsupportable by fact or intent. Frankly we're not very good propagandists.

The day of aimless, over-exuberant, corporate boosterism in communications is obviously over—as is the time when the need for effective corporate communications can be seriously questioned. Corporations communicate whether they want to or not, even at an advertising or public relations standstill. Their publics perceive the corporation in many other ways: through its products, people, press, and actions. The corporate communicators' role is to keep that perception in focus, to convey with clarity the products and services, the aims and objectives, the activities and attributes that concern and touch so many different groups, from customers, to employees, to government, to shareholders—a complex and difficult task. The men and women who can do the job are in position and doing it. And baking a better cake than ever before.

The Corporate Communications Challenge



We have the choice of resigning ourselves to reacting to the pressures and criticisms of others, or we can assume leadership roles and tell our story more effectively than ever before. As an economic instrument, the corporation has been a spectacular success. And business has also contributed greatly to the achievement of our nation's goals. But apparently not enough people are aware of these things to fully understand and appreciate what we have done and what we are now doing. We must demonstrate through effective communication that we are indeed serving the public interest.

Leslie H. Warner, Chairman and Chief Executive Officer, GTE

The seminar's keynoter, Leslie H. Warner, chairman and chief executive officer, GTE, traced the symptoms of poor communication between the corporation and the public, explored the underlying sources of today's new and different corporate communications problems, and described the basic characteristics he felt are always present in effective communications.

Both keynoter and representative of top management's necessary involvement and commitment to corporate communications, Warner set the stage for his discussion of the corporate communications challenge by citing a recent Opinion Research Corporation survey* which revealed that favorable attitudes toward business have dropped sharply since the mid-1960's.

"Most significant of all," Warner said, "is the fact that the attitudes of managerial and professional people, college graduates, upper-income people, and 'initiators' as a whole—the people who play leadership roles in their communities and their organizations and who ought to know better—are substantially less favorable toward industry and business today than they were six or seven years ago."

He also noted that the survey indicated a drop in the percentage of people who felt that large corporation profits "help make things better for everyone who buys their products and services," from 67 percent to 51 percent. At the same time, the study showed that the general public's estimate of the 1970 earnings of manufacturing companies averaged about 28% after taxes; in reality, they were about 4%.

Warner saw the principal obstacles to effective communications to be:

- Taking for granted the fact that the people or groups important to the corporation are well informed about it, which makes it seem unnecessary to tell the corporation's story. Lack of understanding

*The survey, "Trends in Public Attitudes Toward Business and the Free Enterprise System," was presented to The White House Conference on the Industrial World Ahead which was held in February, 1972. Several speakers, in addition to Mr. Warner, alluded to the study during the FORTUNE seminar. It is included in the appendix of this brochure.

exists, in fact, among individuals in government, in universities, as well as among segments of the general public.

- The difficulty of talking to someone in terms of his own interests. "We think we are saying one thing, but the listener thinks we are saying something entirely different because we are talking on two entirely different wavelengths." There is also the tendency to talk in terms of the corporation's problems and not the listener's problems.

These obstacles are confronted in a business climate of rapid, far-reaching change. There are changes in industry, in the ways corporations conduct business, in the development of entirely new industries. There is the blurring of once well-defined lines of business, the emergence of multinational corporations, foreign competition, government controls, social protest, changes in living patterns, consumerism, and the greatly increased involvement of young people in social, economic, and political institutions.

"There are a number of other major trends," Warner added: "environmental protection, the increasingly high level of education of the general public, the crisis in our urban areas—but they and the others add up to only one challenge for us: the challenge of taking a fresh new look at the ways we communicate with all our publics."

He concluded that there were four basic characteristics present in effective communications: a strong and sincere sense of commitment to good communication, collaboration—bringing together a multitude of viewpoints from within the corporation, credibility, and continuity.

"Communication must be continuous and it must look ahead . . . good communication must be a day-after-day fact of corporate life."



Research, analysis, and evaluation are the quality controls of the total communications concept. They permit us to perform much more effectively and efficiently in this area than at any time in the past. Their sophistication is increasing rapidly, and the communications undefinables of the past will be the definables of the future.

H. Walton Cloke, Vice President, Public Relations and Advertising, North American Rockwell

How an effective corporate communications concept evolves to respond to changing corporate capabilities and objectives was demonstrated by H. Walton Cloke, vice president, public relations and advertising, North American Rockwell, and W.P. Dunlea, Jr., vice president, Campbell-Ewald Co., the company's agency.

Dunlea traced the evolutionary chain leading to the current campaign concept, "North American Rockwell—Where Science Gets Down to Business."

The first step, taken in 1967 when the company was formed, was to announce the merger of North American Aviation and Rockwell Standard. A campaign to build recognition and definition for the new company followed in 1968. Before it was launched, however, research was conducted to determine a basic approach to North American Rockwell's publics. Analysis of the study indicated that "identity" not "image" should be the company's immediate objective—not just for advertising, but for public relations and corporate identity, the other facets of what Cloke calls the company's communications "triad."

"Over the next three years," Cloke recalled, "we identified . . . and we identified with emphasis." Supporting this concept was a new corporate symbol and logotype and a special "identifier" series of scatter ads to complement the main corporate advertising campaign. Factored into both series of ads was a "request for response"—an offer of North American Rockwell's annual report. In addition a number of different research studies were conducted to measure advertising effectiveness as the campaign proceeded. Media included newsweeklies, business, and financial publications.

The first significant indication of reaction came from the annual report offer. In the three-year period, 1969-1971, more than 40,000 annual reports were requested.

Realizing the opportunity for built-in research, Cloke initiated a study which was conducted by the Yankelovich organization among 4,294 respondents, 1,202 of whom returned the questionnaire. The results showed that 98 percent were male, 78 percent

were between the ages of 25 and 59, 85 percent were employed in business or finance, 8 percent in marketing and sales, 4 percent in science and engineering.

The main facts, however, were that 2 percent of the respondents said they bought the company's stock as a result of reading the annual report; 7 percent said they recommended the stock to clients or friends; a strong 42 percent said they intended to study the company further.

Eighteen months later, a benchmark study was conducted which also proved that the North American Rockwell message was getting through. It showed increased recognition of the company's name, management, capabilities, quality products, potential for growth, and its qualifications as a good investment for those interested in growth companies.

The study also suggested a change, Cloke reported. "It appeared obvious our publics had identified us quite well. The objective now was to maintain and continue to increase our recognition, but at the same time, to move from total emphasis on identity to a tandem effort including image."

A new slogan

In placing more emphasis on image and making it the spearhead of the corporation's total advertising program, the slogan "North American Rockwell—Where Science Gets Down to Business" was developed. It represented a primary capability—the transfer of technology from high scientific and engineering areas such as aerospace and technology to the corporation's commercial activities in automotive and industrial products. The theme was tested successfully and became part of the current series of ads, which place greater emphasis on North American Rockwell's total corporate capabilities.

Another seminar speaker, Robert C. Meyers, director of marketing, United States Steel Corporation, also pointed to research as a guide to determining the effectiveness of U.S. Steel's "We're Involved" campaign.

"At the beginning of the program," Meyers said, "we did a study which revealed, not too much to our surprise, that not many people realized we were involved. Less than a year later in a follow-up survey, two-thirds of the customers and prospects in our area of heavy advertising recognized our new slogan and associated it with U.S. Steel.

"Our most recent research shows some significant improvement in attitudes about our company. In regard to 'doing things of social significance'—from 24 percent before to 41 percent today. Similar improvements occurred in 'working to eliminate air and water pollution' and in 'keeping the public informed of its activities.' And a large number of respondents who have seen our advertising said, 'It improved my opinion of the company as a good business/community member.' "

Corporate advertising pitfalls

A step-by-step analysis of the common pitfalls in developing corporate advertising was suggested by Dr. Virginia Miles, senior vice president, Young & Rubicam:

- While trying to find a unifying theme for diversity of products, companies fail to look around at what others are doing. Messages from different corporations have become duplicated to the point where it is harder and harder for advertising to gain attention.
- Some companies try to shove every product the corporation makes under the same umbrella. Sometimes it's better to leave out products that just don't fit—i.e. "XYZ brassieres, another fine product of the American Meat Packing Corporation."
- Targets for corporate advertising are multiple. The danger exists of being diffuse—of trying to talk to all of the publics at once, so that the message fails to make a real impact on any of the publics.
- The message in some corporate advertising is so indirect nobody knows what the company is trying to say; borrowed interest overwhelms the message.

- The advertising is stuffy, abstract, pompous, even condescending.
- The company's other communications—through its products, its vertical advertising, its packaging, its pricing, its employment practices—contradict what the corporate advertising is saying, wiping out its believability.

Control at GE

In directing corporate and other advertising in a multi-divisional corporation, Roy Stratton, manager-corporate advertising at General Electric, utilizes four controls to manage a product and corporate advertising budget of about $70 million.

The controls are trademark usage (through a 108-page corporate trademark manual); media rate and schedule analysis, with a small media unit within the company that coordinates this activity; reports of advertising and sales promotion expenditures "to give a running fix on many different parameters of the GE advertising effort vis-a-vis sales, market share, and other factors;" and the GE Advertising Council, a group of 15 senior advertising managers who meet quarterly and discuss broad subjects related to the effectiveness and integration of GE advertising programs.

The GE Advertising Council, Stratton said, is the most important control because it provides a forum for sharing internal information, and an instrument for collective action in problem areas; it also ensures that all GE marketing components are aware of external trends that could conceivably affect GE communications.

Love and respect

At GTE, George Norton, vice president/advertising, also insists that the divisions employ common signature practices, media studies and joint media purchase. "But we have a very hard time controlling these people except with love and respect." He sees corporate advertising as an adjunct to marketing. "You've got to be very careful that you don't get in the way of the man running the division or the man running the marketing group."

At the same time, he observed, an effective corporate advertising program requires ". . . a total management commitment. There can be no equivocation on 'Is corporate advertising good or is it bad? Is it right or is it wrong?' " He also commented that the success of GTE's corporate advertisements was in no small measure due to the agency's having spent considerable time in the field with the divisions.

Stratton and Norton were in agreement on the funding of corporate ad programs. In Stratton's words, "We have long since learned not to try to go around and negotiate division by division. They just get the bill, and it's not broken out from the overall corporate assessment."

A New Basis for Corporate Communications



More and more, corporations are communicating with their publics not through the traditional verbal maneuvering and eye-pleasing graphics but through their actual deed—the actions they take, which are a reflection of how they think, how they feel towards society, the world around them.
David J. Curtin, Vice President, Director of Communications, Xerox Corporation



If the corporation sees itself as an integral part of the total environment and acts within this context, it will by this very recognition be doing something about the human spirit. So innovation is the imperative, and it has never been easy. And even if innovative steps forward may be ponderous, the echoes can be bountiful.
Robert A. Sandberg, Sr. Vice President, Advertising and Public Relations, Kaiser Industries Corporation

How should corporate communications react to a changed society, where today's publics—both internal and external—are looking at business in new ways? A new concept of corporate communications is needed, said David J. Curtin, vice president/director of communications, Xerox Corporation, and it is evolving from increased sensitivity to social issues: "The tone under which the corporation operates will sure enough communicate itself to its publics."

"Today's publics," Curtin pointed out, "both internal and external, are looking at big business in new ways. They are interested in the what, rather than the how, of what is communicated to them from big business. Society has reached that plateau of self-interest that emboldens it to ask big business: 'What have you done for me lately?' "

Curtin noted that Xerox' success—from $40 million in sales in 1960 to $2 billion in 1971—was not accidental nor directly attributable to advertising, public relations, or sales promotion. The basis of its success is the kind of company it decided to be.

The late Joseph T. Wilson, long-time chief executive officer of Xerox, felt strongly that every business decision must be a social decision, and that the two are inseparable. "His successor, Peter McColough, is of the same philosophic persuasion—a commitment to continued growth with good profits but also an honest determination to put something back."

Can this philosophy be communicated? "The answer," said Curtin, "is that you don't communicate—the company does . . . by its actions, by the nature of its decisions. More accurately, the company enacts its attitudes, and the corporate communicator is the conduit through which these deeds reach the public awareness."

How this philosophy was put into practice was revealed as Curtin described Xerox' communications effort, particularly its use of television. From selective sponsorship of "CBS Reports" in 1961, "The Making of the President" by Theodore White, a. series on the U.N. in 1964, and other public interest programs, to sponsorship of the current series, "America," the overall effect for Xerox is that people now perceive Xerox as a business institution

concerned with significant issues and problems. "It was not our product commercials that communicated this image, but the program itself, and our sponsorship of it."

Xerox' social responsibility does not end with its sponsorship of educational-type programs. The company is involved in training programs for inner-city minorities, financial aid to higher education and cultural pursuits, and the participation of corporate executives in community affairs and public activities.

"Such institutional concern for the public welfare . . . has translated itself—in terms of business success—into a reputation for product quality, excellence of sales force, and dedication to meeting the needs of the customer. It has bred a sense of integrity, of excellence, and of self-esteem among employees, and this, too, has passed on to our users and the public at large, including in large measure, young people.

"The concept I have been speaking of," Curtin continued, "does not minimize or obsolete the individual functions of corporate communicators . . . the responsibility of the communicator is, indeed, expanding rather than contracting. His challenge today is to modernize his thinking and broaden his scope and sensitivity."

The impact of innovation

That concept at work was in evidence as Robert A. Sandberg, who heads up Kaiser Industries Corporation's advertising and public relations, described the planning, production, and impact of Kaiser's Oscar-winning film, "Why Man Creates," and the development of the corporation's outstanding magazines and books.

Innovation can mean impact, both external and internal. At one time, the film was generating 500 to 600 letters a week as it was being shown around the country, and it was not unusual to get 200 to 300 letters in a week commenting on individual issues of the magazine, Kaiser News.

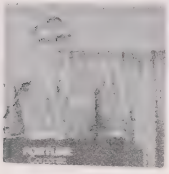
This attempt to portray Kaiser's involvement in great issues and trends is also reflected in Kaiser's corporate advertising.

Why does Kaiser do things the way it does? Sandberg answered this question with a quote from Albert Schweitzer: "The momentum of our time is change and the human spirit is the impetus."

Corporate Communications and Government



If effective assistance is to be provided to the business community, and if business people are to do their share as corporate citizens, there must be continuing two-way communication between the business community and government people who are shaping and carrying out national policies.
Basil Littin, Director, Office of Public Affairs, Department of Commerce



A major company which fails to serve as its own interpreter in Washington, either directly or through a trade association, runs the considerable risk that its activities will be misinterpreted by those who regard business quite simply as a form of organized theft.
Rodney Markley, Vice President, Washington Staff, Ford Motor Company



I think that corrective advertising is the kind of remedy which is inconsistent with the very broad reach of the Federal Trade Commission's authority, and I think if they are going to be able to nip anti-competitive or deceptive practices in their incipiency, then they ought to recognize that the nip should be a circumcision rather than an amputation.
Paul Warnke, Partner, Clifford, Warnke, McIlwain & Finney

An increasing number of corporate executives find Washington, D.C., a regular stopping-off point in their business travels. And they're more likely to see the inside of a congressional hearing room than the top of the Washington Monument. There is no question about the growing involvement of government with business and vice-versa. There are, however, many questions about how best to communicate with Washington, how to make business heard as loudly and as well as its critics, and how to exert legitimate influence on policies and programs that affect corporate operations and profitability.

"The trouble with most thinking and conversation on the topic of business-government communications is that it is grounded on a false assumption," said Rodney Markley, Ford's top man in Washington. "The assumption is that business has a *choice* about whether or not to communicate."

Markley pointed out that a "low profile" is not a feasible stance for a major company today. Communication with government takes place through annual reports and proxy statements, through press coverage and trade advertising, through data supplied to the I.R.S., the Labor Department, the Price Commission, the Commerce Department, and, as Markley noted, what the government doesn't discover on its own may come from stockholders, dealers, consumers, environmentalists, or social activists on the national or local level.

"What some businessmen regard as a deliberate policy of noncommunication with government is, in actuality, a policy of negative communication . . . Those in Congress who are or *would* be receptive to the business point of view repeatedly complain that they do not receive the kind of information they require if they are to be effective in the legislative process."

Confirming this view, Basil Littin, director of public affairs for the Department of Commerce, said that the typical corporate executive views government as the other side in an adversary relationship. He urged that businessmen get to know the workings of the bureaucracy and, particularly, to start with the

information or public affairs staffs of those departments or agencies which are pertinent to a company's operations.

Littin, as did Markley, emphasized the importance of frequent and personal contact by corporate representatives, but both noted that few corporations have executives assigned on a regular schedule to the Washington beat; most rely instead on trade associations for their government communications.

"These associations," said Littin, "do a good job as far as they go, but they are severely limited by having to speak for a consensus. . . Trade associations also lack eyeball to eyeball clout, the ability which a company possesses to grapple with the guts of an issue and to engage in plain talk about it."

Markley had two suggestions for a corporate representative who arrives in the capital, works his way through the bureaucracy, and has the opportunity to speak out:

First, "bear in mind that you should not say anything in Washington that contradicts what you say elsewhere to other audiences. Your chances of getting caught in a contradiction are very high. Indeed, if your statement is made on the public record—in congressional testimony, for example—the chances approach 100 percent.

"Second, while rhetoric has its uses, Washington is much more interested in facts than in being sermonized. Present accomplishment is much more impressive than promises about the future. Honesty is not only the best policy; it's the only policy."

Markley also contended that effective Washington communications must be tailored for different audiences with different interests and needs, as disparate in intent and purpose as the Commerce Department and the Antitrust Division of the Justice Department. Such a program requires professional help, internal or external, from an experienced Washington operative.

"Communicating" with the FTC

Paul Warnke, noted Washington lawyer and former top official in the Defense Department, gave the seminar the benefit of his experience in "communicating" with the Federal Trade Commission.

Warnke saw the controversy about the FTC circulating around three different areas:

- The question as to whether or not the FTC can utilize its cease-and-desist powers to impose retroactive relief in the areas of corrective advertising and restitution.
- The proposal that the FTC has presented to the Federal Communications Commission concerning counter-advertising.
- The recently issued complaint against cereal manufacturers, with its implication that the federal government will attempt to restructure oligopolistic industries—industries in which there are too few sellers and a captive market.

Warnke's view of remedies such as corrective advertising, and restitution, meaning giving money back to somebody who has been deceived, was that they are not consistent with the broad construction of the FTC jurisdiction, which has been traditionally confined to the devising of prospective remedies. However, he cited a 1950 Supreme Court decision involving a motion picture advertising case in which the Court held that the FTC could nip anti-competitive practices in the bud. And, recently, in deciding the Sperry Hutchinson-Green Stamp Case, the Supreme Court held that the FTC could outlaw a competitive practice even though it constituted no violation of either the spirit or the letter of the antitrust laws, and that they could do so even though the practice had no effect on competitors. The FTC could do it solely because of the *possible* effect on consumers.

In Warnke's view, the present tendency of the FTC to deal in remedial measures—measures that are retroactive when coupled with their broad jurisdictional sweep—constitutes an economic impact of very appreciable significance.

"In order to prevent the continuation of ads that the Commission has determined to be false or deceptive, I can see where they might be able to require affirmative disclosures. If there is some misleading omission, then the Federal Trade Commission should be able to decree that an advertiser should supply that omission. But I think that is quite different from requiring a concession of past misconduct in some future ad. . . The Commission, if it is going to have this very broad sweep to deal with practices in their incipiency, ought to be limited to dealing with these practices only in the future and not in any effort to require some continuing *mea culpa* on the part of somebody who might have been in a sort of 51-49 or a 49-51 position, as far as legality is concerned."

Corrective advertising

In discussing corrective advertising in relation to recent complaints about analgesic advertising, where the contention is that comparative advertising was misleading, and unfounded scientifically, Warnke was troubled by the proposed relief. That is, 25 percent of the advertising budget would have to be spent in corrective advertising over a two-year period, with the alternative of not advertising the product at all during this time span.

In addition, Warnke pointed out that there have been suggestions that the FTC should not have to wait until the end of a long proceeding before putting a stop to an advertisement that it regards as false and misleading. "What they've suggested is that, when the FTC files a complaint, the advertiser should be required, in the alternative, either to drop the ad or else to put a flash across the ad which says, 'Despite what I am saying, the Federal Trade Commission says I'm a liar. . .'

"I suspect that what all of these things indicate is a degree of hostility to advertising. This has been suggested in the past, but I think that it's beginning to show up more and more and that the federal enforcement agencies really feel that advertising is, by itself, somewhat suspect. . . This overall attitude is, at least potentially, a very grave threat."

Warnke then went on to discuss counter-advertising, which is quite different from corrective advertising. The FTC has proposed that the Federal Communications Commission should afford a free forum for the opponents of advertising, for those who espouse a different point of view to have an opportunity to get through to the American public.

No free rides

Warnke's opinion is that those who have an opposite point of view in relation to a particular advertisement, or a particular category of products, should have to pay to present that view. "The opportunity is really all that ought to be available, not a free ride."

"As I've understood it, in principle, the purpose of a seller's advertising is not to present all sides of a controversial subject. It's to plug his product. That's his one concern. And if he does it honestly, that's really all that ought to be required of him."

Warnke felt that restrictive control over advertising can have a serious effect in curtailing advertising expenditures, depriving communications media of an essential source of revenue. "I would not argue that this contribution justifies the permission of false and deceptive advertising but I don't regard the history of advertising as a threat to the Republic. . .

"I support a vital and active FTC. It's supported me for years. But an indiscriminate use of its wide-ranging authority would cause an economic pain that even Preparation H won't cure."

The Impact of Consumerism and Environmentalism



For the first time, many industrial corporations find themselves in the public eye and forced to talk directly to the public. Even those corporations which make and sell consumer products often have been insulated from the man on the street. Now that insulation is being stripped away as segments of the public make their demands known. So the question becomes, how best to conduct this dialogue? Through existing corporate communications channels, of course, but to what publics? Obviously we must address ourselves not only to the environmentalists, but also to legislators, other corporations, customers and suppliers, the financial community, and the "public"—John Q. Citizen.

Richard N. Confer, Vice President and General Director of Advertising, Reynolds Metals Company*



. . . we intend to communicate [to the public] a degree of sophistication that makes them realize that the earth will never be pure again. It hasn't been pure since the first animal waste trickled into the first snowcapped stream flowing off the Rockies. It will never be pure again. There is waste always in the world; it's a question of managing the environment.

Barry Bergh, Special Assistant to the Administrator of the Environmental Protection Agency

*Mr. Confer has since left Reynolds and is now president, Communications Counselors Network, Incorporated, a division of the Interpublic Group of Companies.

While the twin concerns of consumerism and environmentalism touch every corporation today, Reynolds Metals Company has been involved on these fronts for a number of years. The Environmental Protection Agency is a relatively new adjunct of the federal government.

Both organizations have had to shape their communications efforts to create a fuller understanding of their aims and objectives. While Reynolds has the benefit of seasoned, in-place communications echelons with experience in the environmental and consumer fields, the EPA is faced with the difficult task of defining its communications problems while simultaneously working out definitions and standards for the agency itself.

The common ground they share is that neither can function effectively without public support of its programs and goals. And, ultimately, both Reynolds, symbolic of major industry, and the EPA need to communicate their special views to each other.

These parallel communications challenges became evident in talks delivered by Richard N. Confer, then vice president and general director of advertising at Reynolds Metals Company, and Barry Bergh, special assistant to the administrator of the Environmental Protection Agency.

At Reynolds, the issues of consumerism and environmentalism had little effect on the *organic* structure of corporate communications; its advertising and public relations departments were entities in existence for a long time. Supplementing these departments is a field system of four regional public relations offices providing mobility and local community awareness. But Reynold's communications—what it said, how it said it, and to whom—underwent marked change.

Effect of environmentalism

In 1963, Reynolds started the first high-speed manufacture of the 12-ounce, all-aluminum can. Advertising sold the beer and soft drink industries and the general public on the aluminum can's advantages. Sales mushroomed. Plants were built around the country to meet demand. But, as Confer related, "It wasn't too long before the first murmurings of environmental concern were making themselves heard."

At about the same time, Reynolds started its reclamation program. It was designed to make recycling a household word and recycling aluminum a part of life. Reynolds hoped the program would also demonstrate to legislators and the public that the solution to solid waste and litter "can be found in technology and economics, in motivation and incentives, not in compulsion."

Recycling has always been a part of the aluminum industry; aluminum is too valuable to throw away, and now more than 20 percent of the aluminum used in manufacture is recycled material.

After approaching the problem of retrieval by appealing to the public's altruistic and charitable instincts, Reynolds soon modified its programs and offered 10 cents a pound for used aluminum cans. The response increased slowly, but today it is exceptional, and the program is becoming national in scope. It is supported by advertising in a variety of media and by public relations on national and local levels.

A corporate advertising campaign that several years ago took the form of a progress report on recycling ideas and programs was followed by ads which showed that the program was working. In 1972, one Reynolds ad was headlined: "How Aluminum Can Help Pay Our $5 Billion Garbage Bill." "We invited letters to learn more about what we were doing," reported Confer. "The response has been overwhelming."

Confer concluded that "the greatest impact that consumerism and environmentalism have had on Reynolds is the sensitization of both operations and communications people within the corporation to these factors. These are recognized as real problems in a real world rather than some passing fad."

Government's appreciation of these problems is clearly manifested in the existence of the Environmental Protection Agency itself, now about two years old.

Reaction at the EPA

Dealing with the complexity of environmental problems at such a tender age isn't easy. "We probably have a more difficult job to do than other regulatory agencies because we work in a field not necessarily new," said Bergh, "but so broad and in which so much research has yet to be done that we are asked practically every day to make standards and decisions for which there is not yet scientifically verifiable data."

To ease this problem the EPA is run as an open agency and, under the Freedom of Information Act, it makes available to the public all of the evidence that is submitted to it, on which its decisions are based.

"We maintain that the only way we can win back the confidence of the American people in their public institutions is to convince them of the extraordinary complexity of the public issues of the day."

To do this, the EPA is drawing up a communications plan, attempting to set priorities for what it considers the important things the public should understand. The basis for the plan is a benchmark study, what Bergh calls "a very sophisticated piece of attitude research" to determine people's perceptions of the environment and environmental hazards right now. This will serve to distinguish between what the public considers a nuisance and what it considers a hazard.

In addition, the agency is focusing on a five-year communications plan. Bergh described its purpose: "to communicate to people some of the truisms that they too little understand about environmental quality—what it means, how you go about achieving it, and what relationship it has to all the other activities of our society."

Communicating with the International Business Community



Effective international communications demand extraordinary perseverance in respect to this most basic element of communications: language. Frankly, many European businessmen, journalists, and government officials with whom I have spoken often find the American's eagerness to impress and impose working to our disadvantage. They're critical of our communications programs because we too often insist on asking them to accept our methods in our language on their premises.

Richard R. Mau, Director of Communications, Sperry Rand Corp.



There are more audiences to reach in more countries, and their attitudes are already colored by varying degrees of hostility. Local business and financial communities can no longer be counted upon as natural allies. It will be harder to make local corporate policy jibe with global corporate policy and to communicate both without contradiction.

Robert W. Bowen, Senior Vice President, Hill and Knowlton International, Ltd.

As multinational business expands and corporate profits attributed to operations outside the United States increase in significance, worldwide and worldly corporate communications programs must reach out to accomplish around the globe what they have traditionally attempted to achieve in the United States. Many U.S. communications programs do not travel well, although fueled by good intentions. As in the U.S., the currents of change—economic, political, social—make the journey difficult, and demanding of artful and experienced hands.

Two communicators with special expertise in the international area, Richard Mau of Sperry Rand and Robert Bowen of Hill & Knowlton, gave the seminar audience a realistic view of the practicalities involved in worldwide corporate communications.

Mau emphasized three basic considerations:

- identifying and respecting the variables that exist in corporate communications in the international marketplace.
- knowing the perspective of the public you are attempting to reach.
- clearly defining the future course of action.

Mau pointed to the "potential abyss of understanding when people of two or more national heritages attempt to exchange ideas through generally inadequate translations of their native languages: Your audience may read and speak English, but they *think* and *work* in their native language."

Both speakers noted the impact of Servan-Schreiber's book, *The American Challenge.* Bowen said the book was "a catalyst to existing trains of thought. In an orderly way it caused Europeans to focus on what they were already worried about but had not articulated—whether the American corporate presence was not an economic Trojan horse."

Already, counter-measures are being taken by various nations to avoid technological and economic dependence on the United States: investment restrictions, controls on foreign management, and proposals for Europe-wide corporation laws to promote mergers of European companies so they can compete with the

American multinationals. Mau said the last is illustrated by the number of combines being formed to compete with U.S. computer manufacturers. He also noted that current studies show that pollution, education, and government control are now concerns of Europeans as well as Americans.

Differences in audience

The audience for international communications is different in character and size than the U.S. audience. The relationship of national and state governments with industry and labor unions differs from country to country. Trade associations are far more effective as spokesmen for industry than are their U.S. counterparts.

Mau continued, "Europeans are persuaded and kept informed in much the same manner as Americans, but in Europe fewer individuals carry more influence. It's a smaller universe of opinion leaders, but their power is far more substantial in most respects than in the United States. Control of major companies tends to be held by fewer people . . . Officials of banks are more important in Europe because in many countries the banker also serves as stockbroker. Government officials tend to have more power over the economy . . . they work closely with business management." Mau proposed that communications planning must consider these differences as well as anticipate public issues which are coming to the surface in other countries.

Robert Bowen saw the last few years in Europe as a period during which a number of sleeping dogs awoke. "In the last two years there has been a steady polarization of attitudes in Europe, with government, business, and labor unions increasingly making common cause for different reasons—and in ways often hostile to the interests of American multinationals."

Governments are alarmed about the U.S. balance of payments. Currency revaluations have dissipated the cordial relations that existed between American and European businessmen and, in their stead, there is growing resentment and nationalism. Labor, traditionally weak on the international plane, is now trying to organize across national boundaries. And hovering above is the Common Market Commission, whose first antitrust action was directed toward an American company.

Bowen advised that these problems could be dealt with in a number of ways:

- more international travel by a greater number of corporate executives.
- the development of more truly multilingual young executives than ever before.
- teaching American businessmen more about how to deal with state-owned companies and become more at ease philosophically with foreign governments, which are much more involved with their economies than is ours.
- encouraging the present trend toward greater European direct investment in this country, and helping to publicize the extent of European investment here so European opinion leaders will be aware of their stake in the U.S. economy.

Communicating with the Financial Community



Perhaps the most practical and economical job that corporate advertising can do is to presell the people who are the financial community's clients and reinforce and supplement your personal and printed communications with Wall Street and your shareholders.

Bruce Friedlich, Chairman and Chief Executive Officer, Friedlich, Fearon & Strohmeier



If you can find a dynamic company official who is hard-hitting, but not too hard-hitting, thoroughly honest, but not too thoroughly honest, articulate in the best sense of a good sales type, but armed with information, with a knowledge of—and this is important—who the analysts are . . . and supported with the full backing of top management in his company—if you can find him, I think you would go a long way in solving your problem, if there is one, of successful corporate communications with Wall Street.

William I. LaTourette, Senior Vice President, E.F. Hutton & Co.

One of the key tasks of the corporate communicator is to keep the investment community apprised of all the salient aspects of his company's performance. The assignment is continuous, sensitive, and perhaps the most difficult of all. What is the makeup of the audience—and who are the key targets within the audience—for financial communications? What are the best methods for reaching the financial community? What do you say when you've got them?

These questions and others were deftly answered by two men with special expertise in finance and financial communications: William LaTourette of E.F. Hutton and Bruce Friedlich, who heads an advertising agency which creates effective corporate financial campaigns for a number of major clients.

LaTourette's talk was hard-hitting, incisive—and off the record. He cited a number of cases of effective and not-so-effective corporate dealings with Wall Street, took the seminar participants behind the scenes of recent Street activity, and left them with revealing insights into how best to make their corporations heard and heeded by the financial professionals. A theme running throughout his talk was: know who the analysts and the other key influentials in financial firms are, give them the information they need—give it to them honestly—and most important, pave the way for direct contact between corporate management and the financial marketmakers.

Rounding out the seminar's view of financial communications, Friedlich was not off the record, but very much on the mark. His "simple" definition of its role: "To tell the financial community what management is doing to increase the value of the enterprise."

Credibility is basic

He joined with LaTourette in pointing out that credibility of the message is basic. Given the right message, who do you deliver it to? Friedlich defined the financial community as the stockbroker, the banker, the individual investor—ranging from the sophisticate to the very naive—the institutional investor, the pension plan, the mutual fund, the insurance company, the bank and trust department. . ." but most of all, it is the security analyst."

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How many analysts have to be reached? "We are talking about only 100 or 200 analysts in Wall Street firms or institutions who are crucial to your company. If you are a pharmaceutical company you need talk to only two analysts and an assistant at Merrill Lynch. These analysts are at the heart of your corporate communications target and they're not easy men to influence."

The analyst can be reached through direct contact with top management, and with printed materials, but "in one year, the typical security analyst is subjected to somewhere between 600 and 1000 annual reports . . . thousands of quarterly reports, business and trade publications, and thousands of routine publicity releases, earnings reports, etc. . . With about 40,000 public companies, all with disclosure needs—and ambitions for higher price-earning ratios—he is the target of a blizzard of information."

Friedlich focused on the use of printed communications; first the press release. He concluded that "reaching the analyst via news columns is like sending a lettuce leaf via a rabbit." He backed this contention by reporting on a fast survey he had done at the New York Times and the Wall Street Journal. The former gets over 1,000 corporate press releases every business day. The latter gets what was described as "two waist-high wastebaskets-full."

Abolish annual reports?

Moving to the other mainstays of printed corporate communications, annual reports and corporate advertising, he contended that annual reports are largely outdated or beyond serving their original purpose. "Too many annual reports are, literally, monuments, ego trips, gilded lilies. All too often the package is not what the company is, but what the company would like to be." In fact, the investment professionals know almost everything that appears in an annual report long before it appears.

"I'd like to suggest that annual reports be abolished, at least in their present form," said Friedlich. He recommended that a continuous flow of information through sufficiently detailed quarterly reports would be more responsive to the financial community's needs. "I'd even suggest that the fourth quarter report not wait for the audited figures."

To supplement these financial reports, which would also be sent to shareholders, Friedlich recommended advertising and described the advertising audience in this way:

"This community is structured like a target. The center of your target is a few hundred out of about 15,000 security analysts. Their recommendations go to, and may be acted upon by, perhaps 43,000 institutions, 50,000 stockbrokers with NYSE firms . . . who sell to your own shareholders, plus from one to five million businessmen and, potentially, to some thirty million total investors. Beyond this are wider circles, which include the general public and your special publics.

"The appeal of your company becomes a major factor in whether (or to whom) the analyst or broker recommends your securities."

Friedlich took a dim view of "good guy" social program advertising, feeling that it misses the cynical Wall Streeter. "They consider it wasteful and blatantly self-serving."

He suggested that there is a much tougher "consumerism" among the investment professionals. "They want to know more about the ingredients in your product and profit—more than they want to know how you feel about Motherhood."

The Future Environment for Corporate Communications



I think consumerism, environmentalism, hostility to economic institutions, hostility to their values—including achievement, advancement, work, orientation to the future, an interest in technology, an interest in planning, rationality—hostility to all these things is probably here to stay, and is very rapidly growing stronger. It is likely to be led by intellectuals in the artistic creative sector . . . and it is likely to be shared by many people in the business community itself.

Anthony Wiener, Chairman, Research Management Council, Hudson Institute

Anthony Wiener and the other seers at the Hudson Institute are presently developing a study of the corporate environment, 1975 to 1985. Wiener said the study was not an attempt to predict what's going to happen in another ten years but an aid to planning, a search for unforeseen contingencies. His analysis of forces shaping the environment and related trends was consequently not only to the point but filled with a number of valuable perspectives.

Some of his views in summary:

- The prospects of growth rates in various parts of the world indicate that inequalities in the distribution of income are likely to continue and in some cases grow worse. It will be well into the 1980's before many European countries have living standards comparable to the American. About 1985, unless something has changed, the difference in labor costs and the difference in living standards between the U.S. and the rich countries of Western Europe will have disappeared. The highest growth rate in Europe is that of France, and in another 15 to 20 years, France will be the richest country in Europe. Great economic gaps will still exist between the developed and underdeveloped countries.

- The state of our society, or the U.S. economy, has become post-industrial. About twenty years ago, we began to employ more people in the service sector than in the manufacturing sector, with practically no increase in the manufacturing sector and a great decrease in the agricultural sector.

- Because the markets of a service-dominated economy—i.e. transportation, communications, insurance—are different from those in manufacturing, they are more subject to government regulation and certain manufacturing activity gets redefined and perceived differently. A company is no longer perceived as putting widgets on the market and selling them on an intrinsic basis; it is perceived as providing certain kinds of services which are connected with widgets.

- Are there limits to growth that are physical, that are imposed by limitations of energy, resources, the capacity of the environment to absorb pollution, etc., as indicated by the recent Club of Rome study? "All this is nonsense, because the things we are going to do, with environment, resources, and food supply,

etc., are likely to be just as exponential as they have been in the past. That doesn't mean we can go on forever. What it does mean is that we do not know the limits."

- New middle classes are emerging all over Europe, in Japan, in countries like Brazil and Mexico, and other places in the world. In the past, periods of great renascence and great creativity paralleled a sudden emergence, an upward thrust, of some new group in society. But these new middle class advances point in the direction of a new kind of renascence, which is directed against business, against economic activity, against the very economic institutions that have given rise to the prosperity.

- The new pressures on business—consumerism, environmentalism, corporate social responsibility—are here to stay. Corporations cannot take a low profile. "If there is a battle of persuasion, it had better be joined."

- The confidence of Americans in every institution has decreased, but it has decreased more for business than for other institutions, and more for some sectors of business than others.

- While it is true that there is hostility toward multinational corporations in Europe, these corporations meet very real needs in terms of their capacity to transfer capital, technology, and management skills, and to provide development which would not otherwise occur. What is happening is conflict between two pulls in opposite directions.

- Strategically placed minorities make a huge difference in terms of social change. The dominant values of communicators in society—academics, journalists, intellectuals—are hostile to business and economic institutions. "We're quite sure that this has something to do with the increase in affluence, that affluence is going to continue to increase, and the hostility will continue to increase."

- It would be a mistake for business to promise more than it can deliver in relation to corporate social responsibility. Business cannot afford to say it is setting forth to solve the nation's problems. "In another five or ten years, those problems will still be with us, not solved, and businessmen will be blamed for not having solved them."

A Word from Fortune

The FORTUNE Corporate Communications Seminar clearly indicated that corporations and their communications directors are actively responding to the changing environment in which business operates today. How well they succeed will depend on more than their awareness and creativity. It will ultimately be decided by how effective their programs are in reaching the audiences for whom they are intended; not an easy task in the face of the information deluge that envelops us all.

As so many of the seminar speakers noted, pinpointing target audiences is one of the most important steps in making corporate communications work. No corporation can afford to talk with equal emphasis to everyone, but it can focus its communications on those people who carry the most influence—in customer markets and in money markets, in echelons of social activists and in centers of government, in traditional U.S. business communities and in industrial capitals of the world.

In the end, it is not how many are exposed to a corporate message that counts, but how many of the *right* people absorb it, understand it, and have the power to act on it.

Generating response to corporate communications by the *right* people is FORTUNE'S traditional role, and a continuing one. The Corporate Communications Seminar was an extension of that responsibility. And we intend to keep the dialogue going in the future.

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Appendix

"Business Needs to do a Better Job of Explaining Itself" by Max Ways. Reprinted from Fortune, September, 1972.

"Trends in Public Attitudes Toward Business and the Free Enterprise System," Thomas W. Benham, President, Opinion Research Organization.

Business Needs to do a Better Job of Explaining Itself

by Max Ways

"The solar system," said Ralph Waldo Emerson in one of his unanswerable sentences, "has no anxiety about its reputation."

Nice, no doubt, for the solar system, but what else can afford so lordly a detachment? Not the U.S. business community, which is, right now, desperately worried about its reputation, so anxious that it tends to shrink back into its shell.

Such timorous occlusion can't be the right business response to calumny. Nor would the reputation of business be brightened by a new outburst of aggressive boasting, a tactic tried all too thoroughly in the past. Nor does it do much good to blame "the intellectuals." The root of the difficulty lies deeper.

For decades business has been underestimating the gravity and the nature of its public-relations problem. The truth is that there has never been a wide and solid understanding of the business system. As it becomes more complex, as it gets more deeply involved in such questions as the tax structure or environmental protection, the public's inadequate understanding of business will cause more and more trouble. The defect lies more in the quality than in the quantity of the corporate messages. Despite torrents of advertisements, press releases, and internal corporate communications, misunderstanding and ignorance of the business scene remain widespread.

The public needs to know more than it does about business—about its products, its processes, its performance, its profits, its motivations, its internal relations, and the ways all these are changing. From this premise a basic strategy of public relations emerges: business should do a better job of explaining itself. Until it does, it will not be able to defend itself, much less to counterattack its critics. A strategy of explanation would influence the handling of many day-to-day matters—the way ads are conceived, the way periodic corporate reports are written, the way queries from the press are handled.

What a strategy of explanation implies can be more clearly seen in a perspective that includes the past evolution of the anti-business attitude and its future dangers.

Current anti-business sentiment is no summer squall, no mere election-year flap, no recession-born disenchantment, no transient hostility stirred up by a few malcontents. It would be unwise, for instance, to assume that Ralph Nader created the wave of consumer resistance; he vocalized feelings already present in the public. Nor was the outburst of populism in the 1972 Democratic primaries a projection of George McGovern's limited ability to read profit-and-loss statements; his soak-the-corporation tax proposals reflected widely held beliefs. The ill repute of business would still flourish if Nader started doing commercials for General Motors or if McGovern, awed by the possibility of administering the federal budget, decided to learn arithmetic.

That 28 percent profit

The picture of reality that people have in their heads shapes their emotions and actions. For example, the U.S. public has long held a wildly erroneous notion of the size of business profits. A recent survey showed that the public's estimate of after-tax profits as a proportion of total sales centered at 28 percent. This is more than five times the actual level of profit margins in recent years. All by itself, such a grossly mistaken estimate of profits goes far to explain demands that corporations should pay higher taxes, increase wages, and absorb environmental costs—while holding the line on prices. No wonder millions of Americans feel unfairly treated by the economic system. A more drastic "redistribution of income" through the tax structure would indeed be feasible if after-tax profits amounted to $250 billion instead of $46 billion.

Other consequences follow from other mistaken public notions about business. Many of the brightest young men and women will continue to turn their backs on business because they believe that corporate careers are stultifying to personal development, devoid of intellectual challenge, and subversive of true social values. Many who do enter business will continue to think they are selling their integrity for material gain. The public's exaggerated notion of corporate power will result in the passage of more laws that add to the cost of production without any proportionate benefit to the public. Many consumers will continue to take little joy from what they buy because they think they are victims of a system that is dishonest, insensitive, oppressive, and inhuman.

In short, the declining reputation of business could, unless it is reversed, weaken the internal morale of corporations and so poison the relation between business and the rest of society that the quality of American life would deteriorate.

Unlike the solar system, which can ignore human opinion, any pattern of relations between men depends upon a measure of mutual understanding and respect. The freer the men, the greater this dependence will be. And since prosperity contributes to freedom, a prosperous society has more need to understand and respect its own economic system than a poor society in which material necessity can coerce a cooperation that may not be freely and intelligently given. A prospering, highly educated, democratic people, like today's Americans, will not assent to an economic system merely because it produces a lot of goods and services. If people view the system as grossly unjust or tyrannical or deceitful they will, even at a cost to themselves, withhold their full cooperation.

Eating our weight in beef

What can business do to attain a higher level of public understanding and trust? Should it perform, by public-relations techniques, plastic surgery upon its "image"? Or reform its actual practice?

One businessman who rejects proposals that business can cure its reputation by public-relations poultices is Irwin Miller, chairman of Cummins Engine. Since few, if any, businessmen have a better reputation, Miller's view is worth attention. He says: "The corporation is not unlike the individual. It achieves a good reputation if it deserves it. Image and reputation follow performance and service to the community."

This is the traditional view of a Christian gentleman—and all men of good will would like to believe it. But was it true, even in a simpler world than ours, that public opinion infallibly awarded to everyone the reputation he deserved? In our complex world it would not be easy to appraise business by Miller's standards—"performance and service to the community"—even if there were a firm consensus on what those two terms meant. "Performance," for instance, now means more than mere efficiency in supplying goods. But nobody is quite sure how to define other standards that are emerging.

At any given moment the public must have in mind some criteria, however imprecise, of what constitutes a satisfactory performance by business. The public keeps raising its standards—as, in an achieving society, it should. Trouble develops because the public is not aware of how rapidly it raises its standards. Because it believes its standards are unchanging, it tends to perceive business performance as moving backward.

A simple example of this optical illusion is provided by the recurrence a few months ago of the perennial uproar over the retail price of beef. Prices were described as "out of sight" or "impossible" and other words indicating that consumers could not get as much beef as they were accustomed to eat. How many of the enraged housewives were aware that the per capita consumption of beef in the U.S. has risen in almost every year since World War II? We are now eating 115 pounds of beef per person per year, more than double the 1938 level and 30 percent higher than that of ten years ago.

Maybe the price of beef is in some sense "too high." Markets do lift specific prices to levels that are supposed to discourage demand. But it's one thing to know that the price of beef has been rising in the presence of surging demand, and another to believe it has been manipulated upward by greedy meatpackers and butchers. Though the production of beef in the U.S. is two and a half times what it was in 1951, the breeding of cattle still cannot keep up with the rise in population and the sharper rise in real incomes. How many newspapers or TV newscasts mention, just factually, the rising consumption of beef when they report these passionate consumer outbursts?

Here is a clear case of a discrepancy between what has actually been happening and what the public thinks has been happening. Much of the ill repute of business arises from such misconceptions, which, in a complex, prospering society, are bound to occur unless there is a huge and intelligent effort to keep the people informed. The absence of such an effort explains why the reputation of business has in the last twenty-five years been getting worse, while the performance of business, by almost any economic or social or moral standard, has been getting better.

And then came Phil, the Finagler

A public-relations problem does, indeed, exist and it is—at least partly—independent of actual business performance or behavior. The problem ranges all the way from the moral validity of the market system itself, which is far from universally accepted, down to the day-to-day dealings of corporations with the press and with individual customers and employees. Obviously, this problem is not going to be solved by gimmickful flackery. But neither is it going to be solved by quiet business virtue or by the supposedly healing passage of time. Improvement of the business reputation has to start with the recognition that the problem goes back a long way and is getting tougher every year.

At no time in the American past did business ever enjoy full public understanding and approval. This fact has been somewhat obscured because most twentieth-century historians dwell, in wonderment or irony, upon nineteenth-century sermons and moral tracts praising the business influence on American life. Moralists who took this line were impressed by the business system's stress on personal responsibility and self-improvement in the material realm, a stress that seemed to reinforce fundamental teachings in the moral realm. More or less consciously, the emergent American business system was being compared to the rigidly stratified societies of traditional Europe where each man was supposed to follow a path set by society.

Many of the pro-business moralists so grossly over stated their thesis that they seemed to be placing prosperity next to godliness. There was bound to be a reaction. The disenchanting discovery that Horatio Alger's *Phil, the Fiddler* did not provide a perfect paradigm of how material success relates to virtue was certain to produce a thousand later books in which the businessman would appear as Phil, the Finagler.

But even in the heyday of the pro-business moralists there was a vocal dissent—and also a silent absence of assent. The group now known as the intellectuals included at all times some who despised what they called "moneygrubbing." Romantic writers, especially, were inclined to prefer the aristocracy to the bourgeoisie. It was "no accident," as the Marxists say, that the semifeudal American South, soon to go to war against the moneygrubbers, reveled in the chivalric extravaganzas of Walter Scott.

Far below such levels of literacy were inarticulate millions, white and black, who had little reason to admire and little need or chance to understand the emergent business system. No business missionaries tried hard to convert the emancipated slaves or the immigrants from Europe who went to work driving railroad spikes or digging coal. Nor was there much effort to proselytize the sons and daughters of the agrarian society, north and south, as they left the farms to enter the very different world of industrial capitalism. The economic cooperation of all these groups was ensured by material necessity. Apathy and illiteracy delayed the growth of their political power.

Today, their grandchildren are in a far different position—educationally, politically, economically. They have to be sold on the system. And a great many of them have never been sold.

The nonfeasance of the intellectuals

Probably the high point of business prestige in the U.S. (though surely not the high point of its performance) was reached in the 1920's. Even then business was considered good only until the adjective "big" was put in front of it; then it was bad. Since big business was destined to become more conspicuous, the base of later criticism was already laid fifty years ago. By the late 1920's the pro-business moralists were no longer in the ascendant. The intellectuals had begun the shift toward more emphatic anti-business attitudes, a trend that greatly accelerated during the depression and the ten-year debate over its cause and cure.

Because the dependence of society on its intellectuals has increased, their estrangement from the actual economic system becomes a very serious matter. In previous centuries the intellectuals were a handful of clergymen and writers. Now the term covers whole armies of teachers, journalists, scientists, artists, fictioneers, and entertainers. A society so specialized and complex that no one man can observe it with his own eyes must rely on these mediators for its sense of what it is and where it's going. Nobody—not even a businessman—can "see" the business system. What the public perceives is refracted, to use the politest word, in passing through the medium of professional communicators.

This doesn't imply, as some discouraged businessmen think, that the entire blame for the business reputation lies in the disaffection of the intellectuals. If it be true, as stated above, that a very large proportion of Americans *never* admired or understood market capitalism—not even when it was praised in tract and pulpit and on campus—then the responsibility of the intellectuals for the present ill repute of business begins to look more like nonfeasance and less like malfeasance.

Many businessmen incorrectly suppose that the communicators as a group are involved in a malicious conspiracy to substitute some other economic-political system for the one we have. Thirty years ago, socialism had a significant, though not a dominant, following among U.S. intellectuals. Many of them are still enthralled by the negative aspect of Marxism, its critique of capitalism. But few today are hankering for government control of the means of production. Among today's intellectuals, government has become almost as dirty a word as business. Indeed, the intellectuals have communicated to large sections of the public, especially the young, an abhorrence of all institutions larger or more complex than a rock combo.

The coconut gatherers

The decline of the socialist appeal, in fact, complicates the problem of the business reputation. When socialism was seen as a viable alternative, market capitalism had a definite rival with which its performance could be compared, either in terms of economic efficiency or in higher terms of human freedom and dignity. Today the typical critic of the business system does not accept the responsibility for saying what he would like in its stead. His habit is to denounce some specific shortcoming or injustice, implying that this is what one would expect from a system that is basically sick or outmoded. Proposed reforms are not seriously worked out in terms of how they would affect the system as a whole.

This kind of criticism relieves the communicators of a very difficult task, that of understanding and explaining an economic system that is far from self-evident in its complex workings. The discussion assumes that everyone knows how prices are set, how wages relate to profits, how a businessman thinks, works, acts, and lives. But this assumption happens to be untrue. What little the American public knows about business is some fifty to seventy-five years out of date. The public image of the big businessman is about where Theodore Dreiser, Upton Sinclair, and the cartoonists of fifty years ago left him.

Where in the communication network would the typical American have encountered a more accurate and up-to-date picture? At school? In college? In church? From newspapers? From fiction? From television?

Among professional communicators who deal in nonfiction—the teachers, journalists, clergymen—only a very small minority know or care much about business. Current fiction is not more informative. A quick two-week riffle through the best-selling novels, prizewinning plays, long-running television serials, and high-grossing movies of the last five years discloses very little concentrated hostility to business. In such popular art, the businessman is not so much attacked as ignored. For all these mirrors show to the contrary, American civilization makes its living by picking coconuts off the ground. As reflected in fiction, the only two interesting activities in American society appear to be making love and making war—both usually depicted in a manner that would repel people who are ever so slightly fastidious.

True, sex and war are ancient themes of drama; business is not. But in previous centuries the economic life of societies was highly transparent to the participants. Nobody needed a drama or a novel to understand what was involved in milking a cow or to figure out that both the milkmaid and the owner of the cow had claims upon the proceeds.

The record of contemporary business isn't going to "speak for itself." For most Americans that record is locked in darkness—and it will remain obscure until a lot of very hard work is done to overcome the nonfeasance of the communicators who stand between business and the public.

"You don't need me, do you?"

Essentially, the obscurity of the business scene to outsiders is a price exacted by the concentration of effort—itself the mainspring of modern progress. Unless this price is balanced by conscious, effective communication across the barriers of specialization, then incoherence will overtake efficiency.

Managers already understand this challenge in so far as it applies to life inside a corporation; they need to extend to public relations the practices they use internally. Within the corporation, top managers are less and less inclined to view themselves as the prime fonts of judgment, decision, and policy. The men at the top are more and more concerned with encouraging horizontal flows of information among the parts of the organization so that the left hand will know when the right hand's thumb is in a wringer.

Observing Great Britain, where this modern kind of management has evolved less rapidly than in the U.S., Antony Jay, an analyst of corporate behavior, has drawn a vivid contrast between the old and the new kinds of management. The old kind is hierarchical in attitude and practice. It reveals itself, says Jay, in statements like: "This memo must go through me" or "I must be notified before one of your staff comes here" or "If you want to talk to my subordinate then I must be present." The newer concept of organization, which Jay calls "cellular," is revealed by remarks like: "Why don't you go and put it to him yourself?" or "You don't need me at this meeting, do you?" or "Perhaps you'd better drop over and have a word with the marketing boys."

There are two important lessons about public relations to be drawn from the contrast between old and new styles of corporate coordination. The first is that business has failed to get over to the public the extent to which the new internal style now prevails. As Jay, along with some observers of U.S. business, has noted, many managers who actually behave in the new way continue to explain their organizations in the old, hierarchical way. This anachronism can be important because a significant part of the public's resistance to business is based on the belief that it operates, as it did fifty years ago, mainly by a chain of command, with all significant decisions made at the top. Today's employees resent a business image that casts them in the role of robots. And this repulsive image has been painted not only by intellectuals but by businessmen who use outdated concepts and vocabulary in explaining how they work.

Holtzman's pitch

At long last, the newer concept of management is beginning to trickle down to popular levels. The other day a baseball player, Ken Holtzman, was quoted on a sports page as referring with some bitterness to his former manager, Leo Durocher, in these terms: "The manager has a lot to do with the mental attitude of a ball club. His main job is communication. Today's type of ballplayer is a lot different from what it once was."

So is today's type of citizen different. And that's where the second lesson on an updated theory of business public relations comes in. Just as internal coherence between the parts of a corporation can no longer be mandated from the top down, so the relation between any corporation and its multiple "publics" must now be achieved through a flow of information and persuasion. No large number of today's citizens is going to accept slavishly the business community's judgment on a matter of public economic policy. If business has a case, it will have to argue it. The degree of public acceptance will depend largely on business credibility—i.e., on reputation.

What this indicates is that the foundation of a sound business public-relations policy lies in recognition of *the public need for an understanding of business.*

The italicized phrase is not the same as "the public's right to know," which is now stridently and loosely asserted in some journalistic quarters. A few public rights to corporate disclosures have been formulated in recent decades by the SEC and other bodies. Many more rights will be formulated, notably in the field of consumer protection. But a "right" in this sense takes a while to harden to the point where it can be clearly defined and legally tested against other rights, such as privacy.

Meanwhile, the *need* for public understanding is now urgently present and cannot wait upon the evolving definition of rights. Nor should this need to be thought of as a public interest competing against a business interest. It is business itself that most desperately needs public understanding of business. Candidly, most of the public is not stirred by any conscious need to know more than it thinks it does about business. The need, which is real, has to be sold to the public.

This situation is not without precedent. The history of American business for a hundred years has followed a pattern of discerning real needs, making people aware of them, and then fulfilling them. What

has been done for soap and toothpaste and automobiles can also be done for an intangible and presently unrecognized need: public understanding of the business system.

Horn blowing isn't enough

Starting from the need for public understanding, let's look at some current business public-relations practices.

Corporations are not coy about calling attention to their products, nor timid when it comes to celebrating those achievements that can be represented on the famous "bottom line" of their reports. But in these—and many other—cases of corporate horn blowing the message is highly concentrated on narrow targets. Selective self-praise isn't the same as explanation.

Concentrated action always runs the risk of undesirable peripheral consequences. A corporation, for example, may design a merchandising campaign for a certain product toward the rational goal of maximizing sales in a short span of time. The most effective means to that goal may "oversell" a lot of customers who will later think they were promised more than they got, a reaction that will have peripheral effects on subsequent sales of that product, on other products of the company, and on the general public reputation of business.

Or a corporation, concentrating on the investing public and the securities analysts, may boast in a year-end statement that it had increased its earnings by 33 percent. In fact, its earnings may have risen from 3 percent of sales to 4 percent, still meager by historical standards. Stress on the 33 percent increase is the "best" way of presenting the case to investors. But other publics overhear this communication. When headlines say, "QED Corp.'s Profit Up 33%," a lot of people get a mistaken impression of what has happened, and George Meany will find a resounding public echo when he speaks of the "unconscionable profits" received by corporations.

A keener appreciation of the need for public understanding of business would require a more rounded attention by companies to the peripheral effect of their communications.

The secrecy syndrome

The same principle applies—emphatically—to corporate noncommunication, or secrecy. In many companies a given piece of information will not be disclosed if any department, intent on its own area of responsibility, can think of a reason for not releasing it.

Professional communicators concerned with business get a lot of help from corporations. Still, what they get is about 1 percent of the help they need. Nor would a hundredfold improvement in the quality of corporate communication necessarily entail a comparable increase in volume or costs. Much of the information emanating from corporations is just hot air. Every Thursday afternoon for years the editorial office of FORTUNE has received by private messenger mimeographed handouts from a certain big corporation. Frequently, the information therein has already appeared in the daily press. Often, the information has no immediacy and could have been delivered, without spoilage, by third-class dogsled. Nobody here can remember when this weekly visitation was last useful in any way.

As a group, business journalists, a tiny subspecies of the genus communicator, are not hostile to business. Yet no month passes in the work of a business journalist without his encountering some grotesque and enraging instance of corporate noncommunication with the outside world. He finds huge public-relations departments that are not trusted by their top managements with information that ought to be publicized. He finds financial vice presidents who react to questions about the taxes their corporations pay as if the inquiry had been directed to the sex life of their mothers.

He finds, above (or beneath) all, the legal counsel of great corporations; some of them could not be more defensive, more evasive, more secretive, if their client were the Mafia. Many corporation lawyers will prevent a disclosure if they can imagine its hostile employment in any contingency, however remote, by the Antitrust Division or Ralph Nader or the SEC or a competitor or a union or women's liberation. Since lawyers are trained to imagine future trouble, this legal filter can inhibit a lot of information. It can also suggest—even to communicators who are friendly to

business and relatively knowledgeable about it—that so much determination to conceal might indicate that something wrong is being concealed.

Business journalists know that most chief executives are more candid about corporate affairs than are the people who usually deal with the press on a day-to-day basis. But this doesn't mean that more disclosure decisions should be handled at the corporate top. The quality of public relations, like every other function of a large corporation, is determined mainly by behavior of personnel other than top management. The responsibility of top management for improving public relations is in changing the corporate atmosphere in which public-relations decisions are made, whether at high levels or low. As long as management as a whole believes that the only "safe" disclosures, other than those required by law, are messages that give unstinting praise to the corporation or its products, so long will the day be postponed when the public understands and trusts business.

Neither goldfish bowl nor closet

Most specific public-relations decisions will involve difficult questions of balance among conflicting values. One of these values is the genuine need for privacy. Under today's conditions, corporate privacy cannot logically be derived—as many businessmen think it can—from the right of private property. A corporation that recruits its main assets, its employees, from the public education system, that resorts to public markets for capital, that sells in a national or international market, that pays out nearly half its earnings to government, really isn't much like a "private" individual trader.

Corporate privacy today has a different basis. The concentration of effort represented by a corporation (or by a government bureau or a research laboratory) does imply that those who work therein have a genuine need to be protected from continuous public view. As we now recognize, the second part of the slogan "open covenants openly arrived at" describes a disastrous pattern of diplomacy. Business efficiency would decline markedly if all competitors spent their time reading transcripts of one another's committee meetings. People involved in complicated work, especially if it includes the development of new ideas, require screening from the misunderstanding and ridicule that would ensue if every chance observer were allowed to look over their shoulders at all times.

Because the need for corporate privacy is genuine, the disclosure problem cannot be solved by saying, "We're going to operate in a goldfish bowl." Because the need for public understanding is also genuine, the problem cannot be solved by saying, "Put everything in the shredder." This kind of conflict, never to be finally settled, has to be worked out case by case and day by day.

At this point in time, however, it can be said that business—along with the Pentagon and the Vatican—tends to err on the side of disclosing too little rather than too much of what goes on inside them. In their public-relations policies, few contemporary institutions have caught up with the implications of Ken Holtzman's principle: the new type of ballplayer has to be informed, not commanded.

What's good for the Thessalonians

Throughout, this article has assumed that actual business behavior is not as bad as its public reputation holds it to be—a proposition that cannot be rigorously demonstrated. It may also be assumed that actual business behavior is not as good as it ought to be. What effect would an improved public-relations policy have upon the actual behavior of business? No effect, if by public relations we mean a mere front. But there's a well-known difference between improving one's looks by cosmetics and improving them by better health.

Suppose a company adopts a course of action, honestly believing it harmless or even beneficial to the public. Suppose it finds that this policy "looks bad" and is hard to explain. Instead of bulling ahead in the face of public disapproval, this might be the point to put more thought on the quality of the explanation. And if it still appears unlikely that the public can be persuaded that the policy in question is socially right, then perhaps the corporation should back off.

St. Paul, no cynic, was serious in his advice to abstain from the appearance of evil. Today's Americans are in a situation much more complex than that of the Thessalonians to whom Paul was writing. Among us,

the appearance of evil can have morally destructive consequences proportionately greater than such actual evil as may be present. How much crime in the streets is connected with the widespread judgment that the business economy itself is a gigantic rip-off? The belief is erroneous. But it is there—and business must bear part of the responsibility for combatting the belief by prudent behavior that makes explanation less difficult.

There's a positive side to this point. On many topics that seriously engage public attention (e.g., the environment) the general business attitude appears defensive, almost sullen. One can sympathize with businessmen who are unjustly accused of environmental sins or subjected to sloppy regulations drafted in a punitive spirit. But sulking over drinks on the country-club veranda isn't going to improve the situation.

What's needed is more positive business leadership—in public statement and also in actual behavior. Everyone by now should recognize that the environment isn't going to be improved without a whole library of new statutes and other governmental rules. If business took a positive lead in this great change, instead of seeming to drag its feet, it might accomplish the following objectives: (1) condition its own middle managers to a more alert sensitivity to environmental factors; (2) improve the quality of environmental laws and their enforcement; (3) begin to persuade the public that business has, indeed, concerns that go beyond making goods and making money.

But in this and kindred questions the business public-relations policy must be real, not cosmetic. Irwin Miller, quoted at the beginning of this article, may be too quick in assuming that business gets the reputation it deserves. But he is profoundly right on the other side of the coin: mere image polishing won't work.

Is the summit too steep?

Business needs to look first at the aspects of its own practice that make it easy—nay, tempting—for the communicators to be unfair. Have products got a reputation lower than their actual quality merits? Some of this unjust reputation may be properly blamed on unreasonably high consumer expectations. Did lazily imprecise advertising have anything to do with the unreasonable consumer expectations?

More damage may be done by messages that business does not mean to send. Take the delicate matter of top executive compensation. The young—and not they alone—say they don't want to work in organizations where all the significant decisions are made at the top. Good, replies modern business. Organizations, it says truthfully, aren't like that nowadays. The pyramid of influence on the formation of policy has flattened; hundreds of people now have significant roles in shaping the corporate course. The chief executive officer, no longer a monarch, is now merely one voice among many.

But if that be true—and it is—why does the typical big business salary-and-bonus structure rise so steeply near the summit? If business has reason to complain that its public image is out of date, why are relative rewards within many managements scaled as if the chief executive officer were still a nineteenth-century boss, bearing in fact all the responsibilities of decision? Are the reluctant young entirely to blame when they resist joining organizations where nobody makes nearly as much money as he who has been anointed chief executive officer?

If business does a better job of cleaning up the messages, intended and unintended, that it sends, if it manages to explain more about what it does and how it works, society may trust business enough to let it have a highly significant share of leadership in tackling the huge tasks ahead. Otherwise, business, known mainly by its scandals and other samples of its pathology, will become less and less able to fulfill its mission.

Trends in Public Attitudes Toward Business and the Free Enterprise System

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Presented to The White House Conference on the Industrial World Ahead, Washington D.C.

If American business is going to achieve the goals that will be outlined for it during this Conference, it will only be with the full support and backing and understanding of the American public. Yet today, as I will attempt to demonstrate and document for you, business has been declining sharply in favor with the public. The mass media have turned the spotlight on many of the defects and problem areas in our society. Concern over ecology, consumerism, and the social responsibilities of corporate management have created a skeptical, if not hostile, atmosphere in which industry must get its work done.

In examining the opinions of the public, it's well to ask ourselves who are these people who are speaking to us through these data? They are not the same fellows we talk to at lunch, or play golf with, or engage in business discussions with. Over 80 percent of them haven't traveled by air during the last year. Eight in ten don't own any stock. Three-quarters of them have never been outside of the country. Half of them haven't been two hundred miles from home in the last year and half of them don't use any credit cards.

	U.S. Public
Have not traveled by air during the last 12 months	84%
Don't own any stock	79%
Have never been outside the U.S.	75%
Have not been 200 miles away from home in last 12 months	52%
Don't use any credit cards	50%

Thus, if their attitudes don't seem to match the attitudes that we run into every day, you can understand why—they are a different kind of people. They are the typical people. You and I are the atypical people.

General attitudes toward business

Now let's take a look at some basic trends showing how these people are feeling and thinking today about business. First, let's take a look at their financial sense of well-being, with a question we have asked every two years since 1959.

Sense of Financial Well-Being

	1959	1961	1963	1965	1967	1969	1971
Worse off	18%	20%	14	14	17	20	22
Better off than a year ago	31	29	35	38	39	34	36
Same, no opinion	51	51	51	48	44	46	42

Notice the top figures on the chart, those who feel worse off, compared to the year before. From about the middle of the chart—1965—to the current period, we see a steady climb in the percentage who say they're worse off. These people feel they are treading water economically, slipping back in the picture.

When we measure public sentiment in terms of agreement or disagreement with a series of general statements about business, we see a steady decline in favorability. For example, "large companies are essential for the nation's growth." There is no argument about this as a concept. Eight in ten to nine in ten agree. But there is a slight downtrend evident, even though agreement is still at a very high level.

Similarly with some other propositions. "The profits of large companies help make things better for everyone." Notice the trend line since 1965. About half of the public still agree, but there is a sharp downtrend.

Taking the other side of the question, the disagree side, "as they grow bigger, companies usually get cold and impersonal." The number who disagree has been declining.

"There is too much power concentrated in the hands of a few large companies." The number who were willing to disagree with this are on the decline, down about from 31 to 21 percent.

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"For the good of the country, many of our largest companies ought to be broken up." Again people who disagree with this proposition are declining sharply in number.

	1959	1961	1963	1965	1967	1969	1971	Difference 1965-1971
Agree								
Large companies are essential for the nation's growth	82%	83%	85%	88%	87%	85%	83%	– 5
Profits of large companies help make things better for everyone	60	59	64	67	63	55	51	– 16
Disagree								
As they grow bigger companies usually get cold and impersonal	27	24	28	30	30	24	19	– 11
There's too much power concentrated in the hands of a few large companies	24	24	28	31	30	23	21	– 10
For the good of the country, many of largest companies ought to be broken up	37	37	40	45	46	37	35	– 10

Now, if we sum up the opinions on these and other propositions in an overall measurement, we can classify people into three logical groups: those who express a high degree of approval of business, those who give moderate approval, and those who give little approval to business.

Overall Attitude Toward Business

	1959	1961	1963	1965	1967	1969	1971
Little approval	52%	55%	52%	47%	46%	56%	60%
Moderate approval	28	27	27	31	32	26	27
High approval	16	15	18	20	20	15	11
Unclassifiable	4	3	3	2	2	3	2

As you can see, the proportion who give little approval outweighs the other two by a sizable margin. And this group has been growing proportionate to the rest.

If we examine the high approval group, we can see that their numbers have been cut in half since 1965, from about one in five to about one in ten.

Now, within the population, which are the groups who have been changing their opinion?

High Approval of Business

	1965	Latest	
Total public	20%	11%	- 9
Men	25	12	-13
Women	16	10	- 6
15-20 years	24	12	-12
21-29 years	23	12	-11
30-49 years	21	13	- 8
50 or over	16	9	- 7
Whites	21	12	- 9
Nonwhites	14	7	- 7
Professional, managerial	28	16	-12
White-collar	25	12	-13
Manual	18	11	- 7
Grade school or less	9	7	- 2
High school graduates	22	12	-10
College graduates	36	17	-19
Under $5,000	14	6	- 8
$5,000–$9,999	21	9	-12
$10,000 or over	30	17	-13
Initiators	33	11	-22
Average initiative	20	11	- 9
Lowest initiative	13	10	- 3

Notice younger people—the decline here has been sharper than in the other age categories. Similarly, notice the professional and managerial group—normally thought to be favorable toward business, but quite sharp in decline in approval of business.

Also college graduates. This group, more sophisticated, more knowledgeable, has been more favorable towards business traditionally, but they have slipped badly since 1965. So it is with the more affluent, shrinking in terms of approval. In the initiator measurement we have scored people on three factors: their degree of input of information, the level of interest they show in public affairs and business, and their degree of output, that is their opportunity to pass on and express their opinions and ideas to others. We arrayed people on a scale from zero to one hundred, cutting off the top 12 percent and rating them high as initiators. It now becomes evident that the decline in favor toward business has been greatest among this group. Today they show no higher approval than people in the lower categories of initiative.

Thus, it is not only the enemies of business who have been intensifying their attacks; the friends of business also have been weakening in their support at the same time.

Attitudes toward specific industries and companies

Now these are generalizations. When we look at attitudes toward specific industries we unfortunately see confirming trends. The data below and following are from a series of Opinion Research Corporation surveys, either our biennial corporate image studies or our twice-each-month Public Opinion Index reports.

Industry Favorability Trends
(Very or Mostly Favorable)

	1965	1967	1969	1971	
[illegible]	[illegible]	[illegible]	[illegible]	64%	13
Banking	[illegible]	[illegible]	65	58	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	58	19
[illegible]	73%	68%	60	53	14
Food	--	72	64	54	18
[illegible]	66	60	58	47	19
[illegible]	[illegible]	[illegible]	[illegible]	47	[illegible]
Electronics	[illegible]	[illegible]	58	46	12
Tire and rubber	71	64	63	45	18
[illegible]	73	65	65	45	20
Computer	[illegible]	[illegible]	47	43	4
Steel	64	56	47	43	4
Automobile	75	61	63	43	20
Packaging, containers	[illegible]	[illegible]	[illegible]	48	[illegible]
Travel, tourist services	[illegible]	[illegible]	49	40	9
Prescription drugs	[illegible]	[illegible]	51	37	14
Book and magazine publishing	[illegible]	[illegible]	35	35	0
Insurance	[illegible]	[illegible]	57	34	23
Chemical	55	44	43	32	11
Tobacco	[illegible]	[illegible]	34	29	5

While we do not have data in every year for all industries, we nevertheless see a uniform picture in the measurements we have—every industry down in favorability. Opinions are asked of those who express some degree of familiarity with each industry. who express some degree of familiarity with each industry.

Let us now go on to individual companies whose reputations we've measured over the same period of time—without mentioning names.

Trends in Favorability for Individual Companies

Time Period	Number of Companies Measured	Number who . . . Improved in Favorability	Stayed The Same	Declined in Favorability
1963-1965	39	13	26	0
1965-1967	44	1	27	16
1967-1969	58	5	43	10
1969-1971	39	0	6	33

From 1963 to 1965, of thirty-nine companies measured, twenty-six stayed the same in favorability, thirteen improved. From 1965 to 1967, only one improved its rating, twenty-seven stayed the same, eleven declined. From 1967 to 1969, five went up, ten went down. In the latest measurement, of thirty-nine companies, only six stayed the same and thirty-three showed a decline in the public's favorable rating.

You will be interested in another piece of research that suggests that it is not business alone that is dropping in favor with the public.

Lou Harris, in one of his newspaper columns, showed some data that measured what we may call confidence in institutions. In 1966, and again in 1971, Harris asked people about the degree of their confidence in the leaders of various major institutions in our society.

Confidence in Institutions

	1966	1971	
Banks, financial institutions	67%	36%	- 31
Big companies	55	27	- 28
Local retail stores	48	24	- 24
Military	62	27	- 35
Scientific community	56	32	- 24
Mental health, psychiatry	51	35	- 16
Medicine	72	61	- 11
Education	61	37	- 24
Organized religion	41	27	- 14
Organized labor	22	14	- 8
Congress	42	19	- 23
Executive Branch of Government	41	23	- 18
Supreme Court	51	23	- 28
The press	29	18	- 11
Advertising	21	13	- 8
Television	25	22	- 3

Notice the sharp declines in the percents who give a high confidence rating to the leaders of these institutions—confirming more or less what we've observed in our corporate image study, relating to business. It is not only business, however, but also the scientific community, education, religion, organized labor, and various aspects of government that have fallen in favor.

Finally, at the bottom of the list we get to the media—the press, advertising, and television—never very high on the scale, but now at new low levels of confidence.

This last data must have a message for communicators in terms of credibility. When you talk to the public, you are handicapped by a large measure of skepticism, if not outright hostility among many.

Major causes—inflation

Now let's try to identify a few of the very complex causes behind these major negative changes in the public's attitudes toward business. We observe three interdependent factors involved. Inflation is one of them. When people talk about the major causes of inflation, they talk about the Vietnam War, but they also talk about companies raising prices, wages outpacing productivity, interest rates going up, other non-war government spending and so on.

Major Causes of Inflation

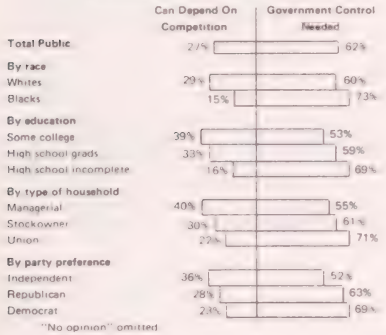
Vietnam war spending	53%
Companies raising prices	41
Wages outpacing productivity	34
Banks raising interest rates	24
Government spending at home	21
Consumers buying too much	20

(Main mentions)

Only in the long term trends, since 1946, we see a massive shift in people's confidence in competition as a mechanism to keep prices fair. Today a majority feel government controls are needed to do the job.

"Do you think we can depend on competition to keep prices at fair levels this year, or is some sort of government control needed to keep prices fair?"

Public Believes Competition Will Be Ineffective At Holding Down Prices



"No opinion" omitted

These data also have something to say about the value story that you as communicators may be trying to get across. When people are asked which products or services give the most value for the money, or the least value for the money, only the regulated industries score very well.

Value for Your Money:

	Most	Least
Electricity	62%	5%
Telephone service	50	7
Life insurance	23	12
Major appliances	21	7
Grocery products	16	30
Autos	13	19
Gasoline	11	15
Home furnishings	9	10
Prescription drugs	8	29
Automobile insurance	8	27
Cosmetics, toiletries	2	31

Most of the other product categories—autos, grocery products, appliances, etc.—rate pretty low in terms of value. At the bottom in value are cosmetics and toiletries, auto insurance, prescription drugs.

Thus, you may well ask yourself how convincing will be a claim that "we're really giving you value for your money" in the face of this wide-spread general feeling. Incidentally, we feel part of the problem is a result of the fact that businessmen are at the tail end of the pricing process. Regardless of the cause of inflationary prices—falling worker productivity, high wage settlements, government spending, or whatever—it is the businessman who ultimately jacks up the price.

Major causes—consumerism

Consumerism has also added its bit to negative attitudes toward business. And it's not all smoke—there is some fire there. In a recent study, when we asked about recent purchasing experience, we found, in a nationwide probability sample, some 21 percent who said they had been cheated or deceived in their dealings as consumers.

Have been cheated or deceived recently on purchase of a service, or product 21%

Chief mentions: Groceries
Meats
Autos
Appliances

Some of our clients have asked why we haven't emphasized the 79 percent who don't report having been cheated. The fact is that 21 percent adds up to many, many millions of people. They are grist for the Nader mill or any other group that wants to assert leadership.

How were people cheated? The product was faulty, the packaging was deceptive, I was overcharged, the ads didn't tell me the truth or the service was lousy.

How Were you Cheated or Deceived?

Faulty product
Deceptive packaging
Overcharged
Misleading ads
Poor service

(Main mentions)

There are undoubtedly enough real examples of unfair treatment that a certain skepticism can result about anything that is put on the market. Is it going to work? Is the service going to be good? Is the price fair?

Personally, I think for many years the public had a rather low level of expectation. If you bought a car and had some problems with it, you worked with it; you didn't get too excited. In other words, our consumer tolerance for defects and poor service has been wearing thin. And the politicians and the consumerists have been helping the erosion process.

Consequently, on a general proposition, we have seen a sharp uptrend in those who favor federal laws to help consumers get value for their money.

Favor New Federal Laws to Help Consumers Get Full Value For Their Money

1967	1968	1969	Latest
55%	58%	68%	66%

In this connection, notice the attitudes of business editors. In this survey, we interviewed the business editors of the one hundred largest newspapers, the major news weeklies, and the wire services.

Business Editors

Favor new laws to help consumers get full value for their money	54%
Oppose	41
No opinion	5

Even this group who understand business problems pretty well, and who are generally sympathetic, nonetheless feel that some type of legislation in the consumer field is needed if we are to see action.

Major causes—concern about the environment

Now another whole facet of the cause behind these great attitude changes is found in the area of attitudes on environmental problems.

We have compared people's awareness of different threats to the environment to everyday newspaper items: namely, drugs, crime and auto accidents. Note that air pollution and smog are as much in the news these days as unsafe drugs. Public awareness of water pollution is on a par with awareness of violent crimes. Littering and garbage are as familiar to John Q. Public as are automobile accidents. Mercury in fish, and D.D.T. in animals and humans, outrank coal mine explosions as subjects for popular discussion.

Have heard a lot about . . .

	1969	Latest	
Air pollution, smog	67%	79%	+12
Unsafe drugs	74	78	
Pollution of lakes, rivers and seas	57	73	+16
Violent crimes	67	71	
Earthquakes	33	63	+30
Littering and garbage	–	61	
Automobile accidents	65	60	
Mercury residues in fish, other foods	3	57	+54
Oil spills	30	56	+26
Overpopulation	–	56	
Fish kills	26	48	+22
Cyclamates	62	45	- 17
D.D.T. in animals and humans	45	41	
Phosphates	–	37	
Lead poisoning of children	16	36	+20
Noise pollution	–	36	
Changes in weather or climate	29	35	
Coal mine explosions	22	35	+13
Accidents involving dangerous substances	26	27	
Sonic booms due to aircraft	25	27	
Thermal pollution of waterways	13	25	+12
Radioactive wastes	16	23	
Underground nuclear explosions	26	22	
Mid-air collisions of aircraft	32	17	15
Military accidents, poison gas	16	–	
Nuclear fallout	17	14	
Silt buildup a problem	13	–	

Note the trends. Air pollution and smog, 79 percent, up 12 points. Pollution of lakes, rivers and seas up 16 points since 1969. Earthquakes up, obviously a reflection of the California mishap.

Notice the change in awareness of mercury, from 3 percent to 37 percent. People are getting that message. Oil spills almost double in awareness.

Cyclamates, petering out somewhat, but still well in the forefront of people's awareness. Notice lead poisoning of children. There has been growing press coverage of this, and awareness has been increasing.

Now throughout these environmental problems, industry is always in evidence. They are the ones who pollute, they are the ones who litter, they are the ones who create the problems. Obviously, companies don't throw beer cans on the side of the road, but it is the company that makes the can and it becomes the target for legislation. Thus, the public's growing sensitivity to many aspects of environment brings industry into focus over and over and over again.

Now that doesn't mean there isn't some realization that companies want to do the right thing. When people are asked if large companies want to correct pollution, a large majority say yes.

Most large companies want to correct pollution they may be causing

	General Public	Youth	Executives
Agree	61%	47%	78%
Disagree	29	45	19

(No opinion omitted)

But notice youth in the middle column. Many are skeptical. It is also interesting to me that even among executives, as many as one in five questions company sincerity in wanting to do something to correct pollution.

It is also interesting here—in a period perhaps, when companies are doing more about pollution than ever in history—that the realization that something is going on has been diminishing.

How much companies are doing to control pollution . . .

	1967	1968	Latest
Great deal	10%	9%	10%
Fair amount	33	35	35
Very little	41	44	53
No opinion	16	12	2

(Big City Residents)

The percent who say companies are doing little about pollution has been rising. In other words, tolerance is diminishing at a faster rate than awareness of company actions to correct the problems.

Consequently, do we need new federal laws to protect the public's health and safety? Yes, say a large majority.

Favor New Federal Laws
To Protect Public Health and Safety

1967	1968	1969	Latest
70%	69%	74%	76%

Should we close plants that violate the laws? Up sharply from an already high level.

Close plants that violate pollution laws?

	1967	Latest
For	70%	81%
Against	19	15
No opinion	11	4

Now, how much would you personally be willing to pay to help correct pollution? Nothing, or don't know say the majority.

How much would you *personally* be willing to pay this year in extra taxes or higher prices to help clean up pollution?

	Total Public
Something	22%
Nothing	40
Don't know	38

People don't think they created the problem. They don't think they should pay for it. Obviously, however the bill is paid, whether in higher prices or taxes, and regardless of on whom those taxes are imposed, it ultimately will be the man in the street who will foot the bill.

What is Ralph Nader's role in all of this? He certainly didn't invent consumerism, or concern about the environment. But he did come along at a time in which he has helped to crystallize the thinking and concern of many. And business editors, as friendly as they may be to business, nevertheless feel that Nader's influence, in the long run, will be a plus. In other words, things will happen faster, companies will do more as a result of his influence than they would without it.

In the long run Nader's influence will be . . .	
Helpful to business	75%
Harmful to business	10
No opinion	15

(Business Editors)

Basic attitudes toward out business system

Finally, I'd like to close with a few slides dealing with some basic attitudes about our economic system and then wind up with a few observations.

Here is our latest survey at Opinion Research Corporation on the public's conception of what the average manufacturer makes after taxes on sales.

Profit on Sales

Latest Median Public Estimate Of Manufacturing Profits In America, After Taxes



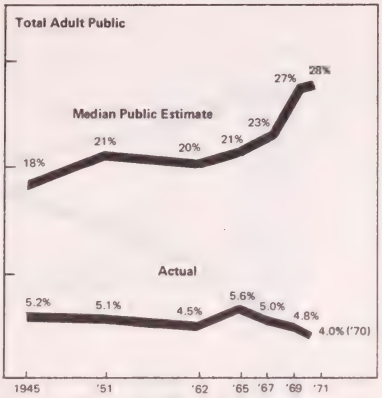
Actual 1970 Manufacturing Profits In America, After Taxes



Source: F.T.C. and S.E.C.

The latest public estimate is that the average manufacturer makes twenty-eight cents out of every dollar of sales after taxes. The actual fact is around four cents.

Median Public Estimate of Profit Compared to Actual



Profit Data: Federal Trade Commission, Securities and Exchange Commission

In the fifties, people estimated about twenty cents on a dollar. That has now gone up to almost thirty cents. Thus, when you as a communicator are trying to tell a value story, you've got this misconception in the mind of the public. You are making a fat profit. A so-called "bargain" may not be very credible to me, if I have this notion fixed in my head.

Also the public tends to think companies can raise wages without raising prices.

Companies Could Raise Wages
10¢ Per Hour Without Raising Prices

	1953	1955	Latest
Agree	55%	57%	66%
Disagree	29	27	25
No opinion	16	16	9

Also, if we ask people to classify themselves ideologically as liberal or conservative, they tend to say, "well, I'm in the middle-of-the-road, or I'm fairly conservative." Only about one in four admits to being liberal or fairly liberal.

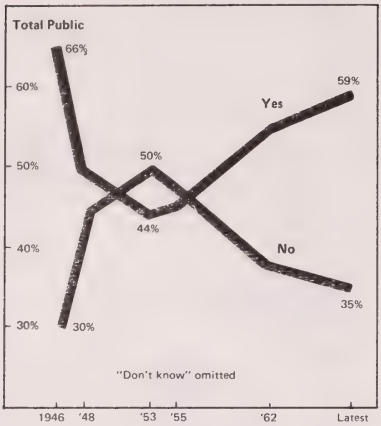
Consider self . . .

Very conservative	11%
Fairly conservative	28
Middle-of-the-road	29
Fairly liberal	19
Very liberal	7
No opinion	6

Many of the ideas that people hold, however, cannot be considered too conservative.

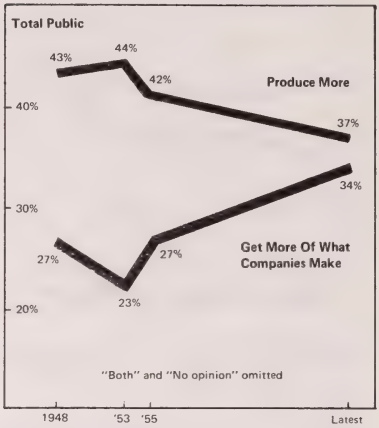
The idea that the federal government is responsible to see that every one who is willing and able has a job, is broadly accepted.

Should Government Assure A Job For Everyone Willing To Work?



And, what's the most practical way for workers to improve their standard of living—to produce more or to get more of what companies make?

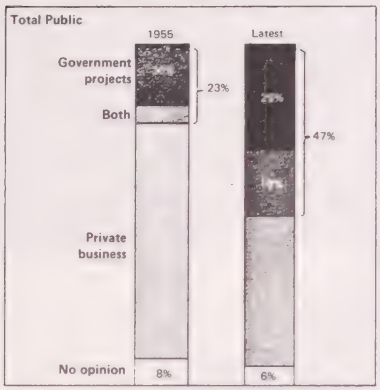
Most Practical Way For Workers To Increase Their Standard of Living



Since 1948 "produce more" has been getting a substantially larger part of the vote. Today the balance is shifting in the other direction.

Similarly, what's the best way to provide jobs for our population, private business or government projects?

How To Provide Jobs For Our Growing Population



In 1955, people said business would provide the jobs. Today, as many say it should be a government or joint responsibility.

And now the final table. This shows the results of a study which we did this year and also twenty years ago.

Teenager Impressions of U.S. Business System

	1951		Today	
Very good	8%		5%	
Good outweighs bad	45		31	
Good equal to bad	29		40	
Bad outweighs good	2	4%	7	20%
Very bad	2		13	
No opinion	14		4	

These are high school seniors nationwide. In 1951, when these teenagers evaluated our business system, one in twenty-five felt that the bad in the system outweighed the good. Today that same category has gone up by five times. Today one in five thinks our system is so bad that it needs to be completely overhauled. These are future adults.

Now, what are the implications of all this for The Industrial World Ahead? As we have seen, business must stem a flood tide of adverse public opinion if it is to continue to prosper. The business community must educate in those areas where half truths dwell and must hold itself accountable in those areas where it has fallen down in its responsibilities. The public will no longer accept lip service on pressing issues. Large numbers see their air becoming poisoned, their water undrinkable, their quality of life deteriorating. Large numbers see—and badly exaggerate—unequal distribution of wealth, hunger and poverty in the richest nation in the world, housing unfit for human habitation. Large numbers feel cheated on what they purchase, see products judged unsafe, experience poor quality, and the like.

Business must, by its deeds and words, correct these basic feelings of suspicion and resentment about its contributions to American life. If businessmen fail in this, the areas of decision within which business will be able to operate will be shrunk smaller and smaller. Already the government is partner in many of your business decisions. The government's voice will grow louder and more insistent, and that of business will be reduced. There is perhaps nothing more urgent than this tremendous problem of public dissatisfaction when we lay plans to grow and expand to meet the needs of American society in the future.

Exhibit 49: "Crosscurrents, 1973"



Introduction

In just a few years, corporate communication has undergone tremendous change and growth. It is now more sophisticated, measurable, and effective. The expression of opinion, ideas, and know-how at the second FORTUNE Corporate Communications Seminar indicated that these efforts are highly individualized from company to company, but there are many common points along the line.

There is recognition, too, of the fact that corporate communications cannot really be directed to a single entity called, "the public." Rather, there are many distinct publics important to a corporation's well-being, and it is possible to concentrate communications on those with the greatest influence on profit or opinion.

Awareness of corporate social responsibility continues to be highly perceptible, but there are more divergent opinions about the ways in which corporations best serve society. Under question are the limits of corporate involvement, and how communications can be utilized effectively to identify the social benefits of business enterprise or to advocate special points of view in relation to current or emerging national issues.

"Crosscurrents in Corporate Communications No. 2" will, we hope, make a significant contribution to the information available on this subject. We thank the seminar speakers and the participants who helped make this second annual event such a lively exchange of pertinent viewpoints. FORTUNE is pleased to have provided the impetus and the environment that made it possible.

James B. Hoefer
Advertising Director

If you would like additional copies of this report, please address your inquiry to James B. Hoefer, Advertising Director, FORTUNE, Time & Life Building, Rockefeller Center, New York, New York 10020. Enclose $1.75 per copy to cover basic costs and handling.

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Keynote Address by Max Ways, Fortune 8

Business has not been very effective in explaining itself to the rest of society. It is a complicated and difficult task. As a result, the corporation's primary function—to concentrate on the goals it is organized and best equipped to do—is misunderstood. The benefits of that concentration, which flow to the rest of society, are not fully recognized or credited in assessing corporate social responsibility. This dilemma perplexes executives who question their own altruism and morality. Yet it is society, not business, which defines social responsibility through legal restraint and changing standards and ethics. If business takes on the role of curing society's ills, it will lose its ability to concentrate on doing its job well. Ultimately that will diminish its service to society. Business must be conscious, too, of the fact that there will be more and more pressure for corporate discipline, for behavior that will not hurt society as a by-product of the corporation's concentration on its goals.

Corporate Communications by a Highly Divisionalized Company 14

There is a "5C" formula at work at Greyhound Corporation: outstanding companies, compatibility, capable people, cash, and communications. Robert McGinley, vice president-advertising, relates that without effective communication none of the other big "c"s could be made to pay off. The companies which make up the corporation are organized into six groups and that in itself reduces communications problems. The advertising department assists these companies in agency selection, cross-promotions, joint space and time buying, and in other ways, but it does not infringe on the independence of the separate company advertising departments. Corporate advertising is designed to reach the financial community, to demonstrate that Greyhound is more than a bus line, and to provide a corporate communications setting often re-employed in the advertising of the individual companies.

Selling the Value of an Advertising Program to Management 17

No longer "the postage meter people," Pitney-Bowes is today a paper-handling company. Its director of advertising, Kirk Jewett, says he runs a marketing communications operation organized to communicate with customers and prospects through advertising, informing and motivating the sales force, and utilizing marketing meetings, incentive contests, sales publications, and other devices. Management is regularly informed of the value, objectives, and functioning of its advertising program. This is accomplished through an annual advertising program presentation, followed by monthly status reports, where research findings, advertising results, and analysis of various aspects of the program can be highlighted. These activities are performed in cooperation with the company's advertising agencies. Jewett believes that management must get both good and bad news, that the information for management must be significant, and that a rapport must be established with those who sit in judgement of the advertising program's contribution to corporate profits.

Corporate Advertising—What's Wrong With It? 21

Corporate advertising has a long way to go, says John Hoefer, chairman of Hoefer, Dieterich & Brown, the San Francisco-based agency. "I believe we can get there faster if we but realize the problem is an individual one and cannot be solved either by cafeteria prescription or molasses language." Hoefer discusses the lack of retention of corporate slogans, the problems inherent in promoting social responsibility, the pitfalls and inhibitions present in the creation of corporate messages, and the relationship of product and corporate advertising. There are good guidelines to follow in developing corporate advertising: clear-cut, attainable objectives, knowledge of a company's existing image, verbalizing of performance rather than intention. But the greatest danger may be carefully planned, fully researched, minutely documented mediocrity.

Corporate Advertising 26

Paul Harper, who heads up Needham, Harper & Steers believes there is only one kind of advertising—plain old advertising. His secret of successful corporate advertising is to start with the problem, not the message, and to aim for action-producing programs. Advertising is one element in total corporate communications and necessarily has different goals for different companies. How these goals are established, special publics targeted, and corporate advertising executed in different situations is demonstrated through the analysis of a variety of campaigns for major companies. "Each of them tries to do no more than a paid advertisement for a good company with something meaningful to say can be expected to do; to tell the truth and tell it simply and well."

Corporate Advertising—A Worthwhile Use of a Corporation's Resources? 29

The answer, according to Leonard Matthews, president of Leo Burnett, is, "It depends." It depends whether the need actually exists and whether the advertisement or campaign addresses itself to that need. The disciplines and marketing sense that go into the creation of consumer campaigns should also apply to corporate programs. Over-editing and tampering by committees results in corporate advertising that is just plain dull. Matthews breaks corporate campaigns into two categories: advertising to change minds and efforts intended to tell the public more about a company. The former he feels is the most difficult to create, but with proper homework and enough self-questioning, it is possible to define not only what opinions are to be changed, but whose opinions, and how much.

Corporate Communications in a Crisis Situation 32

From the spring of 1970 to late summer of 1972, when the issues were resolved, Lockheed Aircraft Corporation was engaged in a struggle for corporate survival. The central arena was Washington, D.C. and the key issue was whether the Senate would vote affirmatively on the guarantee loan legislation essential to keeping the company in business. William Wilson, Lockheed's vice president-advertising & public relations, recounts the events of this dramatic episode and details the total effort to communicate that engaged all of Lockheed's employees, the unions, contractors, the airline

customer, the company's bankers, supporters in government —everyone concerned. The means employed to make Lockheed's position heard in the media, in government circles, and in key public forums provide a valuable case history of how to deal with a corporate crisis where the communication is "both more harrowing and more rewarding."

How to Talk with Washington 37

Talking with Washington is a task that H. Thomas Austern, partner in the law firm, Covington & Burling, has been dealing with for a number of years. His experience and expertise bring a sharp focus to the subject of effective, direct communication with government. He contends that a basic rule is first determining to whom any message should be directed. This involves a careful evaluation of the multitude of congressional staffs, agencies, commissions, and employees of other government branches. Other important guidelines are to work from the bottom of the hierarchy up; deal with bureaucrats as people (they really are); be truthful, objective, succinct, direct—and keep accurate records of what is said to whom and when. "Never send a boy to do a man's job," Austern stresses. Company representatives should be in a position to know all the facts, engage in frank discussion, and exchange commitments. And . . . check with your lawyer—before, during, and after.

Corporate Image Advertising and the FTC 40

In recent years, some corporate image advertising, particularly messages with environmental themes, have sparked controversy and evoked complaints of false and deceptive advertising directed to the Federal Trade Commission. The jurisdictional and legal questions involved in any regulation of corporate image advertising are complex. Moreover, they are clouded by the need for precise definition of image advertising, itself, and of the circumstances when such advertising is protected by First Amendment rights and when it is not. Stepping briskly into this tangle of thorny problems, David Dennison, one of five FTC Commissioners, provides direction and insight into the FTC's role, if any, in regulating this advertising. In addition to his cogent analysis, he provides elaborate annotation which in itself is a valuable bibliography on the subject of corporate advertising.

Corporate Communications in the European Business Community 47

Back from an exploration of the state of corporate communications in Europe, Joseph Brouillard, vice president and director of the Corporate Communications Group at J. Walter Thompson, reports that while this activity is not at the level it is in the U.S., it is growing in scope and interest. "Industrial and prestige" advertising expenditures in the U.K. are estimated to be $25 million. The primary medium is print, but reliance on corporate PR and identity programs instead of paid-for advertising space is greater in the U.K. than in the U.S. Motivation for engaging in corporate communications, the themes employed, and the publics addressed are to a great extent the same as in the U.S., with corporate identity and awareness themes used most. His interviews also indicated that corporate social responsibility is an issue in Europe, and the debate is as active there as it is on this side of the Atlantic.

Should a Company Promote Its Own Stock? 50-55

Does the question need to be asked when the reasons for doing it are so good? That's the query posed by Carol Loomis of *Fortune*'s Board of Editors. A company's stock is its currency, says Loomis, and it is currency that can be used to buy another company or, when a public offering is made, to buy "cash." The higher the price of a company's stock—the higher the price in relation to that company's earnings—the better off it is as to the number of shares it must give up. One problem is that promotion of stock is often done for the wrong reasons, such as fighting off raiders. It should be done in the interest of the company and its stockholders. Management officials also feel defensive about presenting the values of their company's stock because they may be among the major stockholders and it appears self-serving. Yet, Loomis feels, this self-consciousness is far outweighed by the overall advantages of law-abiding steps to improve the public's opinion of a company's stock. "I also think of a good stock price as having indirect benefits in the sense that this price is likely to influence the attitudes of all the company's publics."

Offering another perspective on this subject, Jones Yorke, executive assistant to the chairman, Paine, Webber, Jackson & Curtis, believes a continuous flow of information to investors is fundamental to the operation of our capital market system. "A great deal of good can come from active company involvement in the information dissemination process to investors, both current shareholders and those who potentially are shareholders." The regulatory agencies are, in fact, encouraging more disclosure from corporations—not less. Yorke urges companies to keep the investment community and individual stockholders informed, to avoid company-written "research reports" distributed as objective documents, and to release information as soon as possible. He sees no easy answer to the problem of "inside information" and suggests that information should be balanced, based on reasonable assumptions, and available to all. "The days of the hard sell, tell them anything but keep the stock up, are over."

Stockholder Communication Program 56

"A securities market communication program," says Robert Baylis, vice president-research, First Boston Corporation, "should be a responsibility shared by a number of individuals, including the chief executive officer of any company." Baylis believes a program of this kind should be geared to cover all investors—but professional investors and analysts are likely to have the major impact in shaping the market's opinion of investment prospects. With an understanding of the key factors that go into investment analysis, steps must be taken to insure that the investor has an adequate understanding of the company's management strategy and basic economics. These include an internal plan for performance, management belief in the plan and understanding of its competitive position, and evidence of a quarterly earnings pattern consistent with the plan. There must also be knowledge of who key analysts are, exposure of key people to influences in the marketplace, help for the professional analyst in developing a model of the company, a clear public statement of earnings at the start of each fiscal year and an updating of the forecast on a quarterly or semi-annual basis, and targeting of annual reports, quarterly statements and other mailings to different selective lists. "Remember that the investor is not buying a company or an industry or a product, he is considering an investment alternative."

Optimistic Trends in a Disturbing World 59

Optimistic trends don't seem to attract the attention of people these days; the world is filled with problems, discord, injustice. Yet, careful analysis of statistical data suggests that in the face of many things going wrong, there are many others that are going right. Theodore Gordon, president of The Future's Group, sees the lot of all people improving. His lively tour through the trends indicates that the economy will grow another trillion dollars in about 15 years; it took two hundred years to reach the first trillion. The economy is actually more stable than most would believe; consumer prices are still lower here than in most of the major Western nations and prices and rents are more favorable. The areas of income, leisure, and education all show trends of improving standards for more and more of the population. Within these trends and Gordon's forecasts of the future one sees changing sociological and demographic patterns that could affect not only the way corporations communicate but the very nature of their enterprises.

Seminar Participants 4

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Covington & Burling

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Keynote Address

Max Ways
Board of Editors
Fortune

As you may know, this is the second annual "do" of this sort. And I am so pleased to be the first, or as the program says, the keynote speaker at this second meeting, because at the first, I was the concluding speaker. That was a two- or three-day meeting, and I was scheduled to speak at 5:00 p.m. on the final day. I arrived with some trepidation myself, because I was writing a *Fortune* article at the time. And I got here and I kept my engagement, but somehow or other, everybody else had to catch a 4:30 plane. This is what comes with printing programs in advance, telling audiences what they have in store for them. On that occasion, I had, if I may say so, a very carefully prepared and rather well-written speech, which I delivered. I delivered it to a gentleman from AT&T, and two waitresses who had wandered in from the cocktail lounge. All three of them seemed to like it.

What my message was then, and I think this was in the spring of 1972, later evolved into a *Fortune* article published in September called: "Business Needs to Do a Better Job of Explaining Itself." And I guess I've worked on harder articles, articles that required more technical know-how. But I don't think I ever wrote an article that got the kind of reverberations that that one got. I don't mean results, I mean reverberations.

You know a lot of people in jobs like yours recognize that I was saying something that you wanted to see in print, and actually, since I claim that I've never had an original thought in my life, I must have gotten that from associating with people like you. I merely articulated, which I concede to be my function in this world.

Again and again, I have been asked to expound upon and express this to businessmen and this is all the more remarkable because the message is not particularly flattering to you. it would have been very easy to flatter you in this context. The way to do this, the way you flatter businessmen in this communications context is to tell them what they know and they're all too ready to recognize. To tell them that the society isn't fair to them. That the media give them a dirty deal. I don't deny any of this, but I've tried to lead businessmen, especially business communicators, away from this thought. When I'm talking to journalists; when I'm talking to academicians, I have a very different pitch. When I'm talking to those groups, I say, look, there is a thing out there called business, which is one of the most exciting things to write about the world has ever seen. You just couldn't have a thing to write about like this. It isn't easy. It takes a lot of sweat, but try it. I've tried it late in life, and I've never found any kind of writing that was so much fundamental fun as writing about business. Now that's what I tell them. But that's not what I tell you. What I tell you is the other side of this story. What I tell you as businessmen and as communicators for and of business, is that you're not doing as good a job as you ought to do of explaining this process. In my mind, the key word there is explaining.

Sometimes I get introduced at these meetings as the man who told business to speak up and defend itself. Oh hell, that ain't what I said. Business has always been speaking up and defending itself. What I'm talking about is explaining itself. Not defending itself, but speaking up. Be aggressive and take the initiative. But this operation is not what I have in mind. Nor do I have in mind the defensive operation of business. When some scandal breaks, when there's some problem, when all of the quarters are calling up and the phones are ringing, the people that handle this thing are not morons . . . they do all right on that. Sometimes they do very well indeed. But in between those two extremes of a specialized message that any given company wants to get across and a crisis in which any given company is defending itself, between those two extremes is an enormous area of public ignorance, of what I claim to be an unappreciated, underestimated need . . . a need that arises in this society in which we all need to know much more than we do about what the other fellow is trying to do. And I mean all, not just business.

Sometimes in business groups when I get on this subject, somebody says, why do you single us out? Why not somebody else? And I say, oh, God, you're so right. Do the universities do a good job? They were in the seller's market so long that they didn't have to explain themselves to anybody. And they're still in the seller's market. It may not be forever, it never lasts forever for any of you. Government? Oh well, there's hardly a government agency that I think does a half adequate job of just explaining its operations. I'm not talking about defending. In a way, I'm not even talking about selling. Unless for selling you will use the word broadening out to include what I mean by explaining. I claim that much too much attention has been paid to the antagonism of the media and of the whole intellectual community toward the business community. The antagonism is there. I don't argue with it. Unless I'm talking to intellectuals. Then I argue.

The Price of Concentration

Well, then, talking to you. I tell you that if all these intellectuals were on your side, if their whole ideological position were to reverse, you would still have hell's own time communicating business, because business is essentially complicated and essentially hard to communicate. Not impossible, just hard. And that hardness means that sometimes some great responsibility devolves on you, on everybody in business management, not just the public relations people, not just the advertisers, but the whole damned management group. To explain this thing outside. This is the kind of society we are. As we specialize, as we concentrate on our tasks—and we must concentrate, because this is the whole secret of modern advance—but as we do this, we pay this awful price of isolating ourselves. You may have millions of customers, and you may spend millions on advertising and say we have a message that goes here and there, and the message is almost certainly about a product. But you're still isolated. And isolated in two senses. You're not explaining yourselves, you're not explaining your system. And you're not necessarily listening. Communication is a two-way street.

This morning, I was in Atlanta, Georgia, at a Western Electric public-relations people's annual conference. I was the 8:00 a.m. speaker. This is hard for a New Yorker. This is hard for a journalist. 8:00 a.m. is hard. I fulfilled my duty not

well, but I congratulated myself on having gotten there at 8:00 a.m. At 9:00 a.m., arose a man twice as big as I am, Arthur Fletcher, recently Assistant Secretary of Labor. And why I am talking to you about him is the word "listen." I give the Bell System very good marks for inviting Arthur Fletcher. Not only have they been hurt in the pocket but all kind of problems, personnel problems, have arisen as a result of Arthur Fletcher. He's their enemy. He's the guy who wrote those guidelines into the Department of Labor that resulted in AT&T having to pay all that back pay to people who had been discriminated against.

This wouldn't have happened ten years ago . . . but this company invited this tough and bitter man, and he is tough and bitter. He described himself as ex-bitter, and I think that's probably right morally. But every now and then you get a thought that sounds not so ex-bitter.

But I congratulate AT&T for inviting that guy to come talk to them. This to me is communication. This is a public they needed to know. This is the guy who wrote the regulation that reamed them. And boy he did it nicely. It's seldom that you hear a speech which actually changes anybody's mind in the audience. That one, I suspect, changed quite a lot of people's minds. It wasn't moral, it was very direct.

He had been a poor boy as you expect a black to be, had gone to what he considered a hell of a good law school at Washburn in Kansas. He got very good marks in the predominantly white law school. He'd known what he wanted to do, he wanted to be in the government. Having got out of this law school, he then said, if I hadn't been able to play professional football, I would have been sweeping floors three yearsmxer. Sooner than what? Sooner than when he was sweeping floors in the State House in Topeka. He was running an elevator there, when his law school classmates were already coming up in the Legislature. And they'd come in and say, hey, Art, did you ever keep your notes on so and so's lecture? Remember the lecture? It was absolutely great. We can use it this afternoon.

They were running the Legislature, he was running the elevator. Well, you look at it from that point of view, you begimhget it. And what I love was that he had been invited there to make this point. Tell them that this thing that almost everybody, or so many people at least at AT&T, had thought was an unfair thing, had another side. Fletcher said, look, one of those guys said to me, one of the members of the Legislature who had been in my law school class said to me, your day will come. It's not necessarily *your* day, but maybe your children's or grandchildren's. And he just said to hell with it, I'm going to hurry it up. A not unreasonable reaction. And it came over to that group, which isn't the most lovable group you would ever see assembled, as a not unreasonable reaction.

Corporate Social Responsibility

So that when I talk about business explaining itself, I don't really have in mind aggressive messages. I have in mind a duty that I think lies on all of us, including journalists, to explain something about our function and the way we do things. Because I just don't think anybody is born understanding this kind of society. I think we've all got to work to learn what we know about it, and we've got to work even harder to explain to somebody else why we function in our jobs, and in our own way, as we do in this society.

Now, as I go around this circuit of talking about business explaining itself, and so forth, the request I hear most often is that I write an article about the social responsibility of business. Why don't I? Well, partly because I'm no fool. I'm a reasonably lazy man. I've tackled quite a lot of tough jobs, but that one I don't want to tackle yet. I may get needled into it and I may be needling myself into it at this moment. But what a can of worms it is.

Now you're all involved in this. So bear with me while I just speculate a little bit about this phrase that bubbles around all these meetings about social responsibility of business within the social order. One of our guests here tonight told me that he keeps getting questionnaires, please do a social audit of your corporation. What social harm do you do, what social good do you do? Assets, liabilities . . . what do you think of that? I said, "Well, I think you should send a letter back saying it had been misaddressed to you. Tell them to address it to God. God keeps our social audit."

What Is to Be Measured

I say this not frivolously but simply because I cannot get, and I cannot find anybody else who has got a grip on this thing. What the hell does it mean? I've read a lot of long transcripts that thick, a verbatim report on an academic conference—not just any old academics, but business school people, for whom I have great respect, in general. And they were trying to come to grips with this social responsibility of corporations. And like everyone academic, every other scientist, they want to measure something. Now what were they going to measure so that they could get some kind of social audit of business . . . of corporations, or any given corporation? And they get quite specific about this. Are they going to measure such things as pension plans, welfare, that a minonty feel they should? This is part of the social audit, this has something to do with society. I can tell you it has a hell of a lot to do with society.

Were they going to measure that? Oh, no. Because that would have been originally sold to the stockholders as something in the self-interest of the corporation. This is something you did to keep your employees. This was part of the way. The way you did it. Would you include such things as all that money spent on safety devices? Oh no, you wouldn't include that—that has been going on for many generations. That wasn't done for social reasons, that was done for reasons selfish to the corporations. If they didn't spend that money, think, for God's sake, of the legal problems they'd have, of the lawsuits that would come in, and the verdicts that would go against them. They couldn't be part of it.

Now what about such a thing, which goes back many, many years in the history of American corporations, as contributing money to colleges, either in matching grants with employees, or directly. Well, the majority, they really didn't want to include that either. Now what was the majority's motive, was it anti-corporation? Not really. The majority's motive was, first of all, they wanted to isolate something that a corporation did that had a single motivation in the sense that it couldn't contribute to profit. It had to start very recently because in the concept of these prospective measurers, they were going to measure the improvement of corporate responsibility from some old base. What they didn't want to get involved in is the fundamental complexity of life, which scientists never want to get involved in. The fundamental complexity is that we all have lots and lots of motives for whatever we do. And on many occasions, no motive that we can isolate and explain. This makes it very hard to measure anything connected with motivation.

So, the motivation study was going to be narrowed to those social responsibility things which could be shown as recent, that is to say, in response to an outside agitation for more social responsibility. And second, it was going to have to be that kind of activity that had no other motive, that could not possibly be in the self-interest of the corporation, in the ordinary sense of the word. Now, in a sense, this is really where the social responsibility thing stands at this moment.

Now, I'm going to switch and approach the same subject of the corporation and society from another angle. And this is very important because in the years that I've begun talking about business needing to explain itself, I have been insisting and I still insist that there is not enough basic neutral information about the actual business process. That was what I wanted to get on the table. And I still do. And this is still

very high in my personal priority. But other things enter, and I believe they enter much more intimately, not only in the public, but in the morale of people like you. Every now and then I get on an airplane coming back from one of these meetings, and I talk to a young, that is to say young from my perspective, business executive whose morale isn't so hot. The social activists may be trouble to him. And what they bug him with is this word: altruistic. They have altruistic motivations, they want to help people. And he, as a businessman, has been committed by definition, not clear definition, to helping himself. This thing is a rock. It's a deep-seated worm that is running in this society, and we've got to deal with it.

Debating Business Ethics

As it happens, Pat Lenahan and Chuck Whittingham and I are all OJB's—that phrase may mean nothing to you, but it means Old Jesuit Boys. And we've got a hell of a lot of intimacies. I won't say that we got a hell of a lot of education, they may argue with that, but we got a lot of emphasizing. On the ethical and moral implications of practical life. Now, in my old age, I wouldn't say that any of this is unsound, glad I went through it, but I would say it was about 99 percent irrelevant to the real ethical problems in which my generation was involved. I'm not blaming anybody for this; the world moved. Nor am I going to stand up here and preach some new doctrine. I'm just saying that people professionally concerned with ethics and morals have not got themselves informed and engaged with the society we have; especially the business society.

I was invited to appear at Cornell University to enter a debate on business ethics. I couldn't quite figure out what the question to be debated was, but I accepted because the other debater was going to be Paul Weiss, then of Yale. I was so damn flattered to be on the same platform as Weiss that I said yes, and I got up there and discovered that Weiss, whether he had been unflattered to be on the platform with me or otherwise, wasn't there, that he had sent a last-minute cancellation. Needless to say, Cornell was in a flap to find to somebody who could debate ethics with me. Not that I'm a low handicap man in that way. But they just couldn't find anybody. Finally they found somebody in the Philosophy Department. Five years before, they would not have found anybody in the Philosophy Department who'd been good in ethics.

But they did find somebody in the Philosophy Department who was interested in ethics, and they asked me to have dinner with him before the debate so that I could kind of tell him what I was going to say. I talked a little bit and then he said, "You are going to have to help me more than that." So I said, "Well, what do you mean? This is a very soft field. I mean, there isn't any part of your literature that you haven't read, old pal. There isn't anybody living . . . business ethics is a desert literarily and historically." "It's not that," he said, "you seem to have a passionate feeling that business ethical standards ought to be better." And I said, "Yeah, I do have that passionate feeling." He said, "Well, I never really thought about business ethics that way. I thought the whole damned thing was criminal." Now, really, this was the best Cornell could do, given only a week. Given another week, things would have been better.

Okay. So if that's the way it is, maybe it would be all right if I made a few observations in this area because there's this whole business of fear of authoritative or successful contradiction. Who the hell is going to contradict you if you talk about business ethics today? I think that the ethical situation in business is infinitely better than (a) the public believes, but what really interests me is, (b) better than businessmen believe. And by the ethical situation, I do not mean that there are not many, many transgressions. There's so damn much opportunity for transgression, for cheating, for hypocrisy, for lying and semi-lying, that the transgressions must be infinite. But by the ethical situation, I mean the fundamental context in which business lives and works. There has got to be a lot of trust, and that trust would not be there if it were not more often than not fulfilled. But now we are talking about trusting, as among and between businessmen. But what about this matter of responsibility toward the rest of society? Let's look at that ethical situation.

We know that the whole material progress and a hell of a lot of the immaterial progress, the non-material progress, of the last 400 years has been based on concentration . . . on men fixing their minds on one thing at a time, even before you get to the specialization of knowledge. Even before you get to that, there's this propensity of a free property owner for specializing and developing his property. Relations between human beings, husbands and wives. Tremendous growth in concentration of attention in these modern centuries.

Now this concentration really is a modern characteristic —sure, you can find examples of it in the ancient world. But the generality of it is a modern characteristic. Now this specialization, this concentration has a price. It has all kinds of prices hanging on it. If you are concentrating on finding this tree, you are not paying attention to that tree. If you are building a paper mill, trying to get the most production for the least cost, you are very likely to pollute a river. If you are pursuing a line of academic research, if you think you are on the verge of discovering something, and you also have undergraduates in your care, you are very likely to neglect the undergraduates.

Concentration has a price. Corporations are not only concentrating on a series of specific goals, but even more particularly, they are full of people who are quite specifically concentrated on quite specific jobs. Even a conglomerate that can get into any old kind of business is not full of people who could get into any old kind of business. It's full of people who specialize in this and that. Even if there are a lot of so-called generalists around at any given time, they are looking at this and that. This is concentration. It is on this that we are built.

And it is this that we have to pay for, and part of the price comes back in the form of the demand for more social responsibility on the part of corporations.

A Dividend from Du Pont

My colleague Gilbert Burck, a great man, who retired two weeks ago—and I hope to God his retirement is more passive than mine—Gilbert started off an article the other day talking about the social responsibility at Du Pont. And he hasn't had a damned thing to say about what most people mean by the social responsibility of Du Pont. He just talks about how they get the prices down on this chemical and that chemical, and so forth, as a result of what? Their altruism? Hell no. As a result of their pursuit of their selfish corporate interests in a competitive system. This was society's dividend from Du Pont over the last ten to fifteen years. It was a brilliant passage.

Now that leads us to another matter.

The theological and ethical problem . . . altruism and selfishness. These middle-aged men with whom I come in contact these days have kids who have been pretty bored . . . when the kids talk about their own life goals and express them in altruistic terms, they want to help other people. They do not want to necessarily make as much money as their fathers did. They would much rather trade that off. In helping other people. The fathers are disturbed by that; they're not antagonistic. Almost to a man, they applaud the kids. But then they kind of say, what does that make me? And I guess what I've been going through is to try to work out a message to them which I will, in its rough form, let you overhear.

I think it is the nature of this society—and I don't think it's been the nature of any society for very long—it's the nature of this society that when you concentrate, when you succeed, when you do things right (and by succeeding I'm not now talking about money, getting a better yield out of the south quarter, or whatever the hell it is), when you do well, you are

not putting somebody else down. Almost inescapably you are helping somebody else. But you may not have meant to help anybody else. You may only have meant to help yourself. So is this selfish, and therefore morally negative, or at best neutral? Or is this a plus?

I am not trying to revise thousands of years of ethics. But I am suggesting that we need some rethinking and modification of how we talk and think about these things in the light ofy actual situation in our time. It is very hard for a man to do a good job in his own acres, whether it's his monetary interests or, more likely, just his enjoyment of his work, very hard for him to do this without helping a hell of a lot of other people. Perhaps most of them as much or more than he helps himself. Does this count ethically or morally, if he doesn't mean it that way? I am getting so damned sick of this word, sacrifice.

Let me go back just a second to what I was saying about the symposium on corporate responsibility. And those people who would not accept as corporate responsibility any kind of corporate activity that had anything suggestive of corporate self-interest. How crazy. How nuts. How utterly antiquated. To think that if it didn't reduce the per share earnings, it couldn't contribute in social responsibility.

Now let's swing this back. Not in my generation, but in the generation before mine, there were a hell of a lot of women, especially in the better educated or upper class or upper middle class segments of the English speaking world and the Gaelic speaking world, who believed that it was not respectable for a woman to enjoy sex. A wife's participation in sex was altruistic. It was something that she did as part of her social responsibility. Honest to God! I do not want to see corporations get into the state of mind of that generation of women. One result was that a hell of a lot of women who otherwise would have appreciated and enjoyed sex, did not. Which, at this stage of psychological sophistication, must seem a surprising statement. But it was indeed true.

I can see corporations becoming so God-damned socially responsible that they won't have any standards any more, any standards arising out of concentration. If somebody does a lousy job and says, well, I'm sorry boss, or if he's a chief executive officer he says, I'm sorry, stockholders, it was a terrible year, but that was the year I was being socially responsible. How do you know? How do you produce the audit? Who knows that it wasn't just the year that he was being sloppy.

What I'm trying to say to you is, in relation first of all to your own morale, I suspect that most of you enjoy your jobs, that you like what you're doing. You may not always admit this, but I think you do. I've been around you a long time. Second, I think that this enjoyment of your job is probably a more important motive to you than purely material rewards, and I'm not saying for a minute that these are all spinach, because they're not to me. But what I want to help you resist is the notion—whether it comes to you from your own children, or from your pastor, or anybody else—that in pursuing this kind of selfishness you are hurting somebody else and are, therefore, necessarily being uncharitable. Within that context, you can do a lot of wrong. But you will not be fundamentally demoralized by thinking that anything you get either by way of enjoyment or by way of material rewards by your concentration is taking away from somebody else.

More Freedom, More Choices

I urge you very strongly to understand that sacrifice is not necessarily the key to brotherhood and fellowship. The key parable in this respect is that of the Good Samaritan. There isn't a line that indicates that the Good Samaritan puts cash or credit or anything else in serious jeopardy when he helps someone less fortunate than himself. This may sound to you like 19th century capitalist ethics. But it isn't, because in the 19th century a hell of a lot of gain was and had to be made at the expense of somebody else. This is absolutely not the case, not the case nationally, not the case internationally, in the United States today. Other things being equal and in a typical case, when U.S. money moves to an undeveloped country, corruption ensues, confusion ensues, insecurity ensues, but underneath we know there is an unfolding of the human spirit involved. Give us fifty years. Give us seventy-five years, it's going to be better. You know this. It has been proved so often. And so often it does work.

But what I'm saying, opposed to what I've said tonight, is that you should not only explain business to the rest of society, but really examine it for yourselves. Don't get demoralized. Don't get bugged underneath. We're going to have these ethical problems, and I think in the years ahead they are going to get worse, and worse. How can it be otherwise? The freer we get, the more choices we have, the more ethical problems we are bound to run into. Fleas don't have many ethical problems, we have thousands. That's what we want, isn't it?

QUESTION AND ANSWER PERIOD

Ways: *You don't have to ask me questions, or raise objections. I always hate this question period. It reminds me so much of the classroom. A format in which I was notably unsuccessful and so unsuccessful that the scars still lie upon me. So, I don't ask you to ask questions, but have you anything to say to which you want me to respond?*

Q. *Mr. Ways, I would like to ask you just one question. It seems to me that being socially responsible has to be a voluntary act. And two or three years ago, for example, a company might be called socially responsible if it did an extraordinary job of controlling effluents out of the plant or into the water, or was spectacularly truthful on the front page and so forth. But today those things are controlled by laws and standards and rules and regulations and so, if you live up to the rules and regulations of pollution, you're not really being socially responsible, you're just being lawlike. And how much of social responsibility of corporations has been taken away by rules and regulations?*

A. *Well, actually, I would say the social responsibility of business must be defined by society. Not by business. Within limits. That is to say that if a corporation found out today that it could put a really noxious drug on the market, it would be socially irresponsible for that corporation to wait for a law to be passed before it suppressed the production of the drug. But this is an easy and clear-cut case. Ten years ago there was talk about corporations becoming more socially responsible and sacrificing part of their earnings for the common good, but when the public agenda of things that needed to be done, things in which corporations were involved, like the environment and so forth, as this agenda began to build up, it became perfectly apparent that the agenda of social goals was far higher in cost than the total of all corporate product present or future.*

Under those circumstances, in a competitive system, it is nuts to talk about the comparative social responsibility to two corporations, neither of which has done anything extraordinarily dreadful, if they're competing with one another. The only way that society can define their responsibility is by passing a law. It really isn't so novel or disgusting and it's nothing to do with creeping socialism. It's the situation. If there weren't other people out there demanding those laws, I'm damn sure people in corporations would begin to.

Q. *Sir, in the absence of real explanations for what is real social responsibility, do you think that as the public recognizes how much this is going to cost, there'll be less and less pressure for "social responsibility"?*

A. *Well, I hope so. In a sense, that is to say I hope there will be more and more social pressure for corporate discipline, for such behavior that society in general, or some part of society, is not hurt as a byproduct of the corporation's concentration on the corporation's goals. I go back a long way in this thing to 1930. I was discussing, and many other people were,*

environmental problems in a most simplistic way. We, the people, were victims. They, the corporations, were villains. It took a while for it to dawn on us that the things we bought, the things we wanted, and the things we wanted more cheaply, were the things that polluted the nation. I think in the last two or three years this little lesson has begun to percolate. We begin, society in general begins, to understand that.

Now this doesn't mean to me that pressure is going to be relaxed. To me it means, I hope, that pressure is going to become more realistic. If it's a matter of polluting a river, and it's very hard to move that plant, and there are many social and not just corporate reasons why that plant shouldn't be moved, possibly—and this has worked in other countries and is working in some situations here—possibly the answer is an effluent tax. This isn't a moralistic way of getting at it. I would rather call it a moral way of getting at it. It's going at it practically. The corporation would not do this and typically cannot do this of itself, without external pressure, whether by law or some other kind. And if our system is as really competitive as I think it is—I think it's highly competitive—no one corporation can do this. It just can't be done.

We're a nation with a deep involvement in sport and we understand that in any of our sports, mayhem is not committed. There are limits on what you can do. There really are. In any sport, limits. But these limits are enforced by rules. They are defined by rules and enforced by referees. This doesn't bother me as a person who is committed, although perhaps belatedly committed, to business and the corporate world, and to its ethical values. I am absolutely convinced that business by and of itself cannot properly and effectively organize that kind of social responsibility. That's up to society, the government. It doesn't bother me that one sees ahead many, many more laws saying this, that, and the other things business can't and corporations can't do.

I should think many corporate executives would read those laws and thank God, I'm also worried that in the present state of the art of government, many of the laws are stupid. Stupid as statutes. Even more stupid as administered. Okay. I'd get absolutely furious if one of those things landed on me. On my desk. Nevertheless, I'm not going to say the government has no business telling me what I can put into a river. I'll handle that out of my conscience. To hell I will. In a competitive business I can't. The government has got to do it.

Q. *What happened to a free market?*

A. I think what I'm really trying to say is that there are a lot of laws in this land, and a whole load of them passed in the last ten years. There are many constraints, restraints upon business activity. Thank God, from a business point of view. I don't want corporations to pursue either the image or the reality of social responsibility. I want corporations to concentrate on whatever they're doing, division by division. I want them to do this, and fundamentally I want corporations to develop a little more peripheral vision, a little more sense, to realize that if we put this thing on the market, we're going to get into trouble, and the people aren't going to stand for it. The sixteen-year-olds are going to like it, but the parents aren't. This is what I mean by a little bit of nonconcentration. But essentially I do not want corporations to substitute a sense of their immediate service to total society for their present concentration on whatever markets they're pursuing. If you go back to the sense of the other thing, then you've thrown away four hundred marvelously valuable years of human evolution. Because those four hundred years are not years of technology, essentially. Technology was just one of the things that came out of it. The underneath effect, the gut effect, was concentration. And don't desert this for some shapeless, amorphous thing called social responsibility.

Q. *Max, you pose a real challenge to communicators, I think, with respect to, as you put it, explaining business in terms of its motives and in terms of things that may have started out as objectives and goals for one reason and yet reflect social responsibilities and moral ethics. I wonder if you'd comment on perhaps some of the ways in which the executive part of the corporations can really attack this problem. Without sounding shallow on the one hand, or sounding evangelical on the other hand? It's a very difficult situation.*

A. In 1972 I seemed to be saying, listen more and keep talking. I think chief executives should encourage their organizations to cultivate a sensitivity. Sensitivity to publics outside. Not necessarily the obvious objectives. Maybe you listen too much to Ralph Nader and too little to people who have less articulately expressed other kinds of dissatisfaction with American industry. I think we ought to—every chief executive ought to think awfully hard about how good his communications are with his own workers. Now functionally, they have to be pretty good. He thinks of that all the time. The whole damn thing runs by communication. But it runs by very specific, concentrated, exclusive kinds of communication. How much sense does he get over to his employees of the state of the company. If things are going badly he's got a motive for getting over. "You're not going to get a raise this year, boys, because things aren't so good," but this isn't really what I mean. I mean the nature of the company. Getting over to them such aggregates as how do the total wages relate to the total of dividends.

God almighty, more than half the people miss that. They think that dividends paid by large American corporations in dollars just about equal wages. It's just appalling. If you lick this in one company and then another company, by telling people what the relation of dividends and wages etc. is in that company, then you erode this myth of how it is in business in general. The erroneous myth about it, that is.

Every now and then I see something that makes me think now why the hell wasn't this done twenty years ago. The last time it happened was when the Macmillan Company got out an annual report for children. Well, it sounds like a gimmick, but somebody worked like hell on it, and as a professional communicator I would say that somebody worked very well on it. It's a very nice piece of work in getting over the Macmillan Company to children. Naturally, I don't think many children will read it, and I don't quite see how it would come into their hands, but I think a lot of teachers will read it and I can't think of any group in the United States which is more ignorant about business, which is more in need of just such information about any given company, than the school teachers.

Q. *What role do you see for the business press in helping us explain what we do?*

A. Well, in the first place, I belong to an organization and I also have a temperament which is incapable of sustained self-satisfaction. Fortune—really one of the things that I love about it, that's compatible to me, is that we never walk around that place patting ourselves on the back. We always think of ourselves as telling the business story better than anybody else. But that's just a footnote to what we really do. We tell the business story, very dramatically. Now, all I can say to you is that the business press is the best press you've got. So keep it, foster it. But don't stand there, you've got other possibilities. Not all those people out there in the rest of the media are your enemies.

I can't tell you how to lick it, but I can tell you that in Fortune's relations with a corporation, our feeling is not one of total gratification. When we try to get some information about a company we are not always met with what we consider either candor or legitimate reticence. I had a startling experience last summer. I wanted to defend a corporation against an attack, a very specific attack. I didn't want to defend the whole corporation; it's not my favorite corporation. I just wanted to be able to deny a statement. I asked the corporation for the truth. Awfully simple matter which was how much federal taxes have you paid in the last five years? Not awfully simple, but not the hardest question they'd ever had asked. And you know I couldn't get them to say, "If you bring your tax lawyer to talk to our tax lawyer, we'll come to some kind of an answer." I couldn't get anything but unanswered messages. It's one of the biggest

corporations in the United States. And what we are talking about is Fortune. *Now if* Fortune *has this trouble, what the hell kind of trouble does the ordinary newspaper have. The ordinary newspaper hasn't even got the guy who can ask the question.*

Q. *Would you comment on the Japanese approach to business where there seems to be a total commitment to the company structure on the part of all employees.*

A. *Well, why not say a larger commitment. Total commitment in the 20th century is exceedingly rare. And I'm rather glad. I kind of like it that way. We generally find quite a lot of limited loyalty and when I find people with unlimited loyalty they bother me. As in Watergate.*

The Japanese slice the pie somewhat differently and I'm inclined to agree with a marvelous woman whom I met when I was in Japan in 1967, a sociologist, who says that whereas western society slices itself horizontally, all the bricklayers, all the business executives, all tend to group-coagulate, in Japan the slice is vertical. If you belong to a corporation that's what you belong to whether you are a physicist or a bricklayer or whatever. I can see advantages and disadvantages both ways.

Curiously, the social responsibility problem, this kind of thing that we're all running into in all these advanced societies, may turn out to be worse or harder to handle with the Japanese way of slicing this thing than with our way of slicing it. And then, of course, there's the Soviet way of slicing. Don't ever forget that they slice too. Over there a guy may be a member of the Communist Party, but if his job is to build, it is by pretty much the same standards you are going to build by. If you are told to do that and those standards will be concentrated on and will have socially undesirable byproducts, the Soviet Union hasn't got a systematic, theoretical, or administrative way of handling this well anymore than we have. I'm not saying they're going to run behind us on this, or ahead of us in the long run. But the problem transcends capitalism. The problem really goes down to concentration vs. whatever is the problem there.

Q. *In terms of that problem of concentration, one of the prices we are paying for that is that a lot of institutions other than business, such as government bureaucracy, are also becoming concentrated, with the result that individuals feel a great deal of alienation. As a society, that's really what we have to deal with.*

A. *Perfectly true. It isn't business alone that's in trouble because it isn't business alone that is concentrated. The word bureaucracy in sociology is applied in the 20th century to both large corporations and governments. Actually, I believe that bureaucracy as a mode of organization is softening in corporations. Softening slightly in government, but softening much faster in corporations. Corporations have more people around who are not willing to abide by the results of the bureaucratic machine. More people who want to say, yeah, but wait a minute. Do we really want to do this? This is the business we want to be in. And this is a good thing. This is one way in which we move gradually and without any great moral conversion... We move gradually and naturally from concentration to peripheral vision.*



MAX WAYS

Corporate Communications by a Highly Divisionalized Company

Robert E. McGinley
Vice President—Advertising
Greyhound Corporation

Although advertising is something we are all deeply involved in, and is of course my profession, advertising per se is only part of what I have to talk with you about today.

My subject is one of America's great, highly diversified corporations and how it solves the problems of communications.

It's a true story entitled "How Care and Proper Feeding Make the Top Dog Run," or, "synergism without the 'sin.' "

Our story deals with The Greyhound Corporation. Why Greyhound moved to Phoenix. The logistics involved. How it's working. How problems are being resolved and, importantly, how communications in every area, at every level, keep Greyhound a closely knit, completely unified corporation. Please let me repeat that: a completely unified corporation.

Not a loosely knit fabric of companies and commodities like those which, too often, we watch unravel whenever Dow Jones drops a stitch.

So much for metaphors. What I would like to tell you about at this meeting is what I choose to call the 5C formula that works at Greyhound.

What are they?

Simply, five very important ingredients that make the top dog run smoothly and powerfully. They are outstanding companies, compatibility, capable people, cash, and, of course, my main subject—communication.

First, let's talk about our outstanding companies. As you may know, The Greyhound Corporation is America's 33rd largest company on Fortune's 500 list of industrials, generating over two billion, nine hundred million dollars of business annually.

We are a corporation of over 100 companies, spending some seventy million dollars annually with 25 advertising agencies and other communications experts to advise our many publics that we supply people's needs in a hundred basic ways.

Right off, this would seem to be the basis for communications problems. Not so. That brings me to my next big "C."

That's compatibility.

The Greyhound Corporation is not a heterogeneous group of companies acquired at random because they were available, or to be had at a small price. Rather, they have been carefully selected to complement each other. Each must quality under our slogan, "Serving People's Needs in a Hundred Basic Ways." Each is not only a profit center in itself, accountable to the corporation, but at the same time, must contribute to the success and profitability of the others. For example, we have some companies with a tremendous cash flow. And we have other companies whose sole business is to make use of this cash at a good profit.

These companies are organized in six groups, each led by a corporate group vice president who has the assignment to make sure that companies in his group not only work efficiently by themselves, and with each other, but that they cross-pollinate where advantageous with all other groups.

Of course, these companies could not do the great job they are doing without the next "C"—that is, capable people.

There is not time here to discuss the capabilities of each of our people. What I do wish to communicate is that all of the companies in The Greyhound Corporation are led by people who built them in the first place. When we acquire a company, we always make sure to acquire its key people, too. Without them, it would be a poor investment.

The next big "C" is cash.

Again, I will not elaborate on this, because it is a subject in itself. But I believe that you will realize that when about three billion dollars in cash flows through one corporation's hands, there are tremendous advantages which can be gained, not only for the individual companies, but for the corporation as a whole. One example will illustrate my point. Greyhound Leasing and Financial Corporation, which deals in money, basically the cash flow of the other companies of The Greyhound Corporation, earned nearly fifteen million dollars net in 1972.

And now I come to the last of the big "C"s—which is the basic reason for my talk with you today.

That's communication.

Without effective communication, none of the other big "C"s could be made to pay off. Let me review a few of the ways in which we achieve effective communication.

How It Works in Phoenix

First, the organization which I have previously discussed into six operating groups. Those groups, and the key subsidiaries within them, all work together. This group system of operating greatly reduces communication problems.

Next, at Greyhound we don't go our separate ways or rattle around inside our beautiful, sun-drenched, ivory tower in Phoenix, Arizona. Phoenix. Why did Greyhound move there? Among the major considerations, of course, were the problems of crime, pollution, taxes, congestion, and inadequate transportation of many major U.S. cities that all but stifle the operations of a major corporation today. Perhaps, though, a more major consideration was communication. Consolidating our operations under one roof meant we could all see each other. All talk to each other. All help each other solve our problems. So that we, as a corporation, could run stronger, run faster, and maintain leadership in so many areas.

Modern technology plays an important role, too. Air travel, for example, can help representatives of companies of our corporation get together and work together on a moment's notice. Even more easily in Phoenix, where the airport is only fifteen minutes away. And you can park your car one minute from the loading gate. And because of the weather, the planes leave on schedule.

Telephone WATS lines help our people communicate quickly and more efficiently. A study showed telecommunications in Phoenix to be superior to those in most major cities. And far more adaptable. That's an important consideration, when you're paying a phone bill of nearly a million dollars a month.

Streamlining the day-to-day business of being on hand to

handle the business at hand produces some end benefits that can only make things work better, more smoothly, and help solve more problems. These things allow for flexibility. Adaptability. Change, when necessary. And profitability. They also support the enthusiasm, the unity, and the overall effectiveness of the 5C formula that produces synergism without the "sin."

And the best part is, everybody benefits. Even the banks Greyhound does business with. We work with about thirteen hundred banks in the United States. Since our move to Phoenix, you'd be surprised how many of their top representatives are anxious to call on us. To communicate with us, in Phoenix. In season, of course.

In addition to our system of group vice presidents, we also have an outstanding staff setup which permits all of our companies to enjoy top assistance and counsel in such areas as the law, finance, purchasing, accounting, ethnic relationships, and, of course, advertising. Since that's the part I know best, that's the sample I will discuss with you in some detail.

The advertising department of The Greyhound Corporation serves to make sure that each operating arm of the corporation has the advantage of all the advertising brains, know-how, and, particularly, the "clout" provided by the corporation itself, as well as by each of the companies which make it up.

The basic watchword of my department is the word "help"—because that's what we do. Our assignment is to help all the companies which make up The Greyhound Corporation. We help them to apply the arts and sciences of advertising to promote the sale of their services and products.

I like to describe our operation by pointing out those things which we do, and contrasting them with the kinds of things which we do not do.

Do's and Don'ts

Some of the things which we do are: we help select advertising agencies; we bring the companies together on cross-promotions, which permit each company to take advantage of the products, services, and advertising of the others; we review the advertising of all the companies to make sure that nobody has overlooked any bets in finding ways to work together to mutual advantage; and we apply our corporate "clout" and buying power in buying advertising space and time at the lowest possible rates.

Now, the things we don't do. Perhaps they are even more important than the ones we do. We don't allow corporate red tape, corporate "brass" looking over shoulders, or any of our other activities to stand in the way of each company, its advertising people, and its advertising agencies in doing the job that they know so well how to do. We help in every way we can to make sure that they have the proper people, the proper facilities, and then we get out of the way and let them do their job.

There's another area in which the corporate advertising department supplies an extra measure of competence which might not be effective for any of the individual companies on its own. The broad base of our corporation and the many areas in which we are involved often enable us to be more up to date or more aware of future trends in the technical phases of advertising. For example, we keep a close watch on trends in advertising media, and make sure that all of our companies are aware of what's happening and, perhaps more important, what will probably be happening in the future. This applies to many areas, such as the year-ahead-look we gave them in early 1972 at the crumbling picture of the general magazine publishers. For example, we specifically warned everybody nearly a year in advance about the prospective demise of Life magazine. We have been able to help in many other ways, such as providing background expertise in such areas as where TV commercials may be produced most economically. All of this sounds great, but how does it work?

I would like to show you some actual samples.

As you'll see, we'll be touching on just a few of our many advertisers.

Our corporate advertising has been designed both to represent us attractively to the financial community, and to provide local help to our divisions and subsidiaries. This ad, featuring Greyhound Lines' very successful business arrangement with Walt Disney World, was the first of three consecutive corporate ads measured by Starch to score as the number one most noted and remembered ad in the publication measured. Greyhound Lines, of course, is currently the greatest profit contributor to corporate coffers.

More Than a Bus Line

This was the first time in our 1973 series of corporate ads, featuring Greyhound Leasing and Financial Corporation. It helps us promote the diverse operations of a corporation that, as all our ads say, is serving people's needs in a hundred basic ways. This ad has been adapted for use by Leasing and Financial in its own advertising program. All of our corporate ads include a list of important subsidiaries, by groups, as shown in the lower portion of this ad. You might be surprised at the number of comments we get from informed business people who still think that Greyhound is just a bus line.

This second 1973 corporate ad not only promotes the financial strength of Greyhound Lines, but was timed for release as the Congress began reviewing AMTRAK subsidies for 1973-74. We look hard for opportunities to make all our ads serve more than a single purpose.

This ad has just appeared as the inside front cover of the May *Fortune* 500 issue. Development of the ad in its final form involved Phoenix headquarters representatives of The Services Group, Greyhound Leasing and Financial, Greyhound Lines, Inc., and Armour and Company. You can see that corporate ads not only help individual companies, but group heads and representatives of the companies help to create advertising.

Many of the corporate ads are adapted for use by the subsidiaries which are featured, and we are aware of business created by this kind of use.

Frequently, as in the case of one of our newer companies, Compass Automobile Insurance, The Greyhound Corporation association is one of the most important selling assets. An entire advertising and promotion campaign for Compass is being built upon this association. This print ad is a good sample of the campaign. The headline is a bold approach to a problem of low cost insurance. The copy in the ad and the logo both emphasize the Greyhound backing. In fact the last line reads, "Since Compass is part of The Greyhound Corporation, all the confidence you need comes free."

Let's talk about Armour-Dial for a moment. The bar soap industry volume during calendar year 1973 will approximate $350 million. Deodorant soaps will lead the industry growth and presently represent in excess of half of the industry's dollar sales volume. It is expected that they will continue to provide all of the industry growth during the next five years. Dial's share of this dollar volume is over 20 percent, and growing—which would seem to refute the doomsayers who predicted the hexachlorophene decision would adversely affect the brand. We have selected four 30-second commercials—the first of which was screened in 1968 and is a classic in terms of its presentation capabilities and is still in use today. The second is one of a series that ran during calendar year 1972, the third is the new creative force that positions Dial as a quality product with effective deodorant protection, and the last is our latest addition to the pool. (commercials shown)

The next commercial you will see is a Dial Antiperspirant commercial which emphasizes the underarm protection of an aerosol spray antiperspirant, and we will use this commercial to accomplish this. (commercial shown)

The newest entry in the deodorant market is the light

powder category. Dial is introducing its dry powder aerosol nationally using this commercial technique. (commercial shown)

It is expected that Dial's growth rate in this industry in 1973, including the dry powder introduction, will be double the growth rate for the category as a whole.

The next group of commercials are representative of the principal consumer products of Armour Food Company's four divisions.

The Armour Fresh Meat Division has several value-added products. The leading one is Armour Testender Beef. Armour has developed an instrument which can test meat in carcass form for tenderness without injecting tenderizers. Beef which passes the tenderness test is marked Testender and sold at a premium to retailers. The retailer in cutting and packaging the carcass is asked to drop in an Armour Testender label.

Television commercials may then be scheduled in support of the Armour Testender Beef availability. Here is one of these commercials. (commercial shown)

In 1972, the Dairy, Poultry and Oils Division sold approximately 10 million pounds of Golden Star Self-Basting Turkeys. Their goal for 1973 is 15,000,000. This is the only turkey which self-bastes itself with butter from the inside out and the only turkey with self-basting ingredients in the breast, thighs, and drumsticks.

The emphasis then in consumer advertising is the butter basting and assurance of Armour quality—let's look at one of these commercials. (commercial shown)

For the Meat Products Division we have two representative commercials. The first is for hot dogs. The annual industry volume is 1,260,000,000 pounds, or $860,000,000 at retail, which is growing at the rate of 1½ percent a year. Armour Hot Dogs have approximately a 6 percent share of this market and are an aggressive number two brand in the marketplace. With constant updating, the Armour Hot Dog Song has been used in a variety of ways in the past six years to build consumer awareness and a consumer franchise for this product. The commercial is a combination of Pied Piper and Tom Sawyerisms to demonstrate that Armour Hot Dogs are "The Dogs Kids Love to Bite." (commercial shown)

The canned ham market represents 424,000,000 pounds in annual sales and is growing at the rate of 3.9 percent a year. Armour Golden Star Ham is the premium product of the category, having grown 75 percent since 1967. Since this ham is made from a special muscle, which is naturally tender and naturally without excess fat or gristle, this product has been called the Filet of Ham. (commercial shown)

We feel these commercials have worked hard to tell consumers that Armour Food Company is indeed an innovator and a producer of fine quality products.

And here's that fellow again to bring us to Greyhound Lines, Inc. Besides exploiting new business opportunities, Greyhound Lines recently responded quickly, toughly, and successfully to a price cutting and promotional program by AMTRAK in the Northeast Corridor from Boston down to Washington. Here's one of four localized films used in each principal television market to counter AMTRAK. (film shown)

The really big Greyhound Lines news of 1972 was the September national introduction of the Greyhound Ameripass, a new way to see America at a remarkably attractive price. We used newspapers, publicity releases, posters signs, banners—all the guns we have. Here's how this virtually unlimited America/Canada travel ticket was introduced on television. You may not have seen our commercial since it ran in the daytime when it would be seen by people with the leisure time to use the Ameripass. (film shown)

The Ameripass has sold over 30,000 tickets in eight months. And most of the $5,000,000-plus revenue has been incremental, going right to the bottom line.

One month ago, Greyhound Lines began a new advertising campaign, based on a strategy which calls for reaching people who can afford another travel way. To capture those people, we'll have to change their minds about bus travel and us. And the slogan "A Change for the Better" brings it all together.

The spokesman selected to tell our audience about all Greyhound's changes—changes in new terminals, new buses, new promotions, the Ameripass and more—is Fred MacMurray, a man, to make a phrase, as American as apple pie, and under exclusive contract among transportation companies for all 1973.

Let's take a look at just a few of the many commercials already produced with Mr. MacMurray selling "Greyhound—A Change for the Better." (films showed)

Gentlemen, we have just shown you some samples of what we call "synergism without the 'sin' " or, more flippantly, "how to make the hot dog hotter."

It really all comes down to our corporate philosophy: "When you deal in basic needs, you're always needed."

And as people need us—need our products and services—we, indeed, need each other. That's why the 5C formula I mentioned earlier works so well at Greyhound. When you have outstanding companies, compatible companies, capable people, cash that works for you overtime, and open-line communication around the clock, you can't help but be the top dog.



ROBERT E McGINLEY

Selling the Value of an Advertising Program to Management

Richard K. Jewett
Director of Advertising
Pitney-Bowes, Inc.

For years Pitney-Bowes salesmen have been told repeatedly by their field management: "Your customers are interested in the results and benefits they derive from the products, rather than the products themselves. Millions of drills are sold," they tell them, "not because folks want drills, but because they want holes!"

I sincerely believe our corporate management feels the same way about their advertising. They, too, are interested primarily in the results and benefits they derive from the advertising program, rather than all the specifics of the program itself. Close to five million dollars are spent each year at Pitney-Bowes on advertising, not because management wants promotions, but because it wants sales.

Selling the value of your advertising program to management is easy . . . if you work hard enough at it . . . continually. You simply have got to sell the holes . . . not the drills.

I think it is important at the outset to take a moment to brief you about our company and its advertising. We are no longer simply "the postage meter people," although we are extremely proud of our 53-year history as the inventor and principal producer of the postage meter and mailing machine.

Today, we are a paper handling company, and are quite confident that wherever there's paperwork, there just might be a Pitney-Bowes machine close by . . . or a prospect for one. We believe "Business travels at the speed of paper" — our current slogan . . . and are proud of the role we play in helping people everywhere cut the cost of expediting this paperwork with our expanding line of mailing machines, collators, folders and inserters, addresser-printers, and copiers. We also sell retail systems equipment . . . computerized cash registers and complete point of sale systems . . . but my review today will cover only efforts pertaining to our mailing equipment and copier divisions.

Now, to the organization that must sell the results and benefits of our advertising program to management.

In reality, we are considerably more than an advertising department . . . we are a marketing communications operation. That role is important because we are a direct sales, marketing company, both in the U. S. and in some 100 foreign locations. The largest number of our domestic sales, however, are closed by the more than 2,500 commissioned sales representatives operating out of some 150 branch and district locations throughout this country. They sell our products directly through sales calls among prospects and customers in their respective territories.

As with many companies, including yours, I'm sure, effective marketing communication is a key to helping sales for Pitney-Bowes. First, we must communicate successfully with customers and prospects. That's where the advertising effort is directed. We use most of the tools you are all quite familiar with . . . publication advertising, direct mail, radio, sales literature and aids, national and regional trade shows, motion pictures, product publicity, etc.

Second, we have a major communication task of informing, motivating, and recognizing that field sales force I just mentioned. Here we utilize a myriad of techniques and formats . . . monthly field marketing meetings, special salesmen publications, sales incentive contests, our annual conference of top sales leaders at a major resort, new product introduction kits, and the like.

To handle this dual assignment . . . this marketing communication program . . . this two-way street between marketing management and the field sales force, and between the producer and the buyer, I feel our group is positioned in the ideal location within the corporate structure. As director of advertising in charge of this complete program, I report to the group vice president who oversees both corporate marketing and all of the operations—manufacturing, engineering, sales, and administration—of our two principal product divisions, mailing equipment and copier products. In turn, he reports to the chief executive officer of the company, our president.

And that sets the stage for the meat of my message: how we sell the value of this program to management, marketing as well as top. As I said at the outset, it's easy, if you work hard at it, continually. Here's how we do it.

We begin by firing our big guns whenever we do any shooting at all. We don't save our salvos for the right moment, the critical time, or when we feel we need "something extra." Our big gun is communication. That's our business, our show of strength, our job. If we can't communicate effectively to top management, as well as we communicate with our buying public and our sales force, then we have a problem that is insurmountable.

Take the Message to the Top

So we go to our strength by communicating upwards. We *regularly* keep our top management informed about our advertising program and its progress. We simply do not spread the gospel downward and wait for the word to worm its way north. We don't wait for that call from upstairs. We go upstairs first with important information. Other results are included in routine communications that travel across the company board, such as field and home office regular merchandising of all efforts.

We not only communicate upwards but also we communicate in a positive position. We try never to be on the defense. We *carry* the ball to top management. When you are on the offense, you've got momentum going for you. When you possess significant information about the value of your program—when you can put some money where your mouth is—then it's your job to inform your management of the results.

The same practice holds when there may be a breakdown in your program. Maybe the results aren't all that gratifying. But keep in mind, you have the ball, and you are in the best position to justify your actions and your decisions. Don't punt and think that the bad news is going to lie dormant for awhile and then go away. Believe me, it won't. Management will come back at you. Only now, they'll be on the offensive and you will have your back to the end zone. Not an enviable position to be in.

Now, to specifics on how we try to sell the value of

marketing communication to top management. Here are some ways we try to convey this most vital message during the course of each business year.

First, we begin by telling management exactly what our advertising program for the coming year is going to be. We have adopted the reasoning that you can't sell the value of your program if the powers that be don't know what that program is. Therefore, the most significant and formal presentation of our efforts during the year actually takes place some three months prior to kick-off.

Over the years, top management—my boss, our executive vice president, the president, and the chairman of our board—have been accustomed to and, I might add, look forward to our annual advertising program presentation.

Our presentation, I'm certain, is not unlike the meetings that many of you have either chaired or been audience to in your own organizations. It's a detailed review of the specifics of the program. It's a preview of the actual national advertising campaigns we plan to run during the coming year, along with where and when we plan to expose them. And more important, why. It's the time when we, the advertising and promotion staff, and all the representatives of our three agencies lay it on the line for consideration, approval, and budget appropriations.

We expose our entire program, every facet of consumer advertising, direct mail, sales promotion, salesmen communications, participation in trade shows, our film program, and the myriad of other sales support activities planned for the coming year.

This exposure is not conceptional in nature. Not by a long shot. We have been hard at work at it for more than four months, and this presentation is the culmination of hours of hard work, both creative and administrative. Only two weeks earlier we give the same presentation to our first line sales management. We want to make certain that our program is meeting their marketing objectives, which we reviewed with them in early summer. Because they, too, you see, are interested uppermost in the holes, not the drills. They want results.

Thus, it is at this formal presentation of our scheduled program that we begin to sell its value long before we go into production. We have an astute advertising-conscious top management, and, therefore, we all must go into this meeting fully prepared to sell the program. It usually develops into a question and answer session where the value of each individual campaign, promotion, or even one proposed ad may be questioned, but usually not, because concepts have long since been accepted. When this four-hour meeting is over, we have traveled a long road toward gaining not only full acceptance of the program but also insight into the value of it by management.

That's the beginning. We have communicated upward and we've communicated on the offensive. The program has been officially approved. All that remains is to implement it successfully and report its progress. Again, we have to work at it.

Value of Monthly Status Report

The second step in working at it becomes the very obvious form of communication that everyone in business uses, the monthly progress report. Here's where I keep my boss (and top management) fully informed of major activities and results. It's simply a step-by-step report of progress on the total advertising program that was presented to him in the annual presentation.

He's not concerned with details. Just the highlights, and it's my job to cull the significant from the insignificant. He relies on my judgment in this respect. And the quickest way I know to gain disrespect both for you as a person and for your ability to administer a multi-million dollar advertising program is through the pages of your monthly status report. You can't oversell in your status report. You've already sold your program, and the status report is not a medium to elaborate on its value. There are other more valuable means to accomplish that end.

One of these means is through an advertising effectiveness measurement source such as the Gallup & Robinson Research Study. Here's an extremely valuable tool and one we rely on quite heavily at Pitney-Bowes to judge the impact of our advertising. I can't stress enough how this tool has helped us measure readership results. I'd be glad to discuss it further during the question period.

A word of caution (if I may) about research findings. Not in the caliber or results of the study, mind you, but in how you use them to sell the value of advertising to management. It's often the easy way out and provides the most tempting passage upstairs to blow your own horn. I learned a long time ago that you don't sit back in your advertising director's seat, wait for those research reports to come in across your desk, separate the flattering from the embarrassing, and then present only accommodating findings to top management.

When you contract for a research report on the effectiveness of your advertising, you are laying it on the line. It now becomes your responsibility to accept the report, digest its findings, and report the results to management. News, good or bad, must come from you, the keeper of the keys to the advertising vault. Management expects that. And in my situation, they had better damn well get it. So if I am going to go out of my own, and ask for a study on my program's effectiveness, then I had better be prepared to communicate upwards, downwards, or laterally to all concerned on the results of that effort.

Sales Force Is Your Barometer

I'm certain you have all realized that you cannot begin to sell the value of your program until there are concrete indications that you are getting satisfactory results from those people in your own organization who beneift most directly from your advertising. At Pitney-Bowes, that audience is our 2,500-man sales force. Consequently, one of the more accurate barometers for measuring the impact of our advertising stems from the guy who is carrying the bag from day-to-day, making his calls on customers and prospects.

It becomes mandatory then that we, the advertising staff, conduct periodic studies within our own house. These studies take a myriad of formats, from personal field trips into our 150 branch and district offices where we informally "shoot the breeze" with our sales people, to compact questionnaires on specific campaigns that are directed to each salesman. Overall, we find that our sales people are honest and to the point in these opinion polls, and we receive valuable input from them. But, once again, whether that information is good or bad, whether the news is favorable or not, if it's significant, we inform our management. Not just on the results, but more important, on what we plan to do about them.

Here's an example of a typical in-house study: Our annual survey of the value of our advertising leads. I believe that it is as important as any test we conduct to judge the impact of our total program.

Besides his important cold canvassing, the qualified sales lead is the lifeblood of the man in the field selling our wares. He secures them in any way he can—from his own initiative via newspapers, regional business publications, yellow pages, and the like. He also obtains direct leads from his serviceman counterpart . . . the man assigned in his office to service the machines he sells. But he must rely heavily on the leads that develop through our national advertising programs.

Leads result from all of our communication efforts but particularly they are realized through our direct mail campaigns. Last year, for instance, we delivered over 350,000 leads to Pitney-Bowes salesmen.

The mechanics of the direct mail operation are quite similar

to direct mail campaigns you have probably initiated from time to time. Therefore, I won't elaborate on procedures. They are primarily booklet offering mailings to selective lists we maintain or rent on prospects for, and users of, Pitney-Bowes equipment. Naturally, when you have a pool of more than 500,000 customers, these mailing lists can become quite selective depending on what product or products the *user* has and what he *doesn't* have. Obviously, we key in on what he doesn't have.

A study is conducted on the results of these leads. We take a sampling, about 10 percent, of the thousands of leads that come in each year. Then we concentrate on tracing the avenues that those leads take. How far did the lead travel? Did it result in a sale? Did it at least result in a future call-back from the salesman who received it? Or did it simply die a natural death somewhere along the way, possibly never to be heard from again? Such studies are done both statistically, when we determine the average value of the leads from various media, and, as mentioned, through time-to-time contact with salesmen and customers.

Study of Competitive Position

In my dogeared book, another way to learn about communication results is through an awareness study. Every eighteen months, via the combined efforts of our staff, the agencies, and through the facilities of an independent researcher, we aim to find out where we're at—where we stack up with the rest in our business and marketplace.

The result of such an awareness study is most meaningful to management. It tells them what they want to *know* about what other important people in business *know*, about Pitney-Bowes. It tells them just where we stand alongside our competiton. They learn what other decision makers in business and industry think of Pitney-Bowes. And they can discover what favorable (or unfavorable) impressions these businessmen have about us, as a company, or about the products we manufacture and market, and how these impressions may have changed over the eighteen-month period. In the most recent study we scored well in every measurement. Certainly, not all of this can be traced back directly to our advertising programs, but the study is an excellent yardstick for immediate or future program planning.

I've discussed some of our regular efforts, so now I'd like to review some special presentations we've initiated over the years to keep management informed on advertising results.

For example, at our initiative, we recently made a presentation to management on the value of continuity in advertising. We made it at a time our business was lagging a bit and budget cuts were a possibility.

The presentation had six main sections and was based on data and research with charts provided primarily by Time Inc. and McGraw-Hill—if you'll pardon the latter reference in these halls. In addition to our staff, we called on John de Garmo and his staff and two people from *Time* to be a part of the meeting, to present a solid team effect.

You might be interested in what we reviewed. First, we reminded all concerned of the famous Ebbinghaus Curve of forgetting, which, as you recall, proves that once something is learned, it is often forgotten, and forgotten rapidly. Then, in a positive vein, we stressed five pluses of frequent and continuous advertising: it increases remembrance; it improves individual ad readership and cost efficiency; it improves reader attitudes towards a company, it increases product recognition and brand preference among publication readers, and, from the famous Morrill Studies, it lowers selling costs. On the other side of the fence, then, we discussed how decreased advertising reduces awareness of brand and company name . . . over both the short and the long run.

Further evidence that advertising continuity is important was covered by relating the extreme mobility—up, down, sideways, and out—of the management audience we are trying to reach. Our discussion concluded with an examination of factors substantiating the points that advertising reaches decision makers not covered directly by our sales force—top brass, etc.—and that consistent advertising provides many corollary benefits besides traceable sales, having to do with stockholder, employee, and prospective employee, relations, etc.

In all, we reviewed a lot of material, but in an up-to-date way that was revealing and informative to management—and us, too, as we put it together. In summary, it proved that continuity was vital to the success of a communication program and a must for sales success. It worked. No ad cutback.

Other sessions, or sometimes just summary memos to management, have dealt with new data from the Morrill Studies and anything else we determine of significance. I stress the we here, meaning the advertising team, because in deference to our media friends and others outside PB who want our business, we've found—and management agrees—direct approaches to them whether by mail, in person, or whatever invariably miss the mark, at least at PB. Management relies on us to be the experts in our field and to screen and interpret what they should see, good or bad.

Agencies Part of the Team

Now, a few more important points. Every step we take to measure the value of our communication efforts we do with the full knowledge and cooperation of our three principal agencies. We never, I repeat, never, go off on our own, get value measurements, and then ask our agencies to comply with our findings. They are an integral part of our team. They get deeply involved. They are never brought in after the fact. I firmly believe that because they play such a major role in the planning, creation, and implementation of our total communication program, they have the right and the know-how to be firmly ensconced on the measurement team. I would not want it, nor would I have it, any other way.

Second, I repeat, give management both the good news and the bad news. It has to pay off in both the short run and the long haul.

Third—that matter of significance in reporting. Only you can be the judge of that. Whenever we receive *significant* feedback on the value of our program, we report it to management. They expect it. They want it to come from us. Not from another source.

Fourth, and along that same line of thinking, we don't go to management simply to justify our existence. The multi-million dollar budget they gave us only a few weeks or months ago justifies our existence. Nor do we cry wolf by seeking their advice on every day-to-day crisis that comes along. To me, it may be a crisis. To them, I'm only number 17 on their list of priority crisis conferences scheduled that same day.

If you don't cry wolf, then you can quickly go from number 17 to number 1 when you have something solid to say about your advertising. Because it's their program, too.

In conclusion, I refer back to one of the very basic rules of management communication: you must build a rapport with those who sit in final judgment of your contribution to corporate profits.

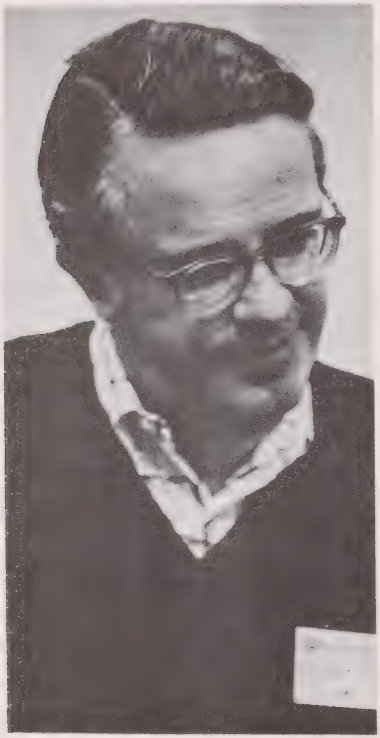
If you have built a reputation for sound judgment, honesty, and integrity, if you have not oversold your advertising, if you have reported only the hard facts, then you have gained their respect and confidence. But more important, your program has become a highly respected contributor within the corporate structure.

I would like to believe that we are companion to a good salesman in the eyes of Pitney-Bowes' management. You see, we try very hard to sell the holes, not the drills.

QUESTION AND ANSWER PERIOD

Q. *I would like to ask Kirk a question. Have you developed any advertising research techniques for pre-testing advertising? And if so, what are they?*

A. *Yes, we have done some pre-testing. Last fall we used Gallup and Robinson for pre-testing our magazine advertising. They have an on-going program for doing that, and our campaign this year for copy machine advertising is based on a pre-test. We had two good campaigns that John deGarmo and his agency proposed to us last fall. We, like John and his group, liked them both, but we didn't know quite which way to go. So we gave them to Gallup and Robinson and pre-tested there, and one came out better than the other, and we're now running it. We're getting some results from the on-going program, proving that we made the right decision. We've also done pre-testing in the area of radio advertising by market basis by picking one market or two and trying our campaigns there before we go to a larger campaign. We don't do it for all our programs. It's very expensive, but we do it on a major effort as much as we can.*



RICHARD K. JEWETT

Q. *On your results when your responses come in, your sales data, do you keep those on computer, or how do you follow them up?*

A. *At the moment, they're not on computer because our master list of users has just recently gone on computer, but we do have a system for checking sales. Since, as you know, the postage meter is rented from Pitney-Bowes we have a continuing record of who our customers are. We take the sample of the leads I referred to and check them against our records as to who are our customers and when they bought. We've found, incidentally, that we can go anywhere up to a year after the inquiry comes in and sales will still result. So a year after the leads have been out, and on a continuing basis, we study a representative sample of the leads to see if sales resulted. One of the things I'm careful about in talking to our sales people is very important—don't say advertising is 99 percent responsible for the sale, or even 10 percent, for that matter. The salesman's job is to get the order—we open the door for him. We try to get the prospect to ask questions, as I indicated earlier, or whatever the case might be. The salesman's job is to get in and get the order—we don't want him to get into a frame of mind that it's the salesmen over here and the advertising over there. They're working together. So we are very careful in explaining this to salesmen and working with them on that basis.*

Q. *Kirk, how do you get your expense level—as a percent of your sales, or do you depend on new products introductions, etc.?*

A. *It's a combination. The direct mail program, which is about 25 percent in terms of dollars to our total program, is set on a task basis. We decide ahead of time how many leads we want to produce per salesman per working day during the year's time, depending on his product mix or whatever he's selling. And then we work backwards from that to what kind of results we can expect from the direct mail, such as what percentage response we expect to get. Then we come up with a dollar figure of how much it's going to cost to produce that kind of a direct mail program. The sales literature part of it is very similar, of course. How many salesmen do you have and how much sales literature are they going to need. For new product introductions, we believe strongly, as I'm sure most of you do, that you've got to put extra steam on with a new product—a little extra advertising—so whereas we might spend on a percentage basis 2 percent of gross, we might go up to as much as 10 percent to introduce a new product. We did that with the copy machine. We got into a tremendously competitive new field, and we had to blast it out. We're still spending on a higher percentage for copying.*

Q. *Kirk, I was most fascinated with the number of leads you generate. You've got 2,500 salesmen. Do you do any screening? We're looking at what we can do to make things more productive for our salesmen. I was one once and got awful tired of somebody getting the literature for me. Do you do any pre-screening? Or do you send salesmen the whole batch?*

A. *No, we started to do that, Bill, and we got away from it. Based on some of these experiences I was relating earlier, you just never know who is going to buy. We're selling a little postage meter, in many cases for $7.50 a month rental. And a guy who operates a business in his basement often needs this thing. So we found it just doesn't pay to try to pre-screen. The salesman knows his territory. If he's been around a "prospect" a few times and realizes that he is not a prospect, of course he'll screen it out. But we, at the home office, make a very deliberate effort not to pre-screen because we get too many testimonials back from our salesmen that they've sold somebody that if you looked at on a pre-screening basis, you'd throw out—you know, a scribbled piece of paper, or a back of an old card, or something—and so we just stopped that a long time ago. Now different businesses might be different, but in our case . . . sure there are literature collectors, but some of those literature collectors turn into customers later on, so you never know.*

Corporate Advertising—What's Wrong With It?

John H. Hoefer
Chairman of the Board
Hoefer, Dieterich & Brown, Inc.

Good morning, gentlemen. I feel honored to have been invited to participate in Fortune's Annual Corporate Communications Seminar, and to be with you here today.

I would feel still better if all of us, jointly, could lay a garland of roses at the feet of corporate advertising for its extraordinary effectiveness. I would feel better if all we had to do to make good corporate ads was to follow the more or less established principles of product advertising.

However, gentlemen, as you all know, it doesn't work that way. And that is why I agree with those who say that corporate advertising has a long way to go.

Let me explain.

First, let me expose you to some $263-million worth of corporate advertising. I'm going to do it by reading you some slogans—twenty-five of them, to be exact. The multi-million dollar figure I named is roughly the amount that has been put behind the promotion of these slogans, and the publication of the advertising that carried them. As I read the slogans, you write on the sheet in front of you the names of the multi-million dollar advertisers who are using them.

Are you ready?

Is there anyone who *isn't* ready?

Here they are:

1. The Better We Get, The Better It Is For You
2. For the Business of Management
3. We're Involved
4. We Go Out Of Our Way To Take Care Of You
5. Serving People and Nations Everywhere
6. A Company of Uncommon Enterprise
7. The Proud Inventors
8. We Help Make It Happen
9. Making Machines Do More So Man Can Do More
10. Man Helping Man
11. Where Science Gets Down To Business
12. We Make Things That Bring People Closer
13. Going In New Directions With New Ideas
14. Partners In Progress Around The World
15. The Uncommon Company
16. Working Toward Tomorrow Today
17. We Guarantee Tomorrow Today
18. We Know What You're Looking For
19. We're Basic To Success
20. Just Slightly Ahead Of Our Time
21. Not Just Data, Reality
22. The Automation Company
23. The Company
24. The Growth Company
25. The Dependability People

These are the slogans, gentlemen, of some of the largest corporate advertisers in the United States. Believe me, they are not small or obscure companies. All of them stand tall in the *Fortune* Directory; a number are represented here today.

I think you will agree that many of the phrases are bland and platitudinous, and others are irrelevant and blatantly self-serving. Unfortunately, there are lots more just like them. On the good side, there are a few that fit their progenitors like a glove, which is what gives us all hope.

Why are so many of these slogans so weak? Why are some completely meaningless? Are corporations talking to themselves? Where is the bold individualism?

Let me ask you a question. Would it make any difference if we put them all into a hat, and let each of the twenty-five companies draw them out by chance? I think it would matter very little.

Obviously, a number of responsible communicators spent a lot of time developing these slogans, and my purpose is not to demean their efforts. Yet I really wonder if their labored contrivance doesn't provide a clue as to why there are not more memorable.

The concealed art is said to be the best art. There isn't much subtlety here.

Well, let's see how well you did. Here are the answers to the quiz.

1. The Better We Get, The Better It Is For You
   Burlington Industries
2. For the Business of Management
   Bank of America
3. We're Involved
   U.S. Steel
4. We Go Out Of Our Way To Take Care Of You
   Shell
5. Serving People and Nations Everywhere
   I.T.T.
6. A Company of Uncommon Enterprise
   Dravo
7. The Proud Inventors
   Gould
8. We Help Make It Happen
   Crown Zellerbach
9. Making Machines Do More So Man Can Do More
   Sperry Rand
10. Man Helping Man
    General Electric
11. Where Science Gets Down To Business
    Rockwell International
12. We Make Things That Bring People Closer
    Western Electric
13. Going In New Directions With New Ideas
    Boise Cascade
14. Partners In Progress Around The World
    First National City Bank
15. The Uncommon Company
    Diamond International
16. Working Toward Tomorrow Today
    The Southern Co.
17. We Guarantee Tomorrow Today
    New York Life
18. We Know What You're Looking For
    J. C. Penney
19. We're Basic To Success
    Chemetron
20. Just Slightly Ahead Of Our Time
    Panasonic

21. Not Just Data, Reality
I.B.M.
22. The Automation Company
Honeywell
23. The Company
Textron
24. The Growth Company
Georgia-Pacific
25. The Dependability People
Maytag

For scoring, give yourself four points for each one of the twenty-five you identified. Incidentally, I think it would be fair to ask you not to take credit for identifying your own company's slogan, or the slogan of your client, in case you happen to be an agency member.

On the basis of a score of four points for each correct identification, total your grade.

Is there anyone here who got 100%?

Please raise your hand so we can all see how the slogans registered:

If you got: 20-25 right, you scored between 80% and 100%
15-20 right, you scored between 60% and 80%
10-15 right, you scored between 40% and 60%
5-10 right, you scored between 20% and 40%

Is there anyone who flunked entirely?

If you got 50% or over, your recall rating borders on the genius.

If there is any group of communicators that should be able to score high in identifying corporate slogans, it should be the group here today. Which leads me to ask: How do you suppose the general public would do on this same test?

This little exercise tells us something about the retention quotient of contemporary corporate communications. Not that pairing slogans with their patrons is all there is to it. We all know it is not; it is far more complicated.

Also, taking a slogan out of its context is not like looking at the complete ad. Yet I will leave it up to you to decide how much it would have changed the scoring had I showed you the entire ads, but without their signatures.

For most of you I realize I have spoken only commonplaces so far. I have approached the subject this way in order to clear the decks for a more central problem. The problem is not just remembering slogans. The problem is what, if anything, stands behind them? It is what they mean and the ideas they convey—their credibility, or lack of it—that matters.

Perhaps the simple thought contained in a poem I would like to read to you gets to the heart of the matter:

"Tell Me Quick and Tell Me True"
(Or else, my love, to hell with you!)[5]

("I turn over page after page of the magazines, costing the advertisers thousands per page; and still they are talking about themselves and—as far as I am concerned—to themselves." —Comment by a reader.)

I see that you've spent quite a big wad of dough
To tell me the things you think I should know.
How your plant is so big, so fine, and so strong:
And your founder has whiskers so handsomely long.
So he started the business in old '92!
How tremendously interesting that is—to you.
He built up the thing with the blood of his life?
(I'll run home like mad, tell that to my wife!)
Your machinery's modern and oh so complete;
Your "rep" is so flawless; your workers so neat.
Your motto is "Quality"—capital "Q"—
No wonder I'm tired of "Your" and of "You"!
So tell me quick and tell me true
(Or else, my love, to hell with you!)
Less—"how this company came to be"
More—"what it can do for me!"

[5] Anonymous

That poem says it all for pragmatists like myself, and it makes me wonder what common denominators appear throughout corporate ads. There are some that do:

Statements that we're "making things better" or "helping to make things better" or "serving you in a variety of ways" or "are with it" or "doing amazing things" surface time and again, as do:

Photos of the factory	Sales and earnings graphs
Bogus heartiness	Exclamation points
Ponderous humor	Trite graphics
List of products	Founding dates
Fake humility	Tired ideas
Photos of the sales force	Photos of the founders

Could it be that the current "ain't we noble?" school of corporate advertising is precisely the sort of gambit that makes students uptight about business, about advertising, and about advertising as a career? As a friend of mine says, "The trouble with corporate advertising is that it's corporate . . . the trouble with institutional advertising is that it's institutional, and they are both 'advertisey'." I think we will all agree that most corporate/institutional ads lack the stopping power of most product ads.

Why Are You Doing It?

Let me ask you a question relative to your presence here today. Why would a nice person like you engage in corporate advertising anyhow?

You can state the answer to that question many ways.

You engage in corporate advertising because the world doesn't see you the same way *you* see you.

They don't know how diversified you are.

They don't know your outstanding reputation for product quality.

They don't know you've changed your name. They didn't know your old name, and now they don't know your new one.

They think you're sluggish, not dynamic.

They don't know Thing One about your magnificent technological competence.

Worst of all, they won't buy your stock. It just hangs there, drifting up and down with the market, mostly down, hopelessly undervalued at 31½ times earnings, and you KNOW it's worth at least twice that. Maybe three times. But there it is.

You may never get a chance to exercise your stock option.

Seriously, friends, options may not be at the bottom of corporate advertising, but stock price is. Price-earnings ratio. My guess is that roughly 98 percent of all corporate advertising is aimed at giving the stock price a massive kick in the pants. Don't let anyone tell you different.

The big question is: What's the best way for corporate advertising to give it that massive kick?

Some of the popular ways—and they've all been done badly more times than they've been done well—are to tell people how diversified you are, about your outstanding reputation for product quality, about your new name, your dynamism, your magnificent technological competence.

Today you make a direct frontal assault: you tell them about your earnings record. You show charts of ten-year growth. You plead with the reader to see you through *your* eyes, not his. Much of the corporate advertising that has appeared in 1973 is based on earnings, profits, graphs, and related financial data. The declining stock market and low p/e ratios must be driving a lot of people bananas. Based on a limited, non-projectable survey, I understand this strategy isn't working. I noticed the day I.B.M. announced first quarter earnings of 340.1 million dollars, the stock dropped four points!

I've been kidding these corporate advertising topics, but they're really all more or less legitimate. Depends on the company, what they really have to offer. No two companies alike, but, by the same token, no two companies all that different either.

Question No. 2, then, is this: Why is so much corporate

advertising so bad?

I won't attempt to answer this question, but I will offer a few suggestions as to what I think is the cause:

Are there too many high-level copywriters?

Is there too much looking over the shoulder at everyone else's corporate ads?

Has everyone in the company had a shot at perfecting the ad by the time it reaches the chief executive officer? Have all the dangerous, interesting, provocative, gutsy, controversial ads been carefully screened out before the ad reaches the boss?

Here's a question: *Should* anyone screen for the high-level guy that gives final approval for corporate advertising? Or should No. 1 sit down with the fuzzy-haired copywriter and the sandaled art director and work out the ad, with no go-betweens?

A further question: Should a corporation talk about its sense of social responsibility?

Yes, if it's really *socially responsible*.

No, if it still thinks increased profit-per-share is a corporation's prime responsibility, and everything else in the world—clean air, decent housing, elections in Chile—is secondary.

The world has changed. While there are still those who feel that raping the environment, or planned obsolescence, or treating employees like numbers is okay as long as it makes a buck, many serious-minded business executives don't feel that way.

Another question: Why is corporate advertising so boring? One reason, of course, is that the communication of the simplest idea can be, and often is, a very difficult task. Many have said that before me, and it will always be true. The communication of a corporate identity idea, for some reason or other, magnifies the problem to a quantum degree, embracing, sort of, the same kind of built-in destruction encountered in producing annual reports.

Guidelines for Good Corporate Advertising

Yet the practice of corporate advertising is not without some practical guidelines. For example:

First, good corporate advertising, like all good advertising, derives its effectiveness from clear-cut, attainable objectives. If you don't know what it is supposed to do, how do you know whether it is accomplishing its purpose? A good fix on problem definition is probably at least half the job.

Second, corporate advertising is presumably supposed to project a corporation's identity so as to reinforce or change the corporation's image. It makes good sense, therefore, first to find out what the existing image is before trying to change it or communicate the desired one.

Third, it's a hard, but true, fact of life that the only way a corporation gets to be thought of as being a "good guy" is by *being* a "good guy." Deeds still speak louder than words. Performance is the pay-off and verbalizing the intention without corresponding action can do more harm than good.

Many enlightened corporations recognize their responsibility to society as it relates to employee relations and to the protection of our environment, natural resources, and treasured democratic institutions. This recognition sometimes finds its way into corporate communications. Still, there is clear evidence that such enlightenment as yet extends only to a small percentage of the total.

*News Front**, in an effort to ascertain corporate attitudes and specific actions denoting social responsibility, conducted a survey of 1,000 top firms. As you might expect, there was a lot of foot-dragging. Some corporations seemed to regard corporate social responsibility as a PR ploy: supportive words, but no action. Still others seemed to feel that too much social activity would foul the nests of corporate profit and stockholder responsibility. All in all, the magazine received 200 firm replies—one out of five of those contacted.

Such apathy prompted corporate identity planner David Linowes to propose a "Socio/Economic Operating Statement." This statement, he says, would be prepared along the lines of a firm's operating statement. It would be a tabulation of voluntary expenditures aimed at improving the welfare of the employees and public, the safety of the product, or the conditions of the environment.

The impact of consumerism and ecology on political strategy could conceivably lead to SEOS statements or their equivalent for all large business organizations. These exhibits would be demanded by consumer groups, councils of economic priorities, social institutions, investors, and an ever-increasing number of regulatory agencies. Is this visionary? No, not at all. As Dave puts it, "If we don't get industry to apply its capabilities to society's most pressing problems, they will never be solved."

SEOS type of declarations could suggest some of the best corporate advertising of the future. Ads would match deeds and deeds ads. The self-aggrandizement that appears in so many corporate ads might then be far less common than it is today.

This is not to suggest that altruism for altruism's sake is the answer. It isn't. You should do good deeds not only because they are good, but also because they pay off over the long haul.

SEOS is among the clear developments in corporate advertising that some day will serve as precedents for future corporate advertising planners.

Now, as you might suspect, there are some muddy areas that need more attention.

For example, corporate communications should employ *both* advertising and public relations to do the job. Neither can do it as well alone as both can together! Advertising enables you to say what you want to say, where you want to say it, when you want to say it, and as many times as you want to say it. PR releases, as you know, are subject to rewriting and appearance at the editor's convenience—not yours. PR is an absolutely vital force for projecting corporate identity, but it should not be expected to carry the entire burden. You know about the 1,000 corporate press releases that hit the New York *Times'* financial editors every day and the similarly huge number that attempt to get into the *Wall Street Journal*.

Corporate Overtones in Product Ads

Here's another muddy area. Doesn't every advertisement (product or corporate) contain an institutional message for the corporation behind it? Corporate identification in corporate ads may be more emphatic, but that does not exclude corporate identification from ads that are designed to sell products. There is a relationship here that does not seem to be thoroughly understood. Any time a corporation puts its name before the public in any way, it is making a statement about itself. It is confusing, therefore, to look at these two forms of advertising as entirely different propositions. Product advertising and corporate advertising—hard sell or soft sell—call it what you will—can and should work together. There should be no doubt—their ultimate goal is identical, advancement of the corporation in some material way.

There's a lot of mud to be got rid of in the areas of "me, tooism" in corporate ads, particularly ads that exploit the problems and ills of our times—pollution, crime, drugs, consumerism, racial strife, etc. If you can't write it in some original and highly innovative way, my guess is that it won't fly.

Let's take a look at some corporate ads that have received some very high marks:

1. "What Have You Done To Your Country Lately?"
   This ad, portraying a greatly needed public service, was voted the outstanding overall example of corporation

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advertising in *Saturday Review's* 17th Annual Advertising Awards Competition—1969.

2. "In A Few Weeks This Striped Bass Will Die Of Water Poisoning"
   This was the top ad in the 1970 competition.
3. I've Had A Driver's License For 10 Years. For 9 Of Those Years I Was A Drunk"
   A top ad in 1971

I selected these ads because the voting on them was done by some twenty-five highly respected advertising people. One person could easily make a terrible mistake in praising or condemning any given ad. The consensus of twenty-five "experts" is hard to deny. Also, I am sure it is as clear to you as it is to me that "public service" ads are a lot easier to do than ads more directly in the corporate self-interest, enlightened as it may be.

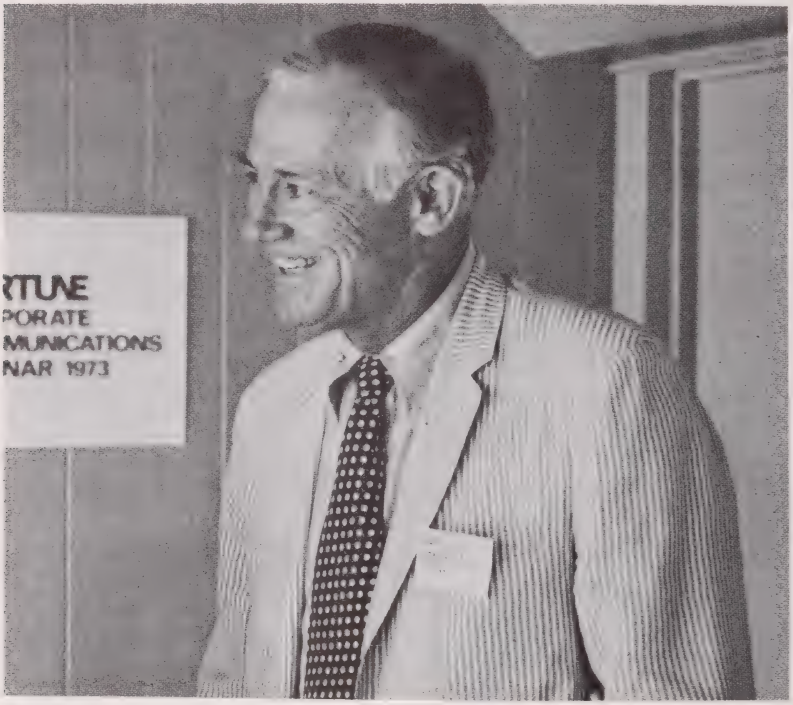
In connection with public service ads, I have been doing a lot of wondering about why the ads produced under the aegis of The Advertising Council are so outstanding in contrast to so many corporate ads. I am beginning to suspect that part of the reason is that the copywriters and artists working on public service activities are completely uninhibited, are allowed to do their own thing, and don't fight the unmerciful battle of someone blue-penciling their work. There may be a real message here—undoubtedly the subject of another talk on corporate communications.

Now, let's look at some other "no contest" ads:

4. "Ten Facts Parents Should Know About Marijuana"
   This ad pulled over 98,000 requests for reprints. More than likely, everyone in the audience today has had some immediate or indirect exposure to marijuana. I don't have to tell you the intensity of the interest that exists nationwide on drug abuse.
5. "Some People Believe A Door Should Be A Work Of Art . . . Schlage Does"
   This ad is one of a series of five that brought forth written responses from approximately two-thirds of the target audience—some 25,000 American Institute of Architects members. The letters were written to request reproductions of the illustration.
6. "Close Your Eyes And You Will See What Sam Sees All The Time"
   This speaks for itself.

The ads you have just seen have come in for a lot of attention. They are classics and will be around for a long time.

I have shown you some good ones. The bad ones you can



JOHN H. HOEFER

see in every issue of every publication that carries corporate advertising. So, as I said at the outset, the business of creating corporate ads has a long way to go. I believe we can get there faster if we but realize the problem is an individual one and cannot be solved either by cafeteria prescription or molasses language.

The unique nature of each corporation's identity seems to me to be where we should start and what we must learn before we try to project it. Then we must be sure the audiences peculiar to each and every corporation are correctly identified. How? By doing our homework. More work: greater rewards. What worked yesterday will not automatically work today. To keep up with change we must continue the study. There are many corporate communication challenges that simply can't be met by short term solutions.

Now, I'd like to close with a word of caution about what I consider to be the greatest danger of all in corporate advertising.

It is this: carefully planned, fully researched, minutely documented mediocrity. The Edsel approach, if you will.

So much wonderful thought and loving care is lavished on corporate advertising that it often ends up completely sterile. Safe. Dull. Boring.

It may even end up counterproductive. The company that wanted to come off as a dynamic, wonderful, Tomorrowland company comes off like Dead Centersville. Stolid. Unimaginative. Hardly a company you'd want to invest any money in.

So I'd like to give you my prescription for fixing this kind of situation. The prescription is one of my favorites. I've had it on my desk for years. Oscar Wilde said it. It will never go out of style. It is: "An idea that isn't dangerous is hardly worth calling an idea at all."

Sure, it takes a knowledge of where you are; and where you want to go; and how the public regards you; and how your public relations is going to work hand-in-glove with your corporate advertising; and how you're going to measure attitude changes over time. It takes all of these.

But it also takes something else: the willingness to be daring, to be provocative, to be *interesting*, to smash a few stereotypes in both deeds *and* words.

In other words, it takes the willingness to take a risk. But doesn't all progress involve some risk?



PAUL HARPER JR.

Corporate Advertising

Paul C. Harper, Jr.
Chairman and Chief Executive Officer
Needham, Harper & Steers, Inc.

First of all, let's define terms. I submit that there is no such special breed as "Corporate Advertising." There is only one kind of advertising. It's just plain old advertising, a highly pragmatic method of getting people to do something.

Advertising has been known to get people to do four things:

Slide A

If you have something to sell, it can get people to buy. If you want to recruit, it can get the right kind of people to apply. If you seek to enhance the value of your stock, it can help to get a favorable investment decision if everything else is working your way. If you want to build character with the people who make laws and regulations, the facts presented in a straightforward way can help get fair and favorable treatment.

As you go down this list, the cause and effect relationship between advertising and action gets harder and harder to establish. But all these things are legitimate goals for paid advertising—as long as the advertiser has something of enough interest to say.

But all advertising must pay off in action—not in euphoria, but in *action* through sales, recruiting, stock price, or fairer government treatment.

What is the secret of successful corporate advertising? The rule is simple.

Start with the problem. Not with the message. Start with the audience—not with the factory. Just as any successful product campaign starts with the consumer, so any successful corporate campaign starts with that segment of the public where action is required, whether it is fifteen Senators on the Subcommittee for Urban Redevelopment—or the entire home-owning public.

Planning for corporate advertising must become more *action*-oriented, and action takes place *out there* and not *in here*.

Planning for successful corporate advertising programs starts with the recognition that advertising *may not* be useful at all. There may be far cheaper and more appropriate ways of reaching the fifteen Senators on that subcommittee or the 100,000 influentials in the investment community.

Four questions must be asked:

1. What change or action do we desire to bring about—and where?
2. Can the desired change or action really be accomplished by advertising?
3. How much money is this change or action worth to this company?
4. Assuming that advertising is appropriate to the problem, what is the cost-benefit relationship between a certain number of dollars spent on advertising and the same number of dollars spent on other means of persuasion, such as public relations, industry-wide activities, sales promotion, lobbying, and so forth?

But questions two, three, and four cannot be answered relevantly unless question one is answered candidly: What change in attitude do we want to produce in whose mind? What action do we want to produce in what segment of the public?

I would guess offhand, judging by the results, that none of these questions have been answered coolly and candidly by about half the current corporate advertisers and their agencies, and that if they had been, half of the advertising wouldn't be running at all—in its current form at least.

In a way, it is difficult to discuss corporate advertising at all as a separate subject because it is so inextricably related to all other forms of corporate communications including of course product design and packaging. One reason why so much corporate advertising is wasted is that it becomes the vested interest of some elements in the corporation and it therefore becomes inelastic. It's run whether it's needed or not and is not regarded, as it should be, as one of many channels available to corporate communications.

I would like to show you the way in which three totally different corporations use or do not use corporate advertising against the four action targets I listed earlier.

Slide B

This chart shows how advertising is used by a major oil company as part of a total corporate communications program. Each bar on this chart is divided into an advertising segment and a segment representing all other factors. This includes deeds on the part of the corporation undertaken for civic or other noncommercial reasons. It includes personal appearances by the president or other company officials. It includes public relations, stockholder relations activity, and a host of other activities aimed at producing favorable action on the part of the company's publics. This chart does not represent dollars but rather degree of emphasis, and where the advertising segment falls below the 30 percent line it can be considered a relatively insignificant part of the total effort.

In the case of this oil company, product advertising rather than corporate advertising is relied on to promote large corporate orders, and product advertising is not factored into this chart. The corporate advertising that this company does is not supposed to produce sales. On the other hand, this company is on an intensive drive to raise capital. Therefore, its corporate advertising plays a major part in its total program to improve investor attitudes towards the company. This company has a stable employment pattern and promotes heavily from within. Therefore, the corporate advertising is not designed to recruit people.

All oil companies have a major image problem with the government and other opinion leader groups. Therefore, this company's corporate advertising is heavily laced with appeals to the government and academic communities. This company has identified its publics, knows what action it wants to produce, and has geared its corporate communications accordingly.

Slide C

Now let's look at a rapidly diversifying consumer goods conglomerate. The non-consumer advertising this company does is not aimed at producing sales. The product advertis-

ing, not shown here, takes care of that. But owing to the rapid growth and diversification of this company from a static base, there is a need to inform investors that the company is entering into far more dynamic segments of the market than it was in originally. Corporate advertising is a fast and economical way of doing this for this particular company.

Because of its rapid growth, this company needs to expand its executive structure. Hence its corporate advertising is also geared towards informing the potential employee of the opportunity it offers him for an interesting career. This company has no great image problem that can be attacked through advertising.

Slide D

Finally, we see an innovative business machine company. Here the line between the corporate and product advertising is hard to draw. The reason it is shown here as low as 40 percent is because of the extraordinary importance of its sales, service, and technological staffs. For this same reason, recruiting efforts and corporate advertising are closely linked at high levels. This company feels that if the corporate advertising helps sell goods and presents an attractive prospect to recruits, investor attitudes and government attitudes will take care of themselves. There will be some favorable rub-off in these areas but these two factors do not determine the direction of the corporate advertising.

So here we see three companies with three sets of problems where corporate advertising plays three entirely different roles.

Having defined what action is wanted and what advertising can do about it, if anything, we now move to the matter of what to say.

The trouble with a great deal of corporate advertising is that it assumes more interest than is really there on the part of readers and viewers. Actually, what corporations do, apart from the products they make, is of very limited interest to most people and this is where a lot of planning for corporate advertising runs off the track. Here is a set of values and the people to whom I think they would appeal.

Slide E

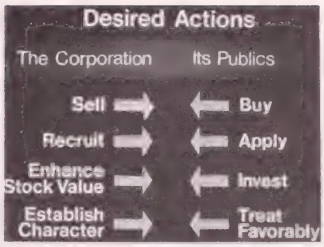
The corporate customer is interested in two things, the specific product values and the technological resources that back them up. To talk to him in his role as customer about how diversified you are, about how much money you are making, about what a good citizen you are, and about your new ten story pagoda is a waste of money.

The investor is interested in three things: technology, because that's where future earnings growth will come from; diversity, because it suggests stability; and your fiscal picture, because that's why he's investing in the first place. His interest in product as such is secondary to these and his interest in your civic and aesthetic postures is slight.

When we come to the potential executive employee, we find a wider range of interests. What you market defines the character of your company. Your technology defines its future. In diversification, he will see opportunity, and in a good fiscal showing, bigger pay checks. The best potential recruits will also be attracted to a company with a civic conscience and a well developed if practical interest in the arts. On these last two points, we have found with Xerox that the one reason which almost always appears when an employee is asked why he joined Xerox is its sponsorship of first-rate TV like the Civilization series and "America."

Finally, when we come to the government official, his professional interest in your business will be as broad as his professional brief. It will certainly begin with product values and may extend to technology, depending on his duties. He will only be interested in diversity if he's a member of the antitrust division and then you may not want to remind him anyway. Your fiscals he can get, if he wants them. But he and the academic community, which is such a heavy source of government personnel and opinion, will respond to state-

Slide A



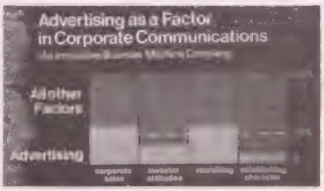
Slide B



Slide C



Slide D



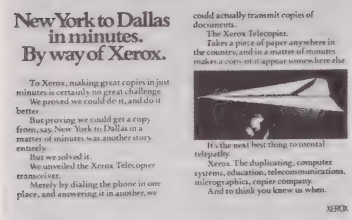
Slide E





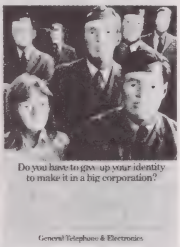
Slide F

Slide G



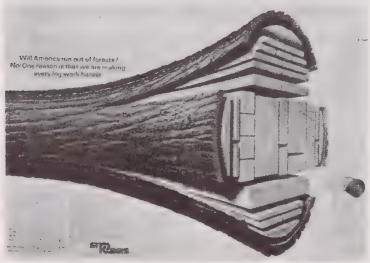


Slide H



Slide I

Slide J



ments of position on public affairs and to genuine contributions to the cultural environment.

Thus, what we see here is again a wide diversification of appeals, some of which work with one public and some of which work with another.

Finally, let me show you five campaigns which I think have been thought through carefully in terms of how to produce action and where the resulting advertising is aimed directly and single-mindedly at the target public.

Slide F

Here's our consumer goods conglomerate—Liggett & Myers, a company which has an urgent need to let the investing public know that it is expanding from its tobacco base into growing high profit categories. This ad does it simply and with a light touch. It is a campaign aimed precisely at the problem.

Slide G

Here is our business machine company using its technical innovations to do two things: (a) to sell a product, and (b) to build investor confidence through emphasis on diversification. The series of which this is part has also had considerable recruiting impact, although this was not a central aim. It is a simple but versatile campaign with an unmistakable message.

Slide H

Here is our oil company. This is part of last year's series of omnibus ads on the technology, economic and environmental problems of the petroleum industry. Although this campaign is clearly aimed at the critics of the industry, it has omnibus appeal.

Slide I

This General Telephone ad is aimed precisely at the fear felt by many a college graduate that a big company will swallow him up and destroy his identity.

Slide J

Finally, we see in this St. Regis ad a single-minded but fascinating attack on the industry's leading problem—the widespread impression that lumber companies are wasters and spoilers.

What do these five ads have in common—to put it in one word, they have discipline. Each is aimed at producing reasonable action on a part of a clearly defined public. None of them ask too much or too little. Each of them is specific and each avoids fatuous generalities and self-congratulation.

Most important of all, each of them tries to do no more than a paid advertisement for a good company with something meaningful to say can be expected to do, to tell the truth and tell it simply and well.

Corporate Advertising—A Worthwhile Use of a Corporation's Resources?

Len Matthews
President
Leo Burnett Company, Inc.

One great advantage of talking to an informed audience on a subject as broad as "corporate advertising" is that there is no requirement for a tight definition of corporate advertising. At any rate, I'm not going to attempt a tight definition. There are enough experts in this room to pick any definition of mine to pieces, if you were so inclined.

But I recall that, back in the days when corporate advertising was more often referred to as "institutional advertising," Leo Burnett made a remark about it which is a fairly memorable definition.

"Institutional advertising," Leo said, "is something like peering in the pants of a blue serge suit. It gives you a nice, warm feeling. But no one else notices it."

In subsequent years, Leo got to thinking more deeply, and less flippantly, about corporate advertising. He made at least one other comment about it which I hope I won't ever forget.

"A common fault of corporate advertising," he wrote, "is that too many people who use it seem to feel that, in itself, it will project the image of a company."

Personally, I don't think that can be true. The image of a company, it seems to me, is the sum total of the company's words *and its deeds*, as the public perceives them.

Corporate advertising, then, is a relatively small part of a company's image. If it accurately reflects the company's deeds, corporate advertising can enhance the public's perception of the company. But if corporate advertising is contradicted by a company's deeds, it is worse than useless."

So much for definitions. I will proceed on the comfortable and, I think, entirely reasonable assumption that you all know what I mean by "corporate advertising," even though no two of you might agree exactly on a definition of it.

The question before the house seems to me to be, "Is corporate advertising a worthwhile use of a corporation's resources?"

And the answer has to be, "It depends."

It depends, primarily, on how well a corporation does its homework in determining, first, whether a need for corporate advertising truly exists, and second, whether a given corporate advertisement or campaign truly addresses itself to that need.

Probably any one of us could leaf through three or four consecutive issues of *Fortune* Magazine and find a few examples of corporate advertising that made a great deal of sense. Reading these, we could be sure that someone—or, more likely, a whole lot of people—did his homework thoroughly, and developed some objectives and strategy both before and after the actual writing was begun.

On the other hand, in those same issues we'd be altogether too likely to find other corporate ads that would cause us to wonder whether certain basic information was collected and digested before someone was told to start writing—in fact whether there was any agreement on the communication job to be done.

Today's consumer goods advertising, as it is jointly developed by successful companies and their advertising agencies, is long on fact-gathering and research and testing. The object of all this is to find an *idea* about a product that is relevant and believable and can be sold to the public.

Because today, when actual product superiorities are very difficult and costly to create, and almost impossible to maintain for any length of time, it is increasingly the *differences among people's perceptions* of products that are decisive in the marketplace.

When the people responsible for a corporate advertising effort do their homework—when they subject themselves to the same disciplines that are second nature to good marketing men—when they ask, and answer, the same kinds of fundamental questions that invariably precede the execution of effective consumer goods advertising—then corporate advertising can become an important influence upon the public's perception of a company.

What I am saying is that the disciplines of creating and selling an *idea* to a consumer are essential to prevent the waste of advertising money. The idea may be *about* a can of peas, a washing machine, a seat on an airplane, *or a corporation*. But what an idea is *about* is not as important as the idea itself.

Before I go any further, let me make a clear distinction between what I call "homework" and "editing."

Homework is what should come *before* writing. Editing is what happens after the writing has been done—and more often than not, to the great detriment of what has been written.

Committees Dull the Cutting Edge

I'm sure you've all heard a remark attributed to the late great Charles Kettering. One day in 1927 his wife came into his study bursting with news she had just heard on the radio.

"Charles!" she exclaimed, "Lindbergh has landed in Paris! Isn't it wonderful that he did it all alone?"

Yes, Dear," Kettering replied, "It's wonderful. But it would have been miraculous if he'd done it with a committee."

When a corporate ad emerges from all the committees that edit it and massage it and worry about it, it's almost miraculous if that ad retains any kind of cutting edge that can make an impression on the minds of the people who will read it—or rather, the people who may start to *start* to read it.

Because what happens is that everyone on the committee (formal or informal) puts in his two cents' worth, and nearly everyone takes out a nickel's worth of whatever clear thinking and sharp writing went into the ad to begin with.

You sit through one of those committee meetings and you come to loathe the sound of voices saying, "I don't think we ought to say that," or "Can't we soften that a little?" or "Our stockholders might be upset by that," or "What will the chairman of the board think of that?" and so on ad infinitum. The result is an ad absurdum, if not an ad nauseam.

Good writers are rare enough, God knows, but they are a rather numerous tribe as compared with the total number of good editors who are alive and practicing their trade at any given time.

"An editor," Elbert Hubbard wrote, "is a person employed to separate the wheat from the chaff, and to see that the chaff is printed."

Or as someone else said, even more pointedly, "An editor is a man who knows what he wants, but doesn't know what it is."

Overediting is probably the one most important reason why there is so much corporate advertising that is just plain dull. What may have been a penetrating message at some stage of its creation becomes, under many hands, a smooth round ball that rolls into a reader's mind and out again without a chance of sticking.

Suppose one of our clients came to us tomorrow and said, "We think maybe we ought to do some corporate advertising. What do you think?"

There are many things I believe we would want to know before we replied, "Yes, you should do corporate advertising" or "Don't do it. Save your money."

To begin with, what is the intended purpose of the corporate advertising?

On analysis, nearly all corporate campaigns appear to be generated by one or the other of two attitudes on the part of management. The first attitude can be stated like this:

"We believe there is a condition or state existing in the minds of the public that we would like to change, correct, or modify."

And the second management attitude is:

"We would like to tell the public more about our company: what we are, what we're trying to do, what our corporate philosophy is."

What Do People Really Think?

The first kind of corporate advertising—that which is intended to change, correct, or modify a supposed state of the public's mind—is the riskiest, the hardest to do well, and the most effective *if* it is done well.

It reminds me of what a famous football coach said about the type of long forward pass that is called "the bomb." He was quoted to this effect: "when you throw the bomb, one of three things will happen. And two of them are bad."

Just so. You can score with that kind of advertising, if your homework has been done well and if your execution is, for all practical purposes, perfect.

Or, like an incomplete forward pass that wastes a down, your advertising can simply fall flat and waste your money.

Or, like an intercepted pass, your advertising can be so misguided that it leaves you worse off than you were before you ran it.

I can cite a recent case history.

Three months ago we were asked by a client to consult with the officers of a farm organization which is an important supplier to our client.

The farm organization's managers told us they believed that their farmer-members were getting a large, unfair share of the public's criticism of food prices. They were considering an advertising effort aimed at demonstrating to consumers in a certain large area of the country that farmers in that area are *not* making villainous profits from rising food prices; that, in fact, farmers are being squeezed as hard by the escalating costs of almost everything they buy as are the consumers of farm products.

So we wrote a few ads that said those things. We showed the layouts and copy to the managers of the farm organization and they said, "Great! That's just what we need to tell the public about our members. How soon can we get started?"

We said, "Let's find out what the public thinks about these ads, not just what you and your members think. Let's test the ads with the kinds of people they'd be exposed to if they actually appeared in print."

And we showed the layouts and the copy to several groups of consumers, making use of interviewing techniques that, over the years, have made many millions of dollars worth of advertising more effective for our clients than it could otherwise have been.

What we learned was that there is indeed great public concern and resentment about retail food prices—but that very few people have cast the farmer as the villain in the piece. Instead, there is a large degree of awareness that many thousands of small farmers are struggling hard to get by.

And we learned that if we advertise to consumers that farmers are having a tough time, their typical reaction is not only "yes, I can believe it," but equally important, "Don't tell me about the farmer's troubles; I've got troubles of my own."

We tape-recorded those interview sessions. We played the tapes for the farm organization's management and told them, "This is why we think you don't need or want this kind of advertising."

They elected not to use the bomb. They could see that it was too likely to blow up in their faces.

The point is clear: corporate advertising that is intended to change people's minds absolutely must be preceded by probing, objective analysis of what people really think as opposed to what we *think* they think.

Once it has been determined who thinks what, intelligent approaches to changing their opinions become possible. And intelligent testing can improve those approaches, sharpen them, make them that much more likely to score.

Quite often, perhaps in a majority of cases, research and testing will point to the conclusion that the public really isn't as mad at us as we may think. If so, we can either accept that with a sigh of relief, or we can very seriously ask ourselves, "*Why* did we think the public held this view? What's on our conscience that we haven't admitted to ourselves?"

Such self-questioning could be the genesis of changes in *our* ways of thinking and acting that might do more than any amount of corporate advertising to make the public think better of us.

But if our carefully done homework tells us that there is indeed an opportunity for corporate advertising to change people's minds about our company, then let's define as accurately as we can not only *what* opinions we're trying to change, but *whose* opinions, and *how much*.

The setting of realistic, realizable goals is a great discipline. So is the development of techniques that will enable us to measure our progress toward those goals.

Corporate advertising, for most companies that have ever done any, is one of the most vulnerable spots in their total advertising/marketing budgets. Often, that is simply because they've cut no yardsticks to measure what's happening as a result of spending all that money.

Many of these comments I've made about mind-changing efforts apply also to the other principal type of corporate advertising: that which is intended to tell the public more about our company.

Reaching Special Segments of the Public

To raise such efforts above the level of mere ego trips we need of course to determine what the public knows about us *now*. The answer often turns out to be, "Not much." Sometimes, if we're really honest, we can add, "nor do they give a damn."

Well, then, if the general public doesn't know much about us, and exhibits no burning desire to learn more, are there certain segments of the public toward whom we can direct our efforts with more hope of success?

Almost certainly there are. When we have defined who they are, we will have a good basis for media decisions, for determining which are the most cost-efficient methods of getting to these special audiences.

And what do we want to say about ourselves? If it's simply a story of mergers or sales growth or new product introductions, the job is to make the facts speak for themselves as pointedly and entertainingly as possible, always remembering that this kind of advertising is pretty much ho-hum for mass audiences.

But if telling people more about ourselves involves a

statement, not merely of where we've been, but where we're going—if we want to tell not merely what we make, but how we think—we have a lot of homework to do.

For instance: Do we have a corporate philosophy? If a dozen of our top executives were asked to state it, would they come up with essentially the same ideas?

Has our corporate philosophy ever been put in writing? If so, when? Does it still seem to fit, in this world of 1973? Does it seem reasonably projectable to 1980, and beyond?

In addition to making a profit, does our company have social aims and goals? Can we be specific about them? Have we ever tried to define our roles in the several communities we inhabit?

Do we have any products and services that contribute to the solution or alleviation of this country's important problems? Is our research and development activity entirely profit-oriented or is it also directed toward social gains? If it isn't, why isn't it?

What do we do for our people besides pay them money? What, besides a job, could we offer to a young, idealistic college graduate?

I was asked to talk for ten minutes. I have, but I haven't raised—let alone answered—all the questions that should influence a company's decision to do corporate advertising.

I think they all come down to this one question.

Are we ready to do our homework? That's the only way to make corporate advertising, or any kind of advertising, good.

In 1758, Dr. Samuel Johnson pontificated that, "The trade of advertising is now so near to perfection that it is not easy to propose any improvement."

Sorry, Sam; you were talking through your thick wig. That wasn't true 215 years ago, and it isn't true today.



LEN MATTHEWS

Corporate Communications In a Crisis Situation

William R. Wilson
Vice President—Advertising & Public Relations
Lockheed Aircraft Corporation

When Chuck Eidson asked me out on the West Coast a couple of months ago to come talk to you about communicating in a crisis, my response was well, Chuck, which crisis? And as a matter of fact, he could have picked out several, but I knew which one he had in mind. And that was that do-or-die, life-and-death problem that we had two years ago when we were snatched from the jaws of bankruptcy by a single vote in the Senate. That was a crisis that is easy to talk about, and I suggested maybe that is the one we could talk about. Communicating in that area a little bit today. The memory of that event is very green in my mind. It is something we won't forget for a while. How could we? It was an overwhelming experience, gentlemen. It was a total corporate effort dedicated to a single audience, Congress. To a single end, corporate survival. Before I get into some of the details of what went on, let me take you back and sort of set the scene.

I'll take you back to August 2, 1971, the day the Senate was voting on the guarantee loan legislation that would allow banks to make loans to us under a government guarantee. This legislation was absolutely essential if we were to stay in business.

It's one of those hot days you have in the nation's capital and you're sitting with me in the Lockheed office down on Farragut Square, and with us is Dan Haughton, Chairman of the Board, Vern Johnson, Senior Vice President in charge of our Washington operations, our chief counsel, and several other corporate officers. And the reason we're there is that we're waiting to get results of the Senate vote that's going on at that time there on the floor of the Senate. The fate of our corporation, the fate of our billion dollars' worth of programs, the fate of 71,000 employees and their management and us is at stake. This is "S" day, the Senate vote. A "nay" vote means bankruptcy; a "yes" vote means that we still get a chance to live. And we're sweating, but it isn't just because of the weather.

The reason we're sweating is that things don't look very good. We've been testing the pulse. We sort of have a feel as to how things are going, and it's going to be terribly close. The Treasury people, who are sponsoring the legislation, and who have been doing a lot of liaison work with the Senate, they are openly pessimistic. The unions, who have been working very much in our corner, at least many of them, gloomily forecast defeat. Senator Tower, who was a tower of strength for us as the leader of the bill in the Senate, is equally gloomy. And as the rollcall goes on, we're sharing this pessimism, because at the halfway point we're ten votes behind where we thought we were going to be.

Well, in a few minutes a phone rings, and I take the call. It comes from Los Angeles, and one of our people out there says that the Los Angeles radio stations are carrying the story that we have lost the Senate vote. Well, I know that radio station has jumped the gun, because the vote hasn't yet been completed. But we could get that call any minute from the Senate. So I turned to Dan and I said, "Well, boss, what are we going to do now?" And Dan didn't say anything. He just got up and walked over to his briefcase and pulled out a folder marked "bankruptcy," and sat down and started to study it. Well, that's kind of typical of Dan. He doesn't waste time, he gets to the point. And I started thinking of the Alamo and what do you do when the massacre begins.

Then another phone call came in and here's a voice that you can hardly understand on the other end of the phone that's yelling and screaming: "You made it, you made it, you made it by one vote." So we all take a big sigh and Dan puts that folder back into his briefcase, and he gets on the phone to start calling all the people who have been of help to us. Well, that one-vote margin was immediately dubbed "the Haughton landslide" and you can't stand many landslides like that.

Well, so I've given you the third act. Let's now go back to the first act, and see how this thing started. What caused this crisis, and what we tried to do about it. And what our communication effort was during this time. There are a couple of things that I might say in general before getting into detail.

One of the central facts that came to my mind during all of this communication effort in this crisis was that communicating in a crisis situation is different and unique in the sense that it is a total communication effort. Not just total on the part of the corporation, but a total effort involving all of our employees, the unions, the contractors, the airline customer, our bankers, our supporters in government. Everyone concerned. And because it is total, it is somewhat remarkable. For the first time, all of our people and all of our supporters are wholeheartedly engaged in a single operation. I know that you are all aware that in times of tranquillity or just mini-crises, the job of communication turns out to be sort of a part-time thing, and management sometimes wants to fob this off on the public relations practitioner and say, well, you go and take care of it. And others aren't concerned with somebody else's task, so you don't have the unity of action that a major crisis creates. But this was a crises—everybody came and worked on this as if our corporate life depended on it, and it did.

People Were Listening

I think the second central point that comes to mind about this period—and it sets this communication period apart from other communication periods—is that almost everyone was listening. The Administration, Congress, opinion leaders, media, plant workers, certainly, and a good part of the general public were reading and were aware of the facts and they were listening to them and they were discussing them.

So not only was it a total effort to communicate, but it was being communicated at a time and in an atmosphere where it was being received and was being listened to. People might not be buying our story, but they heard it. But, of course, the same people were listening to our critics, so the listening went for both sides of the controversy. Well, enough for generalities. Let's get back to talking about how this thing started.

If I had to pick a starting date, I'd pick March 2, 1970. That was the day that Dan Haughton wrote a letter to David

Packard, Secretary of Defense, to tell him that we were running out of money on our government contracts, and couldn't long continue to work on four major disputed defense programs unless the Pentagon made a settlement of these disputed contracts, or provided interim financing while the issue was taken to court.

Now this dispute was a very complicated and legalistic affair, and I'm not going to go into the details on it and I don't think you'd want me to. But it did spark a lot of demagogic attacks on the part of Congressmen and Senators, and widespread reporting of these sensational charges by the news media. Interestingly, by far the most accurate story of our difficulties during that period was done by *Fortune* magazine in an article entitled, "For Lockheed, Everything Is Coming Up Unk-Unks." It was an excellent account, and we had it reprinted for employees and others, and we made good use of it throughout our communication campaign.

After Dan's letter had gone off to Packard, there were several months of discussion back and forth. Debates as to what to do as we tottered on towards the brink of financial collapse. Finally, nine months after the letter went out, we received a copy of a letter from Secretary Packard addressed to Senator Stennis, who was Chairman of the Senate Armed Services Committee, and in the letter Packard said he offered us two choices: we could either take a 200 million dollar fixed loss, plus the added disallowance cost on our C-5 contract, or we could sue the government. Under either alternative, he said, it would be necessary for the Air Force to provide funds to complete the C-5 program.

Press Opposition to Litigation

We studied these alternatives, and we decided the loss was too big to swallow, and opted for the second alternative. We knew we had a good legal case; we felt sure we could win it, and so we decided on litigation and on January 5th we wrote Secretary Packard and said so . . . that we welcomed the chance to prove our case in a court of law.

But, as it turned out, the chance to go to court was denied us. A few weeks later, Secretary Packard wrote to us to say, in essence, well, litigation is fine, if that's what you want. But we've now determined that we cannot provide the funding during the time we will be in court. So now Lockheed would, perhaps, like to review its decision. Unless you can find a way of financing the program while the matter drags through the courts.

Well, we had no way to do this. The cost of continuing the C-5 program would have been several times our net worth. So now we had no choice: we had to accept the government's offer and agree to a 200 million dollar loss. We thought then, and we think today, that we had a good case, but there was simply no way out.

So we agreed to accept the loss. Combined with losses on other disputed programs, it all made up to more than half a billion dollars down the drain. It was tough. It took us to the brink of disaster, but we still had a chance to survive.

Dan Haughton, following a board meeting, sent a letter of agreement to Secretary Packard. This was on February 1st. And on that same day he grabbed a TWA plane for London, arrived there at ten o'clock the following morning. He was met by the Rolls-Royce people who took him to lunch at Grosvenor House, served him a glass of wine and some cold salmon, and said, "Dan, in twenty-four hours we're going into receivership." Another bombshell! Would the British Government continue the engine program? No, not without a new contract and special assurances from the U.S. Government.

Well, now followed weeks of frantic activity in which Dan burned up the air lanes between here and England trying to find some way of keeping the engine program going, while at the same time keeping our airline customers together, keeping our bankers with us, and talking to officials in the Treasury. In the end, it boiled down to our having to get loan guarantee legislation. And from early summer—May 1971—to the congressional vote in July and August, our entire public relations effort, well, indeed the entire corporate effort, was devoted to the end of having this legislation passed. The vote in Congress was very simply a key to our survival. It was the only way we could get the financing that we needed.

During this period we observed how misconceptions tend to feed on themselves. In our case, apparently many people wanted to believe that Lockheed, the banks, perhaps even the government, had joined in some sort of nefarious conspiracy against the little people, or the taxpayers of this country. Unquestionably, in this issue, we were part of the victims of the time—of rising sentiment against big business, against technology, against the military complex, against the war in Vietnam, against the establishment. For many, we as the nation's No. 1 defense contractor were the symbol of all that was wrong in America. Against us were raised the forces of the liberal, the ultra-liberal, the big city news media, the Ralph Naders, the Proxmires, the anti-war protesters, and so on. And curiously enough, but perhaps predictably also, ranged against us were arch-conservatives who saw in the government bank loan guarantee some threat to the nation's system of free enterprise.

It was in this kind of hostile climate that we undertook our communication campaign.

Making the Case at Congressional Hearings

It was clear from the beginning that our major communication platform would be the Senate and House hearings. Here was where the battle would be fought. Here's where the publicity spotlight would be focused. So we placed much of our strategy on telling the story in those hearings as forcibly and convincingly as possible.

Vern Johnson, our top executive official in Washington, ran the Washington campaign, and he ran it with great skill and knowledge. The Administration saw the importance of the loan guarantee to the national economy, and we were extremely fortunate to have most of its leaders on our side. We were particularly fortunate to have the then Secretary of Treasury, John Connally, as the Administration spokesman. Connally is one of the quickest and one of the most persuasive men I have ever seen in action. He familiarized himself with our situation and mastered the complexities down to the smallest detail, and cut through to the heart of the issues. His testimony was simply superb. Without his leading the attack for the Administration, I am absolutely sure the cause would have been lost.

While I'm passing out bouquets I certainly have to hand one to our Chairman, Dan Haughton. There's no question, no question whatsoever that we never would have made it without him. Throughout the whole crisis, he worked harder than any man I've ever seen or known. He never gave up. He kept faith in darkest hours. And he inspired all of us to keep ours. He, too, did a magnificent job at the congressional hearings, and when he finished the Senate hearing, he won the grudging applause of even Senator Proxmire. Proxmire said, and I quote, "Although I have not agreed with you, I think you have been a most responsive witness and you have done an excellent job for your cause today." No doubt about it, he did an excellent job, not only at the hearings, but throughout the entire troubled affair.

Even before the hearings, we were holding weekly strategy meetings in Washington with Vern Johnson. Later it became daily, and even hourly. We organized a program of personal visits to Senators and Congressmen. In these visits, we tried tell our side of the story. Some of these calls were made by our people in Washington; a great many were made by members of our top management. We have plants and offices in many states, and we naturally asked people in those areas to talk to those members of Congress that they were acquainted with. In all this, we were helped considerably by our subcontractors and our suppliers. And a lot of them had good contacts in certain areas. We also got a great deal of

support from our union, the International Association of Machinists, and the AFL-CIO. I'll come back to the unions in a minute.

One of the things, as you would expect, we did from the beginning was to prepare written material, reams of it. Letters to shareholders, outlining the course of events, suggesting that they make their own views known. Letters to members of management, doing pretty much the same thing. Articles in our plant newspaper, testimony from company officials to use at hearings. Fact sheets on our company's major programs. Position papers on why the loan guarantee was needed, and why it should be granted. Analyses of the issues—and there were many issues. I won't detail them all, but they were, including employment, the issues of, was the loan guarantee a fortunate or unwise precedent? The issue of Lockheed's management itself, the issue of whether it was a good risk for the government, and on this point we demonstrated that the guarantee loan would have first priority over all other Lockheed debts, and it would be paid off by the delivery of the L-1011 TriStar aircraft for which we had firm orders in hand. So from our viewpoint, this was worth the risk. Of course, there were other issues: government responsibility, situations with the airline customers, impact on defense contracts, and on and on. But economics and jobs turned out to be the key issues here.

Effort to Contact Media

Not all of our communication efforts were concentrated in testimony. For example, we organized truth squads of our people to take the case to the media in the big cities and the small hamlets throughout the country. It was a grass roots campaign. Often, our people showed up cold, at doors, knocked and invited themselves in to newspapers, radio or television stations. For the most part, they got a courteous reception. Sometimes it was cool, but nearly always courteous.

It was in the big cities where we found the greatest opposition from the media. During the final days before the vote, many editors across the country began to follow the lead of the New York *Times*, which carried editorials advocating the bankruptcy of a company as a lesson to others. The *Times* showed total disregard for the catastrophic economic consequences. Our chief editorial support came from *Fortune* magazine, which in June published an excellent article on our effort to save the company, along with an editorial urging passage of the loan guarantee legislation. It was a very effective piece, and we were very glad to have, once more, the great prestige of *Fortune* on our side.

A Total Effort Including Everyone

I've been emphasizing the total effort, and it was. Everyone was involved. Take our employees—many of them wrote personally to Congressmen and Senators. We had one man who made a career out of it. He wrote two letters to every Congressman and every Senator in our government. This employee writing campaign was largely self-generated, but we in PR approved of it, provided background material. It isn't really something we take any credit for. It just happened, or rather the force of the situation caused it to happen.

In addition, employees of some of our major companies—our missile and space company, for example—bought and paid for newspaper advertisements in their local community papers and the Washington *Post*, Washington *Star*. This, again, was something they did on their own. We had ourselves considered the possibility of taking ads and finally rejected the idea. Our industry has gotten into trouble with ads intending to influence government decisions. But ads by employees signed by employees and paid for by employees is something else again. We were very glad to see them appear.

Our unions rallied around. They took up the cause and did an outstanding job. They took the leadership in raising employee funds for advertising and other efforts, and I'm sure you are aware of the effectiveness of union groups on legislative activity. We had occasion to see it on a first-hand basis, and I've got to tell you it's very, very good. Union experts more than once guided us in our approach in getting our story across to particular members of the legislature. You may recall that a number of union leaders, including George Meany, testified for us.

I've already mentioned how our airline customers and subcontractors and bankers helped. The outstanding public relations firm of Hill & Knowlton gave us special and effective assistance. There were others in the total effort. I'd like to think that PR had an important part in it. But I have no illusions about our role. It turned out to be a victory, it was a victory won by very many people—inside and outside the corporation. From the closeness of the vote, it's evident that we couldn't have made it if a single segment of our supporters hadn't done its share and done it effectively.

Well, I don't want to prolong this because I know you'll have questions, but perhaps it's appropriate to close with a couple of the things we have learned.

One was the overriding importance of the job issue. We may have been a little naive at the start of our campaign. We thought that we could fight it out on more high-minded issues—the need to preserve competition, the importance of aerospace technology, the vital nature of defense programs, the special and extenuating problems that led to our particular situation. Well, maybe these had some major impact on some people, but by far the most persuasive issue was jobs. Admittedly, we were helped in the timing of this issue. This was when the nation's unemployment problem was at its peak, jobs were a burning issue to the unions. Moreover, Congress had just added to aerospace's unemployment by killing the SST. And perhaps there were some guilty consciences and some second thoughts. But apart from all of this, it seemed to me that jobs were the major concern. If it comes down to a crunch in which battle lines are drawn between jobs and say, environment, or jobs and consumers, or jobs and whatever, I'd hate to bet against jobs. The need for jobs is a powerful social force and it's represented by powerful voices in the nation and in the halls of Congress.

Another lesson, which perhaps shouldn't have come as any surprise, was nevertheless a somewhat disillusioning one. We learned that some of your competitors won't hesitate to kick you when you're down. Some of our competitors testified openly against us. Others worked, and worked hard, behind the scenes against us.

Different and More Interesting

Finally, we learned that in a crisis, communication is a different breed of cat, certainly a more interesting breed, and in a lot of ways an easier breed to deal with. I'm not particularly anxious to go all through this again, but I must confess that in some ways communicating in a crisis is a simpler thing, and perhaps even more satisfying than the run-of-the-mill communication that we are normally concerned with when we have little attention and no one is listening.

The reason is twofold, as I've already indicated. The total commitment you get from the entire organization. You get all the support, all the attention, and all the resources you need and even some you don't need. You have a ready-made audience of people who are ready to listen. You may not get much attention when you announce a new product or a new vice president, but when you are announcing the impending fall of a corporate giant, you've got a lot of people who want to hear more.

Some of the social historians have pointed out that it's easier to lead a nation in war than peace. Witness Winston Churchill's towering success during wartime, and his unpopularity in times of peace. In war, everyone has a single objective . . . everyone is motivated to peak performance.

Everyone hangs on the latest news of victory or defeat. In peace, motivation dwindles, unity becomes fragmented, interest wanes. There's no doubt it, war provides a better climate for communicating, even though you don't like the climate.

I'm not drawing any conclusions, I just leave it up to you. I want to point out that crisis communication is both more harrowing and more rewarding. Well, let me give you a chance to communicate with me, if you wish.

QUESTION AND ANSWER PERIOD

Q. Bill, can you identify any further the action of shareholders during this period? Was it political action, letter writing?

A. I was unable to identify very much action on the part of shareholders. Now it was hard for us to keep track of the letter writing part of it, as to the source, because you see most letters were coming from people with private addresses, and it wasn't often that they identified their particular motivation. I would say that the bulk of the letter writing came from employees and from suppliers. The hints were made, if you feel about this thing you may want to write your Congressman or Senator. And so a lot of them, a lot of the suppliers across the country, were writing. If I hazard a guess I would guess that shareholder letters probably amounted to no more than 5 or 10 percent, compared to employee job-oriented letters.

Q. What was going to be the main thrust of your legal argument, had you been allowed to make it?

A. The conditions of the contract weren't allowed to run. When we accepted the C-5 contract, and I'll try to make this simple because it's a huge complex problem, it contained certain clauses without which no company would have accepted this contract, which was a firm fixed-price contract to run over an eight-year period. There had to be some clauses that made for some adjustment. And the contract that the three competing companies all signed, Lockheed and Douglas and Boeing, contained these certain clauses. The three contracts were on the Secretary of Defense's table and he selected one, he selected ours. All three companies had signed the same contract with the same clauses which allowed for some price adjustments under certain conditions. Those clauses were not allowed to act. That contract was awarded in '65, and people in a later administration started looking at the problem in 1969 and 1970. From their point of view, they said, oh, no, that wasn't the contractual intent. Our attorneys maintain that it's exceedingly clear what the intent was. And we believe in a court of law that intent, which we believe was the initial intent, allowing for these clauses to operate, would have been upheld, and we would not have had to sustain the kind of loss that we did.

Q. Bill, would you care to say what it cost in dollars to do the campaign in support of the guarantee legislation?

A. I don't know that I could, but I don't think it would be very much. For the most part, it was being done by people who were already on the payroll, and we didn't have a big ad campaign. Obviously, we had additional mailings. I suppose our postage bill going through Pitney-Bowes was large. But I don't think total costs were of any major consequence.

Q. Bill, you drew a rather clear line between crisis communication and day-to-day type of communication. What effect, if any, has this crisis experience had on your company's attitude toward corporate public relations or communication since that time? Have you changed your organization to compensate for any of this?

A. We aspire to an exceedingly low profile. And that's hard to achieve. We seem to find it hard to achieve. One of the difficulties is that every time we make news, the tendency of the writers to say the beleaguered Lockheed Company today announced . . . Great new products announced today by Lockheed, the builder of the controversial C-5A transport. Now, we get this all the time. Our corporation has been, I think for a long time, very conscious of the public's position, and we've had a management that has been very sensitive to it. Very alert to it, and our experiences only leave them more so. And I think that the decisions and actions and policies are all made in the framework of anticipating public reaction and understanding. What will this public feel about it and what will be the impact on that public? I don't lead this group, I just hang on. They are all very sensitive to these areas and these things.

Q. One last question. Bill, perhaps the airplane in question, of course, has vindicated itself pretty nicely. I thought you'd like to comment on that.

A. Which one?

Q. The C-5.

A. Oh, because the L-1011 was also involved and I didn't know . . . Yes, the C-5 is doing well, although it continues to get its harpoons. It's a truly remarkable aircraft. It's, of course, the largest in the world. It was designed to take off and fly 5,000 miles, land on a 4,000 foot unprepared runway, disgorge its 100,000 pounds of payload, without refueling take off from that same unprepared runway, clear a fifty foot obstacle, and then fly another 1,000 miles to another base. To be able to kneel, the whole aircraft can kneel so that at truck bed heights they don't have to have special unloading equipment. It does a whole variety of very fantastic things.

Q. Have you felt consciously that there was any positive residual benefit between Lockheed and their unions? It must have been rather unique to have adversaries of a kind standing side by side and fighting for exactly the same thing. Have there been any residual benefits from this struggle with your various unions, or have you gone back to meeting each other on normal terms?

A. I think our normal relationships have resumed . . . and fortunately, they were reasonably good. We've had reasonably good relationships with our unions.

How to Talk with Washington

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Communication with Washington, as with anyone else, is a two-way reciprocal technique. To be effective, it must surmount language barriers, differing backgrounds, special vocabularies, and what pedagogues call the "apperceptive mass" of the recipient

There is an apocryphal story of the American traveling on the French Line, who came down to breakfast and was greeted by a Frenchman at his table, who said, "Bon appetit." Knowing no French, the American put out his hand, and replied, "Ginsberg." That interchange went on for several mornings until someone translated for the American what "Bon appetit" meant. So the next morning, the American greeted the Frenchman by saying, "Bon appetit," and the Frenchman promptly replied, "Ginsberg."

Paramount in effective communication, with government or with anyone else, is an insight into the recipient. Any message, statement of position, presentation, or argument should always be specifically targeted to the recipient. Any "To Whom It May Concern" letter neither communicates nor persuades.

That basic rule, of first determining and evaluating *to whom* any message is directed, applies formidably to any effort to communicate with the Federal Government.

There are literally hundreds of Federal agencies, commissions, departmental divisions, bureaus, and advisory groups, not to mention the scores of Senate and House Committees and Subcommittees, each with its professional staff.

Each agency or committee has jurisdiction and authority over some specific Federal Government activity that may affect a particular part of the private sector.

Perhaps another way of making the same point is to note that in 1972 there were over two and a half million full-time employees in the Executive Branch alone, wholly apart from the independent agencies, commissions, and congressional staffs.

The Long Reach of Regulation

Whether you like it or not, each of you, directly or indirectly, has to do business with many of them. It should be no surprise, even passing the current ubiquitous reach of wage and price regulations and the EPA, that no matter how free of restraint you may believe your own industry to be, there are few businesses in America that are not heavily regulated by many Federal agencies.

No matter what your occupation, the action or inaction of some Federal bureau has vital impact on what you may make, how you may market it, what you may say about it in your advertising, and, if you are lucky enough to sell it at a profit, what part of your net will be claimed by the Internal Revenue Service.

Moreover, every operating arm of government is functionally a pyramid. Inescapably, every policy determination or specific action reflects an institutional judgment that is usually generated at the staff level.

The controlling facts and resulting determinations, politics aside, are generated in the bowels of the agency.

No greater mistake can be made than the commonplace error of inexperienced men in bypassing those lower echelons, or failing to fathom the characteristics and attitudes of those hard-working men and women so often invidiously called bureaucrats.

Even before the fulminations of George Wallace about the administrative process and the functioning of Washington bureaus, criticizing the action of administrative officials was a popular American pastime.

And very often those who do not get what they want talk long and loud about administrative abuses.

As a starting point, I should therefore like to enlist your interest in a few of the human qualities and some of the everyday problems of an administrative officer in a Federal agency.

I have never been a bureaucrat. But one need not jest at scars merely because he has never been stabbed by an adverse administrative ruling or by a congressional committee.

Let us start by asking ourselves, what kind of fellow is an administrative official in a Federal agency? Behind the facade of formal official language, what is he really like, and how does he work?

Perhaps the first generalization is that no generalizations are valid. Administrative officials are ordinary human beings quite like and, more important, as different among themselves as the rest of us.

They have good or bad digestions. Some play bridge; some detest it. Many are happily married; some are less fortunate. Many understand and even relish a good joke; others aglumly grim. Overall, they appear to have an uncommon amount of fortitude, and I suppose the average share of folly.

Any objective reporter would also observe that these agency fellows are endowed with greater or lesser intellectual prowess, blessed with more or less education and training, and operate with highly varying degrees of zeal.

There is nothing odd about that. A similar cross-section of humanity can be found in any organized group—in any corporation, in any educational institution, even in Congress, and, if I may be forgiven for saying so, probably in your own organizations.

It is only fair to add that most of those bureaucrats have an abiding sense of dedicated commitment.

You may recall the chicken and the hog who passed a church bulletin board that asked, "What can *you* give to the poor?"

The chicken suggested, "Let's give them ham and eggs." To which the hog replied, "For you, that might be merely a gift. For me, it would be a total commitment."

Even more, merely because a man has been in government service for some decades does not necessarily mean that he could not have gotten a job elsewhere.

You must also never forget that there is in any government bureau a wide diversity of specialties. One hundred years ago, all peacetime activities were in the hands of only three professionals—the doctor to keep one healthy, the minister to point him straight after the doctor failed, and the lawyer who

took care of everything else, particularly the whole job of government.

Today, the Federal agencies and bureaus are filled with economists, statisticians, semanticists, engineers, doctors—both medical and philosophical—biologists, ecologists, psychologists, chemists, controllers, computer programmers, electronic buggers, and a host of other supposed experts.

Of course, the lawyers are still around, but they are only one of the many professions in government that control your affairs. The lawyers insist, of course, that those other interloping experts should merely remain on tap, and never be on top. But those other experts still have a lot to say in making the agency institutional decisions.

Nevertheless, I doubt whether differently phrased diplomas mean different human beings. Even a sanitary engineer in the EPA may have a love life, and Ph.D's have been known to harbor prejudices.

The point is that those bureaucrats are busy, hard-working human beings, and in communicating with them you must understand they are to be approached on that basis.

If I am right, effective Washington communication must rest upon an imaginative and intelligent recognition that you are dealing with people, and not with an inanimate institution called a Federal agency.

Common Sense Guidelines

In training young lawyers in the art of securing or forfending administrative action, there have been developed a number of *do's* and *dont's* which perhaps are of equal applicability to every effort at Washington communication. They rest largely on common sense, and not on any esoteric concepts. I might list a few.

Cardinal is the rule that what you say or write must be completely accurate. You must present fairly all of the relevant facts, not just those which support your position.

In blunt English, do not try to put anything over. Usually you will not succeed, and those who offer flat misstatements of fact soon develop an unhappy reputation.

You are entitled to put your best foot forward, but nothing will more thoroughly destroy your effectiveness, your reputation, and what some call the image of your company, than offering as an operative fact information that is wholly untrue or baldly slanted.

Put yourself in the position of an official who soon discovers that your statements are unreliable, or if he ventures to rely upon them, is later proved to be wholly wrong, and perhaps even a naive credulous boob. Only a St. Francis would not harbor a sustained resentment and persistent future disbelief in what you say.

As Max Ways has so cogently pointed out, public acceptance depends upon credibility, and, as Nancy Belliveau concluded last February, " Credibility is a very fragile commodity, and once lost is difficult to reestablish.

Conversely, those who establish a reputation for complete candor and factual reliability will find the administrative door more readily opened and action accelerated.

Administrative officials also do not take kindly to those who talk down to them—or who, by manner, tone, or approach make it abundantly clear that, in their view, the bureaucrat simply does not know what he is talking about. More often than not, you may be wrong. What is clear is that an intellectual sneer does not enlist a sympathetic ear.

Remember that those administrators did not write the law Congress did. The official you talk with may not know your detailed problem, which may be only one tiles in a vast industry mosaic.

It is wise to avoid implying what a foolish man once bluntly said: "If you knew anything about this subject, you would never have written such an uninformed letter." That is not a good way to win friends and influence people—in or out of the government.

Next on the experience of many in Washington, a basic problem in communication with government officials is that people who attend meetings always seem to hear what they want to hear, not what is actually said.

Administrators, like purchasing agents and media buyers, often resort to polite, yet negative implication. The outsider, filled to the brim with passionate conviction that what he wants is right—and of course in the public interest—is very often deaf to what in fact is being told him.

In that same connection, those experienced in dealing with administrative agencies always promptly write a memorandum of what they asked and what they were told. That should be done before the conference is reviewed, rehashed, and probably revised at the most convenient pub.

The government man you talked with probably follows the practice of promptly recording your visit. In many Federal agencies, he is required to do so.

If you plan to rely on what you heard—assuming that you have that priceless gift of hearing what was said and not what you wanted to hear—you ought promptly to record your visit.

In passing, I might mention that objectivity in memo writing is indeed a rare talent. No one, particularly no lawyer, ever fails to make himself look good in writing a report of a conference.

Yet that essential need accurately to record every Washington meeting, knowing that those you talk with will do so, is today increased because under the Freedom of Information Act anyone—your competitors, the press, and particularly the consumer activists—has wide access to government records.

And under the Metcalf Bill, Public Law 92-463, enacted last October, those goldfish-bowl requirements on government discussions now also extend to every advisory commission upon which there is agency reliance.

Organize Written and Oral Communication

It is perhaps unnecessary to suggest that you ought to organize what you have to say, or write, to any agency. It is not necessary to structure your discussion as though it were a legal brief. But it is highly desirable not to waste the time of an official who is far behind in his work, under pressure from his superiors, and who may also have a long shopping list from his wife to deal with on the way home. He will not listen to you forever.

The same observations are applicable to letter-writing. No one, in or out of government, can, with patient enjoyment, wade through pages of introductory gush before finding out what the writer of a letter is talking about or really wants.

Marshall McLuhan, who often peddles the obvious, once said that every technological invention works some social change. He added that the telephone had eliminated the prostitute and had substituted the call girl.

Never telephone a government official directly to ask a question unless you know him intimately and exceedingly well. One does not have to be a psychologist to imagine the reaction of any official who in the midst of trying to finish a difficult job is told that Mr. Jones of Peoria is calling him on the telephone.

He is immediately tortured as to whether Mr. Jones is a fellow he should talk with or can put off. That emotional conflict is usually resolved by interrupting his work and resentfully taking the call. The chances are that you will get a mighty quick answer, and not the one you hope to get.

Remember that even though you are a massive taxpayer, or a corporate president, or a union official, or perhaps even a large contributor to some political party, the man you are calling may not appreciate it.

It is far better to phone his secretary, ask that he not be disturbed, but state who you are, what you want to know, and invite him to call back.

At the very least, he might be able to look at some file

before responding. He will certainly be appreciative of your understanding that even though you are a taxpayer, he is not a telephonic puppet. At the very best, you may get a favorable answer.

Unless the problem is truly urgent, however, it is far better to set up an appointment. You may have a golden telephone voice, but as one experienced fellow has put it, a conference eyeball-to-eyeball is usually far more productive.

What procedure is best, of course, is dictated by intelligent common sense.

The first and most difficult problem is whether you should ever ask the particular question.

There are many nice issues on proposed business conduct as to which experienced men know that an agency, if asked, must say "No"—but if the conduct is pursued, the agency will never take formal regulatory action.

Very often, in an unguarded moment, a government official has acknowledged, "I wish that fool had never asked me that question." I will not embarrass anyone by giving specific examples. But the old adage that fools rush in where angels fear to tread is well worth remembering before you reach for the telephone, dictate an ill-advised letter, or stumble into a conference.

It is also essential to know *whom* to ask. Shopping among administrative officials is not unknown. Discreet inquiry about the best man to see is often rewarding.

The only caution there is the general rule that you ought to begin, if possible, at the bottom of the hierarchy. Neither in business nor in government does anyone enjoy someone going over his head to talk to the boss. Moreover, it is usually the fellow at the operating level who in fact may control the decision.

In that same connection, experienced people avoid even the semblance of coercion. Blowing your top and talking about your Senator or Congressman often ends, and seldom promotes, a helpful discussion.

Politicking sometimes—but less often than you might think—has its place. But do not confuse it with effective, and more often persuasive, direct communication.

Some businessmen approach a government bureau as though it were the representative of a hostile foreign power. Attitude can be important in effective communication.

Try, if you can, to understand the other fellow's point of view. He may be bound by policies and directives which you do not know. Often you can get further by volunteering to help him with some problem that he has in your area. Doing that often buys priceless goodwill.

I have frequently been struck by the fact that many business managers, and certainly those in advertising, who want to sell a product, will study the needs of their potential customers. Very often they try to enlist goodwill by offering help in other areas. Since government officials are after all only people, the same technique is often useful and is decidedly good communication.

Be Prepared to Make Decisions

Never send a boy to do a man's job. If a particular problem involves any give and take, or if a spot decision must be made, it is sometimes helpful to have on hand the man who can make it.

I recognize that it is an old trading technique to say that every proposition must be referred back to the boss. Yet in dealing with government officials, it is often possible to arrive at a practicable solution at that very conference. If you must wait—if you must refer it back—you sometimes may find that the dinner has become cold and wholly unpalatable.

Put another way, if you expect to get answers, there must be frank discussion, and often an exchange of commitments.

Needless to say, in dealing with any government agency, you also ought to have the fellow along who *knows* all of the facts, and who *can* answer questions. He may not elect to do so. But nothing is more frustrating than to find that a key fact that might provide a decent and prompt solution is unknown and is not readily available.

In communicating with congressional committees, and with Congressmen and their staffs, virtually all of the suggestions I have ventured about dealing with agency officials apply with equal validity.

A necessary caution here is not to regard Congressmen or committee members as wholly uninformed and only politically motivated. A few terms in Congress and some years of service on a committee are often a postgraduate course on many industrial problems.

Experience again suggests that the best approach to any legislative committee, or to Congressmen, is to regard them as a group of well-informed, responsible men and women.

Well, that leads to the cardinal question, "*Who* should communicate for you?" or, conversely, "What is the most effective way of communicating with Washington?"

On questions of broad industry involvement, be it base years for pricing, ecology and its costs, or foreign trade, a well organized Washington trade association is a *sine qua non*.

Many of those associations are efficiently staffed and highly effective.

From the point of view of government, it is preferable to deal with a collective group rather than with individuals or in a town meeting.

Politically, a well organized trade association staff will usually know the key people and their attitudes.

There is also an old adage that one constituent may be worth several Washington representatives. Many trade associations also understand that simple profundity, and regularly organize industry committees of knowledgeable and key constituents to represent the association in communicating with government.

The individual "Washington representative" is often very, indeed, highly useful, particularly in keeping close track of what is going on, and in working with the industry association to insure that a particular company point of view is adequately reflected.

Once again, I suggest that no Washington representative, communicating directly with government, can be merely a messenger boy. He must have some authority and be in a position to make whatever commitments become necessary.

Lest I be excommunicated by the legal profession, I must mention the role of your lawyer.

Where you are dealing with technical legal issues, involving the interpretation of statutes or regulations, or advancing suggestions for their revision, it is desirable to have your legal representative along. He can answer questions. And because many governmental issues eventually end up in court, it is desirable that he have the full background from the outset.

At the very least, you ought to talk with legal counsel, both before and after visiting any Federal agency whose rules and regulations and actions are important to your operations.

And despite your acknowledged literary skill and impeccable logic, it is usually good insurance to have your counsel review everything you write to the government—before and not after you have mailed the letter.

To summarize, if you will remember that Washington agencies are peopled with people, that they are ordinary folk of varying abilities, that they are busy and resent having their time wasted, or being misled or seemingly talked down to or coerced, you may not find communicating with them too difficult.

If you fail to follow those simple rules—or perhaps go off on an arrogant frolic of your own—I might safely suggest in this chauvinistic male audience that you may find that dealing with any government bureau will come to resemble what Samuel Johnson once said about a woman preaching.

He likened it to a dog walking on its hind legs. "The astounding thing," he said, "is not that it is done well, but that it can be done at all."

Corporate Image Advertising and the FTC

David S. Dennison, Jr.
Commissioner
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Introduction

It occurred to me in studying the objective of this seminar and, particularly, the remarks of the previous speakers, that it might be of interest to you to appreciate the value, if such there be, of corporate image advertising as one means of communicating with the government as well as the ultimate consumer. We must assume, however, that the degree to which such advertising is effective as a communication method is not precisely known. Nevertheless, as we discuss and study these problems, and as you attempt to communicate in this fashion, more and more will be learned which will be helpful to your role and the role of those of us who are in government in understanding our mutual problems.

Let me begin by taking as an example corporate image advertising environmental themes which have become a common feature of the nation's print and television media.[1] This has brought with it the controversy that has surrounded many aspects of the public's discussion of environmental affairs.[2] Corporate image environmental advertising is defended by some for educating the public about activities of companies that have joined the fight against pollution. On the other hand, among many environmentalists this advertising is called "EcoPornography."[3]

However it may be charactenzed, its dissemination may pose a dilemma for all of us in determining what is false and deceptive advertising.[4] The dilemma is posed partly over the *legal* questions of whether the Federal Trade Commission may assert jurisdiction over image advertising and—even given jurisdiction—whether the First Amendment protects such advertising. Resolution of these legal questions merely sets the stage for confrontation with significant policy dilemmas.

In discussing my tentative views on these subjects, I emphasize that I speak only as one Commissioner. It takes a majority vote of the five-member panel to obtain Commission action, so here I speak solely for myself. Second, I intend to make no reference to the merits of any specific case currently under investigation. To do so would be unfair to the parties concerned and would be based upon an incomplete factual basis.

The Challenge to Industry

The heightened environmental awareness of the past few years is widely in evidence. Mr. William Ruckelshaus, former Administrator of the Environmental Protection Agency, has recently suggested that compliance with the Clean Air Act and Amendments may force some cities to restrict automobile use in urban areas.[5] The Alaska pipeline controversy is now being debated before Congress after three years in the courts. The supersonic transport, the oil import quota system, recycling centers, effluents, emissions, catalytic converters, electrostatic precipitators, phosphate detergents—all of these stand as metaphors of the times.

One of the prime targets in this swirling controversy has been the role that industry has played in creating pollution problems and its role in abating the pollution. In a May 1970 survey commissioned by *Reader's Digest*[6], 52 percent of the respondents rated pollution as the most or second most important domestic problem. Only the cost of living rated higher. And 72 percent of the respondents placed "a great deal" of the responsibility for pollution on private industry. Almost half rated the job being done by industry as "poor or very poor." Only 12 percent gave business good marks for combating pollution. Finally, 83 percent said that they were willing to give up certain products to help solve pollution problems. A second *Digest* survey confirmed these results.[7]

Although these results may be dated, an Opinion Research Corporation study presented to the White House Conference on the Industrial World Ahead in February 1972[8] found that 53 percent of the sample thought corporations were doing "very little" to control pollution—up from 41 percent only five years before. And 81 percent felt that plants that violate the pollution laws should be closed—up from 70 percent five years before. This study formed a part of the report from *Fortune*'s first Corporate Communications Seminar.

A poll of graduate school of business students published in *Business and Society* in July 1972 ranked fifty American corporations on their social responsibility.[9] Utilities, oil companies, and steel companies were ranked low, while banks and insurance companies ranked high. Presumably pollution was a major factor. The sampling for this survey was not random nor the results very reliable, but the poll indicates serious image problems for major corporations among potential *employees*—here, business school students.

Corporate Image Advertising as a Response

Whether or not the image of industry on the environment is deserved, many corporations have taken to defending themselves in corporate image environmental advertising. The *Reader's Digest* survey I just mentioned was used in a prospectus to promote an advertising supplement on the environment which appeared in September 1971.[10] Many other magazines including *Fortune*, *Time*, *Newsweek*, *Barron's*, *The New Yorker*, and others have prepared extensive material to justify corporate image advertising and encourage corporations to engage in it.[11]

The nature and extent of corporate *product* advertising is far easier to document than the extent of corporate *image* advertising. To begin with, image advertising is very hard to define. The Publishers Information Bureau and Leading National Advertisers, Inc., report on the amount of "general promotion advertising" found in most of the nation's consumer magazines and newspaper supplements. Their definition includes advertising which is "devoted primarily to selling the corporate personality; its first objective goes *beyond* the direct sale of a single product or service."[12] This definition distinguishes "general promotion advertising" from brand and multi-brand advertising, political advertising, public service advertising, and association advertising, and represents totals for only approximately 100 magazines. Even with these restrictions the total billings for "general promotion advertising" in magazines for 1971 was 65 million dollars,

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with "association" advertising adding another 25 million, for a total of 90 million dollars.[13]

Broadcast Ad Reports does not use a formal definition for image advertising when it compiles its reports on network and spot-television totals[14] but instructs its coders to determine whether the public can consume the product or service. If they cannot, it is termed "image advertising."[15] Included is public service advertising, and excluded are political and association advertising. The total for corporate and association television advertising for 1971 was 132 million dollars.[16] Adding to this total radio and outdoor advertising, the total for corporate image advertising for 1971 was at least 225 million dollars.[17]

But other sources put the totals much higher. For example, privately owned electric utilities alone spent nearly 300 million dollars on advertising in 1970.[18] This advertising should probably be included in the total. One critic of environmental advertising claims that the total—including utility advertising—is one billion dollars a year.[19]

There is probably no resolution to the controversy, but there is an important reason for its existence. Environmentalists are attempting to compare expenditures on advertising *about* pollution abatement with actual expenditures on the cleanup itself.

These definitions of image advertising are very abstract. It will help if I can give some examples of exactly what I mean and do not mean by image advertising. Again let me state that I intend to make no reference to ads actually disseminated.

I do not mean to include what I call public service advertising—that is advertising which addresses itself to matters with which the advertiser has *no* direct connection or matters which have no direct connection to the advertiser's products or services.

For example, a steel company advertising that the Girl Scouts are good for youth or an oil company explaining the facts concerning marijuana.

I *do* mean to include advertising which seeks to directly *relate* corporate activities to current public issues, or in which the subject of the image created is strongly *connected* to the advertiser's products or interests. For example, an airline company explaining efforts to abate noise pollution. I mean to include such advertising in my definition, whether it is disseminated by a corporation or by an association.[20]

I understand that this definition does not include all of what may be called image advertising. It does include most of the ads which have caused controversy.

Although I will talk here only about image advertising on environmental issues, much of what I say applies to corporate image advertising with other focuses, such as minority rights, equal employment opportunity, and others.[21]

It is not surprising that industry has responded to its critics in a medium with which it is familiar—advertising. Indeed, corporations have less access as a practical matter to other media—the chairman of the board would not, for example, obtain television coverage by picketing the headquarters of an environmental group or by depositing a piece of fouled machinery on the front lawn of Chicago's widely reported Red Fox.

Corporate image advertising has a long history. Often cited as the pioneering corporate advertising program, American Telephone & Telegraph Company began image advertising in 1908.[22] This type of advertising was then far more likely to be called public-service or institutional advertising. Its objective was to make known and understood the purposes, problems, and policies of the telephone system. The trend was established. Streetcar companies advertised to teach the rules of the road and to allay prejudices against their companies. Railroads promoted "safety first." During the war, advertising concentrated on interpreting the corporation's role in the war effort. Since that time, corporate advertising has focused on many themes including the environment.

The Resulting Controversy

What has been disturbing to many is that underlying some of the environmental advertising is the apparent assumption that creating an appearance of environmental consciousness can substitute for the reality of action—form over substance. E.B. Weiss comments that "the gap between corporate claim and performance is at least as sizable as the generation gap—and that's a whopper . . . the total disregard for the role the corporation played in *bringing about* some of our major ecological problems has genuine 'Alice-in-Wonderland' characteristics."[23] The Council on Economic Priorities Report on *Corporate Advertising and the Environment* published in 1971[24] concludes that many environmental ads are false and, in fact, states that some of the ads "subtly co-opt . . . the public's right to free and informed decision-making in this area of vital concern."[25] One skeptic claims that advertising "now owns the word 'ecology.' "[26]

That same critic further claims that "most of industry still sees pollution and environment questions as more of a public relations problem—in other words, an image problem—than as anything fundamentally related to the way they are doing business."[27]

In the last Congress, Senators Spong, Baker, Bayh, Dole, Muskie, and Randolph introduced S 927 which would make it a *criminal* act, subject to fine and imprisonment, for any person knowingly to make "any false or deceptive statement, representation or claim in advertising a product, service, system, or device of any kind or description, with respect to the ability of the product, service, system, or device to prevent or control" air or water pollution. Among their reasons for proposing the bill was that "many industries apparently are placing more emphasis on advertising their abatement activities than they are on abatement itself. The advertisements in some cases are worse than misleading —they are not even truthful."[28] I do not mean to imply that I feel these criticisms are justified, but they do indicate the nature of the controversy which has resulted from some environmental ads.

The Federal Trade Commission has in the past two years received complaints regarding image environmental advertising. I can make reference to these complaints as in each instance the complainant issued a press release regarding his actions. Before I mention these, I will note that as yet the Commission has taken no formal action regarding any of these complaints. In fact, the Commission has never taken any formal action regarding any corporate image advertisement. In a press release dated August 1, 1971, Senator Philip Hart sent to the Comission an advertisement by Bethlehem Steel Corporation regarding its efforts to restore its strip-mined lands.[29] On May 12, 1972, an environmental group called Public Action to Protect Environmental Resources (with the acronym of PAPER) announced it was sending the FTC a complaint regarding an advertisement by Potlatch Forests, Inc., regarding its commitment to pollution control on the Clear Water River and an ad by St. Regis Paper Company regarding installation of pollution control equipment at its pulp and paper mills.[30] A press release dated October 13, 1972, states that Senator Mike Gravel sent a complaint to the FTC regarding an advertisement by Westinghouse Corporation on its breeder reactor program.[31] Finally, on January 31, 1973, Citizens for a Better Environment issued a press release with a copy of a complaint it had filed with the FTC concerning advertisements by Commonwealth Edison Company in Chicago about its environmental program.[32] I want to emphasize that I am indicating no position whatsoever regarding the merits of any of these matters and I am taking public press releases as my sources. I wanted to cite these consumers' complaints to indicate the nature of the advertisements which have been the subject of controversy.

With this outline of the definition, extent of, and controversy about image environmental advertising, let me turn

to the FTC's role, if any, in regulating such advertising. Three legal issues are presented by the possibility of FTC activity with regard to corporate image advertising. The first two of these relate to jurisdiction, and I shall not discuss these items since much has been written and spoken on the subject before.

The third relates to the First Amendment, upon which I shall briefly comment.

Then I will take a few minutes to present what I consider to be the policy questions faced by the FTC, assuming these legal issues present no barrier. To whom is an ad directed? With whom does it have an impact? I am sure that these same questions arise as you decide whether, when, and how to advertise. I gather that the managerial debate over these topics is a heated one.

Image Advertising and the First Amendment

The issue is whether the First Amendment's guarantee of freedom of speech protects image advertisements from regulation or whether image advertising is merely another form of "commercial" speech and thus unprotected by the First Amendment.

The question raised here can be summarized easily. There is no constitutional right to advertise falsely.[34] But the mere fact that a message takes the form of a paid advertisement does not take that message outside First Amendment protections.[35] Stated another way, advertisements which are *non* or *un* commercial are protected. This is a very simplified way of summarizing a complicated legal question. In fact the constitutional test to determine whether an advertisement is protected or "commercial" speech is very unclear.

In any attempt to define "commercial" speech one finds that it is easy to identify the extremes, with the dividing line lying in the murky middle ground.

At one end of the spectrum is the situation in *Valentine v. Chrestensen*.[36] In the interesting set of facts in that case, plaintiff owned an old U.S. submarine which he exhibited for a fee. He attempted to distribute handbills advertising the location of the ship and the price of admission. Plaintiff was advised that such a distribution violated the New York City ordinance prohibiting the distribution of commercial or business advertising on city streets.

Plaintiff had a new double-faced handbill printed. One side contained the original advertisement but omitted the admission charge. The other side of the handbill protested the city's refusal to grant docking facilities to the plaintiff. Plaintiff was advised by the city that distribution of the handbill containing the protest alone would not violate the ordinance; however, distribution of the double-faced handbill containing an advertisement was prohibited.

The Supreme Court held that notwithstanding the non-commercial aspect of the second handbill, the handbill was not protected by the First Amendment since it did contain "commercial" speech.

At the other end are cases such as *New York Times v. Sullivan*,[37] which holds that normally protected speech does not lose that protection merely because it is presented in a paid advertisement. The question is, therefore, whether the idea presented in a particular advertisement is so "commercial" in character that it is not protected by the First Amendment.

Many corporate image advertisements contain commercial and non-commercial elements. At the same time, statements having a "commercial" purpose (e.g., product promotion) do *not* gain protection merely because they raise issues of public importance or controversy.[38]

While there are some cases dealing with the interaction of the First Amendment and the Federal Trade Commission Act,[39] they provide little guidance here. They are all concerned with the seller-consumer relationship.

There is simply no clear precedent. We may, however, ask the question usually posed when the case law is unclear: What are the interests that the First Amendment is intended to protect, and in what manner does regulation impinge on those interests?

Without going into long constitutional dissertations, it seems clear that the First Amendment is primarily intended to promote the broader discussion of ideas for the purpose of keeping healthy the body politic.

Are the representations of a corporate advertiser about its own business behavior that kind of speech so related to the "health" of the body politic that they cannot be prohibited when false?

This question cannot be answered in the abstract. One must first ascertain more about the purpose and impact of corporate image advertising.

The Purposes and Impacts of Image Advertising

The purpose of corporate product advertising is relatively clear, that is to promote sales and use patterns for the product. Many product advertisements do not even mention the parent company, particularly where the same company distributes several brands which are similar in all respects except for their marketing appeal and segmentation. But corporate *image* advertising both mentions—indeed touts—the company name and has a far more complex purpose and impact.

One can single out at least the following commercial and economic purposes and impacts of corporate image environmental advertising.[40]

1. It encourages investment and continued holdings in the company by individuals, universities, foundations, mutual funds, and others whose concern for the environment may affect their investment decision.

E.B. Weiss has stated that "a substantial percentage of corporate image advertising is intended, primarily or secondarily, to appeal to the financial community."[41]

Some of these investment groups may operate under an assumption that a company which pays close attention to environmental problems will likely also pay attention to all the broad range of other factors which affect a company's long-run profitability. There exists substantial controversy over whether this is true.[42] Others may simply not wish to invest in a company which is likely to face expensive litigation or installation of new equipment for pollution it has caused or is causing. Finally, some investors may simply wish to invest in more socially responsible companies when all other considerations are equal—and perhaps even when they are not.

In this regard, some universities and foundations have experienced severe pressure from students and other activists to consider the environmental record of companies when investing their portfolios.[43] Similarly, some mutual funds express in their prospectuses particular policies regarding the social responsibility of companies in which they invest. These were the subject of a recent article in *Saturday Review*.[44] A committee of the Investment Company Institute, a group which promotes the interest of mutual funds, declared recently that "corporate responsibility issues should ... be considered an investment issue."[45]

Some surveys have shown that security analysts and others who manage or influence the flow of investment dollars believe that corporate advertising favorably affects security values, that corporate advertising has led them to look into companies as investments, and that those who have looked into companies as a result of corporate advertising have gone on to invest in the companies.[46]

Corporate image advertisements are directed in part to influencing the investing world in all of these contexts.

2. Prospective *employees* may wish to work for a company which has shown concern rather than disdain for the environment.

This factor may be particularly important in the case of students who have attended the larger and more politically

active campuses—prime recruiting ground for many corporations. The *Business and Society* poll of business students quoted earlier is relevant here. Part of this effect of image advertising may take the form of concern by a prospective employee for his working conditions. Ironically, air pollution may affect the polluter's employees' health more than anyone else's.

Case histories document dramatic increases in inquiries about employment after image advertising campaigns.[47]

3. Banks, insurance companies, and other financial sources take image into account.

Such financial sources are sometimes leery of loaning money to or insuring a company that pollutes, especially if expensive litigation or casualty claims may result.[48]

4. Purchasing agents or individuals (if the firm sells directly to the public) may—all things equal—prefer to purchase from a company with a sense of social responsibility. If the company's materials are known to be used in making a product sold directly to the consumer, demand for that product and thus for the company's materials may grow. Image ads have an effect in *introducing* the company's salesman as well.

5. In the case of a company which sells some of its products to the public, image advertising about its other activities may favorably affect sales of its retail products. This same pattern may hold true where the retail customer has notice that the advertiser has contributed components to a product sold at retail by another company. In both cases image advertising may directly affect retail product sales to the advertiser's benefit.

This is by no means an exhaustive list. But what all of these groups have in common is an existing or potential economic relationship with the company.

In each case the company attempts in image advertising to solicit the support of groups and individuals whose favorable attitudes can improve profits and whose distrust or enmity erodes them. In many cases image advertising serves to prevent the trouble which may arise as a result of a bad image.

Attempting to compare the rank order of the motivation of companies that engage in corporate advertising, the *Public Relations Journal*[49] found that 31.5 percent advertised to improve customer relations, 23.5 percent to improve stockholder/financial relations, 19.2 percent to improve product sales, and 8.9 percent to improve general trading relations.

But in this survey 11.4 percent of the respondents stated their prime objective to be to improve governmental relations.

Thus, in addition to the clearly economic and commercial benefits which I outlined above one must add:

1. the effect of image advertising on local or national regulatory or *governmental bodies* whose powers may be exercised adversely to the company's interests, and

2. its effect on *electoral or appointive bodies* whose votes or nominations may have adverse effects on the company.

It is often easy to distinguish advertising directed towards governmental bodies or the electorate by the fact that it discusses specific legislative proposals by name or reference or calls upon the reader to write his Congressman. I doubt if many corporations fail to take a tax deduction for their image advertising. The Internal Revenue Code, however, states that no deduction can be taken for messages run "in connection with any attempt to influence *the general* public . . . with respect to legislative matters."[50]

Image Advertising as "Commercial" Speech

Although each advertisement must be separately analyzed in terms of the applicability of the First Amendment, it appears that much image advertising is commercial in nature. However, where such advertising refers to the merits of legislative proposals, calls for action by citizens with respect to such proposals, or takes an editorial approach on issues of public controversy, then the First Amendment protections, arguably, would apply. But where an advertisement speaks *about* and *describes the corporation*, even where the corporation's activity is controversial, then the FTC, assuming it has appropriate jurisdiction, may not be barred from assuming a regulatory position.

There is certainly a middle ground which will remain troublesome. Because of the uncertainties of the First Amendment issue, the FTC should proceed very cautiously in order not to infringe on the precious right of freedom of speech.

A Policy Basis for Regulation

But, even if the FTC is not barred from action by the Federal Trade Commission Act or the First Amendment, a question remains as to whether the FTC should as a matter of policy exercise such regulatory authority. Much of what has been said thus far bears on this discussion. The Commission's role, in its broadest sense, is to regulate economic relationships. Specifically, its intended function is the correction and cure of imbalances in those economic relationships brought about by unfairness or deception. These imperatives constitute and define the Commission's mandate. The Commission's mandate is not defined by its past practices. It is clearly stated in a recent Supreme Court decision that the Commission's mandate is to be developed from those "public values" that constantly change, adopting new forms and applications.[51]

Any businessman who uses false advertising to sell a product *directly* to a consumer has obviously created an unfair imbalance in the economic relationship he enjoys with consumers of that product. No one doubts that the Commission can and should correct that imbalance. But it is arguable that a business corporation enjoys a series of economic relations beyond this narrow but important economic relationship it enjoys with *retail* consumers of its products. It is then arguable that the corporation should *not* be permitted to bring about an imbalance in *any one* of these relationships through the use of false advertisements about its own business behavior.

But on the other hand business has a very real responsibility to communicate with the public regarding the important public issues of the day. The voice of business is vital if the public and the government are to make decisions regarding environmental policy which are wise and effective. The complexity of public problems today—especially environmental—demand that business contribute its expertise and educational capacities even if this might result in the application of the fairness doctrine by the FCC to insure that its arguments and assertions are subject to the rigors of the free marketplace of ideas. Public understanding of business is as important as business' understanding of the environment.

Another factor to consider is that no other federal agency has jurisdiction over image advertising if the FTC does not. The SEC can regulate advertising only if it constitutes an "offering" of stock to the public.[52] The Federal Power Commission or Atomic Energy Commission could possibly regulate *utilities* advertising. But no precedent for such action has been established. No agency outside the FTC has jurisdiction over the vast majority of these ads.

The need for self-regulation by corporate image advertisers becomes imperative. When a company has abated pollution it should be proud to advertise this fact. If such simple standards are observed, corporate image advertising may effectively serve its role in educating the public.

FOOTNOTES

1 Sandman, Peter M. (unpublished Ph.D. thesis), *Eco-Pornography: Environmental Advertising and Advertising Acceptance: In The San Francisco Bay Area*. Stanford University, August, 1971. See n. 2, generally. For background on image advertising, generally, see *Modern Institutional Advertising*, George A. Flanagan (1967) (especially Chapters 11, 12, 15, 20, 22, and 27) and *The Corporate Search For Visual Identity: A Study of Fifteen Outstanding Corporate Design Programs*, Ben Rosen (1970).

2 "Ecopornography: One Year and Nearly a Billion Dollars Later. Advertising Owns Ecology." Jerry Mander. *Communication Arts*, November 2 1972 see also: "Management Don't Kid the Public With Those Noble Anti-Pollution Ads." E.B. Weiss. *Advertising Age*, August 3, 1970, at 35; *Advertising*, 1972. Hearings before the Committee on Commerce, U.S. Senate, 92nd Cong., 2d Sess., testimony of Mr. Lawrence S. Blumberg, Public Action To Protect Environmental Resources (PAPER), at 104-242; see nn. 30 and 56. *Advertising and Small Business*. Hearings before the Subcommittee on Activities of Regulatory Agencies RELATING TO Small Business. U.S. House of Representatives, 92nd Cong., 1st Sess., testimony of Mr. Sam Love, Editor, *Environmental Action*, at 453-474.

3 See: Sandman, *op.cit.*; Mander, *ibid.*; "Ecopornography," *Environment Action Bulletin*, February 17, 1973, pp. 1-8.

4 See speech by Commissioner Mary Gardiner Jones: "Public Service Oriented Advertising: A Regulatory Dilemma," presented before the Corporate Counsel Association of Minnesota, April 30, 1971.

5 "Transportation Controls—A Way to Air Quality," an Address by William D. Ruckelshaus to California Newspaper Publishers Association, February 8, 1973.

6 National Family Opinion, Inc., Environment Study Conducted for Reader's Digest, May 1970 (unpublished); *Reader's Digest Prospectus for Advertising Supplement entitled "What Are We Doing About Our Environment"*, published in September 1971. See: "Corporate Advertising and the Environment," *Economic Priorities Report*, Council on Economic Priorities, Sept.-Oct. 1971 for critical analysis of the Supplement; P.R. report reprinted in *Advertising 1972*, see n. 2 and reprinted in part in *Communication Arts*, see n. 2.

7 "Trends in Public Attitudes Toward Business and the Free Enterprise System." Opinion Research Corporation, presented to the White House Conference on the Industrial World Ahead. Apparently represented in Congressional Record and Congressional Digest, and the basis for a cover story in Business Week Magazine.

8 "Trends in Public Attitudes Toward Business and the Free Enterprise System." Opinion Research Corporation, presented to the White House Conference on the Industrial World Ahead. Apparently represented in Congressional Record and Congressional Digest, and the basis for a cover story in Business Week Magazine.

9 [illegible]

10 Reader's Digest Supplement [illegible]

11 [illegible] Corporate Advertising, Annual Index compiled by Time Magazine, published in Index to Corporate Advertising, [illegible] Time, Inc., Marketing and Industrial Marketing, published annually [illegible] Time, Inc. [illegible] Time library see: Strategic Advertising 1950-1962 a historical portfolio; Strategic Advertising A Portfolio from the Pages of the U.S. Edition of Time, mostly taken from 1970. 100 corporate ads divided into sixteen categories including: Management Philosophy, Public Responsibility and Recruitment. The Image Builder, *Forbes Magazine*, a portfolio of corporate advertisements with a commentary on the emphasis of each, 1970.

Association Tested Campaigns for Municipal and Institutional Bonds. "The Corporate Advertising Plays It's Key," Wall Street Transcript, Corporate Advertising in Today's Economic Climate: An Evaluation by Newsweek. Vital Targets of Corporate Communications. "Social Involvement—A Corporate Stake in the Future." The Changing Corporate Public Affairs Function. Corporate Communications Act Portfolio.

For bibliographies of similar publications see: [illegible] Business Horizons, November 1971 at 13; and Journalism Quarterly, November 1971 at 4.

12 Public Relations Journal, November 1972 at 6; see also: Public Relations Journal, November 1971 at 6; 1970 Index.

A [illegible] to improve the public image of the company's products, services, and [illegible] to [illegible] the public [illegible] the company's policies, [illegible] by the shareholders, [illegible] and employees.

[illegible] Social Involvement is [illegible] the company's management to identify [illegible] and to [illegible] progress and undertake improvements [illegible] to contribution to [illegible] and public welfare [illegible] Management [illegible] corporate policy, [illegible] the company's [illegible] and [illegible] Corporate Management Planning.

[illegible] as a good place to work and to offer [illegible] opportunities college graduates or to people of certain skills).

One more definition of image advertising broader than the one used here: served as the basis for a major industrial Marketing survey of [illegible] Marketing's [illegible] way. Advertising, a media measure of [illegible] which is intended to influence the purchase of a product or products, and the motive behind which is the projection of the corporate image (even though such advertising may be a product in nature). "Corporate vs. Product Advertising," Money Marketing, Industrial Marketing, 1967. In this survey the ad agencies questioned in that survey proposed a definition which seemed to obliterate any distinction between corporate and product advertising in defining the function as advertising conducted exclusively on behalf of a firm's products with the objective of creating a more favorable climate for the sale of all of the company's products, present or future. [illegible]

13 See n. 12 above.

14 Private communications with Mr. Chuck Ludlam, Division of National Advertising, Bureau of Consumer Protection.

15 See n. 12 above.

16 *Ibid.*

17 *Ibid.*

18 *Statistics of Privately Owned Electric Utilities in the U.S. in 1970*, Federal Power Commission, 1971.

19 Mander, see n. 2.

20 Substantial controversy has been generated by advertising on behalf of electric and gas utilities. There is not time in this speech to discuss this controversy, but the following materials will present an outline of the question: *Promotional Practices of Public Utilities: A Survey of Recent Actions by State Regulatory Commissions*. A Report to the Subcommittee on Regulatory Agencies, Select Committee on Small Business, by the Federal Power Commission, March 1970. See also: *Electric Utility Advertising and the Environment*, Oak Ridge National Laboratory, National Science Foundation Environmental Program, by Mr. Eric Hirst, April 1972 (an updated and expanded version of this report is soon to be released); *The Price of Power: Electric Utilities and The Environment*, Economic Priorities Report, Council on Economic Priorities, May-June 1970; *Overcharge*, Senator Lee Metcalf, Ch. 9: The Advertisements—The World Upside Down, 1967.

Portfolios of the Electric Companies Advertising Program (E.C.A.P.), N.W. Ayer & Son, Inc., 1345 Avenue of the Americas, N.Y., N.Y. 10019; and The Electric Energy Association, 90 Park Avenue, N.Y., N.Y. 10016.

21 See, for example: "Advertising to the Military," an *Economic Priorities Report*, Council on Economic Priorities, Nov.-Dec. 1972.

22 "Communicating the Total Corporate Personality," Magazine Advertising Bureau of the Magazine Publishers Association, Inc., 575 Lexington Ave., N.Y.C. (the M.P.A. maintains an excellent library of corporate communications). See also: "Strategic Advertising 1850-1962," noted above at n. 11. For a copy of A.T.&T.'s 1908 ad, see *Public Relations Journal*, November 1972 at 22.

23 "Management: Don't Kid the Public With Those Noble Ads." E.B. Weiss, *Advertising Age*, August 3, 1970 at 35 (emphasis supplied.)

24 See cite at nn. 6 and 25.

25 "Corporate Advertising and the Environment," *Economic Priorities Report*, Council on Economic Priorities, Sept.-Oct. 1971 at 13.

26 Mander, n. 2 at 45.

27 Mander, n. 2 at 45.

28 *Congressional Record*, Senate, February 23, 1971.

29 Press Release from the Office of the Senate Subcommittee on Antitrust and Monopoly, August 1, 1971, Senator Philip A. Hart, with attached copy of letter of July 28, 1971 to the Hon. Miles W. Kirkpatrick.

30 Press Release of May 12, 1972, by Public Action to Protect Environmental Resources (PAPER). Suite 1915, One Rockefeller Plaza, N.Y., N.Y., with copy of letter of May 12, 1972 to the Hon. Miles W. Kirkpatrick. See also *Advertising 1972*, cited in n. 2; "Columbia Law Students Charge Two Paper Firms With Misleading Ads," *The Wall Street Journal*, May 15, 1972 at 1; "Columbia Law Students Ask FTC Action on 'Polluters,'" *Advertising Age*, May 15, 1972. For favorable commentary on the St. Regis advertising program, see "Trees Pay Off for St. Regis," *Industrial Marketing*, December 1967 at 38, and "St. Regis Time," a case study by Time Magazine.

31 Gravel Calls for FTC Investigation of Deceptive Advertising for Nuclear Power Plants, Press Release of October 13, 1972 from Senator Mike Gravel, with attached copy of October 10, 1972 letter to the Hon. Miles W. Kirkpatrick.

32 Press Release of January 31, 1973 from Citizens for A Better Environment, Rm. 1101, 109 N. Dearborn, Chicago, Ill. See also: "Environmental Group Hits Edison Ads," Bruce Ingersoll, *Chicago Sun Times*, January 31, 1973; "Chicago Utility's Ads Under Attack at FTC," *Broadcasting*, February 12, 1973 at p. 28.

33 "Industrial Ads: A Debate Heats Up," *Business Week*, July 17, 1971 at 68-69. Corporate Advertising: More Than Just A Nice Warm Feeling All Over. Anthony Gallo, *Public Relations Journal*, November 1971 at 14. It Helped Them Sell Everything Everywhere Up to 1985. But Ads Are Getting Better. *Industrial Marketing*, September 1970 at 69. Look How These Ads Combine Business and Public Service," William D. Tyler, *Advertising Age*, May 4, 1970 at 70. "Most Corporate Image Advertising Couldn't Pass Ten Simple Tests," E.B. Weiss *Advertising Age*, November 3, 1970 at 79. "Role of PR in Environmental Action," Andrew A. Aoki, *Public Relations Journal*, November 1970 at 10.

For case studies on the purpose and impact of corporate image advertising: Alcan Cuts Corporate Campaign in Midstream," *Industrial Marketing*, October 1967 at 80. Uniroyal Takes a Middle Road. "R Trout, *Industrial Marketing*, October 1967 at 82. Trees Pay Off for St. Regis," *Industrial Marketing*, December 1967 at 38. Sperry Rand Puts Point Together, *Industrial Marketing*, December 1967 at 42. "It's a Small Company's Dilemma," George Black, *Industrial Marketing*, December 1967 at 46. Marbon Chemical Goes Consumer," *Industrial Marketing*, November 1967 at 53. Keeping the Name in Front of the Public," *Industrial Marketing*, November 1967 at 62. Corporate Identity—By Design, Not Default," Robert Herhusky, *Industrial Marketing*, November 1969 at 49. "Revolution . . . The Rise of the Corporate Image," David Shylar, *Industrial Marketing*, September 1967 at 63 (emphasizing impact on financial community). "15% Average for Corporate Advertising," *Public Relations Journal*, November 1972 at 33. "Corporate Advertising: Those Who Try It Like It," (case studies of Tenneco, Sperry, Liberty Mutual, Burlington Northern, Sperry Rand, Chrysler Motors, State Farm Insurance Companies, Metropolitan Life Insurance, North American Rockwell). *Public Relations Journal*, November 1972 at 43. "A Corporate Case History," H. Walton Cloke, [illegible] American Brands," *Time Magazine* materials.

For general studies attempting to measure the effectiveness of corporate image advertising see: Strategic Advertising and Attitudes Toward Corporations," Thomas E. Ryan, *Time Magazine*, 1970. [illegible] corporate [illegible] materials). "Measuring Strategic Advertising Effectiveness," Thomas E. Ryan, *Time Magazine*, 1970. [illegible] changes in general impressions toward company, knowledge of its activities, acceptance of new product, [illegible] impression of company's management and development, [illegible] rating of company's stock, [illegible] [illegible] plants, and [illegible] [illegible] [illegible]

QUESTION AND ANSWER PERIOD

Q. *I wonder if it is possible to clarify the overlapping jurisdiction between the FTC and the Justice Department?*

A. *Are you talking with respect to antitrust?*

Q. *Yes.*

A. *Well, I suspect Mr. Austern could answer that much better than I. Without going into detail, the Sherman Act is enforceable both by the Justice Department and the Federal Trade Commission. We develop our authority through Section 5 of the Federal Trade Commission Act which can be construed to give us authority through the Sherman Act. Now, as a matter of fact, our jurisdictions do not in practice overlap. . . . each agency generally assumes priority in a matter where it has begun the investigation in the matter. If Justice begins we then don't investigate it also.*

Q. *The EPA has set standards now for water and air emissions and so forth for practically all major industries, and the standards are very precise. So, if a company in one of its major plants makes the necessary installations and does by some miraculous technology reach the standards . . . two questions. One, is that social responsibility on the part of that company, and second, is that worthy, in your opinion, of a corporate advertising subject?*

Ludlam: *Well, I am sure it could be an example of social responsibility even if the company was forced to do it. They probably could have delayed it, or in other ways affected the way they complied with it, or the speed with which they complied with it, or they may have complied beyond the letter of the law. If this is true it's an example of social responsibility, and the company should be proud to advertise the fact. But there probably is a point where the company could distort what it has done, implying that it has done more than it has done, or implying that the entire problem is cleared up when it is not, or implying that federal or state standards played no role. There is a point where advertising that you have done something could mislead the consumer about what you haven't done, or the nature of what was done. So, although corporations should be very happy to advertise their environmental programs, it is just common sense to try to make it very clear to the consumer exactly what the nature of the activities are.*

Austern: *If I understand what you are saying, Mr. Ludlam, I think I disagree. It is a law and it is a legal standard you have to live up to or you are in violation of the law. Compliance is not a voluntary act and you are doing nothing but obeying the law. It's like driving under the speed limit or at the speed limit. I do not think that is a notable socially responsible act, and I would not think it would be worthy of making a point to the public about it.*

I don't know whether this will help or confuse. But I'm quite sure it will confound you. In any complaint which the FTC issues on advertising, there are two issues. First, meaning. *What is the communication? What does the ad mean? What does it claim? And the second issue is the truth or falsity of its claims. I'm simply reciting what I think Commissioner Dennison might agree is the present state of Commission law and that is a public fact and not privileged legal advice.*

It is settled that what an ad means is what the Commission says it means. By statute, each of the five Commissioners is endowed with semantic expertise. By some process of osmosis that I've never understood, that expertise is transmitted to the Hearing Examiners and also to my learned FTC staff colleague on the far left.

When the complaint charges a false advertisement, you've got to start by analyzing, "What does it say?" And on that issue the FTC has all the cards.

Then you get into the question, "Is what you say true or false?" Narrowing that to your inquiry about an EPA clean water, clear air regulation, and ads about compliance, there are some time factors, as you know better than I do, in those regulations. They are somewhat involved in what the states do first. If the states don't adequately regulate, the Federal Government then gets into it. Thus there is an awful lot of room.

Wholly apart from that issue, what I thought Max Ways properly called the ethical question and which may be irrelevant, there is a lot of room for the FTC to disagree with any pious efforts to advertise. Many of you have seen a full page in the New York Times *by a company saying that it had spent $110 million thus far on ecology. I'm not so sure that it is a false advertisement because, if it says we've spent $110 million and you have a knowledge of elementary arithmetic and the books aren't fuzzled, one ought readily to be able to prove its accuracy.*

But once you get beyond these simple statements and claim "We've done a better job than anybody else in the industry," then there is a great deal of room for the administrative agency to challenge your ecological advertisement.

Dennison: *In one of the petitions filed with the Federal Trade Commission it is contended that the fact that so much had been spent on the ad itself as compared to what the advertiser had spent on the pollution abatement made it an*

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43. "It is important to note that "concern with their reputation in the financial community . . . is one of the reasons most frequently given privately, but least mentioned publicly, for launching corporate campaigns. [But a]ny company which announced it was embarking upon corporate advertising because it wanted to influence its stock price upward would be certain to attract unwelcome attention from the Securities and Exchange Commission. Sothey don't say that.

"They know, however, that a high price/earnings ratio will put them in a favorable position for further expansion through acquisition or merger, since most such arrangements are based upon exchange of stock." "Corp v. Product Advertising," Murry Harding, *Industrial Marketing*, September 1967 at 61. See "A Quiet Revolution . . . , The Rise of the Corporate Image," David Skylar (on influencing the financial community through corporate ads), *Industrial Marketing*, September 1967 at 63-70; "A Merger Maker Relates His Field to the Debate [on Corp. Advert.]", Charles Sexton, *Industrial Marketing*, September 1967 at 71-75; "Mergers: Their Effect On The Ad Page Column," Arthur H. Dix, *Industrial Marketing*, October 1967 at 76. See, generally, *People/Profits: The Ethics of Investment*, edited by Charles W. Powers, Council on Religion and International Affairs, 1972; *The Ethical Investor: Universities and Corporate Responsibilities*, Charles W. Powers, John A. Simon, and Jon P. Gunnemann, New Haven, 1972.

44. "Wall Street's New 'Social Responsibility' Funds," Harvey Shapiro, *Saturday Review*, August 26, 1972 at 44.

45. Corporate Responsibility and Mutual Funds: A Report to Members of the Investment Company Institute from the Committee on Business Standards. Investment Company Institute, 1971.

46. "The Impact of Corporate Advertising on the Institutional Money Manager," Erdos and Morgan Survey for *Barron's* on Corporate Advertising from 1970. A questionnaire was sent to 278 subscribers of *Barron's* who managed or influenced the flow of corporate funds. The results found that 87.2 percent answered favorably the question, "In your opinion, does 'Corporate Image' advertising favorably affect the company's security values?" 82.1 percent stated that corporate advertising had "served to call [their] attention to a company as an investment potential," and 79.3 percent of those who said it had served this role stated that the individual had gone to purchase the securities.

See also, "Measuring Brokerage Firm Advertising Effectiveness." *Time Magazine* study by Thomas E. Ryan, Inc. for *Time*.

47. "Communicating the Total Corporate Personality," Magazine Publishers Association, at 27 (3,000 letters regarding employment after eleven individual magazine ads). See also, "Strategic Advertising and Attitudes Toward Corporations," Thomas E. Ryan, Inc. for *Time*. "Measuring Strategic Advertising Effectiveness," Thomas E. Ryan, Inc. for *Time*, fourth in series, 1971 (recruitment recommendation measurements at p. 31). For examples of recruitment ads, see "Strategic Advertising," *Time*, at 97-99. See n. 33 for case histories of other effects of image advertising.

48. Private communications with Mr. Chuck Ludlam, Division of National Advertising, Bureau of Consumer Protection. See "Corporate Advertising and Its Function," *The New Yorker* magazine.

49. "Are Public Relations Executives Becoming More Involved With Corporate Advertising?" *Public Relations Journal*, November 1972 at 25 (of 125 questionnaires mailed, 89 responded). For 1971 survey results, see "How Public Relations Executives View Their Image Advertising Roles," *Public Relations Journal*, November 1971 at 28 (of 265 questionnaires mailed, 130 responded, with 34.9 percent stating their prime objective to be to improve consumer relations, 20.5 percent to improve product sales, 9.1 percent to improve trade relations, and 8.4 percent to improve governmental relations).

50. *Internal Revenue Code of 1954*, S.162E, 2.B.

51. *FTC v. Sperry & Hutchinson*, 405 U.S. 233 (1972). When the FTC measures practices against "the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the Federal Trade Commission Act."

52. Under the Securities Act of 1933, the SEC may regulate "offers" of securities for sale by a corporation. Almost any communication may be considered an "offer." No offer may be made unless a registration statement has been filed with the SEC. Between the time it is filed and the time it is approved, offers may be made only if they include the prospectus filed with the SEC. After it is approved, the approved prospectus must accompany the offer. The result is that an advertisement might be considered an offer which violates the act if a registration statement had not at least been filed. *Securities Act of 1933*, 15 U.S.C. 77(b) and 77(e).

unfair advertisement. But there are lots of interpretations on how that might be construed. The Commission has yet to act on this petition.

Q. The FTC frequently takes the stance that misleading statements or downright lies in advertising are effective. The one I always hang up on—you're sort of guilty till proven innocent. Because in your omnipotence you decide what is truthful or untruthful, you assume that the general public or whoever the ad is directed at automatically takes the falsehood as true and the company benefits in some way by that.

Austern: I would like to say that in Commissioner Dennison's speech which I have been privileged to see, there is, in my judgment, the most magnificent and complete bibliography on this area that I have ever seen. He has made a monumental contribution, and I hope you can be first on line to steal a copy, as I did. But as to the general public, the regulatory yardstick, if I may quote a case, is the ignorant, the credulous, and those who don't think. If the Commissioners in their wisdom can say that some message has the tendency or capacity to deceive the functionally illiterate, you've had it. In the absence of clear ground rules, and accepting that under the legislation the Commissioners can exercise judgmental evaluation as to the content and the intent of the communications, are you not then really driven to asking for companies to get prior agreement from the Commissioners as to what they plan to do? And, secondly, if that is the requirement, how in the world could they do it?

Dennison: We couldn't. You are talking about pre-clearance of advertising. The Commission simply does not have the resources for doing this. And I certainly would think it would be very unwise for the Commission ever to attempt any pre-clearance of advertising. I'm not even sure we have jurisdiction to do so. I made a talk not so long ago on the value of surveys with respect to advertising, and to determining how a consumer reads the advertisement. Now, I'm not necessarily saying that I'm substituting my great expertise to which Mr. Austern referred, however, it would seem to me that surveys of consumers, how they read the ad, before the ad is published, might be of interest.

Austern: You also have got to understand that in the Commission's approach to a marketing survey—they do not often use a random statistical sample. They are very selective in whom they ask.

The kind of survey they often develop is comparable to a policeman stopping every ten cars and saying "Were you speeding?" Surprisingly, you get a lot of, strangely, negatives. If you think that I'm exaggerating, before Mr. Dennison sat where he is now sitting, the Commission ran a survey on a very well known product which is advertised by one of the men in this room. It was a proprietary drug, and the FTC developed a very fine objective and unbiased questionnaire. It said that the Federal Trade Commission was investigating whether the advertising for the product was false and whether it had any therapeutic value. The final question was: "Dr. Doctor, have you ever recommended this product to your patients?" That is not a fabrication, I can show you the citation.

Many have great skepticism about these so-called probability surveys as proof of consumer understanding, and I am afraid some businessmen have often made mistakes by putting too much faith in them.

Q. The consumer advocates in Washington seem to be spreading their wings so damned wide that they are ruining their own credibility.

Austern: The consumer activists are not losing credibility. Unless you measure it all by the Washington Post which recently moved Ralph Nader and the others to page 6 because they had something called Watergate for the first five. But the number of consumer activist groups has increased exponentially.

Second, they are very well funded. They've got a good bit of money. I can assure you that whatever Lockheed spent in its crisis situation, I can name four of these activist groups that are far better heeled.

As far as Mr. Nader is concerned, despite some of the scatological and slimy and sleazy quotations falsely attributed to me, all of which are wholly fabricated, you've got to look that one squarely in the eye. Any man who gets his face on the cover of Time at age thirty-one is, and will continue to be, significant. That was not a commercial; that is a fact.

When Mr. Nader wrote his book Unsafe at Any Speed, I think 98 percent of the public would have agreed to agree that he made a contribution. The only hazard he encounters is that he's got 150 research assistants . . . how many is it now, perhaps 200? I know he's got 1,100 applicants who are able to work virtually for nothing, as their fathers formerly did. These young people may have little talent to make value judgments, and are not too careful about their facts. If what they said was examined by the Commission—if that ever happened—they would be in trouble. They're not too careful about their facts, they haven't any real experience in making value judgments. Some are highly talented, and some are completely wild. Ralph Nader has to rely on all these people and does not do what Mr. Ways said last night. He hasn't learned the art of concentration, as he did on automobiles. Now he's in everything from pantyhose to Indians . . . and he may consequently get into trouble. But if there is anybody in the room who thinks the consumer activist movement is diminishing, that it won't increase, or more important, that many agencies in Washington won't be overreactive to it, I think he is on the wrong path.

Q. In the eyes of the Commission, how many corporations advertising is suspect today and roughly, also, part two, what proportion is that of the total?

Dennison: I can't answer, I have no idea. The general procedure is that the Commission or its staff normally initiates the investigation. This may be on the complaint of a competitor. It may be on the complaint of a citizen. We get 6,000 pieces of mail a month, complaining about various things. The Bureau Chiefs have to make a value judgment as to the importance of the case—what its ultimate effects will be as a possible deterrent to other companies doing the same type of business from doing the same type of thing. The Commission must decide two things in its judgment, whether a violation of the law has existed or does exist, or has been committed. Second, whether it is in the public interest bringing it to action. The fact of the matter is that our budget is about $30 million. If I'm not mistaken, one company, perhaps there's a representative of it here, spends $100 million a year on TV advertising. So we are obviously limited in what we can investigate. One of the more effective things we can do perhaps is with our trade regulations rules, which would indicate to you what position the Commission would take on the particular issues with a particular set of facts. Anyhow, we are tied up in court on whether we have authority to issue trade regulation rules. I can't give you anything definite at this time as to the ultimate result of our court case.

Ludlam: We get the story boards on all national TV advertising. We get the story boards on every ad run over national network television. How many of those are actually looked at by the attorney at some point is very hard to say, and how many of those result in his taking the considerable time necessary to investigate the facts of the situation is also hard to say. We have thirty people, thirty attorneys in the Division of National Advertising. You can imagine, we have ten attorneys working on one of the serious cases which you are familiar with now—the analgesic case.

Corporate Communications in the European Business Community

Joseph Brouillard
Vice President
Director, Corporate Communications Group
J. Walter Thompson Company

What I have here is the result of many conversations and discussions that I've had with people here in the States who have had experience overseas, Europe in particular, and with people in Europe: advertisers, consultants, public relations men, and our JWT people in Europe. Most of my material is from this latter group.

First we defined our subject (corporate communications) to make certain we were talking about the same thing. Basically, interest is in all types of communications from a corporation to all its publics. We agreed that corporate communications is all the ways a corporation or parent company communicates to its publics for purposes other than immediate effect on the sales of its goods and services. Quite often corporate communications is defined as corporate advertising, corporate public relations, community relations, annual reports, and so on. But that is too narrow, really. Simply, it's what the corporation has to say to whom, and why. The how includes all types of methods the corporation may use to communicate, from the annual report to sky-writing, if you will. I sometimes think the Goodyear blimp is an example of sky-writing.

Looking at corporate communications in the European community, you get the impression that it is pretty much the same way it is in the United States. The corporations talk about the same things, more or less: their growth, their diversity, products, and services. The difference is that the number of companies employing corporate communications in a deliberate fashion is quite small, and the dollars spent on paid media less proportionately. The medium used, as far as I could determine, was just one, print. I did see an interesting corporate ad, a car card in a London taxi cab, behind the wall where the driver sits. It was for Gulf Oil Company, about its services, all of the products it had, its diversification, about its achievements, its successes and its future. It was a lovely corporate ad, but the first one I had seen in a taxi cab.

There is not the use of structured plans for all corporate communications we have in the United States. There doesn't seem to be evidence of total corporate communications planning.

Unfortunately, it wasn't possible to estimate the amount of expenditures on advertising, public relations, staffing, annual reports, shareholder relations, financial reporting, and all of that. It was possible to estimate expenditures on corporate advertising at least for the U.K.

Our people started with the 1971 U.K. total advertising expenditure, which was 590 million pounds. From that was deducted consumer advertising (manufacturers advertising their products to the consumer), which was 271 million pounds. Classified advertising amounted to 119 million pounds. Retail advertising, 63 million pounds. Industrial advertising, which includes corporate advertising, was reported at 70 million pounds. It was determined that government and nationalized industries advertising was 30 million pounds. Savings and financial, that is banks and insurance, was 28 million pounds, and the last 10 million pounds was for books, charities, and tourism. Going back to the industrial advertising segment (70 million pounds), we were able to isolate 43 million pounds for trade and technical display advertising and 9 million pounds for classified ads in trade and technical press. That left 18 million pounds for what is called in the U.K. "industrial and prestige" advertising, which is a new term for me.

At this point one can at least estimate that 18 million pounds is the most that is being spent on corporate advertising, and that is about 3 percent of the total advertising expenditure. But upon a further look, it was agreed that out of the 18 million pounds, 8 million was for what we call corporate finance or "tombstone" advertising, leaving 10 million pounds for corporate advertising and some industrial advertising in the U.K. in 1971. One can then estimate that corporate advertising in the U.K. is less than 2 percent of the total U.K. advertising expenditure or about $25 million. It could be a little higher or a little lower than that, but it is somewhere in that neighborhood. We do not know what expenditures for corporate advertising are in other countries. But in any case, if it is $25 million in the U.K., it is less in any other European country.

The question was asked: Why do European companies spend money on corporate advertising? The answers ranged from corporate vanity to media pressure, heaven forbid, to existence of a corporate communications officer, to "competition does it so we have to" and to other reasons of that type. But when you evaluate the actual advertisements, you arrive at reasons that I think are pretty much the same as they are in the U.S.

Awareness Theme Most Commonly Used

Corporate advertising in Europe seems to be centered on these four themes: (1) corporate identity or awareness of the corporation (to register the fact that your corporation exists); (2) the achievements of the corporation; (3) the philosophy of the corporation and, believe it or not, (4) social responsibility is also evident in some European corporate companies. It seemed to me that the corporate identity or awareness theme was the most used in the campaigns I observed.

We also examined what "attributes" make up a strong corporate reputation, and agreed that these nine areas seem to be pertinent in Europe as well as in the U.S.:

Product Quality
Area of Perceived Competence
Leadership
Research and Development
Modernity
Size
Service
Social Responsibility
Warmth

As for the important publics for a corporate communicator in the European community, they are about the same as they are in the U.S. They are: the financial community, the business community, employees, government, consumers.

As I said before, as far as we could determine, print is the only medium used. One could substitute the *Financial Times*

for the *Wall Street Journal*, as the types of publication used are similar to those used in the U.S.

Television is not used for corporate advertising for a number of reasons. To begin with, the so-called upper demographic, or if you will, the "establishment," is rarely home in the evenings. Although they would like to watch TV, their life style prevents them from doing so. Financial people are reported to be at meetings or dinners in the evening. Members of Parliament are away from home attending meetings and, as you know, Parliament holds night sessions. The other thing too is that by and large, in the European community, TV is spot TV, and it is impossible to "sponsor" a program even if corporate advertisers could afford to.

And, finally, even spot TV is considered too expensive to reach the corporate advertisers' target groups.

Measuring Effectiveness Difficult

Measuring the effectiveness of a corporate advertiser's program is difficult and expensive. The target groups are considered to be too small in actual numbers to make researching them practical. If members of the financial community, Members of Parliament, and other thought leaders are your target groups, you might find that those waves of research, say in an 18-month period, would cover the same exact people and your research would have more influence on them than the communications.

Here is a list of corporate advertisements that we examined: American Electric Power, Hertz (and I know Hertz is not a corporation, but a division of RCA but it seemed to be putting forth a corporate stance, so we brought it in), Cameron Brown, Vine Products, Gulf & Western, Gulf Oil, IU International, Taylor Woodrow, Crown Zellerbach, Cleveland Bridge, and U.S. Steel. Our evaluation of these advertisements indicated that they were pretty much aimed at the target groups we have just mentioned, and they were all using the same classic themes of corporate identity. In addition, there are these points to be made: Hertz, corporate achievements; Gulf Oil, corporate philosophy; Gulf & Western, social responsibility; U.S. Steel, the "we're involved" campaign is over there. The interesting thing to note is that most of these companies are American.

What about corporate PR and identity programs? It seems that corporate public relations programs are much more used for corporate communications programs in Europe than paid-for advertising space. Total expenditures for public relations in terms of fees paid to specialized public relations companies are estimated to have been 10 million pounds in 1972. Comparing this to a 1971 corporate advertising expenditure of 10 million pounds you get a pretty good indication that PR is really strong in the U.K. How much of this was spent on corporate public relations as compared to brand public relations is unknown, though it is believed there is a clear trend toward corporate public relations. It seems to me that this is somewhat the way it was here in the U.S. some years ago.

I think we were in that period ten years ago when corporate programs as we know them now were not in existence, but what we had were primarily corporate public relations programs.

Social Responsibility an Issue

But what about corporate social responsibility in the European business community? I was really surprised that it was as much an issue there as it seems to be here. But it does seem that the debate about this theme or this characteristic of a corporate reputation is as active in Europe as it is in the United States. When we talk about social responsibility, we're talking about how a corporation is perceived by its publics. We agreed that a corporation becomes socially responsible by the deeds it does, not by what it says. And simply stated: are you being perceived as a positive force in society, or a negative force in society?

In London, there is much talk about the social responsiveness of business and so forth . . . very frothy talk. And it is quite a heated debate. Let me quote from a recent London *Times* editorial that was brought to my attention: "Social responsibility is a dimension of business which cannot be ignored. There is a great urgency for the business cunity to build this dimension into its thinking and practice. Increasingly, the subscribers to the doctrine of the Chicago economist who has denounced social responsibility in business as a fundamental subversive doctrine are being relegated to the lunatic fringe."

Well, my colleagues and I do not think that it is fair to Milton Friedman, who I think is the Chicago economist they refer to, to relegate him to the lunatic fringe. I think we agree here and in Europe that there is a great deal to be said in favor of businessmen concentrating on their jobs as businessmen, but nevertheless, they should structure their organizations in a way that will make them socially responsive to our ever-changing environment. We agree wtih Max Ways that the major issues of social progress will be prosecuted by government through its legislative and fiscal policies. We also think that despite all of the high-sounding talk by many people in and out of business, this is what will happen.

Now what about the corporate personality, which is something of interest to us. We're always trying to determine the personality of this company or that company. We saw today that Greyhound uses a very "American As Apple Pie" personality in getting its story across. As we are interested in this, our friends in Europe are also taken up with the subject. I am sure you are all familiar with the various techniques that we use to determine the corporate personality, but here is a technique which was developed by JWT London that I think you will find interesting and maybe charming too. May we have the film, please . . . (Film shown here in which sidewalk interviews asked respondents to personify corporations.)

For our London people (and I agree) this film convinces them that a corporate image of considerable richness and complexity does exist in people's minds. And furthermore, ordinary people are much more intelligent and observant, understanding and articulate than we, the professional communicators, give them credit for.

Increased Activity Without Dramatic Change

If I may sum up quickly, corporate communications in Europe now is certainly not at the level it is in the United States. But it will be of much greater interest in the next five years than it was in the last five years. European corporations or multi-national companies communicating in Europe will need more research, more intelligently analyzed and more thoughtfully applied so that they and their professional communicators can set valid objectives whose achievements can be evaluated.

In the U.S. we are just now developing corporate communications programs that are fully integrated for all corporate messages to all target publics and are structured to relate to a common set of corporate communications objectives. This has not yet started in the European community as far as we can determine. More and more companies will be starting communications programs in the European community, and this development will be led by U.S. and other multinational companies. However, they, like everybody else, will have to evaluate their situation and presence country by country and acknowledge that although each country is different, a completely different program for each country will not be the solution either. Most people agree that in Europe there will be gradual developments in corporate communications along existing lines, rather than any dramatic change.

QUESTION AND ANSWER PERIOD

Q. *Did you find very much evidence of advertising by multinational companies from other countries, Japanese, Middle East, or Eastern . . .?*

A. *Japanese, certainly.*

Q. *Was it corporate or mostly products?*

A. *It was corporate finance, actually. Very heavy with the* Financial Times. *There is a lot of that going on. German companies are very prominent in the corporate area.*

Q. *Did you find a concentration in the corporate programs coming from American-based companies?*

A. *Primarily? That's where they came from. In some cases you don't know what a company is trying to achieve, so you can't really evaluate it. But there's certainly a lot in the* Financial Times, *the Paris* Herald-Tribune. *I'm not sure whether that is just Americans talking to Americans, although there are certainly a lot of non-U.S. companies in the Paris* Herald-Tribune, *as well as in the* Financial Times. *So, they must be going after the same publics. But it is primarily American companies or multinational companies.*

Q. *How much tie-in did you observe between American parent companies and their foreign affiliates in Great Britain, France, and Italy? How much of a variance were you able to ascertain? A connection between a foreign subsidiary and the parent company?*

A. *Not much, as a matter of fact. It was usually the American company itself, rather than the affiliate company. Some companies don't really have any corporate advertising. We know Ford does not advertise Ford of the U.K. as a corporation. Actually, that is one of the questions our clients are asking us. What should we do in these countries? Should we relate to the American company as a multinational company, or should we just concentrate on our German operation or our French operation? And the trend seems to be to relate to a multinational overview. Not blatantly American, but indicating a lot of locations rather than just corporate headquarters.*

A. *Would you in this respect say that English has become the business language of Europe, so to speak?*

Q. *I don't think so. The U.K. seems to always lead in these things, as most of you may know. And it is just that a lot of these ads and programs are started in the U.K., but they will develop in their own countries in their own languages, in their own publications. The* Wall Street Journal *and Paris* Herald-Tribune *I think are read in Europe because they are in English.*

A. *Is there much inhibition by government on advertisers, financial advertisers or any?*

A. *Not that I know of.*

Q. *How much real research did you do interviewing the financial community, for example, in London or Switzerland, to determine the bias which my company feels exists. We have been doing some advertising over there. We do very little, first of all, and this is deliberate, basically an annual report ad because no one quarrels with your right to give a progress report. The feedback we had both in Switzerland and London, and I've had a man over there every two months, indicates they are generally very disinterested in American corporations' advertising. That's my judgment.*

A. *Feedback from whom?*

Q. *The financial community. From the investment people. From Swiss bankers. Investment people really don't believe very much in the typical American ad that runs. You have a product to advertise, this they understand. The question is why would companies do these things? They can understand your running an annual report ad and telling what your results were and telling about who you are, if you changed your name as we did. Only last month, I was in Switzerland and got that feedback from a banker who said "Just a waste of money" in his judgment because unless you are selling products to that country, why do very much of this? Do you have any feedback like that?*

A. *Well, if you don't have a purpose, a need to establish a presence in that country, I agree with the banker. However, it is our experience that most members of the financial community will not admit to being influenced by advertising in Europe, in the U.S., or anywhere else. But we know differently, and we know that advertising will get you awareness and high awareness will get you a favorable disposition.*

Q. *I referred to the* International Tribune *which we found was read quite well, from the feedback we had. We had tremendous response to an ad, just one ad at one time pulled many more responses that I would have guessed it would. But he was referring to that, saying that some American ads he sees in there . . . he can't figure out why they are there. He said it is for financial interest, for the financial community, which is what it was, of course, but it didn't ring any bells, apparently.*

A. *But I suppose the American financial community would tell you the same thing. But we know they are influenced.*

Q. *That's right.*

A. *If you had a reason to be there, it will work as well as it works here.*



JOSEPH BROUILLARD

Should a Company Promote Its Own Stock?

Carol J. Loomis
Board of Editors
Fortune

Gentlemen, it is very pleasant to be with you today and to share this platform with Jones Yorke. I am also always pleased to be on the same program, or in the same issue of *Fortune*, with my fellow staff member, Max Ways, who spoke to you on Wednesday. Max, I understand, covered some fairly high-minded topics concerning business conduct.

We also think about seamier things at *Fortune* and today we get down to one of these—the question "Should a company promote its own stock?"

This is a question out of which I have gotten some mileage before. It was the title of an article I wrote for *Fortune* in December, 1965. Our answer to the question then was "Yes, a company should promote its stock." And I will not keep you in suspense about my answer now. I am not so fickle as to have changed my mind. I still think the answer is yes.

I even think so for most of the same reasons, and in a moment I am going to reframe these to fit today's conditions and remind you what they are—not that I really think this particular audience ever quite loses sight of those reasons. But first I would like to note that these reasons are so good it almost seems strange the question needs to be asked. Of *course* a company should promote its stock. But here we are calling the matter into question.

That we do so, I think, reflects several factors. First, there is clearly a problem about that word "promote." Handy though it may be for the headlines of articles and speeches, it does have a sort of unsavory connotation. This fact has even been recognized in the dictionary. If you dig deep into the definition of "promote," working your way down to about the sixth definition, you find that the word means "to obtain by cunning or trickery." Obviously, that is a definition we wish to relegate very quickly to the shredder—or perhaps I should say to the burn bag. The legitimate definition for our purposes, I think, is to be found, happily, a notch or two higher in the dictionary. "Promote," so it says, is "to present a product for consumer acceptance." For our purposes here, I would make that definition a bit more specific. To promote your stock, let's say, is to present it for consumer acceptance fairly and factually, with the goal of securing a price for it that adequately recognizes its underlying value.

Another problem, I think, is that stock promotion is too often done for the wrong reasons. I asked a well-known financial PR man recently if he had written anything on the legitimate reasons for promoting one's stock. "Oh," he said, "you mean, to fight off raiders and things like that." I am afraid that is not what I meant. Stock promotion should always be done in the interest of the company—in the interest of its shareholders—and at least part of the time the preservation of the existing management is not in the company's interest. Managements which only worry about their stock price because they want to fend off raiders are usually foremost among those who do not deserve preservation.

A third problem is that even those managements who do promote their stocks in the interests of their shareholders sometimes do it with a strong sense of embarrassment. A company's executives, after all, are usually among its larger stockholders, and beyond that they typically hold options. Clearly, these executives are going to be among the chief beneficiaries if their company's stock goes up. It is a fact that makes many managers somewhat self-conscious—a little defensive about any drum beating they do for their stocks.

My advice would be to stop being self-conscious, to stop being at all defensive about any honest, straightforward, law-abiding steps you may take to try to improve the public's opinion of your stock. There are just too many good reasons why you should be doing exactly that.

The good reasons start with the fact that a company's stock is its currency. It is currency that can be used in a merger—to buy another company, or a part of another company. And it is currency that can be used, on those occasions when a company makes a public offering of its stock, to buy "cash."

Naturally, when a company uses its stock to buy assets—be these cash or companies—it wishes to buy cheaply—or, in other words, to give up as few shares as possible for what it is buying. And, just as naturally, the higher the price of a company's stock—the higher the price in relation to that company's earnings—the better off it is as to the number of shares it must give up.

I.T.T. and Putnam's

When I wrote that article seven years ago, the merger movement had lots of steam behind it, and today some that has disappeared. However, there is no shortage of merger situations that point out very graphically today what a company's stock price can do for it—*or to it*. My own choice of an example is a company that requires very little introduction, International Telephone & Telegraph, I.T.T., as you know, is barred by the antitrust agreement that it signed from making major acquisitions in this country, but that does not mean it cannot make small acquisitions—and it has been doing so. In one of its latest acquisition moves, it announced in January that it would acquire G.P. Putnam's Sons, the book publisher. I.T.T. stock was then about 52—around twelve and a half times 1973 estimated earnings—and the company said it would give four-tenths of a share of its stock for every one share of Putnam. That was going to give the Putnam shareholders the equivalent of about $20 a share for their stock, which works out to about eleven times Putnam's estimated 1973 earnings. The higher p/e prevailing on I.T.T.'s stock meant that the merger would have a positive effect on I.T.T.'s 1973 earnings—not much of an effect because Putnam is a very small company, but still it was to be positive.

But then I.T.T. was caught up once again in the Chile controversy and began to see its stock price fall. By March the stock was in the low 40's. At that point, Putnam, no longer in line to get $20 a share, said no deal unless you raise the ante—and, rather surprisingly, I.T.T. did. It would now offer, it said, not the fourth-tenths of a share originally negotiated, but instead nearly one-half a share. I.T.T.'s new offer was the

result of a very simple fact; its currency—its stock—had depreciated in value. As a matter of fact, it had fallen to the point—ten times earnings—that the merger appeared likely to slightly hurt its 1973 earnings, rather than helping them.

The final chapter in that story is that I.T.T. has since fallen to the low 30's and the Putnam deal is off entirely—or at least "indefinitely postponed." Now obviously, the loss of Putnam is not going to make or break I.T.T. But just as obviously, this example indicates why a company has got to worry about the price of its stock.

For another example, make a slight alphabetical move from I.T.T. to A.T.&T. That company has been saying publicly for a couple of years or more that it needs to raise equity capital to balance the huge amounts of debt it has added to its capital base. But A.T.&T.'s stock has been selling below book value, and any stock offering made at prices below book would dilute the existing stockholders' equity. So A.T.&T. has had to wait—doing what it can, in the meantime, to raise both its profitability and its stature in the public's eye.

Improvements in the value of its currency are a direct benefit to a company. But I also think of a good stock price as having indirect benefits in the sense that this price is likely to influence the attitudes of all of the company's publics—its customers, suppliers, employees, and shareholders. When a company is well regarded by the market, its customers think better of its products; suppliers—and let's include in that term banks and other lenders—are more eager to do business; executives and other employees are easier to get and keep; and stockholders are naturally more content, too. Take such companies as I.B.M. and Xerox; there is little doubt in my mind that their great performance in the stock market has helped further the image of them as fine and successful companies—and thereby aided their sales.

I have now run through both the direct and indirect benefits that flow from a good stock price, and have given you my opinion that a company has both the right—and the obligation—to promote its stock. As to how you go about that—now there's another question, and I am very glad that my topic neither requires, nor does time permit me to try to answer it. I only know that it is a very tough job—made particularly so at this moment by a stock market that seems determined to drive down most stocks to incredible bargain levels

It is not a very agreeable time to be promoting stocks. But there is probably no time when the job can be neglected—it is too important. And just think of this: For years you have probably been telling people, subtly and otherwise, that your stock is a bargain. These days you can even say it truthfully.



CAROL J. LOOMIS

Should a Company Promote Its Own Stock?

A. Jones Yorke
Executive Assistant to the Chairman
Paine, Webber, Jackson & Curtis

Fundamental to the operation of our capital market system is a continuous flow of information to investors covering publicly traded corporations. Without this flow the system simply would not work.

Over the years a rather elaborate web of disclosure, interpretation, and transmittal of information to the investing public has been developed. Clearly the corporation itself is at the very heart of this process. The basic raw data flows from the company and to a certain degree the form of this information flow is dictated by the various regulatory agencies—the SEC, states, and exchanges. The problem arises in the system as to how this information is interpreted, by whom, and perhaps even more basic, whether or not it is noticed at all. We are all aware that there is an almost infinite amount of financial news seeking outlets. Further, the raw news itself does not necessarily, standing alone, mean anything to the investor.

Here is when the question arises—should the company promote its own stock?

Obviously equity and debt securities feed the growth of a corporation and the higher the degree of acceptance of these securities by the investing public, the easier it is to raise additional funds, make acquisitions, reward executives for performance, etc.

Corporations take every conceivable position as to how active they are in calling attention to their own securities —from the barest financial statements issued quarterly to setting up elaborate departments that some have even informally called keepers of the p/e ratio. In my view there is nothing wrong in this, and in fact a great deal of good can come from active company involvement in the information dissemination process to investors, both current shareholders and those who potentially are shareholders.

The prime responsibility for disclosure is the corporation's —what is done with it falls into a never-never land.

If the corporation can get the investment researcher to take note of the information, to give a hard look at the facts then the corporation has done itself and the investor a service. If it can get the investor to be interested and to look at the factual and analytical information available, then a service has been performed.

Today the pressure is for more disclosure, not less. The SEC has even said that projections can be used, and has encouraged corporations to provide factual information even during the registration period. It has also encouraged corporations to include more information in the annual report and to present it in a way that can easily be interpreted by the investing public. As I'm sure you are aware, even the holiest of holies, the prospectus, has been livened up—colored pages of products, etc. So the regulating agencies are encouraging the corporations to do more—not less.

There is, however, risk involved in this area—anyone that reads the papers these days sees the phrase "inside information" and even from time to time "securities fraud." We all have heard—and being with a major retail house I can attest to it—the statement that the individual investor is not in the market. He feels that he is not in the mainstream of information, he is the last to know.

These concerns are at the heart of the problem. It is one vast area of gray, but the shading is beginning to change. There have been a number of cases that approached the question of what is material and what is inside information. The commission is now working on guidelines that will help in this particularly sensitive area. I would not look for answers to all the questions in specific terms, and would suggest that the approach be one of—if there is doubt, release the information publicly.

This really puts a burden on the company and the danger, of course, is that rather than take any chance, the flow of information will be cut off. If this occurs there will be an even more serious undermining of investor confidence than now exists. The dual approach of company disclosure and interpretation by investment company research is basic to SEC thinking and forms the basis for Wall Street customer service. To cut off this flow would do extensive damage to the system.

What all this suggests then is that a great deal of good can and does come from the company keeping the investment community informed. I have avoided using the term promote because this suggests that only the good news is put out. Over time, this simply will not work. Speaking as a former analyst, you get to know who is shooting straight with you and you tend to ignore those that are constantly telling you things are great when the economy is falling to pieces. It's tough to say things aren't too good, but over time there is little doubt that you gain acceptance and, therefore, support when you tell it like it is.

All of you have seen "research reports" written by the company for the company and distributed as objective documents. A dangerous way to go about getting acceptance and one that is fading from the scene.

Analyst meetings that overstate the outlook also will in the future be viewed as suspect. After all, if the earnings are going to be down, sooner or later it is going to be known and the company stock will suffer probably more than it would have if an indication of trouble was pointed out before the fact. Credibility of management is lost.

Let's get back to the question of inside information for a minute. The commission has in recent years seen a number of cases in which inside information was disseminated as research in exchange for brokerage commissions. Companies have tried to protect friendly analysts from being surprised by a bad earnings report by letting them know in advance that bad news was coming. This information finds its way to institutions. What happens, of course, is that all parties become insiders and therefore are subject to restrictions in selling. Needless to say, institutions will over time get gun shy about listening to inside information—at least that is the hope.

But what does a company do? The best thing to do is to release information as soon as possible to counter grossly inaccurate information when it becomes apparent that it could have a material impact, and keep a flow of information available to the financial community.

The SEC has given recognition to the fact that most

companies have projections of earnings, which in many cases seep into the public domain. The problem, as recently pointed out by Chairman Cook, is that outsiders can't be sure whether the estimates are management's or outsiders'. Further, estimates are made using assumptions; by themselves estimates may be quite misleading. For this reason it makes a great deal of sense for the corporation to spell out basic assumptions it if is going to use earnings projections in public releases. Further, the commission will require that corporations making projections update them when material changes take place, and after the fact compare them with actual results. There has been some experience in the use of projections in the U.K. and it has worked, but interestingly the projections are not made by the company but by its auditors. The commission has also stated that giving general agreement to estimates such as "it is reasonable" would constitute projections by the corporation. There is, of course, concern that if the projections prove wrong, the company will be exposed to liability. In statements the SEC has said that it feels that earnings projections made in good faith and based on reasonable assumptions should not expose the company to suit, but the commission hopes to clarify this.

Today, more than ever, the public needs to feel that it is getting information about public corporations. Yet we see again and again the problem of inside information and fraud in the press. It is a most difficult area. In a sense, when one answers in the affirmative that companies should promote their securities, the advice does in fact potentially expose the company to possible liability. There is no easy answer. You must keep your stockholders informed, you should keep investors generally abreast of developments, it helps if your present customer base and potential customers hear about the company, but it could be extremely damaging if you overdo it—if you destroy rather than build confidence by an unbalanced presentation. The days of the hard sell, tell them anything but keep the stock up, are over. We are in an era of tell them the facts, even give an interpretation, but have it based on reasonable assumptions, and make sure it's made available to all. It would seem that on the one hand the regulators say tell it to them, disclosure is the rule, but on the other hand you run risks in doing so. It's still gray, but worth doing.

QUESTION AND ANSWER PERIOD

Q. *Carol, in your observations, and you have researched many plans and watched them unfold, who has done the best job of promoting a stock and what has been the medium that has been used?*

Loomis: *Well, as a matter of fact I was just trying to think of the best. I would say that my friends on the advertising side, naturally, want me to tell you that it is* Fortune. *Actually, I would think that the manner of promoting one's stock, though it very much includes media, extends beyond them. For this speech I actually tried to think—because we on the editorial staff of* Fortune *are naturally the targets of stock promotion programs—of what it was that made me feel good about a company. I mean practically any company that you could mention; no I won't go that far—a lot of companies that you could mention, I would say right away, gee that's a good company or, I don't think so much of that. But the problem is trying to discover exactly why I think that. And I finally decided, in thinking about this speech, and then decided to drop the whole problem, that it's a kind of mosaic, that it's built up over the years. It undoubtedly is furthered from time to time by personal contacts that I have. If I talk to a guy that I like at the company and he is nice and helpful and obviously knows what he is doing, that helps me as far as my attitude about the company goes. The question of what company has done the best job of promoting its stock is a difficult one.*

I can think of one company, which isn't even publicly owned, that I feel has done a very good job of promoting its stock. And that has to be Salomon Brothers. About twelve years ago they began to try to do something about furthering their image in the public's mind and they hired a very astute PR man, and what they have done has included a number of things. One was that they began to make themselves very available to the press—never pushed themselves on the press—most responsible publications do not want to feel as if they are being pushed. They are in the business of knowing when a subject is a good subject to write about and usually you should just tell them what the subject is and let them make the decision from then on. If you do any more than that it will work adversely for you. But in this case, Salomon Brothers actually said to the Wall Street Journal: *Look, when you have a new reporter and he needs to know something about the bond market why don't you have him come up and spend a week with us and he could just sit there and observe exactly what we are doing. They also began to have lunches when they had something to say, and only then, which is a very important thing. And they also began to run an advertising program that had to be one of the best around. Originally it was "Supermarket" and since then it has changed into "The Room." In the meantime, they were providing a service that very much needed to be provided. Now I think that was when the market had moved into a stage where large blocks of stock were not being traded on the floor but were being traded up in the rooms of institutional brokers and they became the leader in that. Through all of these things, I think that the public gradually began to recognize that Salomon was really one of the very forward-looking, responsible brokerage firms fulfilling a need. And perhaps that's the real key: it's the fact that they were providing a service and doing a job that very much needed to be done. And people began to recognize it. It's a long answer. . .*

Q. *Could I ask a question. Who is the spokesman for Salomon?*

Loomis: *Bill Salomon, usually. . . . Is that what you mean? He normally, and they have a number of other top executives who also are their spokesmen. And they just do a hell of a good job*

Q. *May I ask Carol what she thinks of earnings forecasts?*

Loomis: *Well, journalists have one strong bias, they like every bit of information that anybody will possibly give them, so for that reason I would be in favor of earnings forecasts, if carried out in a responsible, thoughtful way. Abiding by all the laws or all the understandings that the SEC is projecting to the whole question, I think we would end up with some more to write about as a result of earnings forecasts. Obviously they aren't always going to turn out to be right and the reasons that they didn't are in most cases likely to make good business stories. So I'm all for it.*

Q. *When you were talking about forecasts, you mentioned that there is certainly some apprehension about possible liability to the company. What about the inside or outside directors? Are they going to get gun-shy of these earnings forecasts if they're being held under fire by a suit by somebody?*

Yorke: *Well the outside directors today are getting pretty gun-shy, anyway. It is becoming more and more difficult for public corporations to get outside directors to serve. It's a real problem. Yes, they would become a little bit more nervous. I think the SEC will do everything it can to have what they call a watershed provision to protect the company if it does a responsible job of making these projections.*

Q. *Since the first of the year, there has been a veritable spate of advertisements dealing with earnings, sales, prices, earnings ratios, all things that normally seem to traditionally have influenced the stock market. I've cut out, oh I guess, easily a hundred ads that are devoted to that subject exclusively. Very straightforward presentation of financial data. I was unable to check the correlation all the way through, but every one of those companies that have posted earnings has experienced a very serious decline in stock price. What is happening to this situation, in your opinion?*

One conclusion I think you could draw is that it's chasing the wind to do it that way. Today I.B.M. announced earnings of $340 million and yet the stock went down eight or nine points. In other words, there doesn't seem to be the influence on the individual investor, at least perhaps on the institution there is, but the individual does not seem to respond to any grandiose statement on earnings, the highest they've ever been in the history of this company. That's a sure sign that the stock is going to go down. So why advertise that?

Loomis: *I think there are periods when the stock market enters very strange times and when the trend, whatever it happens to be, is just so strong that good earnings—and seldom has there been a time that we have seen so many of them as right now—just don't seem to have any effect. I agree with you that it is sort of like fighting with the wind. On the one hand, I don't see how companies can just drop out of the information communication business because of a bear market. Some time there is going to be a change. I also think that in a time like this when the stock market seems to be being strongly affected by heavy doubts about basic economic conditions, about inflation and the strength of the dollar, maybe a company's PR and stock promotion efforts should be planned a little bit toward trying to help the underlying causes of it.*

Now, for instance, there is a ceiling on dividends right now and I happen to think it is a small factor that is influencing the stock market. As far as I can tell, very few companies have done anything to try to get the Committee on Interest and Dividends to change that policy. It might be successful now. Politically it is a very tough problem to allow the big increases in dividends at the same time trying to keep a lid on wages. But nevertheless I would think that this was something a company can legitimately be doing right now, trying to get a change in that dividend regulation, which I happen to think would have at least a positive effect on the stock market.

Q. *Several commissions around the states have declared that utility ads do not serve the consumer or the rate payer, a very narrow interpretation, but only the shareowners, so it is not a legitimate cost of operating the business but comes out from the bottom line from surplus. Thus far our position has been that whatever accounting process you insist on our following, we think it is a legitimate ad and necessary to operate this business. We're going to run it. And we'll pay for it the way we have to. Thus far, except through the courts in Massachusetts, we have not attacked the decision. In the courts in Massachusetts we attacked the decision of the commissioner and got the commission's decision reversed, and then remanded it back to the commission. So we are, as conservative as we are, trying to follow your suggestion, but we're having trouble doing it and I suspect that you would agree with our position that however we do it and however we have to pay for it, we're going to have to do it.*

Loomis: *Well, I certainly do and I think that the commissions that are saying that you are wrong are wrong themselves. It's a hard point to get over to them. But nevertheless it seems to me that you're pursuing the right course.*

Q. *The public opinion polls, and particularly the Harris in December I think it was, show a tremendous erosion in the public confidence in big companies. Big companies, for example, have lost 28 percent in the public confidence from '66 to '72 where about 36 percent of the people say that they have confidence in big business. But not only that, it isn't only big business, it's medicine, it's education, it's science, it's the military, it's the government—all have lost in the public confidence in that '66 to '72 year period. But it's difficult for me to see how you can take a particular area, such as what you are talking about, stock, and bring a specific action to bear to get more activity in the stock market. For example, the New York Stock Exchange, I understand, has started now a new program to bring more small stockbrokers into the stock market. Mr. Yorke said something about there being something far more fundamentally wrong with things rather than something specific. I was wondering if you could comment on that with respect to things you're saying about doing specific things for the stock market?*

Yorke: *Well, if you look at graduates of business colleges, for instance as recently as eight or ten years ago these graduates wanted to go into business, they wanted to go into the investment community. And then something happened. They wanted to do public works, they wanted to go into other types of business. Now the corporations and the investment community look at these fellows and say, gee, what's going on here. But I don't know of any concerted effort to get business, for instance, to start talking up the corporation again. To start talking up business. It did become a dirty word. I think that you are going to see this in almost every area. But I think in the public relations efforts of corporations and the investment community, the exchanges, and even the regulatory agencies of government, you can get people to start speaking out. Every little piece helps. There is no one major way to get this done. It is a lot of bits and pieces. First, you start people thinking again, thinking about things like buying a piece of America. You know, that's not so bad. Or Merrill Lynch, for instance, "We're bullish on America." It might sound pretty strange, but that's the type of thing that might just work.*

Q. *A good reference is Justice Powell's statement that was made about a year ago, I forget who published this, the U.S. Chambers, I think. He had a very good statement on the very point you were making about getting back to the universities, to the instructors, and to the students. Let's start there at least and get the image of business and finance turned around. That's a very, very good statement to the public.*

Loomis: *I might just mention one little fact that I was reminded of by the question. The president or chairman, I'm not sure which, of Normara Securities, Japan's largest securities firm, the Merrill Lynch of Japan, was up at Fortune the other day for lunch and we asked him how they felt in Japan about investing in the U.S. And he said, as a matter of fact, they felt very good about it. They think the dollar is strong, they think that we are curing our problems, and their advice at the moment is actually for Japanese investors to put money into the U.S. and then he added to it: "We're bullish on America."*

Q. *What role do you think the concentration of controlled stock has played in this slowdown. The fact that the institutions account for almost 70 percent of the stock traded?*

Yorke: *They still have a minority in total assets. Quite clearly it's the concentration, which is a natural occurrence in that more and more people are saving through pension funds, profit-sharing plans, and so forth. There is a natural concentration going on. The question is often asked, what role will the individual have? This concentration on the institutional level has had quite an effect and it is hurting the marketplace. And you are seeing corporation stocks going down. You've got blocks of 200,000 or 300,000 shares of stock being put on the market, and you can't get a buyer for them. You're seeing them marked down 10 percent and 15 percent. It's got to diminish confidence. No one ever thought about this problem. Now the SEC is trying to do something. Do you limit the amount of trade? What percent of a position can be sold at any given time? Obviously, something has to be done about this, but we don't want to destroy the freedom of movement on the stock market. It has always been a characteristic people liked about it.*

Loomis: *I'll put in a plug for a future issue of* Fortune. *We're trying to attack this problem right now and to look at the current state of the stock market and to assess the investor attitudes and the concentration of trading and holdings, and particularly the holdings of institutions—for an article to be in the July issue. But clearly there is a major problem in that we do have what everybody is calling a two-tier market, in which the institutions are only interested in one kind of stock and that's the kind that's increasing its earnings at a very fast rate. I would say about two-thirds of the stocks or maybe more*

—that's a conservative estimate—are of very little interest these days to most institutions, at least the ones that count, that have most of the money. And it is obviously a very serious problem and a new ingredient in the stock market. I've been working on this story for a couple of weeks and I sure don't have the answers but check the July issue.

Q. Well, Carol answered the question I think. Given the fact that the institutions are not interested, except in a very narrow band of stock, and that the institutions are the only ones being the major traders, and that the market itself, or at least the Dow Jones average, takes ten-point drops and twelve-point rises, the swings just seem rather frightening I think to the individual. Such wide jagged moves don't really give much confidence to the individual investor. He's hopeful that he will catch the bottom of one of these jags. But he really doesn't know that. And it just seems that if the institutions are playing this game, they're losing too. And the individual knows that, and therefore even a tiny little story out of Washington can cause a fabulous rise or a fabulous drop. It just seems that there is so much more emotion than fundamentals in the market at the moment.

Q. Jones, if the good fairy came along and said I'd give you three wishes . . . three events can take place to help restore the stock market where it was years ago, what would be your three wishes? Would it be government action? Would it be changes in the stabilization of the monetary problem?

Yorke: Well, stabilization of the international monetary situation would be one of them. There is no question about that. I think a greater degree of confidence that if this country has not controlled inflation it has at least slowed it down. Inflation was managed, it was controlled. The second, if you could get the capital, that is the market structure system in place, streamlined, simplified, stock certificates done away with so that we wouldn't have these horrible cost problems in our own industry. So that we could make a reasonable return and go out to do our job right. Which, in fact, is getting America interested in our equity markets, and the world coming into the stock market again. In that order.

Q. For number three?

A. It is a . . . Well, I don't know. Bill Casey and I and some other people worked pretty hard on this down in Washington. And it seems like it's coming along, then it seems like it explodes, and then you try to put it back together again. I think the industry and the institutions and the corporations, all three, are beginning to realize that unless something is done we've really got to end this problem, because all of us are going to have to go out and raise capital sooner or later replace our debt.



A. JONES YORKE

Stockholder Communication Program

Robert M. Baylis
Vice President—Research
First Boston Corporation

The capital markets are essential to any company which has or may have securities outstanding. Communication with the appropriate factors in these markets is, therefore, also essential and it involves a knowledge of the pricing mechanism which affects the present holders of your securities and in turn affects your future marginal cost of capital. A securities market communication program should be a responsibility shared by a number of individuals including the chief executive officer of any company.

These programs are usually termed stockholder relations programs since we generally think in terms of the company's common stock and, more specifically, the p/e ratio. Corporate executives are generally anxious to increase their price/earnings ratio as it is a very common syndrome among managements in all industries to consider the price of their stock to be very cheap.

I should point out that I don't intend to discuss the question of promotion of a company's stock or disclosure of material information, but I do believe that it is the obligation of any company's executives to try to achieve the lowest cost of capital and to take an interest in seeing that their securities trade at a fair market value. On some occasions, a low market in a company's common stock or debt securities can have an unfavorable impact on present or potential customers' view of the company.

Let us begin by looking at investment criteria. Over the last fifteen years a careful identification of earnings growth has been the key to above-average equity investment performance 90 percent of the time. This will undoubtedly continue to be the case, but we believe the time has come to analyze price as well as the outlook for earnings and to try to identify the factors which may be supporting high price/earnings levels.

The market price of a stock inherently implies that a given rate of earnings growth is worth a certain p/e multiple. Some of the points that investors often cite in support of a given price/earnings ratio include the following.

1. Most important, the quality of a company's name, its reputation among consumers and in its markets, and the franchise or product patents which it may hold. (I.B.M.)

2. The depth of earnings or the degree of confidence that an analyst can have in earnings growth. This also includes the degree of control a management has over earnings levels. (Coastal States Gas)

3. The maturity of an industry or individual products. Union Carbide and similar companies were considered growth companies in the 1950's. Today they are not.

4. Supply and demand for the security itself, which is sometimes determined more by fads than fundamentals. (Software in late 1960's; food franchising)

In the mid 1960's, the ten-year total return (capital appreciation plus dividends) earned by a number of equity averages, including the S&P 425, was very close to 15 percent. Many pension and profit-sharing fund trustees and advisers who simply wanted to earn an average market return began to expect 12 to 15 percent returns in their equity portfolios. It also became clear in the early 1960's that high growth stocks would by far outperform the market on the scarcity theory, and therefore it was important for a major institution to own these stocks not only for intellectual analytical reasons but also for public relations reasons, as a sign that the managers had the imagination to buy the famous names. In the 1967 to 1969 period, as investors saw multiples rising on the popular stocks, they began to look for secondary growth stocks. Consequently, they bought concepts of future growth rather than present growth until the bubble burst in the 1969-70 period.

Since 1971, investors have once again been buying the popular growth stocks but have been unwilling, owing to their prior experience, to move down to the secondary growth stocks. As a matter of fact, they seem to have been unwilling to buy much else besides high growth companies. The upshot is that the spread in multiples between famous-name, high growth stocks and moderate growth stocks or growth cyclicals is a lot wider now than it has ever been before.

It is certainly not clear that every one of the famous-name growth stocks is necessarily selling too high. However, I believe that we may be approaching a time when investors will focus more than ever before on the quality of growth rates and how they compare with price/earnings multiples and that this return to fundamentals may provide an opportunity for companies with solid stockholder relations programs.

A stockholder relations program should be geared to cover all investors but professional investors and analysts probably have the major impact on formulating the market's opinion as to prospects for an investment. Each one of these professionals represents one unit of active market opinion and these units are formed on the basis of a large number of quantitative factors and other less tangible impressions.

Effective communication is more than the distribution of public press releases of facts. These are lost in the flood of today's mail. The notion should be considered that larger investors require more communication time not because they deserve "advanced" or "special" treatment but because they carry a large dollar responsibility. The analysis done in a major institution controlling a number of large investment pools may result in the formulation of a number of different units of market impression.

How Management is Judged

A most important factor in the analyst's impression is the projected earnings performance and whether it is realistic. This depends to a great extent on the impression of management. The analyst tries to judge the company management on more than just the historical record. Some key factors in the judgment include:

1. Executive development and motivation.
2. Long range planning capability.
3. Profit planning and control techniques.
4. Corporate flexibility.
5. Research and product development capability.
6. Marketing skills.
7. Financial structure and flexibility.

A number of steps seem logical in approaching the

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marketplace to insure that the investor has an adequate understanding of the company's management strategy and basic economics:

1. The company is presumed to have its own internal plan for performance as a prerequisite.

2. The senior and middle management must believe in the plan and understand how it compares with representations currently being made by competitors.

3. Begin to show a quarterly earnings pattern which is consistent with the plan.

4. Develop and maintain a list of the leading security analysts who may be interested in your company.

5. Assign one man the responsibility of actively initiating contacts with professional analysts, but do not allow this to preclude the analysts' having contact with others. These contacts should take place throughout the year as you trade information with analysts.

6. Expose the people that are key to making the plan work to those in the marketplace who are important in formulating impressions. This should be done through organized, professional, but not flamboyant, meetings. (Formal presentation is a high point but not total contact.)

7. Help the professional analyst develop a model of the company so that he anticipates and understands major changes in performance. This includes a clear definition of objectives within the model and evidence that they are realistic. It should be done individually and through an appropriate "splinter group."

8. Make a clear public statement as to your earnings per share forecast or goal at the beginning of a fiscal year and update this forecast on a quarterly or semi-annual basis.

9. Annual reports, quarterly statements, and press releases should be examined carefully from the point of view of the market they are being sent to. Separate mailing lists should be maintained for individual investors, customers, professional security analysts, and portfolio managers. In some cases where a company's annual report is used for marketing reasons beyond stockholder relations, a supplement should be prepared for security analysts.

10. Remember that the investor is not buying a company or an industry or a product, he is considering an investment alternative. He is analyzing (a) the possible total return on an investment and (b) his confidence factor in this return. Effective stockholder communication inputs to this analysis.

QUESTION AND ANSWER PERIOD

Q. *Bob, on the subject of official earnings forecasts, how do you, as an analyst, treat the forecasts you may be getting now in your own analysis of the company, as opposed to the way you used to do it before you got an official forecast?*

A. *Well, remember going back five or six years ago, we were getting more forecasts than we are getting now. So, that's one trend. But what you're really asking is how good is the estimate, what does it mean to you, and does it do anything for you.*

To come in cold and meet a guy at a company you've never met before and have him say $4.20 really doesn't do much for you. I think that's clear and I think that is the point you're making. That's why you have to know the company's environment and what the number is you're getting. It's very important to know whether it's a goal or projection. If it is a projection, based on what economic model? And whether this company, or this individual is responsible for either publishing or even telling you the fororecast. What his general bent usually is. There are a lot of people who always want to come in low, some want to come in high. So I think it's part of a complex relationship with the company of understanding what it means. A good analyst following an industry will make his assumptions and come up with an estimate based on his overview. He would like to know whether he is off base on his economic model of the relationship between the economy and your company. And that's where you give him the help. If you say here are our assumptions on prices etc., and this week it comes out this way, that gives him an indication of what his economics are like.

Q. *Would you comment on your point 3, about showing a quarterly earnings pattern? You plan for those industries which are really very cyclical and experience perhaps only a profit in the summer months or those periods of the year which would indicate that the other three quarters are going to be loss quarters. How do you reconcile that from an analytic point of view?*

A. *Once you're trying to communicate that you have a certain quarterly earnings pattern, you want to stick to that pattern.*

You have to communicate that seasonable basis. But you shouldn't stand up, have a meeting, and say I want you to understand that our second quarter is always a poor quarter, and then the third quarter levels out and the fourth quarter is very good. And then a month later, report the second quarter numbers, and instead of being a poor quarter, it's a very good quarter. What I'm saying is that you have to have a consistent pattern.

Now, the other part which I think you are leading to is the forecasting area. I wasn't suggesting that every quarter you forecast the following quarter. I was suggesting that I think if you have a forecast established, you want to update it on a regular basis. You don't want to update it at random. Because then you are subject to the market manipulation. But you do it on a regular basis.

Q. *Yeah . . . Tell us the criteria for keeping communications out of the junk pile—your secretary's and your own.*

A. *I think that the criteria for keeping the written communication out of the junk pile, is getting it into the recipient's head that he wants to see it before the written communication arrives . . . That's why I'm saying really it won't do you much good with a mailing list of 5,000 . . . it's the fifty you really care about. And it's making sure that you've dealt well with the fifty. If you deal well with them on a personal basis, then a communication will get through to them.*

Q. *Apropos of that, we make a practice of phoning that fifty with any significant news announcement, knowing the mails are so abominable. Is this appreciated? We assume that it is.*

A. *Very much appreciated, yes. I think that works very well. I think you've got some problems which I am not prepared to address myself to, about who you phone first. But apparently you've worked that out. I think that really there are a number of companies that have a policy of phoning the fifty on a regular basis. The advantage of that is that if one of them fails to call you, as part of your program you have to call him on that date. This is particularly important in the period when something big is going on which these analysts are missing. When you call the analyst he is going to say, "How's my number?" And you can say, "Well, there is very little difference from the last time we talked," or whatever your standard line is.*

Q. *To the extent that you use annual reports, what are the principal ingredients you are looking for? And what is, in your opinion, a good replacement for the annual report in terms of timing?*

A. *I don't know, but last year, there was a speaker here that said throw out the annual reports. I think that pictures and hard cover and fanciness is something you can throw out from a professional investor's standpoint although it may be effective with individuals. The annual reports which address the first ten pages to the outlook of the economy or a view of what happened in the last year or something like that are generally a waste of time for the professional. But I think you must have an annual communication put together in a form which is clearly identified and can be filed and found quickly when needed. It should put together all the numbers that you need to analyze the prior year; secondly, it should outline any changes that have taken place wherever possible in the management structure and in the products and trends of the company.*

Q. *What is a good substitute for the annual report on an*

ongoing basis annually? Is it the quarterly, does it suffice?
A. *I really don't think there is any substitute for the annual report in presenting those factors which I just described. I think you could call it something other than an annual report, if that would be desirable. But I think it still has to be in something like a booklet form and there are at least a few hundred people that must receive that kind of information.*
Q. *Bob, are the so-called fact books substitutes for that? Some companies, I notice, have been putting them out, directed specifically at the financial community.*
A. *Yes, I think those are a partial substitute, but I think there is some nonquantitative content which the analytic community needs also. You could possibly accomplish that with a summary in the beginning of a fact book and avoid the annual report.*
Q. *How would you like a 10-K without the material about the pension plans? Would you like that as a substitute for the annual report? Or a supplement?*
A. *There are a number of companies that send out their 10-K's now. We use 10-K's in my firm. We have them on microfilm. I think the in-depth analyst has got to have a 10-K. You can't represent that you know anything about a company without having had some access to a 10-K.*
Q. *It's a bit of a loaded one. If you can detach yourself from this audience . . . how do you feel a professional analyst perceives advertising which is directed towards him by the national media?*
A. *Yes, that is a loaded question, and I think I mentioned to you earlier that I wouldn't talk about advertising, because I didn't want you to have a conflict of interest. Well, I could mention the CNA ads—that's one extreme type of ad. If anybody hasn't seen these you can look at another publication where they ran a whole booklet they had shoved into the middle of it. That just didn't work as well as it should have. I think really that the advertising in the better quality media is very effective in promoting the corporate name and the position. I think that is very important to the individual investor. It's important the investor have that in mind when the rep calls him up and says "Our analysts say . . ." If he's never heard of the company, it's going to be a problem. It is also very important that the advertising be done well and that it help to promote the name well. That will be noticed in the analytic community. So I think from a corporate advertising standpoint, those same things that you achieve for the corporate program are achieved by that kind of advertising. I think, however, there isn't too much credibility in running an ad in a local newspaper saying, "Look at our stock and our nice earnings ratio." I just don't think that works.*



ROBERT M. BA...

Optimistic Trends in a Disturbing World

Theodore J. Gordon
President
The Future's Group

This paper is based on a simple premise: that in our country, now, for most people, many things are going pretty well and seem likely to get even better. This is a paper about "optimistic trends," statistical data that suggest that some things may be going right. Only a fool could ignore the discordant pockets of poverty, the persistent ignorance, bigotry, and discrimination in our country, debilitating inflation, drug addiction, political scandals, and injustice in the name of justice. I am not closing my eyes to such problems; I'm rather suggesting that despite them, our lot, the lot of all people, is improving.

There are several reasons why this is not a popular or widely held view. First, what one man sees as a problem, another man may see as a boon. For example, the energy crisis, on one hand, threatens mobility and the rate of growth of our industrial and economic base. On the other hand, for both environmentalists and innovative firms, it brings new incentives for developing energy sources which do not depend on natural resources and which do not pollute.

A second reason why the search for "happy trends" is not a national pastime is that such trends are inevitably seen to be in the interests of the trend-finder, and in this age of credibility gap, such statements are met with great cynicism. When the paper company includes in its advertisement a picture of a sparkling stream, we're no longer surprised to find out the following week that the picture was taken ten miles upstream rather than ten miles downstream of the plant.

Third, trends which we might perceive as being desirable today may in the end have adverse consequences; similarly, trends which we consider to be detrimental may turn out to be indicators of a revered way of life in the future. The definition of what's good changes with time. Automobiles were welcomed early in this century because they promised a means of eliminating the horse manure pollution problem; now we have substituted one kind of pollution, unexpectedly, for another.

Fourth, and most important, it is probably easier to find, and more fun to discuss, problems and issues, than optimistic trends. We performed a study for the National Science Foundation a few years ago which had as its major objective the identification of important problems likely to face society in the next thirty years. We tried to identify the likely severity of the problem, its expected intensity, and the uncertainties involved in its development. The measures of severity ran from eradication of all life, to mild irritation.

At the final presentation of our work, we displayed a list of problems likely to face us, together with measures of their anticipated severity over time, in a neat analytic list.

This is indeed a disturbing set. It suggests a world of turmoil and chaos, threatening and odious. When this list was presented to the monitoring group, understandably, there was a sense of gloom and doom in the air. One person looked at the list and said, "That's an interesting set, but where is the other side? Where is the comparable list of good developments?" This comment started us thinking how one would go about preparing such a list, a good list. The first item on the list might be: cure all of the problems. But what comes second? We don't even have a word to name that second list.

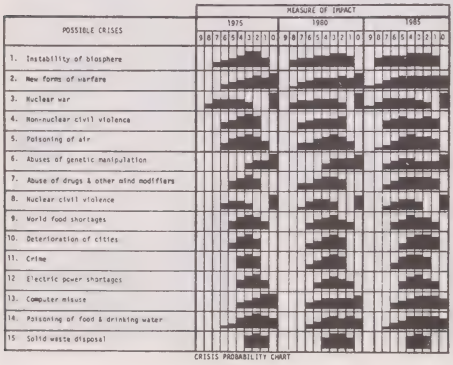


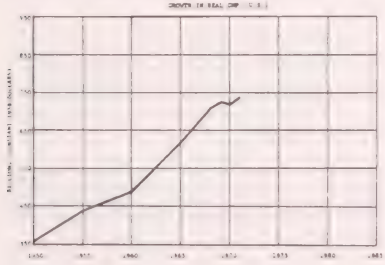
Figure 1

If we call the first one "problems," odious future issues, what can we call the second? Anti-problems? We have no science of utopias; we have no paradigms which will permit us to define desirable future states.

Thus we begin this search for optimistic trends, recognizing that what seems desirable to one person may seem undesirable to another; that often the data themselves may be questionable, subverted in the interests of the agency collecting the data; that trends often have unexpected consequences, and that the whole notion of searching for good things happening in society may be antithetical to our normal way of thinking.

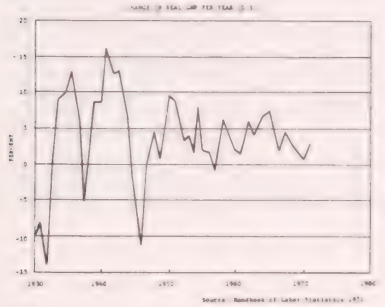
Gross National Product

We are a very wealthy nation. It took approximately two hundred years to reach our first trillion-dollar economy; it will take about fifteen more to reach our second trillion. In terms of constant 1958 dollars, gross national product more than doubled in the two decades between 1950 and 1970.



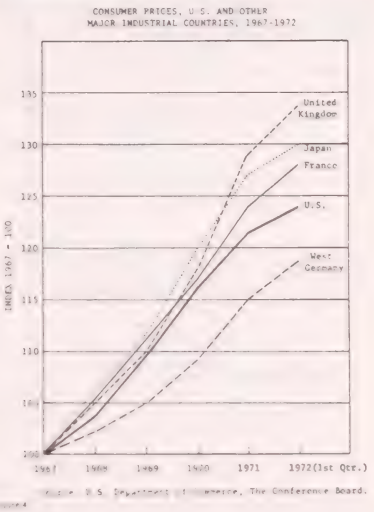
If real GNP grows at least 3% per year, this figure will double again in the next two decades.

It's not unreasonable to expect real GNP to grow at a rate of about 3% per year. The average rate between 1950 and 1971 was, in fact, 3.6% per year.

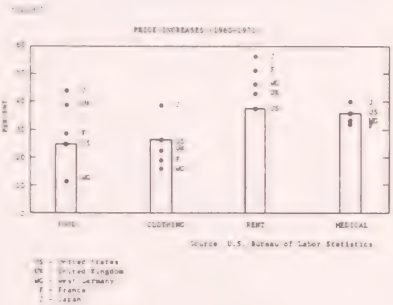


The following chart shows that fluctuations in the economy have stabilized since the Second World War; it is tempting to attribute this to improvements in our ability to manage our economic affairs.

Among the five Western developed countries—United Kingdom, Japan, France, West Germany, and the United States—consumer prices in the United States outpaced only those of West Germany.

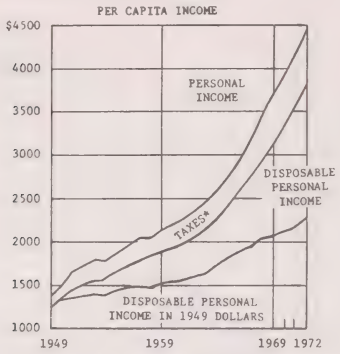


When we compare the percentage increase in prices for various commodities among these advanced nations, we find that the United States has not done too badly. Except for West Germany, we had the lowest of all food price increases between 1960 and 1971, for rent, the United States was the lowest of all five nations examined.



Income

Personal income rose from $1,500 in 1950 to well over $4,000 by 1971. Of course, personal income is diminished by federal, state, and local taxes, and inflation. Even accounting for these, disposable personal income expressed in constant 1949 dollars rose from $1,250 in 1949 to $2,250 in 1972, a factor of almost 2 in twenty-three years.



*Mainly income taxes, personal property taxes, and inheritance taxes.

Sources: Departments of Labor, Commerce, Treasury, The Conference Board.

Figure 6

This increased income has lowered the number of people in poverty in the United States. The definition of poverty changes with time, of course. Families are classed as being above or below the poverty level using an index adopted by a federal interagency committee. This index centers around the Department of Agriculture's economy food plan and reflects differing consumption requirements of families based on their size and composition, and the sex and age of the family head. In 1959, for all families, the poverty level was set at $2,719; in 1970 the poverty level had risen to $3,601. With these figures as the threshold, the percentage of families below the poverty level dropped from 22.4 in 1959 to 12.6 in 1970. Within white families, the percentages dropped from 18.1 to 9.9; the improvement in black and other families was even more dramatic, going from 56.2 percent to 32.1.

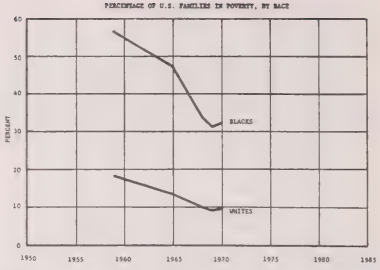


Figure 7

What is this money used for? Increasingly, amenities which we have come to associate with high standards of living. In 1960, 16 percent of all households in the United States owned two or more automobiles; by 1971 this percentage had risen to almost 30. Dishwashers: from 4.9 percent in 1960 to 18.8 percent in 1971. Air conditioners: from 12.8 percent in 1960 to 31.8 percent in 1971.

We have recently passed the point where more than half of the families in the United States earn more than 10,000 current dollars. We are indeed an affluent society. The figure below shows the percentage of families who earn more than a stated amount; the shifting pattern toward greater earnings is indeed startling. The measure of income here is in constant 1970 dollars.

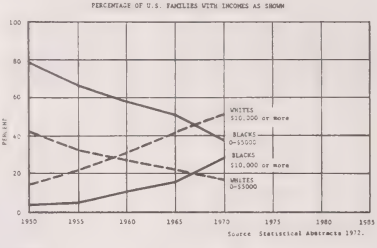


Figure 8

This figure also shows the great economic advances made by black families over the last two decades.

Leisure

Affluence can be measured in terms of leisure time, as well as disposable income.

The growing size of the labor force and increasing automation have not only fueled the growth of gross national product, but have also permitted a significant decrease in the length of the work week.

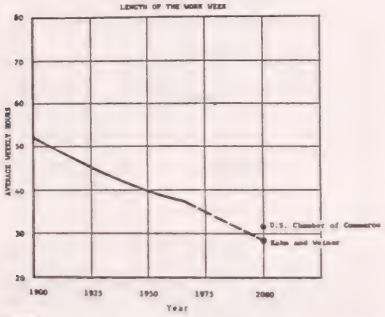


Figure 9

While a large portion of this decrease may result from changes in the length of the scheduled work week, more paid holidays and longer vacations also can be expected. In the last ten years, the number of paid holidays for plant workers has risen from seven to eight, and for office workers from 7.75 to 8.5 days. Since 1955 the average number of paid vacation days per year for production workers has risen from 12 1/2 to almost 14 1/2.

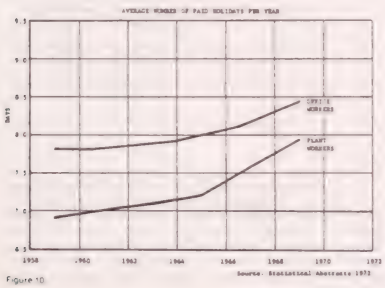


Figure 10

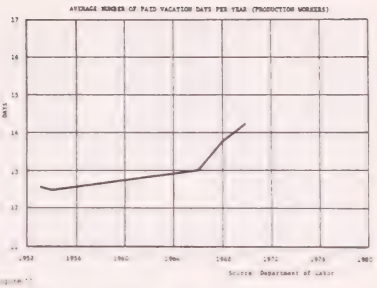


Figure 11

Leisure time activities are big business. In 1971 over $42 billion was spent on recreational activities alone. Some 14 percent of total personal consumption expenditures was spent on leisure and recreational activities.

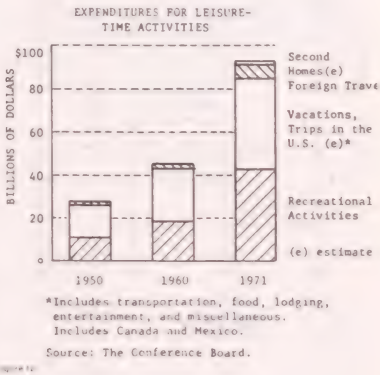


Figure 12

Education

Our society is well educated and is becoming more so. Certainly, we have significant problems with respect to what is taught and how it is taught, but in terms of literacy, percentage of our citizens completing school, entering college, and other exogenous measures of the performance of the system, improvements are real.

For example, in 1959 about 2 percent of our people were classed as illiterate; by 1969, a decade later, this number had diminished to only 1 percent. With respect to blacks, in 1959, 7.5 percent were classed as illiterate; by 1969 this number had dropped to 3.6 percent.

In 1940 only about 40 percent of all persons age 25-29 had completed four or more years of high school. By 1970 this number had increased to over 75 percent. With respect to college, in 1940 only 6 percent of all people of this age had completed four or more years of college, and by 1970 this had risen to 17 percent.

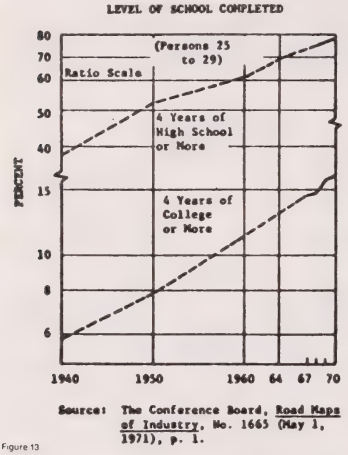


Figure 13

Surprising as it may seem, the rate of dropping out of high school has diminished considerably. For the high school graduation year of 1940, less than half of the students who had finished fifth grade actually graduated; by 1970, of every 1,000 students that finished fifth grade, some 752 graduated from high school.

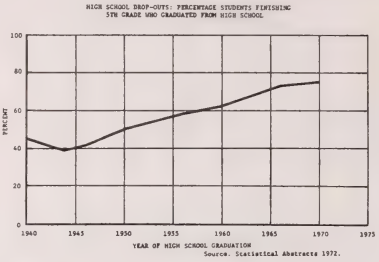


Figure 14

When educational data is disaggregated by race, the tremendous gains made recently by our black citizens become immediately apparent.

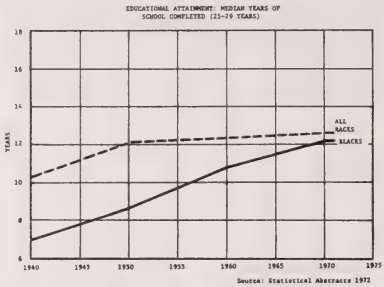


Figure 15

This trend toward increasing education can be clearly seen in the number of degrees conferred. In 1940 there were only about 190,000 bachelor's degrees conferred in the United States; by 1970 this number had risen to 833,000. With respect to master's degrees, in 1940, 27,000 were awarded; in 1970, 209,000. The increase in the number of doctorates was even more spectacular: in 1943, 3,000 were awarded; in 1970, 30,000.

Demographics

Advanced industrialized nations have moved towards lower birth rates, lower death rates, and longer life expectancy. These trends have been particularly strong in the United States.

Demographic Perspective of 20th Century U.S.

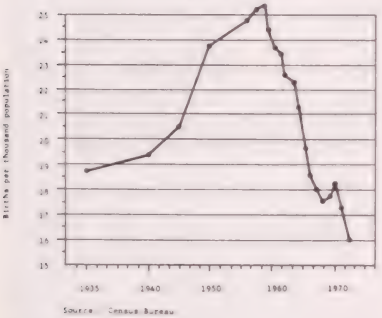
	Around 1900	Around 1970
Population	76 million	205 million
Life expectancy	47 years	70 years
Median age	23 years	28 years
Births per 1000 pop.	32	18
Deaths per 1000 pop.	17	9
Immigrants per 1000 pop.	8	2
Annual growth	1.75	2.5
Growth rate	2.3%	1.1%

Source: Population Growth and the American Future, p. 17.

Figure 1

One of the most dramatic changes of our times is the declining birth rate. In the late 50's, the birth rate hit a peak of over 25 births per thousand population, and then began a continuous decline to a value lower than has been recorded previously in our country: 14.6 births per thousand currently. The "bump" in the curve in the late 60's correlates well with the public announcement that birth control pills seemed potentially able to cause cancer. This correlation suggests that the decline has been triggered by the availability of safe, effective, and cheap contraceptive agents.

U.S. BIRTH RATE



Source: Census Bureau

Figure 2

In addition, the decline has been accompanied (or perhaps caused) by a marked change in attitude among potential parents. Over the past several decades, public opinion polls have been measuring the percentage of population who believe that four or more children constitute an ideal family size. From 1940 through the early 60's, between 40 and 50 percent of the population apparently held this belief; in the late 60's, the percentage took a sharp drop. At the last sampling, only about 20 percent of the population said that they believed four or more children constituted an ideal family size. Thus, technology and value change, interacting in ways not yet completely understood, have resulted in a dramatic shift in the birth rate in our country.

DECLINE IN IDEAL FAMILY SIZE

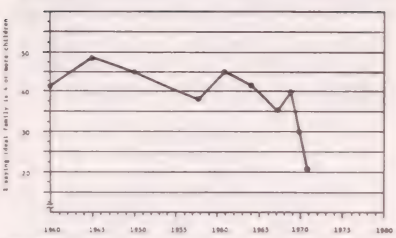
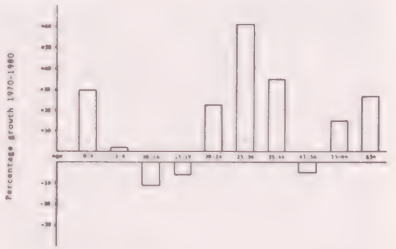


Figure 3

In 1955 the emphasis was on youth; as the median age of the population, thirty years, began to fall, it appeared that soon 50 percent of the population would be under twenty-five. But changes have taken place in our society as the median age of the population has begun to rise and stabilize. The post-World War II baby boom babies are reaching the age of marriage, and consequently one can anticipate an increased emphasis on issues relating to family information.

DEMOGRAPHIC GROWTH PATTERNS IN THE U.S.
BY AGE GROUPS, 1970-1985
SERIES "D"



Source: Census Bureau

Figure 4

Toffler and other authors tell us we are in an age of transience, a time when people move often, things are never permanent, always transitory; relationships are fleeting; marriages, television sets, and automobiles are traded in with little concern. This kind of value shift is difficult to measure. It is true that the divorce rate is climbing and the marriage rate is leveling off.

But *young* marriage is less frequent now than in the recent past. About 20 percent of the women now in their thirties married before they were eighteen years old. Today, fewer women marry at that early age. Although young marriage is

relatively less frequent, early marriage in the United States is expected to continue even though the median age at first marriage may rise slightly. The number of marriages taking place today is about 2 million a year; it is expected to increase to about 2 6 million by 1985.

Divorce is more frequent today, with the divorce rate in 1970 more than double that in 1935. About one-third of all marriages today end in divorce. But divorce is not a permanent state for most, since an increasing number of divorced persons remarry.

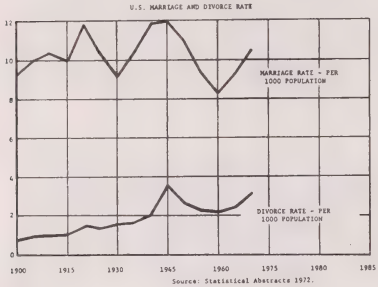


Figure 20

As pointed out previously, the post-World War II baby-boom babies are now entering the age of family formation. Thus the number of first and second births in the next ten or fifteen years will rise faster than total births as the new young couples start their families. This is significant in terms of family expenditures because the earlier children tend to induce greater expenditures than do later arrivals.*

An increase in the number of young families will mean an increase in the number of homes with children present, and from 1970 to the mid-1980's the number of families with children present will grow more than 25 percent.

There is a strong relationship between high fertility and socioeconomic status in the United States. A large number of children in a family is becoming increasingly characteristic of urban and rural poor and cultural minorities, regardless of race. Despite high fertility rates, the minorities and the poor do not contribute significantly to population increases because of their numbers in relation to the total population.

High income and increased education tend to diminish fertility and lead to smaller families. For example, the college graduate tends to marry later in life and therefore reproduces later and not as much.

Historically, the family has declined in size from seven or eight children per family in colonial times to less than three children today.

In terms of family size we may conclude that:

— The size of the family has declined.
— The greatest decline exists among the upper income, well-educated classes, although the middle class has shown declines also.
— In the U.S. the ideal is two children.
— Childlessness is no longer a disgrace.

Population mobility has not been changing much, contrary to the general idea.

*F. Linden, *The Consumer of the Seventies*, NICB (1969), p. 14

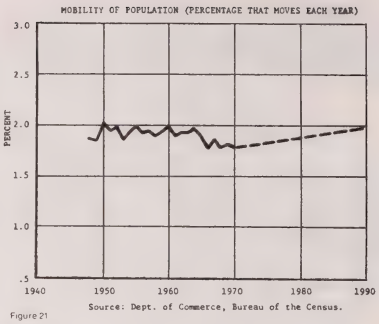


Figure 21

Crime

Is there anything good that can be said about crime? As a matter of fact, there is. Some things are improving. For example, the number of civil disturbances in the years between 1968 and 1972 diminished considerably.

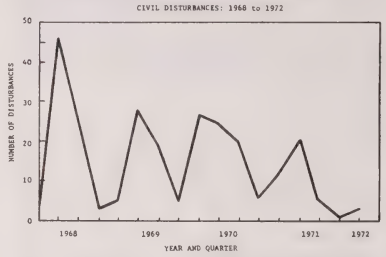


Figure 22

There are many problems associated with reporting crime. The number of incidents reported may be a function of the number of policemen, public attention to certain kinds of crime, reporting instructions given to policemen, etc. Nevertheless, analysis of crime data shows several interesting and favorable trends. For example, during the 1960-70 period, the crime rate increased on the average of 11 percent per year; during the 1970-71 period, the rate of increase dropped to 7 percent per year. Within some crime subdivisions, changes are even more startling. For example, in 1960 there were 182 auto thefts per 100,000 inhabitants; this figure had risen to 432 per 100,000 in 1969. Between 1969 and 1971, there was essentially no further increase. In addition, between 1970 and 1971:

— In the mountain states, the rate of murder and non-negligent manslaughter dropped.
— Robbery decreased significantly in the west north central states.
— Aggravated assault remained essentially constant in the east north central states.
— In the west south central states, the rate of larceny remained unchanged.
— Auto theft dropped in the east north central, west north central, eastern seaboard, west south central, and mountain states.

General Observations

Of course, these trends represent only a small portion of those which might have been included. For example, we might have discussed:

- More blacks have been elected to office than ever before.
- Hard rock has given way to softer folk music.
- The Vietnam war has ended and China has joined the community of nations.
- The first steps of the SALT disarmament talks have apparently been concluded successfully.
- The campuses are quieter now and the propensity to use physical violence to accomplish political ends seems to have diminished.
- The enrollment of black students in colleges and universities has increased by a factor of 3 since 1964.
- Pollution in many rivers and streams has decreased.
- Multinationalism, which is seen as a villain by some people, robbing the American worker of many needed jobs, is seen by others as a new instrument for ensuring political stability throughout the world.
- At least over the last five years, the green revolution, that is the introduction of hybrid seed varieties into certain developing nations, seems to have worked; food production and population growth have kept pace and widespread starvation has been avoided.
- Although the values of many young people seem strange, they involve notions of egalitarianism and anti-hypocrisy concepts which we ourselves believed in, but have some times found hard to put into practice.

Conclusions

The obvious question is: If things are so good, why aren't we in better shape? Why don't we feel better about our status? First of all, the story I've presented here is not complete. It is one-sided, designed to show the good without a full discussion of the bad, a reversal of the more usual procedure. Second, I suspect we are embedded in a crisis of rising expectations. Let me explain. It has been shown that the closer one gets to the achievement of a goal, the greater the pull toward it. It may just be that as we progress into the post-industrial era, a major crisis might be, as Max Ways once put it, a crisis of success. Finally, we operate, in our society, without a clear set of goals, without a consensus of what we're moving towards. Without such goals, it is very difficult to tell whether society has made any progress at all. Without such goals, progress, in many ways, is a meaningless concept.



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Exhibit 50: "Crosscurrents, 1974"



Introduction

This year, the discussion at FORTUNE's third annual Corporate Communications Seminar ranged across a diversity of subjects: global economics, the next generation of managers, lifestyle analysis, top management's role in communication planning, the press, politics, financial communication, the implications of a shortage economy, and more.

As at previous seminars, the participants and speakers were together developing a clearer understanding of the role of corporate communications and its application in achieving fundamental business objectives.

Throughout the regular seminar sessions and during the informal gatherings, we were impressed once again by the expertise and professionalism of the people who are charged with the management of communications for our leading business enterprises. While their companies differ in product and purpose, they share a common and increasingly difficult assignment. That they seem to be succeeding better today than ever before is an enviable accomplishment.

The complete texts of the seminar speeches are contained in this report, "Crosscurrents in Corporate Communications No. 3". You will find them valuable and interesting reading.

We are indebted to the seminar speakers and the participants for contributing so much to the success of this year's meeting. Making next year's gathering equally as good will be a challenge for FORTUNE—but an agreeable one. We are, in fact, working on it right now.

James B. Hoefer
Advertising Director

If you would like additional copies of this report, please address your inquiry to James B. Hoefer, Advertising Director, FORTUNE, Time & Life Building, Rockefeller Center, New York, N.Y. 10020. Enclose $3.50 per copy to cover costs and handling.

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PHOTOGRAPHS BY GUY GILLETTE

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Seminar Participants 4

New Politics and the Global Economy 10

At a time when domestic and international problems quickly become panics, Peter G. Peterson, chairman of Lehman Brothers Incorporated, stresses that government and business need an early warning system to avoid crisis situations and to foresee the global impact of solutions in economic and political terms. The former Secretary of Commerce emphasizes that economics and foreign policy are inextricable. He calls for actions that would make it possible for us to look beyond our immediate concerns, to develop leadership, technology, and a political environment in which we are able to define challenges on a continuous basis before they are upon us. Peterson also feels that business has failed to understand the "new politics of business." Top executives delegate responsibility for dealing with government when, in fact, more high level involvement is necessary. Many groups are more politically powerful than business and, rather than viewing those with opposing views as enemies, Peterson calls for business to enter into a constructive dialogue with these forces. "I'm suggesting the therapy of a certain amount of candor, a certain amount of humility, and a good deal of conciliation."

Corporate Communications—The Management View 18

"I believe that communication is a basic management accountability," says J. Paul Lyet, chief executive officer of Sperry Rand. Internal communications are highly organized within the company to help Lyet manage and motivate all levels of operations, to keep divisional and corporate managers informed and involved with total Sperry Rand activities, and to build understanding and esprit among the company's employees. Lyet believes that "you must work very, very closely with your top communications person. If it's his job to communicate, he can't be effective unless he is tuned in—and I mean tuned in." Management councils of corporate and divisional executives within the company are organized to exchange ideas, iron out problems, and develop programs. For example, the Corporate Communications Council helped develop Sperry's total corporate information program, which now provides a common identity for the corporation where none existed before.

Advertising . . . An FTC Perspective 23

Does the ethical performance of the advertising industry have a major effect on the trust and confidence the nation has in its institutions? Lewis A. Engman, chairman of the Federal Trade Commission, believes it does. He sees three areas of concern: the extent to which the preferences and felt needs of Americans are conditioned by constant exposure to advertising; the growing dependence of national media on advertising; and the "parlous state" of the advertising industry's public reputation. Engman feels that unless something is done to regain public confidence, corporations will have to spend more and more on advertising to get a dollar of incremental sales. Moreover, a skeptical public is challenging all institutions, and the aggregate individual exaggerations of the advertising industry, while not major deceptions, "lay waste the nation's precious and fragile reserve of public trust."

The Next Generation of Managers 28

Many new groups of people have emerged in MBA programs, and their perceptions of business, society, and personal goals are likely to have a significant effect on corporate communication management and strategy. As they move into business, government, and other institutions, many of today's MBA's will be directly involved in communications assignments. As the next generation of managers, they are also a primary audience for corporate communication. How are they different from preceding MBA groups? Richard K. Lazarus, director of admissions and student affairs at Stanford's Graduate School of Business, points out that the interests and direction of a significant portion of MBA students across the country are changing. For example, schools have modified curriculums to accommodate interest in small business management and in management of public institutions—e.g. hospitals and school systems. These and other changes reflect a greater diversity in student body, a broader individual view of opportunities, and a personal approach to career decision making.

Business and the Press 33

There is a communication failure between business and the general press that Robert Lubar, FORTUNE's Managing Editor, says accounts in part for the inaccurate impression the public has of business. Both sides share in this failure: the general newspaper, magazine, and television media don't do an effective job of digging out the facts, the drama, or the full implications of business news. Businessmen, on the other hand, are prone to condemn the press without recognizing their responsibility to improve the flow of solid information and to provide more press access to primary sources within companies. This gap operates against a background of public and journalistic misunderstanding of our business system. "Business," says Lubar, "is the activity in this country that involves more people, more of their time, than anything else—more than entertainment, sports, anything else—yet it's the most poorly covered and poorly understood institution we have in the country."

Communications in Washington: Myths vs. Realities 36

The shift of power back from the presidency to Congress, congressional reform, and budget reform are trends that are changing legislative, economic, and political activity in

Washington. While they have a favorable cast, these changes could mean that Congress will be increasingly involved with legislation that affects the functioning of free enterprise. Charls E. Walker, former Deputy Secretary of the Treasury and now president of his own Washington-based consulting firm, also predicts more power for the General Accounting Office and the "independent" agencies. "We *are* entering a new ballgame in Washington . . . with all of the misunderstanding about the role and nature of business operations in this country, it's going to be much more difficult to communicate effectively in Washington." Adding to the difficulty is the myth that "big business" runs the country. The reality is that businessmen just aren't the sophisticated political operatives they're made out to be.

Financial Communications and the Analytical Haruspex 40

The haruspex was a diviner in ancient Rome who made predictions based on an inspection of animal entrails. Today's financial analyst uses less grisly aids, which is good news for the ASPCA but not necessarily for the companies under review. Financial communications are vital input for the analyst, and Robert P. Colin, executive vice president of Faulkner, Dawkins & Sullivan, Inc., offers some valuable suggestions on how these communications can be improved. He provides the arithmetic necessary to understand the significant relationship between P/E ratio and a company's earnings on its equity. "A most effective way to increase the value of your company," says Colin, "is to have your company increase the rate of return on its equity." He believes that a favorable corporate image must be established for various groups—from investors to environmentalists. Among the factors he considers important in establishing corporate image is "drumming home" a position of leadership—whether it's in markets served, in technology, in pricing, or in profitability. He emphasizes that corporate communication should be a total management effort—from top management on down.

Financial Communications—The Corporate View 44

At Mobil Oil Corporation there is an open door policy for meeting analysts, and 70 or 80 of them come through the corporate portal each year. In addition, Lawrence Heyl, Jr., manager of investor relations, fields 200 to 300 phone calls from analysts and makes two swings a year to visit analysts and institutions in other cities. He also meets with analysts in Europe about once every two years. In running his program, Heyl keeps in mind certain guidelines. He suggests being prepared to release information immediately if a significant fact comes out in response to an analyst's question. He advises against closed group meetings and against accepting invitations to them. Although the SEC has given companies some latitude on earnings predictions, Mobil's policy is not to make them. Heyl states that the strongest argument against making them is that "the prediction then becomes the most important factor, and you might do all kinds of things to make it come true." Commenting on business' image problem, he points to the public's lack of understanding of profits and how they are made and used, particularly as capital investment that stokes the entire industrial process.

Life Style Analysis and Corporate Communications 47

For almost a decade, life style analysis has been under study at Leo Burnett U.S.A. to assist in differentiating significant characteristics of people to whom communications might be directed. Dr. Joseph T. Plummer, vice president of the agency's Special Task Force, has conducted this research for several years and sees essential values in its pursuit. First, it enables communicators to go beyond the aspects of a product, service, or corporation and to think about and learn about the people they are trying to reach. Second, life style analysis is a research method that assists in formulating strategy—it puts together the major essentials: information about the consumer as a person, the products and services he buys, the media he uses, and the promotions to which he responds. Third, life style information provides a rich data bank that can be dipped into at any time. Finally, it is a way to determine current and future trends, to understand social and cultural change. In his presentation, Plummer defines nine major life style segments among men. He also reports on a life style study of men who are earning $25,000 a year or more contrasted with men who are under 35 years old and earning $12,000 or more. The results provide an interesting look at the sharp differences in tastes, activities, and attitudes that life style analysis reveals.

Corporate Communications in a Shortage Economy 58

An in-depth group discussion with nine top purchasing executives, followed by telephone interviews across the country with fifty more, indicates to Richard C. Christian, president of Marsteller Inc., that corporate communication has an important role to play during today's shortages and rising inflation. Christian found out that the buyer wants candor and a company commitment, but the company representative that the purchasing executive knows best—the salesman—often can't provide him with either. Purchasers want regular contact with their suppliers even though products are in short supply, but customer loyalty is waivering. Traditional suppliers need to reinforce their buyer relationships. Eighty-five percent of those interviewed agreed that "there are many important services that a supplier can provide even when he is short of product." Two out of three agreed that they want and need more contact with supplier management. Christian believes that corporate communication—from advertising to publicity to personal contact—can go beyond the salesman's efforts and maintain the confidence of existing customers while positioning a company for new marketing opportunities in a difficult and fast-changing economic period.

We're O.K.—You're O.K.
(A Post-Watergate Opportunity for Advertising) 61

William H. Genge, president of Ketchum, MacLeod & Grove Inc., believes that transactional analysis may provide the key to effective communication in a time when public confidence in all of the country's institutions is waning. Estrangement and alienation between people and between groups points to the need for sympathy and attention. Yet much advertising, according to Genge, "moves unfeelingly against people . . . . is patently self-serving. Often the belligerence and aggression are barely hidden. In effect, advertising often attacks its audience." The central question he raises is whether it is possible to reconcile strong advocacy for products and services with the respect and demonstration of concern that tells consumers they're O.K. What kind of advertising can do it? Genge says it is advertising that respects people's aspirations and human dignity, advertising that is scrupulously honest, advertising that exhibits empathy, advertising that helps people respect life and see the best in it.

50 Brilliant Admen Look at Corporate Advertising 64

Participants

J. J. Attridge
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Johns-Manville Corporation

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PPG Industries, Inc.

Paul Bertness
Director, Corporate Public Relations
Times Mirror

Gerard A. Boucher
Vice President, Director of Marketing Communications
CNA Insurance

Richard Bullock
Vice President, Public Affairs
Potlatch Corporation

Paul W. Cane
Manager, Community & Public Affairs
Bechtel Corporation

H. Allen Carroll
Advertising Director
American Telephone & Telegraph Co.

Bobb Chaney
Director of Marketing Services
Carlson Companies, Inc.

John H. Chase
Vice President, Corporate Relations
Transamerica Corporation

Richard C. Christian
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Marsteller Inc.

H. Walton Cloke
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Rockwell International

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The Timken Company

Herbert Doherty
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Georgia-Pacific Corporation

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Federal Trade Commission

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Harold Harty
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James Head
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A. B. Dick Company

Lawrence Heyl, Jr.
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New Politics and the Global Economy

Peter G. Peterson
Chairman of the Board
Lehman Brothers Incorporated

You mentioned the kidding of my friend Kissinger in your introduction. When I heard about my friend's marriage, I said to him, "You have always engaged in this overblown rhetoric about mutually vested interests in foreign affairs, but I had no idea you would ever practice it in your domestic affairs. Would you mind giving me your rationale for this marriage?"

He said, "Peterson, I'm not sure you could either comprehend or accept a genuine compassionate act, but actually, your envy of my international romances was getting so uncontrollable that the main reason I got married was to relieve some of your envy."

So Mr. Publisher, I have gotten to the point with him that I don't kid him very much anymore, not just because he's on his honeymoon, but because I discovered, after a while, that the kidding of Kissinger was self-destructive of Peterson. That's a far more pregnant reason for not doing it.

I suppose I can illustrate how self-destructive this is by some recent experiences with him. It was not too many months ago, when he got some coveted award in Washington, I decided that his ego was clearly not shrinking, and I didn't want to see him canonized in his own time. So I decided to make a few tasteless comments about the size of his ego.

I pointed out that his ego was only exceeded by his talent and that he was one of those few men in the world that would be perfect if they weren't modest, and a few other equally dull comments. As he stood up, he patted me on the shoulder very gratefully, which bothered me. There were a number of emotional responses which I was trying to engender, but his gratitude was not one of them. I knew then that I had said the wrong thing.

So he stood up and said, "Mr. Peterson has referred to my lack of humility." He said, "Actually, if he knew me better, he would have known that I'm a man of tremendous humility." He said, "For example, none of you probably know that I pray to God every night." He said, "I pray for compassion, wisdom, and understanding and insight." He went on and on and on, and then he paused and said, "Then when I'm done, I ask God what I can do to help him."

Suddenly, the enormousness of my self-destructive act occurred to me. This was one of those obviously brilliant, but obviously totally irrelevant jokes that Laugh-In probably had written for him. Had I not been stupid enough to set it up for him, there would have been no way in the world that he could have started his presentation with a joke about his humility.

Another example: It was only a few months later that he got an award at the Project Hope dinner. Whoever was introducing him was obviously somebody that didn't know him, and he said, "If there were one quality that would describe the uniqueness of this man, it would be his enormous humility," at which point he and I both swallowed our silverware and whatever else we had in our mouths. After the dinner, the Secretary said, "There's something very important I've got to discuss with you up in my room. I wonder if you could get up there right away."

At that point, all of my own very large ego came to the front. I had all kinds of fantasies that he was finally wising up. He was going to get my advice on the Mideast situation, or something of the sort, and I had all kinds of ideas about what I might be doing to help him straighten things out.

He said, "Peterson, what I wanted to tell you was that it's the most gratifying award I've ever gotten." I said, "Is that so? Why would that be?" He said, "Well, all the way back, all I could think about was the thought of Peterson paying $1,000 to hear Kissinger get an award for humility."

So that was the second case study on self-destruction.

If I'm going to get from Kissinger to what I want to talk about, I'll tell you one final story. Incidentally, I do have great admiration for the man, and I only kid people I really like. People keep asking, "Why is he so successful in his negotiations?" I think one of the reasons he's so successful is that he combines a remarkable sense of humor with great empathy for whomever he's negotiating with. And I've never seen a better example of that than last fall at what can gently be described as a tense luncheon situation with a number of Arab Foreign Ministers at the U.N., shortly after his being coronated, I guess would be the right word.

You can imagine the tension of the first Jewish Secretary of State having his first meeting with Arab Foreign Ministers. I didn't know what he was going to say, except that I knew he'd say something that was appropriate.

He stood up and looked over this tense group, and said, "As I stand here before you, I have a suspicion that you are all suspicious of me." Of course, what he succeeded in doing was to empathize so with what they were thinking that it immediately changed the whole environment.

A Case Study of New Problems

In trying to figure out what I might talk about, I thought it might be of some interest to talk about the problems of the energy industry. I'm not going to bore you with petrodollars and the horrendous international financial problems they are creating. What I thought we might do is talk about the energy problem from the standpoint of a case study of a whole series of new problems involving resources, energy, and food that are going to be affected in the new global economy.

If you accept my definition of stupidity—which is to make precisely the same error twice—I think it might be worth examining how we got into this incredible mess, in which the international monetary and economic system is in a state of chaos; a billion people in the world, and the oil poor,

food poor, fertilizer poor parts of the world are nearing starvation; the most important alliances we have are in considerable disrepair. I needn't bore you with the melancholy symptoms of the energy crisis that we see all around us.

What I thought might be worth discussing tonight is a retrospective analysis. How did this happen? What should we learn from it?

The communication problems the oil industry faces today are obvious—an industry that at times must appear to consumers as though it has perhaps achieved the almost impossible assignment of making folk heroes out of the used car dealers—why don't we kind of step back and say to ourselves, how did we, how did business, how did the oil business, and how did the world, get into this mess?

There are two aspects of the problem I'd like to talk about. The first is this: If we are going to avoid becoming a crisis or panic society, in which all of our problems turn into international and domestic panics, we're somehow going to have to invent the problems soon enough, and reward the people who invent the problems politically in such a way that we do something about these problems before they become crises. If there's one thing that characterizes the global economy we're living in, it's that we're beginning to learn that we hurt each other a great deal more than we used to. And, therefore, we need *early warning.*



PETER G. PETERSON

Now, like many of you, when I went to Washington, I was a businessman. I began discovering a few things that make Washington a great deal different from Bell & Howell, and your companies. If we're going to be successful in managing the new politics of business, I think we're going to have to understand, better than at least I understood, the environment in which political decisions are made.

In business, one of the criteria that we used to define a well-managed company was how much time the chief executive and his top people could spend on inventing the future and shaping it. One of the things that strike you very quickly in Washington is that often people invent answers before they've invented the problem. Indeed, not infrequently, there are solutions for which there is no problem. And there is a small political reward for the people who have the capacity to think conceptually about what it is they are trying to solve—particularly if it is in the future. Therein lies one of the important lessons that I'd like to spend a little bit of time on. If we don't lick this problem, some of you in other industries, besides the oil industry, are going to have the same kinds of problems they have.

Inside the Russian Wheat Deal

Your publisher mentioned that I have been involved in the Russian trade negotiations. To give you some idea of how little we know about the future, how little early warning we have on our global economic problems, let me tell you the "inside" and accurate story, I think, about the so-called Russian wheat deal.

It was only a few months ago that Dr. Kissinger and I were at dinner. We were very happy to see some members of the "enlightened press" there. I'm sure that Mr. Lubar will consider that a redundancy, but there are others who would consider it a gross contradiction in terms.

At this dinner of only eight or ten of us were some of the leading columnists in the country. A lot of us in life, in history, and journalism are talented at retrospective analysis in which we take an event and then create an elaborate intellectual, conceptual superstructure that "explains" the event. Certainly, we do this in business. You'll have an enormous success and in your rare honest moments you know it is due to nothing more than just blind luck. But you will, in retrospect, create an incredible self-serving rationale for how it happened, and the "vision" and the "planning" and the "dynamic implementation" that led to it.

Now, this is also true, obviously, in the press. Thus, Secretary Kissinger and I were very amused to hear the unanimity of these distinguished columnists on why we had sold wheat to the Russians.

The story went something like this:

They had heard a number of us talk about the need for inter-relatedness of foreign policy, the need to tie economics and foreign policy together, to use one to achieve the other. They concluded that the wheat deal with the Russians was really this: If they would help us end the Vietnam War, we would feed them, even if at a great domestic, political, and economic cost to the country.

The truth is that precisely because we know so little about global supply and global demand for commodities and resources, the conventional wisdom in our Department of Agriculture was that the problem we faced in the United States and the world was a pathological and a perennial *surplus* of wheat. We heard very excited, emotional stories from the department that there was nothing we could do that would be more important to the welfare of America (which was perhaps a polite way of saying that in a political year getting those farm states motivated is very important) than selling the wheat, which would save the American taxpayer millions of dollars in storage costs. You may remember that in the summer of '72 you'd see pictures of corn in the streets of Iowa.

I was in the Soviet Union for a few weeks at the time the grain was actually being sold. Those of us in New York, of course, rely for all of our information and wisdom on the *New York Times,* when we aren't reading *Fortune* and other such distinguished publications. I had read that the Russians had bought something over a billion dollars worth of grain. This immediately concerned me, because the Department of Agriculture had indicated to us that they'd had about 700 or 800 million dollars worth of surplus, and I've always been very good at arithmetic, and I understood that a billion plus is larger than 700 or 800 million. I came back quite surprised to discover that we were still paying export subsidies of several hundred million dollars to push this wheat in an era in which there was an absolute shortage.

So I got hold of the Director of the Office of Management and Budget, Mr. Weinberger, and I said something like this: "Cap, the pathology of the bureaucracy is that we are constantly solving, like a lot of generals, the problems of the last wars of ten or fifteen years ago. I really think we ought to sit down with Earl Butz and his colleagues and understand just what the rationale is for this, because originally export subsidies were designed to sell wheat at a time when there were surpluses."

So we sat down with Secretary Butz. This incidentally is not a criticism of Mr. Butz, because he was relying on, I'm sure, what information and concepts the bureaucracy had provided him. This story, by the way, is not indiscreet. It has been in one of the major publications.

When we asked why it was that we were doing this, the response was interesting. "Well, the problem that America and the world face is a heavy surplus of grain. Now, if we don't pay the subsidies, the world price of grain will go up. That will encourage farmers to produce more, and that will only add to what the problem of the world is, which is a heavy surplus of grain."

The interesting thing is that we didn't know either the global supply or the global demand for wheat and we didn't know the Russian supply or demand. Because of that, we made some very bad decisions.

We also had not perceived a fundamental eating revolution that was going on in the world; there was a correlation between the quality of life and the quality of eating. All you need to do is look at me and perhaps 80% of you in the audience here to arrive at some judgments about our "affluence," which is the nicest way that I can think of describing it.

But what had been going on in the world, of course, is that people wanted to eat better, they wanted to eat more, and that in turn takes a great deal more grain, and so forth.

So I think one of the things we're going to have to do, if we are going to avoid some of the problems of the oil industry, is to set up some continuous mechanism by which we get earlier warning of these problems, so that we don't get confronted with these crisis situations too late to do anything about them.

A lot of businessmen came in to see me when I was in the government. Frankly some of both their rhetoric and their logic bothered me. Some would say, for example, that they were great believers in the market system and the free enterprise system. Having finished that introduction, they would then tell me that what this country needed was a long-range economic plan.

Before I tell you what I think we have to do to help solve

some of these problems, let me tell you what I think we should not do. There are few disasters that could beset this country that would be more traumatic and more malignant in my view than a ten-year economic plan. I have been privileged to go around the world and look at a lot of these plans. I can tell you that the gap between the paper and the performance, between the rhetoric and the performance, is absolutely breathtaking, wherever you go in the world. And what we should have learned from our price control experience and other experiences, is that even the most brilliant, sophisticated human minds are incapable of grasping the present interrelationships in highly complex economic and political societies—not to say those of the future. Certainly GS-15's in the Department of Commerce, I can assure you, are not capable of having this grasp of the present or the future. And the Soviet Union's economy is perhaps the classic example of what happens.

What's The Plan?

What are the dangers of such a plan? I think it's important that we define what we mean by a "plan." I tried to do that with some businessmen. What it usually came down to is the following concept: What we're going to do is pick out a number of industries, and we're going to decide that certain ones are in the "national interest." Having decided that, we're going to do a bunch of things. We're going to give these industries research, we're going to give them subsidies, we may protect them for a while from foreign competition, we'll give them capital incentives. In any event, we'll do special things for whichever those industries are that we decide in 1984 the United States should be strong in.

Of course, the first and the overwhelming problem is that this presumes that either a GS-15 or Mr. Lubar or me or somebody else is smart enough to imagine what these industries should be five or ten years from now. A second and very important philosophic problem is the impact of all this on something very precious, our freedom.

But let's assume, for the moment, that we find somebody, I don't know who it will be, that's smart enough to allocate this country's resources in such a way over the next ten years and that he's right, which I think is an enormous charitable assumption. But let's go right past these "minor assumptions."

Now, what would happen politically, in Washington, to such a ten-year plan? Well, I'll tell you what I think would happen, and that is that the irresistible process of political logrolling would begin to make itself felt. Some Congressman, a cynic would say, would look at such a plan and ask the very insightful and philosophic question, "What's in it for me and my district?" A thing you learn in Washington is what starts out as a global concept of national interest very shortly gets translated into a highly regional concept of the national interest. By some strange coincidence, this regional concept sometimes happens to coincide with the borders of a particular district.

So, before long, what we would see is enormous pressures to get this plan changed, and a lot of trade-off. For example, let's take a brassiere manufacturer. If it was in a certain district—and I'm going to assume for the moment that there still will be brassieres in 1984, probably a questionable assumption—it wouldn't be long before somebody would be arguing very vigorously for the notion that brassieres really undergird the national will, if I can mix my metaphors, that they give this country's morale a certain firmness of support, and we would hear the most creative kind of rationalizations of why a change was in the national interest.

Well, let's get over that enormous problem, and let's assume that this brilliant plan that some genius has produced passed the Congress in that form. Now, we get to its implementation. Let's ask ourselves what would happen. There's a useful analogy from medicine that I would like to share with you. It's called the concept of the "iatrogenic" disease. For those of you who are not scholars in Latin and Greek, and perhaps there is one of you here in the room, I'll tell you what I have been told the word means. I was told by such a scholar that "iatrogenic" comes from the Greek—iatro, or doctor, and the Latin. So they are doctor-caused diseases, which probably explains why your family doctor hasn't told you about them.

What we would very quickly find with such a plan is that the ultimate iatrogenic disease, which would be the bureaucracy's desire to grow, would then begin to play its inevitable role. I think the largest amount of humor and wisdom that has ever been put into a small book was put in by Parkinson, and I commend his book to all of you on your birthday, as annual reading. Now, you may remember, in this rather classic little book he approached the organization of the British Admiralty on an input-output basis. You may remember, he asked the question that all sensible managers should ask, "What is the work that is being done, the output, and is it growing or isn't it growing?" You may also remember that he listed a whole bunch of criteria related to output: how many ships and battleships, ports, and all this sort of thing. It didn't take that study to make the fundamental point that the British Navy of 1960 was a very different and smaller thing than the British Navy of 1940.

But you may recall that when he looked at the bureaucratic overhead that went with it, he found it was growing at a linear rate of something like 6% to 8% a year and it was growing irrespective of any growth in the need for it.

Now, it is this problem that characterizes most bureaucracies. They measure themselves by whether they are growing or not, and not by whether the problem they were designed to solve still exists.

So, in my view, a ten-year government plan would be a malignant disaster.

Need for an Early Warning System

I come out on the side of suggesting, however, that we need an early warning global economic intelligence system that uses the technology we have to give us earlier warning. I find it a bit grotesque that this country is quite willing to spend five billion dollars a year on security intelligence, using all kinds of highly sophisticated optics and satellite technology that will tell us precisely how many Soviet ships there are in what state of completion and how many satellites and where they are located and how many just came around South Africa, and, billions of bits of information of this sort. Yet somehow it wouldn't occur to us that this same kind of technology would be important in an era in which economics is going to become a vital part of foreign policy—that we ought to use that intelligence to tell us about such "mundane and dull" things as the size of wheat crops and demand.

What are the problems that get in the way of our looking ahead and thinking ahead? I'd like to just mention briefly two or three of them. The first, of course, is what the critics of this administration have called an advance man's mentality. I don't know that there are any more or fewer advance men in this White House than there have been in previous administrations. Let me remind some of you what an advance man is, because it's a very important part, in my view, of the problems that we now face.

The advance man is that indispensable man in every

political campaign who precedes the candidate by about 48 hours, the fellow that goes into Des Moines, Iowa, and sets up among other things what are called the "photo situations." This is the fellow who manipulates the events of the day so that Walter Cronkite and John Chancellor and *Time* magazine, and so forth will have an event or a situation or a headline that is truly memorable.

Now, it's understandable that these are the people who get rewarded, because they get the closest to the candidate and they work very hard, and I'm not criticizing that. But it does present us with certain difficulties because the problems of winning an election and governing a nation are really rather different problems, particularly in time perspective. And to some advance men, in thinking about early warning and long-term forecasts, the time frame is probably between today and tomorrow night's television show—it's hard to get this kind of mind thinking about a problem that may not emerge for three to six years or ten years.

If you move it up a level to the elected official, up to now, at least, we've tended to reward the politician who comes up with dramatic answers to problems. From his standpoint, he gets credit for solving them between now and the next election, and if it somehow isn't that kind of problem, it's very hard to get a politician to take the matter seriously.

So I think that one of the things that we, as citizens, have to do is to see if there's a way we can reward our political leaders that will somehow mobilize them for challenges that don't have a face, for scarcity, which is certainly getting to be a very important problem at a time when we're affluent, against problems that are not enemies, either persons or nations. Part of the political psychology of this country has been that you've got to identify an enemy somewhere along the line. A lot of the resource and global problems we're going to be dealing with are not those kinds of problems.

And we need a system that involves the *private sector* early enough so that we get accurate inputs.

A Trend in Oil Comes to the Surface

On the oil problem, for example, I truly was a country boy from Chicago—and I know that in Manhattan that, too, is a redundancy. When I went into the government I thought it would be useful to do some kind of trend analyses of where our trade picture was coming out, and we did it the way you would do a company budget, a five-year budget. We took it sector by sector. And one of the sectors we started looking at was the oil sector. I think something you learn in business after a while is that when you see a trend that's been moving for five years in the same direction you'd better stop and ask yourself what's going on.

So I was sitting next to an oil company president one night, and I said, here's what I'm seeing, where is this going? What has caused this problem? He said, well, you ain't seen anything yet, and I'm delighted somebody asked me. We're going to have a ten to fifteen billion dollar trade deficit in oil by the end of this decade.

I found that very shocking, and because it would present some important problems, I went back to the government and I said to the economists and the Council of Economic Advisers, tell me about all this. Well, among my many critics there were those who rightfully pointed out that the only kind of economics I had was elementary economics, and that I probably didn't pass that, so they gave me a lecture on what they called "elasticity of supplies."

In retrospect, if you'll forgive the pun, they were stretching things a bit. As I understood their reasoning, it was that this big deficit would never happen because if prices just went up modestly, we would produce a lot more oil and gas domestically. So here was this incredible gap between those who were drilling holes and the economists who were looking at the past through their computer models. Whatever we do, we must somehow bring earlier into the apparatus those people who know something about the problem.

The other thing we need is a level of continuity of effort. If you want to read an interesting report put out by private citizens, I urge you to read the Paley Report, 1952. The opening paragraph is remarkably relevant to precisely the resource problems that we have today. An interesting thing about the Paley Report—it was written 20 years ago with enormous fanfare. So I think we must set up a continuing mechanism. We need some kind of very new mechanism that's bipartisan, that's global, that's available to the public, that encourages private sector inputs, that projects some of these emerging problems soon enough to do something about them.

The difficulty that I think the oil problem makes clear is this: Most of us in business can be rightfully proud of our ability to make and develop and research products, of our financial abilities, and so forth, and I'd give most of us an A or a B in those parts of our business. But when it comes to a sensitive understanding of the *new politics of business,* I would grade most of us somewhere between a C minus and an F minus, if that's possible.

Now, one of the reasons for this is—and there was no one more guilty than I was—we tend to think of the governmental scene as something we can delegate to our Washington representative, or something. For some chairman or president or senior officer to be spending any real time with the staffs in Congress, or the staffs in the Office of Management and Budget, is usually considered a terrible waste of time. Yet it is precisely there where a lot of these very serious problems develop.

New Political Power Groups

Now, the second thing that we grossly underestimate in business is the fact that some of the new groups in our political system are just vastly more politically powerful than, let's say, our companies are. To say that the multinational is not a folk hero is not really an original observation on my part, but what is not widely understood is how powerful some of the non-multi-national groups are. I'd like to take just a couple of examples to illustrate this point.

The Department of Commerce is a conglomerate that makes any of your conglomerates look like highly focused enterprises. I mean, it goes all the way from the Census Department to Maritime. Any coherent, organizational rationale for the Department of Commerce has always escaped me. But among the things that I didn't preside over, but was responsible for, were the porpoises and the baby seals. And I'd just like to take a minute to talk about those two problems, because there is a connection between this and the kind of business-political problems you're having.

I went over there saying, well, let me see, the major problems of the world today have something to do with international economics and monetary and resource problems, and technology and productivity, East-West trade, and that's what I'll spend my time on.

What I quickly discovered was that the politics of porpoises and baby seals, judging by the number of letters that came in and the pressure from Congressmen, was vastly greater than what I had considered more important subjects.

Now, what was the problem with porpoises? The problem with porpoises was that there were some 200,000 of them that were unfortunately caught in tuna nets and accidentally killed. To some, the solution was very clear: we should just go out of the tuna fish business. If one had to choose between—and this is the way problems get polarized—

between tuna fish fishermen and porpoises, you would choose the porpoises every time, politically you see.

So the kind of confrontation and polarization that was presented was: go out of the tuna fish business. Well, I knew lots of my friends, some of my best friends, ate tuna fish. It also contributes very favorably to the balance of trade, provides a lot of jobs, and you could see that you couldn't carry this situation to its logical extreme, or we wouldn't be hunting or fishing anything.

But the problem was that we had to figure out what to do about this very real political problem. Now, after several hundred hours of consultation with all kinds of consumer groups and conservation groups and so forth, I'll skip to the finale. The finale is that as the Secretary of Commerce, who was born in Nebraska, a fairly arid country, not really comfortable in the water, nervous in the shower, I find myself in Marineland petting Flipper, as we announce a dramatic research program of $250,000, with the support of some of these various groups, on how we're going to keep porpoises out of the tuna nets.

As a result of that, we were able to move on to some of these other problems.

The Baby Seal Problem

Another problem that I inherited, several hundred hours later, was the baby seals problem. There was no way I could avoid going to dinner parties, anywhere in America, where several active voters, whom we should prize, often women, would come up and say, "Now, what are you going to do about the baby seal problem?" First, I thought someone was pulling my leg, but then I discovered they were terribly serious about the baby seal problem.

My predecessor had inadvertently said something that was true, but perhaps not the most sensitive political observation he'd ever made, that clubbing baby seals, I believe was the way he put it, was really the most effective and humane way of handling this. So we had to figure out what to do about this. The letters were piling high all over the place, and Congressmen were calling, and Mr. Secretary, you've got to do something about this.

What we finally ended up doing, after again several hundred hours of meeting with all kinds of groups in this field, was adopting the following consensus. Since we were all men and women of the world, we were going to take a larger view of the baby seal problem. We were going to look at the ecosystem, was the way we put it, and what we were going to do was worry about all living animals. So we designed an experiment, with the approval of these groups. We took one island up in Alaska and said we're going to continue clubbing the baby seals, although I think we came up with some slightly different rhetoric. And we took another island and we weren't going to do anything. And then we were going to get the help of people to study ecosystems, and we were going to study the total effects on all living animals in both places. This might take five years to measure appropriately. My critics said that one of my main motivations was to transfer this problem to my successor. I won't deny that that factor was mentioned at the time we were deciding what to do. But the point I'm trying to make is that we finally worked out a resolution to this problem, by bringing in the so-called "enemy," you know, or the provokers of this situation.

Now, one of the great dangers, if I may say so, of a conference like this, is that we unconsciously demagogue each other. I mean, we tell each other what we want to hear—that in the American business community we have one of the greatest systems in the world, which is absolutely true, and that most of what we're doing is just fine, and what we really have to do as communication experts is "educate" those people out there. This is now a common theme for meetings like this. And if we were more honest, we would be saying that they're a bunch of well-meaning but really kind of dumb, ignorant, economically illiterate people out there, many of whom, incidentally, are our own employees, and we're going to have to educate them. There's remarkably little said about how we need to be educated, as business people, about their new views of what's going on in the world.

And many of us, frankly, sound dangerously as if we were saying to millions of new voters that we're trying to make a virtue out of social insensitivity.

So I just want to suggest a rather different approach by most of us in business, who are going to be facing these problems as we move into a real world of shortages of all kinds. The iron law of politics has always been that you have a villain or an enemy. I know you were brought up in a world of folk heroes. In Washington, you're brought up with the concept of folk villains; you identify somebody who is the enemy, who is the problem, and you hack him with all the vigor you have. Now, in the oil companies they've found an ideal villain which explains, of course, what's been going on.

Some segments of the oil business and the business community might prefer it if we were all to sit down here and, in discussing who caused the oil problem, say that the environmentalists are a principal cause of the problem. But you're supposed to be and I'm supposed to be, from my previous incarnation, consumer oriented, and so let's see what the customer or consumer thinks is the cause of the oil problem.

I saw a study just this last week that I found interesting. If you go out and ask people today who is to blame for the oil crisis, there are something like 25 to 30 times as many people who will blame the oil company as will blame the environmentalists, which is quite a ratio. Something approaching two-thirds of the American people now believe that the oil companies manipulated prices and supplies in such a way as to maximize profits. In other words, they brought on the energy problem to satisfy their corporate profit goals.

Now, in our boardrooms and our luncheon clubs and our country clubs and meetings like this, the enormous danger is that we will persuade each other that we know who the enemy is. The enemy is the environmentalist. And certainly the enemy is Ralph Nader. I just want to remind you that Ralph Nader is about the fifth most admired man in America—so whatever you may think about Ralph Nader, he's got an awful lot more votes than you do, in the way our system operates.

Ineffective Oil Industry Advertising

The oil industry, for example, is engaged in something that I think is going to be essentially ineffective as communication. We see full page advertisements in all of our media, and I don't wish to diminish your budgets, which I know are much smaller than they should be. Visualize these advertisements from the standpoint of the consumer, who has such low trust, contempt, and suspicions about oil companies, that he feels they brought on this energy crisis to line their pockets, and how he must be looking at those full page

advertisements that talk about how the oil industry needs money for capital.

These are advertisements that are probably written in the same way that we discuss Ralph Nader, for each other. I'm sure the board members and the club members look at those advertisements and say, by God, this is a free enterprise system, you need profits, you need capital, and if we're going to produce the energy, we need money, and everybody says that's right. But I wonder what that consumer is saying about this advertising, given this profound lack of trust.

So I would like to suggest an alternative to the conventional approach, what I would call the confrontation, or to use the modern idiom, the tough-it-out approach. You know, let them have it, and let's all talk to each other at lunches, and convince ourselves that some son of a bitch somewhere is behind our problem.

Let me suggest that the more modern approach to handling the new politics of business is going to involve talking with your so-called enemies, conveying to them that you're going to listen and that you care and that you're trying to define the problem together, and trying to get them to be part of the solution, instead of just part of the problem.

You see, one of the interesting things that happened in the oil crisis, in my view, is that many of the very fine well-meaning environmentalist groups were permitted the unbelievable luxury of liking every kind of energy except the ones we've had, and simply articulating the problem, instead of helping us to find what the goals were and how we were going to solve the problem. As long as we polarize our "enemies," we permit them that luxury, and in my view nobody should be permitted that luxury.

Take the Opposition to Lunch

I'd like to make a radical suggestion that will probably get me thrown out of here, certainly get me thrown out of most boardrooms, that instead of spending so much time eating with each other, which is what we tend to do, reassuring each other that we're right, why don't we have lunch with Ralph Nader and John Gardner, a few of these people, and try to understand what they think the problem is, to see if we can jointly define what the problems are and what our goals are, and see if we can't bring them into the solution of these problems.

Now, I'm just suggesting that it may not feel good, at first, because it's kind of a new experience, sitting down with these people. But my guess is it's going to be much more effective in the new political world we're living in than whatever we've been doing up to now. So I'm suggesting the therapy of a certain amount of candor, a certain amount of humility, and a good deal of conciliation. I had a friend from Chicago who told me one day that if you have no alternative, you have no problem. Now, that's a very sober thought. In an intellectual sense, it gets you through some very difficult days, but in a visceral sense it's not altogether fulfilling, to understand that you really have no alternative.

But I think that if the oil problem should teach communication experts anything, it's that the alternative of not sufficient early warning, of not sufficient trust-building is unacceptable.

Aristole, to get a little bit philosophic about this, made some very profound comments about communication when he said that there was the substance, the message, and there was the method of delivering the message. But he said, you may recall, most important of all was the attitude of the audience toward the speaker.

And what I'd like to suggest to you in your communication, in which you're dealing with new politics, is that you do not forget that as long as these very powerful and new political groups view you as 19th Century Neanderthals, who are here to manipulate them and use them and abuse them and exploit them and never talk to them, you haven't really attacked the fundamental problem, which is the emotional problem of rapport, of trust, of at least a certain relationship between you.

It sounds very much like I'm down on the country. I'm not. I just think these new problems that we're facing are hitting us so much harder and faster, we're going to have to anticipate them sooner and differently.

I would like to end with this very brief anecdote, if I may, on the disasters of the other alternative, which is represented to me by the Soviet Union.

Our government delegation was coming back from the Soviet Union. A very interesting thing about the Soviet Union, they've had five five-year agricultural plans, I guess, since 1945. Their agricultural productivity in 1945 was 11% of ours, and after twenty-five years and hundreds of billions of dollars of fertilizer and tractors and everything you could imagine, it was still 11% of ours in 1971. Translated in real terms, this means it took about nine times as many people there, nine people to produce as much food as one person did in the United States.

The industrial productivity situation is not quite as bad, but still bad.

Anyway, we had just gone to the Moscow airport, the plane was taking off, and the wheels were lifting from the ground, and a very exciting thing happened—to me, a very thrilling thing. With a total lack of rehearsal or programming of any kind the entire delegation cleered as the plane took off from Moscow, so our people were delighted to be leaving that particular system.

So please don't misinterpret what I'm saying. What I'm trying to say is that I think businessmen, such as yourselves, such as myself, are going to have to become far better students of the economics of foreign politics, we're going to have to become far better students of the new politics of domestic economics.

We all say at meetings like this that our system is the best there is, which it is. The reason it's best, in my view, is that it's capable of self-correction and self-healing, and adjusting to change. Whereas some of these other systems—although I don't want to speak in a pejorative way about birds—are for the birds. They fundamentally don't have our capacity to adjust to change, either technological change or social change. Our system has that great advantage. If I have a message, it's to urge you to change to both the new global economy and the new political economy at home.

Corporate Communications—The Management View

J. Paul Lyet
Chairman of the Board and Chief Executive Officer
Sperry Rand Corporation

As you probably know, I am not a professional communicator. My first job after graduate school was as a public accountant. I went on to join one of the accounting firm's clients—the New Holland Machine Company in New Holland, Pennsylvania. I was controller and part owner of this small farm equipment company which had begun to grow like Topsy. The company was later acquired by Sperry. But in those days communication was easy. I just stepped outside of my office, and most everybody was within the sound of my voice.

As the company grew, we had to work more and more at communication. But I always felt the effort—whatever it took—was worthwhile. The reason was that it made my work easier. For example, it was less work in the long run to put some effort into communicating with employees than not to bother communicating and end up having to deal with avoidable grievances and misunderstandings. I even suggested that we publish an employee newspaper. The president agreed and gave me the added job of being its editor.

As a financial executive, I found it made my work easier to get the people who were nonfinancial executives to understand about finance. So I started courses in financial training for nonfinancial executives. This works at all levels and in all functions of any company—large or small.

Most people think of an organization as a pyramid. I like to think of it another way, because pyramids are static and an organization is dynamic. My concept of an organization is as a wheel with the chief executive officer at the center. And I prefer to think of myself—the CEO—as having the job of keeping that wheel turning and moving steadily in the right direction and at the desired speed.

The trouble is that the CEO is surrounded on all sides by people, by layers of organization. He has to get through those layers of organization to really get the power transmitted to the outside of the wheel. And the only way that the CEO can do it is through proper communication.

There are only so many people that I have direct and frequent contact with. The only way I can get anything done in Sperry is through those people. If they're not effective, if I haven't communicated with them in a proper way, my communication line to the rest of the organization is blunted right there.

The Role of the Chief Communication Officer

I thought you might be interested in knowing the role of the Vice President for Communications in Sperry. To begin with, he reports directly to me. I believe that you must work very, very closely with your top communication person. If it's his job to communicate, he can't be effective unless he is tuned in . . . and I mean tuned in. For example, when we have a financial statement, I see to it that he gets a copy of whatever I see. And I talk to him frequently. He's in my office at least as much as any other executive we have at Sperry. I believe in the saturation theory. He knows my thoughts about acquisitions, about plant closings. He knows what the board is thinking about. He's tuned in on organization moves that I have in mind, many that I can't discuss with other people. But just think how much more effective he is because he knows those things and he can see them evolve. I do this selfishly: I feel that this makes me more effective in this communication job that *I* have to do.

I believe that communication is a basic management accountability. Communication is a part of every manager's job at Sperry. That's written into the job descriptions and I might add that in today's environment, that accountability is even more important than it was in the past. I'd like to comment briefly on that point, and how I view it from my position.

Zeroing in on the Fundamentals

Just picture for a moment my position when I moved to our New York corporate headquarters from Sperry's farm machinery division. I was going to be moving into a top management spot for Sperry, which is a high technology company. In the farm machinery business, we used to think that we had high technology products, but it's a little difficult to call a manure-spreader high technology.

I knew I could not become a computer expert, and I could not become a hydraulics expert, and I could not become an aerospace expert. In order to get control of my new job, I had to zero in on the fundamentals, the common denominators.

The fundamentals that I identified were *people, planning,* and *control.* I concluded that if I could get to know the *people* in Sperry, help them in their development, and see that they got into the right position, then I'd have a leg up.

I also knew that I'd have to have a plan, because planning is needed to provide direction and set goals and provide the means of getting to where we wanted to get.

And the third common denominator for every Sperry division was financial controls. They all have to control their assets, and they've got to have a P and L. They've got to have accounting systems, and they've got to have visibility.

I figured, if I got hold of those three and got people, planning, and controls in good shape, I'd have a handle on the job.

I said earlier that communication is the only way the CEO can get his organization moving. In order to be effective in the areas of people, planning, and control, I also had to communicate my ideas effectively.

Communication Is Both a Technological and a Human Problem

Sperry, like many of your companies, has communication problems because we are a big company. We're far-flung, we're diversified, we even have a large number of employees and publics who speak no English. Our problem then is

both a technological one and a human one. A wide range of solutions is required.

Now, we have a real asset in Sperry. We're a computer company, so we have in place a $60 million—at our cost—management communication and information system, which we think is one of the most sophisticated in the world.

At the same time, we recognize that the most effective communication that we can do within Sperry, despite all these sophisticated tools, is face-to-face communication. And that means listening as well as talking. Now, that's so true that I'm almost embarrassed to say it. It sounds like a cliché. But a lot of people don't realize how true it is, even today.

Quarterly Reviews

One technique we use to ensure regular contact and communication with our division people is our quarterly reviews. At those meetings, the division managers give an accounting of their stewardship. They discuss problems, check progress against plans, explain exceptions, check management development programs, and review the status of management-by-objective programs.

But most important, the people get to see us and we get to see the people.

The reviews have one other major purpose, and that is to help us avoid surprises. Investors don't like surprises. They don't like to read in the paper: "Sperry's chairman announced that earnings were down in the third quarter and he attributed it to the fact that their XYZ Division had to take a write-off because of this or because of that." Surprises and their after effects are hard to live down.

In most of these cases somebody in the business knew he had too much inventory, or that the product wasn't moving. It wasn't a surprise to him. These quarterly reviews help us to bring these kinds of problems to the surface while they're still small problems.

An Alternative to the Large Corporate Staff

Let me tell you about another communication technique that we use in Sperry. We had a problem of coordinating similar functions within various divisions. We wanted to avoid building up a large corporate staff to do it. We think we've been successful in this. Our entire corporate executive staff could meet comfortably in my office, and believe me, I don't have a great big office.

Our solution was to turn our division staff into part-time corporate staff. Now, somebody might ask if divisional people were fully employed, how could they find the time to do this? Let me ask you: If you were a divisional executive and you were asked to do this, and the alternative was that the New York office was going to build up a big corporate staff to do the staff work, do you think your people could find the time? Well, we found they could find the time pretty quickly. This is not a theory I'm talking about. This is something we've had in place for a number of years, and it's working.

The procedure has many benefits. It has saved money for us, it has developed the divisional people, and it has given them corporate-wide exposure. It ensures that programs developed are practical, and, what is important, that they are more readily accepted by the divisions since they have been developed by divisional people.

This solution took the form of management councils, with key areas represented. Thus, we have the Marketing, Patent, Purchasing, Research, Communications, Manufacturing, and Personnel Councils. Each is composed of divisional and corporate managers responsible for the respective functions. Also, the division presidents are assigned to sit in on a rotating basis, for exposure to the function.

The councils meet frequently at Sperry locations to exchange ideas, iron out problems, and develop programs.

Our aim is to be able to transmit the best techniques developed in each division throughout the corporation. For example, our New Holland Division had a lot of experience with opinion and attitude surveys, and we have been able to extend that experience to the rest of the corporation.

Another purpose of these councils is to learn from the mistakes made by divisions in different situations. I'm sure we're making mistakes right now at Sperry, but I don't want us to make any of them twice!

Now, let me give you just one example of the work that these councils have done: Our corporate identity program. The Corporate Communications Council pinpointed the problem that Sperry is a complex company and, as such, very difficult to understand. When I went to New York, for example, I discovered some people didn't know that we were in the farm machinery business, even though that business is the second largest contributor to Sperry's revenue and profits.

Each Sperry division had its own established name, some going back 100 years or more. There was no common identity, there was no common communication approach. This was a serious problem in investor as well as customer relations.

Since the divisional communication managers were the ones who analyzed the problem, they were committed to its solution—a total corporate information program to provide a common Sperry identity where none had existed before. It has worked well because the division people—not just the corporate offices—defined and are implementing the program.

Now, let me tell you briefly about just a few of our approaches to employee communications.

Employee Communications

We carried the corporate council approach over into employee communications. We got the Corporate Communications and Personnel Councils working together. They came up with something that I took a very active interest in—a corporate report to employees.

What we wanted to do—but with 60,000 employees in the United States, obviously could not—was to talk face-to-face with our employees. We also wanted to have our divisions conduct "state of the union" meetings with their employees at least once a year, following the pattern which had worked so well in our non-unionized Sperry divisions.

We made a film report to be used as the corporate part of these "state of the union" meetings. I narrated it, and employees could see me and the president of the company moving around Sperry—visiting, talking to people, doing the things we wished we could do everywhere. We had a booklet to go with the film, telling about Sperry, and providing a card for employees to send their questions and comments directly to New York.

The meetings are now being held and the film is being shown. So far we've gotten about 8,000 cards back. I think the work involved was worth every minute, and it is going to make our job a lot easier.

The film showed one of the informal meetings that we hold throughout Sperry, called "coffee-klatch" meetings. They're very good where you have a non-union situation and there are no formal grievance procedures to surface problems. At these meetings, our people can raise questions about company policy, complaints, concerns they have. It is also an excellent method for ventilating their feelings.

The Importance of Communicating When There Is No Union

Now, I ought to tell you that in Sperry less than 25% of our U.S. employees are members of unions. Every time our employees have voted in favor of a union it could be traced directly to a breakdown in communications. Somewhere, management goofed. If any of your companies are strongly unionized, and you take umbrage at that comment, I'm sorry, but I still mean it. And if we have unions in Sperry, I'm where the buck stops.

The employees' film also shows visits by Bob McDonald and me to various plants. We make it a point, whenever we're visiting a Sperry location, for any reason, to go out and visit with employees.

Another area I want to touch on quickly is attitude surveys. I merely want to report that we've used them with good success at Sperry. They are especially useful in nonunion situations. I think it's essential if you take them on, not to take them on too lightly. You've got to be prepared to go all the way. You've got to be prepared to report the results and to take action.

You may not always like what they tell you. One of my biggest hurts occurred with the employee newspaper I mentioned, the one that I was the first editor of. I thought it was great. We had an opinion survey, and the employees really took it apart. I was hurt because it changed the paper. As a matter of fact, I got off as editor. I'd been on too long anyhow.

You have to report the survey findings to the employees. Then you have to tell them what's being done about the findings, what actions are planned, and then you've got to act.

And finally, you've got to keep on having surveys, so you can measure your progress.

As you've undoubtedly gathered from my comments, I spent a lot of time on the *people* part of the people, planning, and controls formula. I believe Sperry will grow only to the extent that its people do a better job than the competition is doing. I feel that way about everybody down through the organization. My job is to continually provide the environment, to upgrade and develop the abilities of our people.

Investor Relations

Now, somewhere in that crowd (slide) I hope that somebody is buying Sperry stock, and that the last purchase was an uptick. Persuading more people to buy our stock, and getting more people to hold onto our stock, is one of my key objectives.

First, of course, the stock has to deserve to be demanded. That's basic. Next, we've got to work everlastingly at making known who Sperry is, what its record is, and where it's headed. And that, of course, is investor relations, and it's a big communication task. Companies with uncommonly low price/earnings ratios are coming to realize this. I don't know any company, or any top executive, who is satisfied with his P/E ratio. I'll quickly tell you I am very dissatisfied with ours.

Sperry is typical of many companies today in several respects. We want an institutional following for our stock, but we also need a stable group of investors. Reaching small investors is the target, both here and abroad.

In 1964—and these figures may shock you, but look at some other companies and you may see the same figures—we had over 180,000 shareholders. Today we've got about 104,000. And that situation is not unique, because the New York Stock Exchange has been recording the same thing. Last year the total number of shareholders went down by 3%.

Taking the Initiative

We believe that we've got to take the initiative. Some of our predecessors used to say, "If you can keep that earnings per share moving up, the stock will take care of itself. You don't have to worry about institutional advertising. You don't have to worry about going downtown, seeing what the Lehman people or the Blyth, Eastman Dillon people are saying about Sperry, because by golly, if earnings keep moving up, the price of the stock will take care of itself."

You just look at a selection of earnings records and corporate statements, and you'll see many cases where the earnings have gone up and the P/E has gone down. It's a disease that's afflicting most publicly owned companies at the moment.

I see our investor relations job as a constant marketing program. And I see it as a top management function. I can't delegate the key aspects. I must, and indeed, I welcome the chance to talk and listen to the press and investors' groups, whenever I can. I don't particularly like it, there are other things that I like to do better. I didn't start out as a communication man. I saw my background as financial. But I feel I've got to take the lead in communication and it takes work. If it keeps us strongly positioned in the marketplace, it's worth the effort.

In terms of what we're doing in stockholder relations, I would like to say that we're satisfied with our program. But, frankly, I'm not, and I will not be until we reverse that trend. We've done some things like expanding our quarterly report. We've sent shareholders, as we have each employee, a wallet-sized information card that looks like a credit card. It has information on it about Sperry, this year and last year, and it's a good bit of information.

I feel this way: The shareholders really ought to be working with us. They have their investment in the stock. Let's give them something, so that whether they are at a cocktail party or a coffee-klatch or across the back fence, they can talk up Sperry. The same applies to employees; they too should be advocates for Sperry.

We also send reports of our analysts' meetings to our shareholders. And we are making much more information available to fund managers.

A Computer Company Plus

As you can see from our logos, we've got some explaining to do about Sperry. It's a multidivisional company, and most of the people who come to see us from the investment community are computer analysts. We say to them, "How can you tell your clients to buy Sperry stock if you come in and talk only about computers and then get up to leave? Aren't you going to ask me about the other divisions?"

And they say, "Well, yes, we'd like to know about them."

So we have mounted a campaign to educate them about all of Sperry. We say we're a computer company plus, but that "plus" part is very important. We take analysts out into the field to visit our divisions. This has a two-way effect. It teaches the analysts about Sperry Rand and you can also imagine what it does for the divisional people. Someday, one of those divisional fellows is going to be up doing the job I'm doing right now, and I think that if he gets experience in fielding questions that analysts can ask, it's going to be very, very helpful to him.

It's helped a great deal. You say, how do you know? I'll tell you how I know. Because I've made it a point to review every single analyst's report that comes in about Sperry, and there are a lot of them.

You say, how can you take the time? I take them home. I scan them. In other words, if they've got something all

about, let's say, a particular line of computers. I don't read that, because that's just boilerplate. But I do read their reports, and sometimes they're critical. They are putting in the reports what we've told them, but their conclusions are their own.

In addition, we have identified about 100 potential new institutional investors, and we're making personal calls on them. I'm not doing it myself, but we've got a very competent guy who is.

Reaching the Capital Markets Overseas

Now, let me tell you briefly why we feel that we need to give more attention to capital markets overseas. The reasons are very simple. We want to broaden our options. I just don't want to feel that the U.S. is the only place that Sperry, a major multinational company, has to finance its far-flung operations around the world. We want to broaden the market for our shares. I have this fundamental belief that it's a question of supply and demand. If you want to improve your multiple, more people have to want to hold the stock. To do that, get more exposure. We want people in France and Germany and Switzerland, Italy and Spain, Japan, to buy Sperry stock. We've only got 34,500,000 shares and the number has remained pretty stable. We do a lot of business overseas. We want the people who buy our products, and we want our own overseas employees, to have an opportunity to buy our stock.

We want to be able to indicate to the people of France and Germany, who feel that we're an American multinational company, that they can participate in our growth. Stockholders become good customers and customers make good stockholders. And a good bit of the strength in Sperry in the last six months has come from overseas buying.

In the past year, our president, our chief financial officer, and I personally have addressed hundreds of analysts, not only in the United States, but in Japan and Europe as well. Our stock is listed on twelve European stock exchanges. We hope to be listed in Japan this year.

We publish our annual report in seven languages: English, German, Dutch, Japanese, Italian, French, and Spanish. We are getting far more benefits from this than we had expected. It's been helpful not only with investors, but with acquisition activities, with customers, and in supplying information required by other governments. It has helped with suppliers, lending institutions, and so forth.

Last fall we invited a group of 25 European business journalists for a week-long tour of Sperry facilities in the United States. The results are still coming in. The tour spawned a considerable number of articles in newspapers and magazines about Sperry and that was exactly what we wanted to do. There was a noticeable pick-up in our stock activity. And we now have good contacts with those journalists for new information dissemination.

So that's it. That's a sampling to give you the flavor of communications in Sperry. We're doing other things. And I know that we can, should, and intend to do more.

QUESTION AND ANSWER PERIOD

Q. *Has there been developed a budget figure, or a budget as a percentage of total corporate sales for the communications effort?*

A. *I'll give you a figure. We spend 35 million dollars on a base of 2 billion 6, total advertising. Of that, corporate advertising will be about three million.*

Q. *What are the principal objectives of your institutional advertising as directed toward shareowners? Their general acceptance of the corporation as a place to invest?*

A. *Well, not completely. We stress the customer and prospective customers as much as investors. We are also interested in certain other influential elements of the scientific, educational and governmental publics.*

Q. *In your President's letter, are your communications aimed at the analysts or investors?*

A. *Well, we're aiming at all of them. That's where the skill comes in. We've got to be sure that the annual report is one that will be interesting to the "Aunt Janes" and yet it's got to have enough information in it for the financial analysts—but then they're not satisfied with the annual report. They get the 10-K's and want a lot more information than we put in the annual report. But our annual report is giving more and more information, and this year we're going to tell them if they want a copy of the 10-K, why, we'll send it to them.*

Q. *I was under the impression that listing on foreign exchanges was very expensive, No. 1; and No. 2, American brokerage houses are so well entrenched in Europe that it really isn't necessary to move your stock.*

A. *Well, it's costly, but we measure the cost against the benefits, and relatively it's not expensive. And there have been some real benefits in terms of increased holdings.*

For example, at the beginning of this year about 10% of our stock was held overseas. At the end of the year it was about 15%. And that didn't happen before. In other words, before we had our stock listed, we didn't have such growth in overseas ownership of our stock. So one added benefit is your visibility to the investors.

Q. *Do you find it important to have your executives speak out on topics of national importance?*

A. *Well, I think that's fine to do, but I don't give that a high priority. We've got a lot to do at home. I want the speaking out to be aimed primarily at Sperry employees. I believe this strongly. The Opinion Research findings of misinformation about how much profits corporations make, and so forth, bear me out. Many of these people are, as Pete Peterson mentioned last night, our own employees, and I don't think Sperry can go out and educate the world. I just want Sperry employees to know the facts of life, and it's a difficult thing because we've got a captive audience. You've got to avoid having them feel that you're propagandizing.*

But I want the primary thrust of Sperry people to be in terms of directing their activities within a corporation. I don't think that it's really good for Sperry to be coming on alone as a spokesman on broad specific issues. First of all, I don't think that we're too effective as one corporation. I'd rather have us working with the trade organizations, because then there's a lot more clout. I think that if we go down as individual companies and speak out as individual companies—it may be a very statesmanlike thing, but probably not very effective. I'm not out to be a statesman.

Advertising . . . An FTC Perspective

Lewis A. Engman
Chairman
Federal Trade Commission

Some of you are no doubt already aware of the commission's good works in the advertising area. Some of you may even have intimate knowledge of what we are doing in ad substantiation or in trying to come to terms with the complex problems raised by so-called image advertising.

I would be more than happy to discuss with you both these and other aspects of the commission's work—and we will have time to do so in the question period which follows—but they are not the main thrust of what I would like to say today.

I would like to lay before you a more general proposition—the proposition that the ethical standards, and I am speaking of *performance* not rules, of the advertising industry are major determinants of the trust and confidence this nation has in its institutions.

Let me try to be more specific.

I see three converging developments which concern me and which I think should also concern you.

The *first* is the remarkable extent to which not only the preferences but the felt needs of the American public are conditioned by constant exposure to advertising. I don't have to tell you in this room that the impact of advertising on the average individual is beyond his capacity to assess.

Of course, *sophisticated* people like you and me understand this. We are able to cut through the fog of subconscious suggestion and make our product purchases solely on the basis of product merit.

I, for instance, happen to use Gleem toothpaste. That decision on my part had nothing to do with Gleem's advertising. I happen to like the taste of Gleem. Besides, in my job I don't have time to brush after every meal.

But everyone is not as sophisticated as we are. The public's subconscious aspirations and fears are easily preyed upon.

Moreover, the line between what is and what is not deceptive in advertising is not one which can be perfectly drawn by statutory language. There is a role for law enforcement, but there is also an important role for self-restraint.

I am not such a blue stocking as to believe that hyperbole has no place in advertising. Nor do I believe that advertisers should be required to give equal time to their products' merits and demerits.

For example, no whiskey manufacturer can afford to stake his corporation's future on the claim that Old Mother-In-Law "gets the job done."

No soft drink manufacturer is going to pay cash American for page space or air time to say that his product tastes good and has no known harmful effects if taken in moderation and drunk through a straw to minimize contact with the teeth.

The alternative, however, does not have to be advertising which is intended to sell products through subconscious or at least unstated appeals based, not on the merits of the product itself, but on some marvelous transformation which its possession will bring to the life style of its owner.

You will recall that in the 1950's, subliminal advertising in movie theaters was criticized as an invasion of privacy and a violation of the individual's rights to decide for himself when and whether he wanted a soft drink or a box of popcorn.

It is not clear to me that, in intent or effect, there is a significant difference between those subliminal ads and some current advertising which appears to be designed to create subconscious needs.

The *second* development which we need to think about is the growing dependence of the national media on corporate advertising.

Newspapers and magazines are the only commodities I know of which can be bought for less than they cost to produce. This is so because advertisers pay the freight. The history of publishing over the last ten years is replete with instances of magazines and papers which have gone bottoms up with their circulations intact or growing.

As you know, there have even been instances in which magazines have intentionally cut their subscription lists to focus on markets which would appeal to their corporate patrons.

This trend is, of course, beyond your power to affect. Certainly it is beyond mine.

But it is noteworthy because it means that one potential check on the integrity of advertising may be disappearing from the system.

If you are a deepsea diver, you don't pick a fight with the man at the other end of your air hose. If you are an American publisher today, you are, to say the least, judicious in suggesting that an ad is not acceptable. I might note, however, that the networks—in part because of the "fairness doctrine"—may take a different view.

Advertising's Negative Effect

The *third*, and to my mind most alarming, development is the parlous state of the advertising industry's public reputation. Despite the still strong influence of advertising, I would hazard a guess that its actual return on the dollar may be declining. There are limits to the public's credulity.

Over the long haul, it is too much to ask of John Q. Consumer that he accept the implied suggestion that purchase of a one-quarter inch reversible speed drill will cause his hair to thicken and his pot belley to disappear.

The constant bombardment of excessive claims is little by little inoculating the consumer against credence. It is a measure of this effect that those relatively few ad compaigns which have capitalized on the novelty of candor have been notably successful.

I would suggest that you give some thought to your "name" as advertisers and that you reflect on the implica-

tions for your well being of dwindling public confidence in the content of your copy.

A year and a half ago, Lou Harris took a well publicized survey of public confidence in 16 different private and public institutions in this country. Advertising finished at the bottom of the list—and that, I might add, was in the face of some impressive competition, including government.

Unless something is done to avert it, public confidence in you and in what you have to say will continue to decline. If that happens, one of two things will result—both of them bad.

Either corporations will have to spend more and more on advertising to get a dollar of incremental sales—which is economically wasteful and inflationary—or the return on the advertising dollar will decline to the point where its expenditure becomes uneconomic. In that case, total advertising revenues will decline.

The latter possibility would be bad for you, but it would be far worse for the media. The man who builds a better mousetrap will sell it advertising or no. But the man who owns a newspaper or a magazine or a television station is not so fortunate.

For myself, I have a hard time imagining interrupting a third-run episode of "I Love Lucy" to explain to the vastly appreciative audience that the station's continued existence depends on the generous contributions of the audience.

While loss of public confidence in advertising is fraught with peril both for those with something to sell and for those in whose pages and over whose air waves the sales pitch is made, the implication for the nation is more general than that.

A Generation of Skeptics

We are breeding a generation of skeptics in this country. All of our important institutions stand challenged. The federal government is accused of evasion and falsehood; the press is charged with distortion and bias; the church is derided as anachronistic and irrelevant. There is hardly a rostrum remaining in the nation from which communication does not meet with cynical disbelief.

I do not know what the opposite of synergism is, but I suggest that, whatever it is, it is at work here as the loss of confidence in one institution contributes to loss of faith in others. This cannot be in the nature of things. This cynicism, this public incredulity, is conditioned response.

It is, in part, the product of real or perceived deceptions visited not just daily but hourly on the consciousness of the American public—largely by advertisers.

The importance of advertising as a contributing factor is as much a function of quantity as quality. Last year the advertising industry spent $25 billion persuading the American consumer.

It is hard to give that figure a meaningful frame of reference, but you might be interested to know that it is about 125 times the total amount of money given the United States Information Agency in the same year to spread its message and operate its libraries and publications all over the world. I might say, too, that it is nearly one thousand times the budget of the FTC.

The individual exaggerations of the advertising industry are not major deceptions. But in the aggregate, they lay waste the nation's precious and fragile reserve of public trust.

In the end, people are not persuaded that a bowl of breakfast cereal will enable them to pole vault 15 feet. Nor are they persuaded that by pushing against the doorjamb for three minutes a day they can look like Charles Atlas.

What they are persuaded of is that they should take what they are told with a grain of salt . . . and then two grains . . . and then three grains . . . until the end result is total suspension of belief.

When that happens, all institutions are damaged. Skepticism is a healthy check on institutions. Reflexive incredulity is not. It is paralytic.

We have not yet reached that state, but we are too far down the road in that direction not to view with concern the possibility that we will.

Well, by now, I'm sure that many of you are gritting your teeth and thinking to yourselves, "Who is this guy to be telling us that *we* exaggerate things." I couldn't blame you if you are. What I have sketched out is what we lawyers would call a "worse case scenario" and what in today's more popular parlance would be a "heavy scene."

I am guilty of succumbing to the temptation of hyperbole and oversimplification, and I promise that when I get back to the office I am going to report myself. I may even file a complaint. But I have sinned with a purpose.

Crisis of Confidence

The crisis of confidence in our institutions is real. You in this room have played a role in the creation of that crisis, and you can play a role in helping to overcome it.

It is one of the Federal Trade Commission's responsibilities to set rules for advertising and to police them. But you are better situated than we to do that job.

The NARB as a force of moral suasion has already made praiseworthy strides in this direction. In fact, it has been charged that the NARB has done more than has the commission to reform the advertising industry. Although I don't believe it, my reaction to that claim is "Great!"

The Sabbath was made for man, and not man for the Sabbath. Likewise, the FTC was made for the consumer, and not the consumer for the FTC. I am far more interested in our goal than in our role.

Before I stop talking, I would like to slip one more little burr under your saddles. I have learned an important lesson in my four years in Washington. That lesson is that, in the end, everything is political. I mean "political" in the best sense—in the sense that in the end the people's will will be done.

It is not always a fast process. Sometimes it is very slow. But in time it happens.

Where there is abuse, there will be outrage. Where there is outrage, there will be action. Though it almost assuredly will not come tomorrow, it will come as surely as tomorrow. And when it comes, it is never as pleasant as it could have been if you had done it yourself.

I'd like to leave you with this thought: You can fool all of the people some of the time. And you can fool some of the people all of the time. But you can't sell hexachlorophene if it's taken off the market.

QUESTION AND ANSWER PERIOD

Q. *Mr. Engman, do you think advertising is getting worse or better?*

A. *You don't really expect me to answer that question, do you? Advertising is always changing, and I think that national advertising today may be carried out with greater concern for possible deception in its content, and that may be for a variety of reasons.*

The question I was asking today was not whether advertising is getting better or worse in terms of Section 5 of the Federal Trade Commission Act—that is, is it deceptive or unfair in its impact? The question from your points of view,

and from my point of view, as an American citizen, should be whether or not advertising is becoming more credible or less credible. At the risk of stepping on some toes, does the public really believe some of the claims that are made these days? And this may very well apply to so-called "image advertising," which we're seeing more and more of these days, and which I know all of you are interested in, and which may be carried out for a number of legitimate reasons.

The question is: Is it believable to the individual who is reading it? What is the real impact on the individual who has just spent an hour in line at the gas station to pick up a newspaper and read about what some oil company has done for the environment?

I think most of you know that we have received a number of petitions at the FTC, from Members of Congress and others, to crack down on so-called image advertising of corporations, to challenge them, to include them in our substantiation program. I made a recent speech in Detroit which indicated that, in my view, we should be very reluctant to plunge into any area which may tend to infringe upon the First Amendment. But there's another point to be made. Although the First Amendment may protect a certain form of speech, it is not a salvation. If people don't believe what the ad is saying, the advertiser is going to be worse off than if he had never run the ad at all.

Q. *On the question of image advertising, corporate image advertising, and competitive product advertising, it seems there is going to be a great deal more difficulty in trying to regulate that, since you don't have a product in which there are facts and figures. I'm interested in your views on how you would go about it, if you should change your mind.*

A. *Let me begin by emphasizing that the full commission has not yet focused on this question. But, in my view, unless there is a very clear-cut commercial appeal or effect, the dangers of infringing on First Amendment rights and the desirability of encouraging debate and expression of views would lead me to give the benefit of the doubt to an advertiser's rights.*

I think that we can use an analogy from some of the libel cases. The question is, does government activity—even a mere investigation—have such a chilling effect that, in the end, expression of views may be discouraged?

But, again, I come back to the point that if it's not credible, if it's not believable or if people think that this is a big put-on, the ads are counterproductive. In that event, your real enemy is not the federal government or the Federal Trade Commission, but the slick copy artist somewhere who thinks that you can get people's minds off a particular problem by trying to get them to think about something else. That doesn't always work.

Q. *Mr. Engman, I'm particularly interested in the National Advertising Review Board, and you expressed, at least, a modest degree of confidence in what it's doing, and some hope in the future of it. My question is, do your fellow commissioners share that optimism and, as far as you can tell, is that a fairly pervasive attitude among the staff? Before you answer that, I should warn you that I'm on the board.*

A. *I have no problem with answering the question. I think one of the reasons I have survived for four years in Washington is that I have never said anything that I didn't expect to see on the front page of the* Washington Post *the next day.*

First of all, with respect to the commission, I think that the views that I have expressed regarding the NARB are shared by the other members.

With respect to the staff, I am proud of our staff. They are an outstanding group of people. I believe that the top line managers, whom I have brought in during the past year, are outstanding individuals. And I might add that this applies to the entire professional staff.

There are obviously going to be differences of opinion with the staff and between commissioners, but by and large the commission is heartened by this effort at self-regulation. Obviously, we will never abdicate our responsibilities to enforce Section 5 of the Federal Trade Commission Act, but to the extent that the problems can be met in advance, before the commission has to get involved, and to the extent they are handled by the advertisers themselves, I think everybody's ahead.

Q. *If you had the opportunity to make a recommendation to NARB as to what they could do to improve their performance, at the moment, what would it be?*

A. *I wouldn't want to make that kind of recommendation. We all have roles to play in life, and in fact, in my prior existence, when I was making an honest living as a lawyer in Michigan, we used to bitch about the government and the regulatory agencies. Now that I'm wearing a different hat, I see issues and events from a different perspective. Although I do sit down and chat with John Macy and Ted Etherington from time to time, I don't try to tell them how to run their operations.*

Q. *How do you feel about the advertising in which competitive products are laid out in comparison? How do you feel about the role of the commission, and your responsibility to validate the claims?*

A. *You're talking about comparative advertising. I guess I would back up and say I look at this much as I look at any other kind of problem—that is, is there deception or unfairness with respect to the particular comparative advertising being utilized.*

There is an erroneous impression that the Federal Trade Commission is encouraging or is in favor of comparative advertising. The commission has never taken any such position or posture. What has happened is that one or two individuals on the staff personally took that kind of posture. The commission has never said that comparative advertising is or is not good.

I think you have to look at it from a very practical, pragmatic point of view. If you do get involved in comparative advertising, you may very well have different standards to meet so that the net effect of the ad is not misleading. For example, it may be that if you compare two or three product attributes, you may have an obligation to expand that to four or five, to show all sides of the picture. It's that kind of thing.

In sum, I'm neither opposed to nor in favor of comparative ads. They may have a role in some instances, and in others, they may be more misleading than helpful.

Q. *Is the commission going to be looking at political campaign advertising to that extent? Are we going to start practicing what we're preaching in Washington?*

A. *Well, we're not going to look at political campaign advertising so long as I'm Chairman of the Federal Trade Commission. The same First Amendment question which I mentioned in connection with image advertising applies in spades to politically oriented advertisements.*

I have a feeling that John Q. Consumer out there is, in the end, more perceptive than any of us think he is, and he makes his own judgment.

Q. *In the past, action by the Federal Trade Commission has been publicized, I believe, by your own staff, for instance, actions to be taken against corporations. In some cases, it's been quite injurious to the attitude of people in relation to stock investment. I was curious to know what your answers would be on this. I recall incidents which affected our own company, had a very disastrous effect on our stock for a period*

of time.

A. *That's a very difficult question, and I'd like to respond to it at least in two different segments.*

First of all, with specific respect to advertising substantiation, we have had a policy change which was just adopted three or four months ago. Our ad substantiation program is based on the premise "don't make a claim if you can't back it up." Recently, we have attempted to hone the program down and to make it a more effective law enforcement tool. In my judgment, the idea is fine. But when the program started it was based on a very broad, industry-wide effort, the requests were made publicly, and reams and reams of material came in. It took the staff six to nine months to analyze all this, and then they found one or two or three ads which they felt should be challenged and recommendations were made to the commission. In fact, what happened is that the offending ad had already completed its 13 week cycle on the tube, and what were we talking about anymore?

What we have done to change all this is to cut down tremendously on the number of ads that we are challenging. First, the staff gets an idea, based upon work with consultants or somebody else in the technical area, that there may be a problem with respect to a few carefully selected ads. We then send out a request. We do not publicize the fact that we're sending out a request, because when we cut down the number of requests, we have to be careful not to alert everyone else in the industry that maybe since we're looking at somebody else this month, we're not looking at them. We require a quick turn-around time from the companies and we will propose to take action, we hope, while the item is still on the tube.

Now, that means we won't publicize our efforts until we take action. So that when we file a complaint, that will become public. But the old system where we announced that we were asking for substantiation of dozens of, say, tire ads has been abandoned because I think that really began to get a little counterproductive.

Moving over to the broader question of publicity, you put your finger on one aspect of the difficulty when you talked about leaks. When the commission finds that it has reason to believe that there may be a violation of the antitrust laws, let's say, or we don't like the way you advertise your product, and we challenge you, what should our posture be? I think, by and large, there's no easy answer. There are trade-offs. Generally, the commission's position in the past has been that there are fewer problems by having some kind of formal, carefully worded announcement by the commission which tends to put any staff leaks into proper perspective. As you all know, there may be significant differences between the staff's approach and the commission's approach.

It's amazing how often I find myself reading in the Wall Street Journal, *days in advance of our announcement, a press release from corporate headquarters indicating Federal Trade Commissission action—attempting, of course, to establish a posture in a most favorable way from the company's point of view. So there are those problems.*

I could talk on for another ten minutes, but I'll just give you one other factor, and this still won't be a complete answer. Where we do have a potentially significant alleged violation which could have an impact on a corporation's financial posture, and insiders in the company, obviously, are aware of the fact that there's an investigation underway, at what point is there an obligation on the company to report this to the Securities and Exchange Commission or the New York Exchange? In these situations, we try to tailor the time of some of our announcements so as to create the fewest possible problems for the SEC and the exchanges.

So overall, it's a very complex issue. At some point, I think, it's better if we take a uniform posture with respect to the announcements. In the ad substantiation area and in any other area, however, the commission has indicated that we shouldn't engage in publicity just for the sake of publicity.

The Next Generation of Managers

Richard K. Lazarus
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The topic I've been asked to direct my comments to today is communicating with the next generation of managers. I'd like to begin by giving you the perspectives from which I view this issue. One is as a relatively recent business school graduate, the second is as a former junior line manager, and the third and perhaps the most important in terms of shaping some of the points of view I'll discuss today is as Director of Admission and Student Affairs at Stanford's Graduate School of Business. In this capacity I interact with the applicants as a recruiter and selection officer, as well as interacting with enrolled students in the multidimensional capacity of counselor, listener, and friend. It is from these perspectives that I'd like to share with you some of my observations about this next generation of managers.

Let me begin by making a few general comments about this group. Several years ago, a business school student body was a relatively predictable phenomenon. The typical MBA candidate was a white Caucasian male who at the age of 22 or 23, following a 17-year hitch in the great American academic incubator, entered a business school for a final two years of educational maturation in preparation for his entrance into the mainstream of American industry and commerce. As an individual he possessed a channeled stream of interest and a focused career plan.

Although the majority of our students remain very directed white Caucasian males, new groups have begun to emerge in MBA programs in the last several years. For example, women, who made up less than 1% of our student body five years ago, will probably make up as much as 20% next fall. Ethnic minorities, who less than six years ago made up less than 1% of our entering class, have made up almost 15% in the last few years. Additionally, an estimated 5% of our applicant pool of approximately 2,700 candidates consists of what I refer to as "retreads," i.e., people who have completed one career, whether, as in the case of many women, as housewives, or, as in the case of the majority of retreads, as engineers, lawyers, doctors, etc., and have decided to expand on their initial career base or to begin anew. These people have always "salt and peppered" our applicant pool, but now they are emerging in significant numbers. In short, the people input, or more precisely the students enrolled in and applying to MBA programs today, are changing. Not only are they changing in these more easily categorized respects but also in other important respects.

I mentioned that the central role of a business school as an institution was to prepare young people for management careers in many large and medium size institutions like those represented by you gentlemen today. Although this central focus and purpose are being maintained, the interests and direction of significant portions of MBA students across the country are changing. For example, a few years ago business school campuses experienced a wave of interest, which has been maintained up to the present, in small business management and entrepreneurship. Business schools responded by substantially increasing curriculum that was directed at meeting these new interests and career plans (i.e., courses on the key factors in beginning a new business, on the typical problems encountered by entrepreneurs, as well as on new methods of evaluating small business opportunities from the perspective of the potential owner rather than from the perspective of the bank loan officer).

New Options and Programs

More recently the inputs into MBA programs have been changing in a new manner. Again the changes are discernible to us in terms of the interests and career directions of candidates for our program and in the expressed employment interests of enrolled students; business school campuses today are crowded with young people looking for the tools to manage institutions which have not in the past been our output clients. Here I refer to public institutions, hospitals, school systems, etc. In part this phenomenon is due to the growing realization by a wider variety of institutional leadership of the need to train more sophisticated management talent. This leadership has encouraged, sponsored, and subsidized the development of new options and programs within major business schools. At Stanford, for example, we offer a joint four year program together with the Law School, leading toward an MBA and a JD degree, which is training future public managers as well as corporate lawyers; we have a curriculum sponsored jointly with a division of the School of Medicine for training hospital administrators; we have a curriculum sponsored jointly with the School of Education that is training educational administrators; and we have an option within our MBA curriculum that prepares almost 10% of each year's class for public sector positions in all levels of government. However, there is an even greater diversity in MBA programs today, a diversity that cannot be, or more precisely has not been, institutionalized. I speak of the variety of individuals—categorized once again in terms of career objectives and employment interests—who are coming to business schools. For example, in Stanford's MBA program we have a Ph.D in psychology who intends to be a prison warden, a person with an M.A. in fine arts who intends to manage museums—the list goes on and on but the important point is that although these individuals are still in the minority at graduate schools of business they are appearing in numbers that are historically without precedent.

Why is all this important and what does it say to us about communicating with what the editors of Fortune so dramatically describe as the "Next Generation of Managers"?

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First, I think it says that in terms of background and career interests, the group of young people presently enrolled in management schools neither come to MBA programs nor leave them as neatly packaged as their predecessors. Additionally, by examining their perspectives on future career directions and job choice, I find they are considerably broader in what they view as available opportunities. Most important, however, is the viewpoint exhibited by a growing number of MBA's today in terms of job choice. It is a very personal viewpoint that approaches the employment market from the perspective of the individual student's personal strengths, interests, and life style preferences rather than from the more traditional viewpoint of "what's available."

To a large extent social scientists tell us this perspective on the job market is a luxury provided by a world characterized by the abundance and the opportunities that young people today take for granted. But to a large extent I feel that the growing need by our students to personalize their approach to the employment market is also due to (1) the general tendency of young people to question basic assump-

tions (in this case the assumptions that have traditionally underpinned the career decision process) and (2) the general frustration felt by so many individuals facing a wealth of neatly categorized job opportunities (such as investment banker, product manager, etc.) about which they know very little and with none of which they feel entirely comfortable, in terms of making a total commitment. It is not surprising then that these intelligent, talented, creative, and high priced individuals solve this dilemma by turning to their own strengths, interests, and life style preferences to find answers to their career questions rather than attempting to fit what one student recently described to me as "round little me into someone else's square little box."

Large Increases in Applicants

This personal approach to the career decision has had profound effects on business schools already. For example, MBA programs in recent years have experienced a tremendous increase in the number of applicants to their programs despite the fact that new business schools are opening each month. As an illustration, at Stanford we had a 10% increase in our applicant pool last year and a 26% increase this year—the result being that today we are able to offer admission to only about one out of every nine applicants to the program. Although this rise in applicants is due to a variety of factors, one significant factor is the perceived value added which young people today attach to the education and credential an MBA offers. More than any other single attraction, MBA candidates mention that an MBA offers them flexibility in future job opportunities; the importance implicit in this statement lies in the fact that traditionally an MBA was perceived by students as essentially a tool for specialization within the management field. Put in slightly different terms, among today's students the most enticing aspect of an MBA education is that it helps the individual expand and optimize, rather than limit, his career options—while at the same time providing hard skills with a high market value. In short, a growing number of exciting young people I am exposed to daily want responsibility and challenge but also put a high priority on matching their employment to their own interests, talents, and life style preferences. They view an MBA as an attractive investment of two years and $15,000 largely because it gives them marketable skills with which they can approach the job market in a flexible manner. It helps them to secure the type of employment that meets their needs, rather than molding those needs to the demands of the job market. Naturally, the job selection process itself is never as clear cut or as simplistic as what I have outlined here, but I think the prevailing perception of MBA applicants and students of the degree's usefulness in increasing the ability of the young person to "personalize" his job selection and career direction is nevertheless a valid and significant observation.

There is on business school campuses today other evidence that supports the thesis that a personalized approach to the world is becoming increasingly vital to MBA students. For example, the human behavior curriculums have gained in popularity and importance during the last decade. But even more significant, these curriculums have moved from the more general theories of how to increase productivity by fine-tuning the manager's capacity to understand general concepts of worker motivation and interpersonal behavior to the point where at Harvard Business School perhaps the most popular course in the whole curriculum is devoted to teaching the individual MBA how to be his own career counselor. What I think this says once again is that young people are putting an increased priority on starting with themselves in their approach to fitting into the world in general.

Another telling phenomenon is, I believe, the directions in which our graduates are moving. In addition to the previously mentioned diversity of areas and institutions (formerly not significant employers of MBA's) in which many recent graduates have sought jobs, is the growing popularity of other selected areas that are traditional employers of MBA's. For example, the single fastest growing career category in which Stanford MBA's find initial employment is consulting firms. Last year the consulting firms successfully recruited 16% of our graduating class, up from 6% in the previous year. In talking with placement personnel, I find that the reason for the recent popularity of consulting firms is that a one to two year business apprenticeship on a wide variety of consulting assignments offers an unusual overview of the general business community, providing insight into different industries and firms. Apparently the consulting apprenticeship is being increasingly utilized by MBA graduates to achieve on-the-job exposure to the workaday world. The information gathered through such a broad-based practicum offers the MBA a perspective on the business world, particular industries, corporations, jobs, and most important on "self," which will allow him or her to make an intelligent and strategically optimum career commitment at some future date.

Now, I'm sure that the "personalized approach" to the world, and in the example I have used here to the career decision-making process, will appear to many as the logical response of a self-indulgent generation whose whims have too long been pampered. I would argue against this thesis. It is true that this new generation of managers has never faced the harsh necessities of the generation of young managers who emerged from the great depression or the postwar economic recessions of the last thirty years. Equally true, however, is the fact that the job market today, no matter how impressive an individual's credentials, is not the most promising of recent times. More important, this generation of managers has grown up in a period of such social turbulence that almost all of our world's sacred cows have been and continue to be tainted, if not totally discredited. It seems only natural that the new generation of managers should continue to question the established order as well as its traditional standards and methods.

Different Recruiting Approaches

It also appears, if the early returns as measured by the Lazarus gut-feel are any indication of what the future will bring, that the "personalized approach" to career decisions is having positive results. Individuals who go through a period of intensive self-evaluation and employment-market evaluation are finding their niches more personally satisfying in the real world. On the other hand, corporations and recruiters who have responded to the need to personalize the job selection process are better satisfied with the MBA's they are hiring. The techniques different companies have used to personalize their MBA selection process are numerous; some examples follow:

(1) More and more companies are freeing up and sending operating types to recruit as opposed to personnel types; without a doubt they are the most successful recruiters of MBA's. First they have a better understanding of the characteristics an individual should possess to cope and to flower within their company and its environment; additionally,

they offer the MBA tangible insight into the type of individual he will be working with at the recruiter's company.

(2) Some companies take the time to meet students on an informal basis rather than simply on an interview basis in the corporate offices or university placement facilities. Oftentimes this takes place in a series of informal cocktail parties where a group of interested students meet with a group of operating managers in local hotel suites. The most productive of these sessions are characterized by frank responses by the businessmen on the pros and cons of employment with their company that tend to relate to the students' expectation of what a career at XYZ corporation demands and offers.

(3) Good recruiting is increasingly becoming good listening. Here I'd like to use an example. A few days ago, I spoke to a young lady in our MBA program who in my opinion will be one of our most outstanding graduates in the years to come and who is incidentally president of the MBA student body this year. She had just returned from Washington, D.C., where she had gone for a series of job interviews. She was offered several different opportunities and I asked her how she made her final decision on which opportunity to accept. What she told me impressed me immensely. She said she decided to accept a job at the Office of Management and Budget because when she went for an interview with the division head under whom she would be working, he began by asking her to take as much time as she wanted in telling him about herself—her background, her interests, her goals. For half an hour he sat quietly while Susan talked about Susan. Only when she was done did he begin a discourse on OMB, about his division, and about the job available. And as he spoke about his needs and the demands of the job, he did so from the perspective of the pros and cons of what he was offering in terms of Susan's strengths, interests, expectations, and goals.

By way of a conclusion then, I think the only thought that I would like to leave with you is that the next generation of managers is increasingly attempting to understand and resolve the complexities and uncertainties of their world by looking first into themselves. If you want to communicate most effectively with them, it is my recommendation that you, as individuals and as representatives of your respective companies, begin there also.

QUESTION AND ANSWER PERIOD

Q. *Can I ask why you left the business world you were so well prepared for, to go back into the academic life?*

A. *I think the reason that I changed was that I really just didn't think I was going to pay the price of what it takes to make it in the corporate world. I think you need two things to make it in any job. The first is the proper technical and personal talents. The second is the proper attitude—more specifically, an individual's priorities in life have to be consistent with the demands of the job. In my own case I came to the conclusion that my personal priorities in terms of allocating time, life style, and interrelationships with people were not consistent with what I perceived it takes to make it in the corporate world.*

Q. *In one specific area of business, that is, the marketing and selling end, considering the need for qualified applicants from people in the business school and elsewhere to get into marketing and selling, I think it's fairly evident that in student bodies around the country, studies have shown that marketing and selling have pretty low reputations. I wonder if you would care to comment on that, what the students are saying about how we in the marketing end of business can attract these students to come into an exciting and creative area?*

A. *In terms of selling, I think you are right, this is not an area of keen career interests for MBA's and I think it's very understandable. To be a good salesman or even sales manager, in my opinion, does not take an MBA education. It takes a wealth of people skills as well as a certain "street intelligence." People with these interests and skills are not necessarily attracted to MBA programs and it is my experience that the few that are, are not necessarily interested in returning to a functional area that more often than not does not require or reward them for utilizing the more generalized management skills that they have invested two years in business school learning and integrating into their personal modus operandi.*

With respect to marketing, I don't agree with you. Each year a sizable portion of our graduating class go into marketing firms or into marketing oriented jobs. In fact, marketing curriculums rank alongside finance curriculums as among the most popular on most business school campuses. In other words, I think most MBA's would agree with you that marketing offers an exciting and creative career. Stanford's experience with marketing companies is that the ones that have been successful in harnessing MBA talent are those that have made a comprehensive commitment to MBA recruitment and development.

Q. *I was very much taken with your idea of not sending personnel types out. Do you find that when you send the operating fellows, the ones that may be three or four years in the business are the more resultful ones, or the older ones?*

A. *I'm not sure that the age of a recruiter is a key factor. What is important is that the recruiter is representative of the type of individual that the prospective employee will be working with in the years ahead and that the recruiter be a good listener in the sense that he can respond to the MBA's questions and anxieties in a mutually constructive manner. Again, I would send good operating people out, and again, I'd send good listeners out. I hate to keep beating the same drum, but that's essentially my message.*

Q. *I was intrigued with your comment that in leaving business for academia, you first felt that you just didn't want to pay the price that business demanded. And I wondered in what context you made that statement and what kind of sacrifice you were unwilling to make, that you thought business called for, that you don't find in academia?*

A. *That's a fair question but to give you a complete answer I'm afraid would require more time than any of us here are willing to take today. Briefly and superficially I think a fellow must put a high personal priority on prestige, power, and money as well as the tangible and intangible rewards that these three items offer. For these items are, it appears to me, the basic reward structure of the corporate world; now there are certain others—such as a sense of teamsmanship in building something bigger than any individual, and an opportunity to help other people develop their own talents which I put a high priority upon but which are also available in other careers like educational administration.*

What happened to me, I believe, during my brief exposure to the corporate world, was that I came to the conclusion that my needs, in terms of prestige, power, and money, although certainly not nonexistent, were not strong enough to offset my needs for time—time with family, friends, non-career interests, etc., as well as my needs for living a life style that takes advantage of all the wonders of just being alive. For example, I can't tell you how much meaning my bike ride to school across Stanford's beautiful campus, in the shade of eucalyptus and redwood trees, has to me after two years of stumbling down Fulton Street in Brooklyn on my way to work.

Business and the Press

Robert Lubar
Managing Editor
FORTUNE

If Mr. Engman's in the room, I'm going to submit a case for exaggerated advertising.

Not very long ago, the people who took care of buildings were known as janitors, and the press was known as the press. Now, as you all know, janitors are called custodians, and the press is called a communications medium. I don't know what the heroes of *The Front Page*—those doughty, cussing fellows back in the 20's—would have thought of this, and I'm not quite sure I know what to make of it myself, but at least it does entitle me to come to a communication conference.

As a matter of fact, I guess I may be the only one here who represents the editorial side of the press. That may or may not give me an extra perspective. My mission today is to talk about a communication failure: the relations between business and the press are not good. As a matter of fact, with pardonable exaggeration, I might describe them as two scorpions in a bottle, each of which is capable of inflicting mortal wounds on the other. The press has a big stake in a healthy business system. Lew Engman explained before why the press thrives on and needs the advertising that's provided by business, and we all know what happens in a recession. On the other hand, business needs the press, too, because it needs to get across what it's like, and the public forms its impression from what it reads. It forms this impression from what it reads in advertising. It also forms its impression from what it reads in the news columns of papers, and the impression the public is getting of business is not a very accurate one, I've got to admit.

Now, when I talk about the press, I want to except *Fortune* and *Business Week* and the *Wall Street Journal*, and other publications that are read primarily by businessmen. What I'm talking about is the general newspaper and magazine and television media, which talk to the general public. From them, the general public is getting a distorted, oversimplified idea of business, and it's getting information, in many cases, that is just plain wrong.

Now, why is this? A lot of businessmen I've talked to have a very simple explanation. They say that journalists are, after all, just a bunch of antibusiness fellows who come out of liberal arts colleges, Ivy League colleges, where they have been exposed to Marxist teachers, and they don't believe in the capitalist system, and how can you expect them to give an accurate view of business.

Well, there's a little bit of truth to this; the fact is that the higher education system of our country is not exactly conducive to very cool thought about the market system. Many of the professors who teach fledgling journalists are prejudiced against business, and the people who graduate from those schools come out with some sort of prejudice.

Beyond that, for many centuries the people who deal in ideas, abstract thoughts, the people who write and think, have had a feeling that there's something grubby about commerce. This goes way back to the Middle Ages, and a little bit of that has stuck on, and it's reflected in the press.

But that doesn't explain it wholly. A lot of newspapermen really come to their jobs without any ingrained conscious prejudice, but they're looking for a story. They have merchandise to sell, too. They've got to wrap it up in a package which makes it readable. They look for the simple way to do that , and the simple way to do that is to dramatize, and the simple way to dramatize is to look for somebody who has done something wrong. It's the old cops and robbers thing. The best newspaper story is a crime story. It's easy. There's a wrong-doer, there's a good guy, there's a victim. And in too many cases, it's simple to try to fix on business as the bad guy doing something to the good guy.

Beyond that, there's a tremendous misunderstanding of what profit means. It's a funny kind of thing. It's not a Marxist theory about profit. It's just a theory that profit is gravy that somebody is sucking out of the system. The ideal business system, to many reporters and many other intellectuals, would be one that grew, produced more goods, kept lowering its prices, and broke even. They don't want business to take a loss.

That ideal system doesn't exist, but it's what is reflected in the press. Whenever anybody makes a big profit, it's considered equivalent to taking a bribe or embezzling some funds out of a bank.

Now, what can be done about this attitude? Well, a lot of businessmen, again, say the best way to take care of it is to drum the press out of business, or get rid of these guys, or just denounce them. But that isn't going to get us anywhere. I think the problem is, how do you make the press see the light and do the job it's supposed to do, reflecting the way business really is. And that's a tough one.

How the Newspaperman Views Business

I think we could begin by trying to imagine the viewpoint of the newspaperman himself. How does he look upon things? Well, let's see how he looks upon the top executives of business. To him, the top executive of a business enterprise is the richest man around, by far, a man who makes a salary in the couple of hundred or five hundred thousand level, who rides around in private limousines, his private jet, comes to places like this to relax. He's utterly aloof, he never gets around, you never see him in a bar, he's surrounded by batteries of secretaries, aides and so forth. He never really pals with the newspaperman. Remember that in almost every other field the newspaperman can get on very friendly terms with the people he's covering. He can talk to the top ball players, the top actors, the top politicians—all of them can be his friends, but he can never be the friend of a high executive in a corporation, and that's a big handicap. It

means that he's dealing with a remote, aloof figure, and when you don't know somebody, you're more apt to take a crack at him than if you do know him and understand him.

So one of my recommendations for dealing with this very bothersome problem is that somehow or other, the top executives should come down out of the clouds and start really getting across their personalities to the newspaperman.

Now, the press will appreciate a good story that's given to them, even if their conception of a good story is something quite different. And there's a lot of drama in business. There's a human story. There are a lot of problems that corporations have that can be turned into very, very moving stories. And again, what I think business fails to do is convey that this is a well-rounded human enterprise.

There's a bit of a cover-up in corporations. They admit mistakes, they have to, they have to tell their stockholders about it, but they do it in a grudging way. They do it as if it were some real reflection on the record, instead of doing it as if it were part of the problems of doing business. Not everybody's perfect. Everybody has problems. Corporations can have misfortunes. There may be natural and unnatural disasters that befall them, there can be mistakes. There can be predicaments, there can be difficulties in dealing with government, with foreign markets, and so forth. These things are not sins, and they oughtn't to be concealed, they oughtn't to be regretfully admitted. They ought to be fully, openly admitted and made into stories. The press would seize upon them—in the beginning probably slash around for villains, but eventually if this were kept up the press would begin to understand it.

Now, I hate to blow my own horn, but *Fortune* does this sort of thing. We are a good example of what can happen when these things I've been talking about are done right. We do get to know the top businessmen. We don't know them as friends, I don't mean that—some of us do. But I mean, we see them a lot, we talk to them, we talk to them quietly, we hear their problems. We try to write about them as if they were human problems and human dramas. We're not trying to find villains.

I think there's no reason why just a magazine for businessmen needs to do this. Newspapers can do it, TV can do it, everybody can do it. But it requires the cooperation of business.

The truth is never easy to come by, because the truth is, by its nature, extremely complex. You can't just put down the truth about any business or any industry in a few sentences in a press release. It requires a lot of work to figure out what the truth behind all the figures and things is. The press is poor at handling complexity. It looks for simplification wherever it can find it, and it needs help. It needs to be led by the nose through these complex details until it understands them. When it understands things, it can reach a much higher level of truth than if it simply reflects what it's told. It tends to put down what it's told on a day-to-day basis with no perspective of what happened last week or last year. But it needs education and education in the field, education from you people, from your bosses, and all the way down the line.

And that way, I think, is the only way out of this terrible predicament we're in. Business is the activity in this country that involves more people, more of their time, than anything else, than entertainment, sports, anything else, and yet it's the most poorly covered and poorly understood institution we have in the country.

I think it's extremely urgent that we get onto the business of correcting this situation.

QUESTION AND ANSWER PERIOD

Q. *I think your comments are well taken in a number of areas. What we continually run into these days is a dual phenomenon of the business press being swamped with work, being deluged with information and being, themselves, very inaccessible. When you try to get your message across, you find that they really haven't the time to find out about us to a great extent, or if we get an opportunity to work with them, often as not, the time and effort to conduct that kind of activity never gets into print. That's one point.*

The second point I'd like to make is the tendency of many business reporters to come into a business situation with a predisposed idea of what it is they're looking for, what they're going to write, and no matter what you say to them, no matter how you work with them, this predisposition usually comes out.

A. *I'm afraid I think you're right. If I were talking to an audience of business reporters, I would have given a different kind of message. They do come in with predisposition, they are swamped, and so forth. I think the only thing that can be done about it, and it's a painful job, is not to wait until the crisis situation, not to wait until the event occurs that you want to get across, but to cultivate, when things are quiet. Get the business reporter into your confidence when you really haven't something hot to tell him, so that when you do have something hot to tell him, he has a better chance of giving you an understanding ear. But I do think there's a tremendous deficiency in quality of business reporting. I think something has got to be done by the journalists themselves, primarily.*

Q. *Mr. Lubar, you mentioned the "rudeness" of business. We have numerous occasions where we have a business reporter call us up, maybe from a paper, or a* Business Week *fellow, and they want to talk with somebody at the very highest level on some problem of general interest in the news, and we go through handsprings to make that person available to them. And time after time after time, we make them available and we never see any result in the press. This creates its own internal problems. The next time I go back to my controller and try to get him to talk with somebody, he says, well I've talked with him several times before and I've never seen any evidence that what I said has made the slightest difference. I think we've got double-talk. I think we've got a problem of the business press not recognizing the sources of their information, so the sources get discouraged.*

Would you care to comment on that?

A. *I suppose that's true. I guess there are many instances when that happens.*

What I was trying to say, though, was not that people were unavailable. I think that high officers of corporations are made available. They are made available mostly to the business press. I'm talking about the general press, where I think they're not made available enough.

What I meant was, not that they should be made available to be interviewed, but there ought to be some conscious attempt to get these top people down in a kind of social way to meet the press. Now, that's difficult, but it's a long process, and it isn't going to show up in print the next day, with a glowing story. I don't mean that. I mean, if you really want to get the press around, well, give a party. Get reporters and the chief executive together and let them chat for a few hours, from time to time. That kind of thing might help. As I said, it would break down that barrier of one man down below looking up at the top of the castle and never seeing the man in it.

Q. *Many companies have appointed ombudsmen, or consumer relations directors. Do you think they have been*

effective in portraying the point of view that business is trying to do a job?

A. *I think it's a bit early to tell. We haven't been able to determine whether they have been effective or not, over the last couple of years. And I don't know what the result of this has been. In principle, I think it's a very good idea, but I don't know whether consumers are taking their complaints to this fellow. I don't know whether this fellow has any weight back in the office. I just don't know yet. It's something we ought to look at.*

Q. *Would you care to comment on how you feel about dealing with representatives of public relations agencies versus dealing with representatives of corporate staff?*

A. *I think that there's a very genuine value in certain circumstances, in the press dealing with public relations agencies, but it cannot be the whole meal, and if the press gets the impression that the only way business is dealing with it is through public relations agencies, it's going to be even more distrustful than it already is. It needs to get at the real thing from time to time. You can pick up a lot of useful information, it can save a lot of time for the corporation, but at certain points you've got to open the curtain and say, here are the real guys who work for the corporation. Otherwise, the press is going to be turned off.*

Q. *Bob, I wonder if you are agreeing with the diagnosis that part of the problem with the general press is that public newspapers particularly don't count business news as important. Stock tables, yes; stock market summary, yes; the occasional earnings report, sure; but in terms of doing significant, careful, hard stories about this, they don't.*

Now, is there any way of getting that particular donkey's attention? What do you do to convince an editor or publisher that the news is worth reporting? I'm sure the level of contact could be useful from the corporate point of view to the press, not just to making officers of the company accessible to journeymen reporters, but I think to make editors, publishers aware of the fact that business news is not very well reported in 99 newspapers out of 100.

A. *Well, you're right. The press doesn't consider business important, but more accurately, it doesn't consider it interesting enough, and the press is, after all, as I said, putting out a product and they want the product to be bought by the readers. And I think the answer there is for business to try to make its story more interesting.*

That route lies through greater candor, greater imagination in projecting a story. After all, there's nothing intrinsically very fascinating about the fact that a corporation keeps raising its earnings per share 15% a year. If it just puts that out and expects the paper to come out with a six-column banner headline, it's deluding itself. But it can make that figure come alive with a lot of human dramatic detail that might make that story quite readable, and then editors will reach for it.

It's a long process. The real prejudice of editors and reporters is not that they don't like business, but they really think it's very low on the scale of reader interest, and that's a tragedy, because I think business is one of the most fascinating stories that there are. It really is more interesting than politics when you come down to it, especially the way politics has been going lately.

But business doesn't try to make it interesting. It tries to make it cut and dried. It wants to have a simple story of great success. It doesn't want to tell about its failure or its problems, and I think it has to start doing that to capture the attention of the editor.

Q. *What about business news reporting on television?*

A. *Well, speaking from a very prejudiced point of view, I think television has a poor format for presenting anything beyond absolutely the simplest kind of news. It's a very poor medium for explaining anything that requires any explanation at all. Still, television tries, and does special programs and documentaries and things like that, and they deal often with business, so we can't give up on television entirely. The ordinary television news broadcaster is going to take what he gets off the wire services and is going to make it as dramatic and simple as possible, and that's too bad. One of the problems in our whole country is that our information does depend so much on television. I suppose 80% of the people get all their news from television, which is by itself a very sad situation, and it worries even the television people.*

Q. *I wonder if I could take the liberty of changing the subject, for one quick question. Back in January, your publication was most bullish on 1974, and I wonder how you feel now, in April, about the prospects for this year and the coming months.*

A. *Well, if I may correct you slightly, we were most bullish in a relative sense. I mean, as it looked at that time, we were in the bullish end of the scale. We still said it would be a year of slow growth and drag from energy problems, and so forth. We feel now that we were vindicated, that we are now in a recovery from a very shallow slowdown.*

However, the big question that we're worried about now, and the answer should come in in the next three months or so, is what's going to happen with inflation. It will either run wild forever, or it should stop. It may start coming down, and there are good reasons why that ought to happen, but if it doesn't, it could go absolutely out of the window, and we're into a new ballgame, and we're really at that stage. But as far as economic activities are concerned, all the fears of 8% unemployment and recession that you heard in November and December, we disregarded that and we, I think, were right. We were quite lonesome at that time, we really were.

Q. *If I may return to the earlier subject, this is one that concerns me considerably, and that is the education of business media.* Fortune *does such an outstanding job of presenting things accurately that it is simply unmatched in the press.*

It seems to me, you might be able to take the initiative to try to upgrade the business press generally. Maybe you should have a Fortune Award for the most interesting business story that appeared in a newspaper, for instance. And I wonder, do you merchandise your monthly edition to the business press?

A. *Well, my colleague here is the man to talk to about that. He does that and does a good job at it, and one of the reflections of that is that the business press uses us a lot in a funny sort of way. They don't credit us often, but you see* Fortune *stories appearing in slightly different versions, or pieces of them, all over the place after we've done it, and we regard that as a compliment. As far as our activities in trying to upgrade the standards of journalism, I've thought about that from time to time. It's a dangerous thing to get into because you look arrogant and so forth, but I don't know, maybe there is something to that. It's an interesting idea.*

Q. *Do you know whether the business editors of the major newspapers across the nation see* Fortune*?*

A. *We make an effort. We can't send make-ready copies to every single business editor and that's why we rely heavily on the UP and AP, but we do certainly cover the major papers that we can physically get the copy to. That would be principally in the East and we rely on the AP-UP for the rest of the country. And even television and radio have been quite active lately in doing it. We also send them a preview. That covers the whole country. So a preview of upcoming* Fortune *articles is usually in their hand, and then they can either look for them or let us know and we can send the articles, if there is a specific area they want covered.*

Communications in Washington: Myths vs. Realities

Dr. Charls E. Walker
President
Charls E. Walker Associates, Inc.

Tonight I'd prefer to talk to you about the current Washington scene—such matters as the economic and tax developments affecting business. But the powers that be assigned me another subject, "Corporate Communications in Washington," and I talked them into adding three more words: "Myths vs. Realities."

Believe me, this is *not* an easy subject. But I doubt that any of you underestimate its importance to you, for the fact is that the corporate community is behind the eight ball in Washington. And, if I'm any judge of the future, things are going to get worse before they get better. You and your senior management will ignore these trends at your peril.

Here's my game plan.

First, I want to pose a question: With respect to the nation in general and the business community in particular, are we in—or about to be in—a new ballgame in Washington?

Second, I want to talk about the myths and realities of corporate communications in Washington, giving you my image of what effective Washington communications involve, plus a few words on how to achieve that goal.

Finally, I shall end up with what I think is really the fundamental problem confronting the business community in Washington—a problem that is exceedingly difficult to deal with.

The New Ballgame

Are we in—or about to be in—a new ballgame in Washington? I think so, for several reasons. First, for both short- and long-run reasons, there is taking place (and will continue to take place, regardless of the Administration of the day) a shift of power back from the presidency to Congress. Watergate has been an immediate catalyst, but Congress' loss of power—due more to congressional default than a presidential grab—extends back over several decades, and a reversal of the trend was simply a matter of time.

More immediately, the public is unhappy with Congress and Congress knows it. As a result, congressional reform has been moving along, admittedly by fits and jerks, but moving along just the same. Progress is much too slow—but that's how a democracy works. Good congressional budget reform measures have passed both the House and Senate, awaiting only reconciliation in conference (a giant step toward fiscal responsibility at the legislative level). Moreover, the House has been taking the first hard look at its committee structure since the mid 1940's.*

The results of all this? Budget reform is all to the good and soundly structured procedural form can also be good. But beyond this silver lining lurks a cloud—a tendency for Congress, as it shifts power back from the presidency to itself, to get more and more into legislation dealing with the nitty-gritty of our largely free enterprise system. I am referring to legislation which sets prices better set by market forces, establishes deadlines that require such-and-such an industry to do so-and-so by, say, December 31, 1978, and so on.

Certain specific actions notwithstanding, Congress is *not* dumb. It consists of a rather large collection of pretty smart men and women—smart enough to know that a committee of 535 cannot run the federal government, much less the economy as a whole. So, the question is, who would carry out the specific congressional mandates that are coming down the pike?

I doubt that it will be the Administration of the day, whether of Mr. Nixon or his successors. Instead—and this is my second conclusion—I see much more power for the General Accounting Office (which started out as auditor for the Congress but has acquired more and more administrative functions over time) and the "independent agencies."

I have grave reservations about the "independent agency" approach to running the federal government. Except for the original appointments, most of the agencies are theoretically independent of the Administration—headed by the only man in the whole Executive Branch who must run on his record or promises in a public election. Moreover, such agencies are at least semi-independent of the Congress, whose members are also elected.

Two myths prevail concerning "independent agencies." First, some believe that by making the agencies "independent," politics can be taken out of their decisions. To that I say a short and loud "Phooey." So long as government decisions have political impact—and almost all of them do—political pressures (whether from the presidency, from the Congress, from the regulated, or the so-called "public interest" spokesman) will come to bear on the decision-makers.

The second myth about the "independent agencies" is that they inevitably become the captives of the industries they regulate. Maybe that was so in the past, but it doesn't jibe with my experience. Quite the contrary, the big danger that I see is that such agencies are in greater danger of becoming captives of their staffs. Partly this is because the staffs are entrenched and hang around for years, regardless of changes in Administration and attitudes; partly because the caliber of presidential appointments is not always what it should be; partly because of the relatively rapid turnover of political appointees of federal commissions; and partly because the history and size of the regulatory agency automatically produce cumbersome, time-consuming procedures, ensnared in miles of red tape.

Moreover, the staffs of the "independent agencies" are frequently imbued with strongly held views about the market system and how—in their view—it should work. Recently

*By action of the House Democratic Caucus, this reform package was at least temporarily shelved, if not killed, after these remarks were made.



DR. CHARLES E. WALKER

I was shocked to read that a career civil servant moving up into a key position in one of the premier regulatory commissions allowed himself to be quoted to the effect that "big business has opposed every reform proposed in the last century." That statement is simply not true.

I am also concerned as to whether the shift of power back from the Executive to the Congress may make it more difficult to get good political appointees to come to Washington. This remains to be seen. But the combination of congressional grilling and the tendency of both "public interest" spokesmen and the press to ask each new appointee: "Are you a crook? Else why would you want to come to Washington, except to line your own pockets, now or in the future?" —well, this bothers me. I like to think there are just as many men and women *outside* government who are deeply and genuinely concerned with the fate of our nation as there are

who have chosen careers in either elective politics or the civil service.

There are other reasons I believe we are in—or entering—a new ballgame in Washington. If Richard Nixon is impeached for largely political reasons, then we will have moved dangerously close to the parlimentary "vote of confidence" arrangement. The validity of a four-year presidential term lies in the protection against temporarily unpopular decisions—a validity that has been ratified by history.

In addition, I am disturbed by the trend to what I call "plebiscite government," as opposed to the basic republican idea (note the lower-case "r") of electing good and trusted men to represent and be supportive of the best *long-run* interests of their constituents. I wish I could conclude otherwise, but the state of public understanding of economic issues (more on this later) gives me great concern about the implications of the view that, in effect, each Senator and Representative should act as if he had a computer terminal in his office which, when consulted by the member, would guide his vote of the day according to the then existing wishes of a majority of his constituents.

I simply do not believe that that approach is consistent with viable self-government.

Yes, we *are* entering a new ballgame in Washington. I can't look into the crystal ball and say exactly what it means to you—except that, with all of the misunderstanding about the role and nature of business operations in this country, it's going to be much more difficult for business to communicate effectively in Washington. And it's hard enough now.

Myths vs. Realities

In the public image, "Big Business" (whatever that means) runs the country. "BB" (for "Big Business") on the Washington scene is thought to be monolithic, highly sophisticated, and highly effective. What are the realities?

The first reality is that, within BB, there are splits all over the place. Business trade associations are split; industries are split; and companies within industries are split. You've frequently heard of the "oil lobby"—but in reality there is no such thing, at least in a monolithic sense. The majors disagree with the independents, the multinational with the domestic firms, and so on.

As to sophistication in dealing with Washington problems, the reality is that the situation in the business community varies from the sublime to the ridiculous. Much like the girl with the little bitty curl—when they're good, they're very, very good; but when they're bad, they're horrid.

Please don't get me wrong. When I refer to "sophistication" on the Washington scene, I am definitely *not* referring to the type of campaign-financing hanky-panky that some businesses succumbed to for the Committee to Re-Elect the President. I'm talking instead about a fundamental understanding of how the federal government really works, the nature of the political process, and the many strong and diffuse forces that come to bear on both elective officials and bureaucrats. I'll come back to this subject shortly.

It follows from all this that business in Washington is not nearly so effective as the general public believes, or as it could be. And when it comes to an eyeball-to-eyeball, knock-down, drag-out fight with labor on the floor of Congress, labor will win almost every time. There are fewer splits among the major labor unions. They are sophisticated. They are effective.

Effective Washington Communications

Here the prime requisite may be painfully obvious to you, but believe me when I tell you that there are many corporations that rate failing marks when it comes to one simple fact: Top management has to recognize the importance of Washington, understand what makes it tick, and be dedicated to coping with the problem. The men in the executive suites and boardrooms have to understand that sooner or later—and probably sooner—what happens in Washington is likely to be just as important as the traditional functions of production, finance, and marketing. If the "Washington hands" don't have this type of understanding and support, the corporation won't get off the ground.

Obvious, you say? You'd better believe it's not. Here are some common misconceptions that I have picked up from businessmen in recent years.

"Politics is inherently dirty and I don't want to get involved." "Any politician or bureaucrat who disagrees with my view, or that of my company, is either stupid, intellectually dishonest, or both." "Lobbying is bad and most often counterproductive." "Money makes the mare go in Washington." "All of the 'action' in Washington takes place in smoke-filled rooms." "All you need in Washington is more sound businessmen in the government—somebody who has met a payroll."

Let me comment on each of these points.

First, politics is *not* inherently dirty. It has its own code of ethics, a code that is generally adhered to. Admittedly, as Mr. Dooley said, "Politics ain't beanbag," and the rules of the game differ from those of the playing fields of Eton. But rules there are and they're generally followed.

Politicians are human beings and, on balance, are just about as good statesmen as their constituents will let them be. The forces that bear on them are many, diffuse, and frequently very intense. Disagreement with a captain of industry may in some instances be motivated by a basic mistrust of the free enterprise system, but more often than not it is based on honest disagreement.

Lobbying is not per se bad—it's how it's carried out that's important. It is a perfectly legitimate function in our participatory democracy and can be very productive. Money doesn't make the mare go in Washington; power and dedication are really the name of the game. And about all I've ever seen emerge from the proverbial smoke-filled room is a group of people with headaches and smarting eyes.

As to more businessmen in government—a suggestion we heard more *before* the Eisenhower Administration than afterward—there is a long record of dedicated and effective service over the years. But it cannot be said that the track record is uniformly outstanding, and probably the most important reason is that running a government is so much different from running a business. The high official of a corporation is accustomed to making a decision and then telling someone to carry it out—and it's done. In government, the making of the decision within a given department is only the first step in a long line of research, documentation, persuasion, cajolery, attention to protocol, and the possibility (if not probability) of backbiting and bent noses. Sometimes this process has to be carried through the Executive Branch, on through the Congress and, if a piece of congressionally passed legislation is opposed by some of the President's advisers, carried through again in working to get the Chief Executive's name on the bill instead of a veto.

It's not easy, and the processes are considerably different from those of a well-run business organization. I am not at all convinced that corporate experience, however effective the given executive might be, is the best training ground for government service.

Needless to say, top management support of an effective

Washington relationship cannot stop there. It has to be spread laterally or upward to the board of directors (depending on the relationship there), downward throughout the organization, and if possible out to the stockholders and in some instances customers. If this is done, the given corporation will be able to mobilize a tremendous reserve of talent and good will, when and if necessary.

A good Washington operation—whether full-time or part-time, a law firm or a consultant—can be of considerable help. But there is no strict rule here, and the exact form of the organization chart is not all that important. What is important is that the Washington function be wired in very closely to top management. The role of the Washington function is eyes, ears, communication, and action. Filtration of the chain of command through too many layers causes delay and ineffectiveness.

Looking back at the experience of many corporations over the years and the oil companies more recently, it seems to me that every business should charge one of its top officials with the task of keeping on top of company developments that are likely to affect the Washington scene, and vice versa. This person should be highly articulate, skilled and experienced in dealing with congressional committees and the press, and backed up by an expert staff and access to all aspects of the firm's operations

This latter suggestion is a tall order. Looking ahead, my suggestion is that every strong potential candidate for top management spend a couple of years or so on the Washington scene, either as part of the company's Washington operation, or working in government itself.

If you're not already doing so, consider devoting some time in your management seminars to the subject of government and business in general and your firm's governmental problems in particular. Many corporations are well down the road in this respect. Others haven't even started

The Long-Run Task

So much for the easy stuff. If you do some or all of the things I've suggested (and many of you are doing much more), then you will do as well as, or better than, your corporate brethren on the Washington scene. But I'm not sure that what this all comes down to is much more than a holding operation

This is because the fundamental problems faced by the business community in Washington are not soluble in Washington alone—they extend throughout the nation and involve not just a lack of understanding of what business is and how it operates, but outright misunderstanding of business motives, goals, and operations

What I am talking about is economic illiteracy—not on the part of the people in Washington, but throughout the country. For a variety of reasons, economic sophistication in both the Congress and the Executive Branch has increased tremendously since World War II. And, as I said, most members of Congress are just as good statesmen as their constituents will let them be.

But what do the constituents believe? According to the polls I see, that 25 to 30 cents of every sales dollar goes to line the pockets of the owners of business as profits—when both you and I know that the rate of after-tax profits on sales varies greatly among industries (less than a penny per dollar in supermarkets) and averages a nickel or so per dollar.

How much public understanding is there of the role of prices in regulating consumption relative to supply, and vice versa? More, since the baby-chick syndrome of last summer, but still not enough to keep Congress from lurching toward price fixing at all too frequent intervals.

How many voters understand the role of investment in new and modern plant and machinery in creating jobs, fostering growth, controlling inflation, and enhancing our competitiveness abroad? How many recognize the impact of business taxes on such investment? And how many understand the critical role of rate of return on stockholder's equity in attracting capital into productive uses? Not many, I assure you.

What I am talking about, of course, is the crying need for a good system of economic education in this country. I'm not kidding myself. Even with such a system, I doubt that citizens will very often vote against what they consider to be their fundamental short-run interests. But they can come to learn the costs of doing so and the "trade-offs" involved ("there ain't no such thing as a free lunch"). As a result, the Congressman who opposes that which is politically popular in the short run may not be automatically committing political suicide in the process

When it comes to economic education, the record of the business community is lousy—but you're not alone. Trillions upon trillions of words have flowed out of speeches at stockholders' meetings, annual reports, advertisements, and public appearances by corporate officials. These usually don't hurt and often help. But economic education is a job for the education system. As the educators say, it has to be ground in via "K through 12" (kindergarten through high school). And believe me, it is not the subject of economics that is dismal; it's how we've tried to teach it over the years. Economics can be made interesting and informative at *any* grade level. And, insofar as the survival of our enterprise system is concerned, it is just as important as—indeed, more important than—the three R's.

One of the primary reasons for business' failure here is that its approach has been too splintered. Now, with the Business Roundtable's ringing endorsement of the Joint Council on Economic Education as the single best approach to the problem, maybe the business community will get on board. I hope so.

The media deserve a few words of criticism also. The quality of written reporting of economic and financial events has improved greatly in the past couple of decades. Economic reporting on TV has improved *marginally* in the past few years. But neither the written nor the electronic press is doing a first-rate job in educating and explaining. Frequently misunderstanding and confusion are fostered rather than reduced. I am making no accusations of bias, and I believe very strongly in the First Amendment. But it never was, or never should be, an excuse for incompetence and ignorance in dealing with so vital a subject. (I have some constructive suggestions to make in this respect in the not too distant future.)

Perhaps I've raised more questions than I've answered tonight. But I've really tried to say three things

First, there are fundamental changes occurring on the Washington scene, changes that you will ignore at your peril.

Second, if you reject the myths and confront the realities of communications in Washington, you can do an effective job.

Third, all of that may well be just the tip of the iceberg. Economic illiteracy is your No. 1 problem, both in the short run and in the long run. I urge you to put at least part of your attention and effort on solutions to this problem.

I can't promise results on the bottom line this year or next, but you may well see the very survival of the system that makes that bottom line possible.

Financial Communications and the Analytical Haruspex

Robert P. Colin
Executive Vice President
Faulkner, Dawkins & Sullivan, Inc.

There is one analogy between the haruspex* of Roman times and the modern day analyst that I find disconcerting and that is that the haruspex has drifted from the scene. Hopefully the future of the securities analyst is a more promising one since it is the profession in which I find myself. We do tend to wonder about the future of the profession because of events occurring in Washington such as: (1) the ruling on what is "inside information," and how such information should be handled if and when received; (2) the commission reductions already in effect as well as the potential impact upon profitability when and if commission rates reach a fully negotiated stage.

You may have noted in today's newspaper that there were 216 new lows touched yesterday on the New York Stock Exchange. Among the issues trading at their 1974 lows were such prestigious concerns as Aetna Life, American Telephone & Telegraph, Dun & Bradstreet, a number of the nation's largest banks such as Chase, Continental Illinois, and First of Boston, Coca-Cola, Champion Spark Plug, IT&T, and Philip Morris. I am a little bit surprised that so many banks are on the list in that all have recently increased the prime lending rate and profits are at peak levels.

With regard to this new low experience, all that I can say is that if your company's stock is not yet on the list, don't fret; before the market decline has run its course yours probably will be included. I would like to share one thought with you as to how to determine the market bottom. Although not exact in each of the major declines of the past decade—1970, 1966, and 1962—the statistics were sufficiently consistent to indicate market troughs. The basic statistic is the ratio of daily new lows to total issues traded on the NYSE. In the market decline of 1970, there were five consecutive trading days when new lows reached 30% or more of total issues traded. On May 26, 1970, we experienced the fifth consecutive day when the percentage was above 30% and that day coincided with the low of the Dow Jones Industrial Average at 631.16. Although the phenomenon of five trading days when the ratio of new lows to total issues traded was 30% or above did not coincide exactly with the DJIA low in 1966 and 1962—on one trading day in 1962 the percentage reached 74%—at the exact low price point for the average the percentage of new lows to issues traded did not reach those earlier levels. So I think that one could argue that the average stock achieved its low slightly before the DJIA bottomed out. Currently, I think the ratio of new lows to total issues traded is about 12%.

Listening to a story about a stock these days, whether it is one promulgated by the analyst or from corporate officials such as yourselves, is about as exciting as jumping off a pancake. In other words, people are just not too interested in the sales message. They have lost a lot of money listening to similar stories and investing in these securities, as you undoubtedly are aware. Moreover, they are making a lot of money in other things: things such as commodities, or real estate; art is providing the investor substantial capital gains; other interesting items such as stamps or coins are in vogue. Other items that I don't quite understand—antique duck decoys and ceramic circuit breakers—are proving to be very valuable and are rising in price. With respect to the last, people have been known to climb telephone poles to get those.

So again, this is not a time when many are eager to listen to either your story or my story. Perhaps this is sobering knowledge to us all. I have been in the securities business for 22 years now; when I started, stocks were selling at 6, 7, and 8 times earnings. I worked for the man who broke down the ring of silence surrounding IBM at the time. They would not let anyone discuss operations and prospects with management. This man went around visiting the various plant locations of the company, talking with the managers and others, and came back to write what was then the best analysis of IBM that had yet been done.

Corporate communications have come a long way since that time when there were no financial public relations officers on the staffs of corporations. Annual reports were not as explicit in detail as they are today; the Analysts' Society meetings were held in a dimly lit restaurant which offered tacky food, and hence they were not well attended.

Twenty-two years later and after the expenditure of much effort and money on corporate and analytical communications by both industry and the investment fraternity, we are still looking at stocks selling at 6, 7, and 8 times earnings.

Measuring Industry's Value

I want to believe that American industry is more valuable than those multiples would indicate. And that there is value in what you as corporate officials in the area of communication are seeking to accomplish. Judging from the dismal P/E statistics, it would appear that neither you nor I have totally answered the needs of the investor. This is disappointing, particularly in view of the fact that American industry is providing a 14% return on investment. Moreover, to the extent that a company reinvests a portion of that 14% it earns—which it calls net income—back into its business to earn a subsequent return on that incremental investment, the common stockholder is provided an opportunity to achieve growth.

I don't know whether all of you followed this line of comment and I did want to take you through what is really some simple arithmetic since it does relate to the problem of

*A diviner in ancient Rome basing his predictions on inspection of the entrails of sacrificial animals.



the price/earnings ratio and the value of a company's stock in the marketplace.

All of you are aware of what the price/earnings ratio is or is supposed to mean. Quite obviously, the higher the price/earnings multiple, the more currency—the greater total value—your company has. But I think that few of you—and I include many securities analysts as well—really understand the significance of the price/earnings ratio as it relates back to what a company is earning on its equity (book value). It is important to be aware of this interrelationship because one method that will, over time, increase the total value of your company is to increase the rate of return being earned on equity.

I am sure that all of you know how return on equity (book value) is calculated but we might go over it nevertheless. It is as follows:

$$\frac{\text{Net Income (\$)}}{\text{Stockholders' Equity (\$)}} = \text{Return on Equity (\%)}$$

The return on equity can be expressed also in terms of per share if we divide both net income and stockholders' equity by the number of shares outstanding. I want to relate these calculations to the overall corporate profit statistics as released by the Department of Commerce.

The government has estimated that total corporate profits in 1973 amounted to $70.5 billion. Based upon the 1973 earnings of the Standard & Poor's 425 Industrials and the combined book value of those 425 concerns, their return on equity (earnings ÷ book value) was about 14% in 1973. If we can use this 14% return achieved by the S&P 425 Industrials as the proxy for all corporate industry we have the following statistics:

$$\frac{\text{Corporate Profits ($70.5 billion)}}{\text{Stockholders' Equity ($503.6 billion)}} = \text{Return on Equity (14\%)}$$

Most of you, and we in the financial community, are more at home when speaking in terms of per share statistics. So, for the purposes of simplicity we will divide the foregoing statistics on profits and stockholders' equity, which are in billions of dollars, by 10 billion shares.

$$\frac{\text{Corporate Profits ($70.5 billion)}}{\text{Assumed \# Common Shares (10.0 billion)}} = \text{Earnings Per Share ($7.05)}$$

$$\frac{\text{Stockholders' Equity ($503.6 billion)}}{\text{Assumed \# Common Shares (10.0 billion)}} = \text{Book Value Per Share ($50.36)}$$

Therefore

$$\frac{\text{Earnings Per Share ($7.05)}}{\text{Stockholders' Equity Per Share ($50.36)}} = \text{Return on Equity (14\%)}$$

Now, you might be asking just how the price/earnings ratio relates to the foregoing statistics on rate of return. Although about 50% of the S&P 425 companies sell below book value (and a select few concerns sell for as much as 10 times book value), for purposes of simplification we will make the assumption that this "stock" is selling on the market at book value of $50.36. Since we have the basic statistics required to calculate the P/E ratio—earnings per share ($7.05) and market price ($50.36)—we can determine the P/E ratio as follows:

$$\frac{\text{Market Price (\$50.36)}}{\text{Earnings Per Share (\$7.05)}} = \text{Price/Earnings Ratio (7.14X)}$$

Let's see what happens when we turn the foregoing equation upside down

$$\frac{\text{Earnings Per Share (\$7.05)}}{\text{Market Price (\$50.36)}} = \text{Earnings Yield (14\%)}$$

As you will note in the example where the market price of the stock is equivalent to the book value, the reciprocal of the price/earnings ratio as noted above will be equal to the rate of return on equity. If the market price were equal to 2 times book value, or $100.72, the P/E ratio would be 14.28X but that multiple still would relate back to the company's rate of return on equity (book value) as follows:

$$\frac{\text{Market Price (\$100.72)}}{\text{Earnings Per Share (\$7.05)}} = \text{Price/Earnings Ratio (14.28X)}$$

Or

$$\frac{\text{Earnings Per Share (\$7.05)}}{\text{Market Price (\$100.72)}} = \text{Earnings Yield (7\%)}$$

$$\frac{\text{Earnings Per Share (\$7.05)}}{\text{Book Value Per Share (\$50.36)}} = \text{Return on Equity (14\%)}$$

$$\frac{\text{Market Price (\$100.72)}}{\text{Book Value Per Share (\$50.36)}} = \text{Multiple of Book Value (2X)}$$

I hope that I have not overwhelmed you with equations but I did want to demonstrate the interrelationship of the P/E ratio and the company's rate of return on equity for one very important reason: That is, a most *effective way to increase the value of your company is to have your company increase the rate of return on its equity.* Our studies made since 1958 found that the company which can produce an above average return on its equity will, over time, produce (a) above average earnings growth for itself and (b) above average price performance for its stockholders.

But there are other things that you can do to get your corporate messages across to the investing public, to Washington officialdom, and to the environmentalists and others interested in the welfare of the society. Incidentally, these latter groups are important ones with which corporations should communicate since their negative attitudes and actions can do much to damage P/E ratios and total values of corporate industry.

More Cynics on the street

It is true that there is a great deal of cynicism on Wall Street these days. Some of my corporate executive friends have been bemoaning their treatment by analysts, either the methods analysts are using to question corporate executives or the adverse write-ups these analysts are producing. To me, however, the greatest insult the analytical fraternity can render the corporation is to ignore it altogether. Probably the reason for this display of shabby treatment of corporate executives by analysts stems from either poor stock price performance even though earnings results were acceptable, or disastrous price action where earnings shortfalls have occurred. If the analyst is today more cynical than yesterday, it is because he too has been subjected to criticism by the clients of his company.

Probably the annual report—and 10K—is as good as any publication put out by the corporation. They supply the investor and analyst with consistent information and data over the years whereas other information from management tends to be inconsistent, if for no other reason than management changes. To me the annual report still lacks something vital despite the improved detail and text which it now contains. Somehow the overall flow of corporate activity is not conveyed even though all of the numbers are there. For instance, capital expenditures are significant because these dollars are being invested in facilities which will employ people and machinery to produce products which in turn will create revenues; and after related costs, including depreciation, research for the future, and taxes, the residual flow is net income from which dividends are paid and new investments are made.

A Definition of Image

One of the things that all of us are striving for is an improved image. Just what is image and, if it's good, where can we get some of that stuff? There is no simple answer to the problem but I would define image as the view of a company in the minds of the observers of that company. This is true whether we are thinking of analysts, investors, reporters, government officials, environmentalists. It is important that each and every group have a favorable image of our company.

One of the things that are not a part of image is corporate initialing. I believe that some of the companies that have changed their names to cryptic corporate initials are not too happy with the change. I think that it is one thing for an observer, whether it be an analyst, a Congressman, or whoever, to call a company by its initials; it is quite another thing to force initials down our throats or into our minds. Something is lost. I don't believe Mr. Watson of International Business Machines Company dreamed up the idea of the corporate initials IBM, nor were there similar schemes at General Electric or General Motors. Today the initials of IBM, GE, and GM are synonymous with those companies.

But USI, for example, doesn't have much significance to anyone. This is the case with many corporations that have substituted initials for names.

Among the items that are important in trying to promote the corporate image is a position of leadership. This position of leadership—whether it's in markets served, in a type of technology, in pricing, or in profitability—should be drummed home. For example, Delta Air Lines is considered by the financial community as the best in its industry. It is not the biggest airline; but they were able to say that their airline had the largest net income achieved by any airline in history. I think that this image of profitability has established Delta as the premier airline today, and permits its stock to be accorded a premium multiple.

Dr. C. Jackson Grayson headed the Price Commission in Washington in the good old days when price controls were working. He had a corporate hero: Texas Instruments. An important reason for his favorable disposition toward Texas Instruments was that, as a leader in semiconductor technology and production capability, Texas Instruments was, and is, able to continually reduce prices as volume demand expanded. In Dr. Grayson's mind, and in the minds of others I might add, Texas Instruments conveys a favorable

image as a company able to lead in technology, reduce prices, and expand profits.

Frankly too, a position of leadership and the conveyance of this image to all segments of the public should not be limited by boundaries which are too narrow. I think that one of the mistakes that the steel industry, and U.S. Steel (once the largest producer in the world), committed was not seeing its leadership position in terms of world markets.

Management is of course directly involved in the communication—and image—problem. Mr. Lyet of Sperry Rand more than adequately covered the subject from that vantage point. However, perhaps the point that corporate communication should be a total management effort—from top management on down—deserves reiteration.

From an analyst's point of view, I think exposure to senior management is important. Analysts should feel that they can talk to the president or to the chairman of the board, the man who is developing the operating rationales for the company. And it's not to see him with the idea of finding out what the next quarter's earnings are going to be, but rather to get an idea, a firm idea, of just what his philosophies of operation are all about and how he plans to implement them currently and in the future.

Consistency is Needed

One of the weaknesses that I note is that companies are not telling us enough about overseas operations. Many companies today are deriving over 50% of their earnings from overseas, and analysts just don't really have a firm idea of what is going on. Perhaps something can be done on your part to help the analyst or financial community understand the overseas problems and prospects. I think that coverage of the subject should go further than that, too, because Washington, I believe, feels that the multinational corporation is an odious entity. Moreover, labor also believes that it is somehow deleterious to their welfare. Again, I think, all we're seeing is just what the numbers are, with a little text to go along with the numbers, but we're not really gaining any understanding of what overseas operations are all about.

A discussion of the subject of management's part in the communication equation, in creating this currency of value for the corporation and its stockholders, could go on and on, but in my view there is one overriding theme—whatever approach you decide to take, have it be consistent. I suppose I should add a postscript to the word "consistency" and that is that there should be a degree of accuracy in any forecasts that are made. The failure to achieve a degree of accuracy, particularly in the forecasts, can prove very costly to your corporation and stockholders. And I think this is particularly true if reality comes in below projections, but it's also true, to an extent, if you're missing the upside by a large margin.

I'm sort of hesitant to offer examples of successful programs because my predecessor last year gave some examples, and three out of four subsequently reversed their direction. So I figure I might be wrong on four out of four. But with the benefit of this hindsight or rather despite it, I thought I'd give you some examples of successful communication programs. One has been the First National City Bank, which is now trying to get us to call them Citicorp. The banking business, one can argue effectively, is a fairly prosaic one. But management thought they had a dynamic story to tell, one which basically revolved around 15% earnings growth and the operating strategies in place to achieve it. It was well packaged by Mr. Wriston, and the message came across very well. The result of his program and its implementation was a 50% increase in the price/earnings multiple. Today it is a bank stock that is being categorized as a growth stock.

Syntex—the drug business is a dynamic one, as you know. However, Syntex has been an accident prone company. But their story, again, revolved around sharp earnings increases, and of course wrapped up with technology of new products that are expected to pay off in future years. The result of their program and its communication was that as of one month ago, Syntex carried the highest P/E multiple in the drug industry.

Halliburton and/or Schlumberger—the stories here revolved around strong historical growth for both companies and what are believed to be brilliant futures as suppliers to the oil industry. The latter industry, as Mr. Heyl can tell you, was, and is even more today, a capital intensive industry. And the attendant costs of new oil discoveries have risen dramatically. The acceptance by investors of the oil service industry—and Halliburton and Schlumberger in particular—has been fantastic, almost too fantastic.

There are some communication programs that have proved to be failures. One example was that of a leading machinery producer in a particular segment of that giant business. I thought that the presentation of the company and its prospects by management, through visits out to their facilities to see their operations and people and products at work, was excellently done. The message was basically growth in market demand around the world, coupled with an increasing industry position. The stock started to make some headway in the marketplace but, unfortunately, two quarters later an earnings decline occurred because of management's inability to cope with rising raw material costs and Price Commission problems. Whether that earnings shortfall is all the problem or none of the problem, I cannot say for sure, but I do know the stock is down 40%.

Hospital supply companies were favorites of Wall Street not too many years ago and some still remain so. One leading company has sold at 60 times earnings although it appears that analysts and investors may be getting wise to the management strategies employed to achieve a 15% rate of growth. Simply stated, growth has been achieved by raising equity capital at substantial mutiples of book value—it can be demonstrated that, given a sufficiently high P/E ratio, which this company has had, the proceeds raised from sale of stock could be invested in Treasury bills and still earnings would be enhanced. Also, after-tax earnings growth was augmented because the company's tax rate dropped from the mid-40% level to under 20%. Because of the questionable sources of much of this company's earnings growth, the P/E ratio may well be vulnerable to decline.

One hears a lot of discussion about earnings projections and whether or not management should formalize the ritual by incorporating such statistics in annual reports. As an analyst, I'm always pleased to receive these earnings projections. In my opinion, management should resist the pressures from Washington to incorporate earnings projections in annual reports even if it means dropping the practice with analysts, reporters, and investors. I believe that the reliance upon the earnings projection by the financial community is overdone. Moreover, anyone familiar with the problem of creating earnings—which are the residual of myriad corporate activities—would be more interested in the mathematical tools used in making the earnings forecast than in the earnings projection itself.

Financial Communications—The Corporate View

Lawrence Heyl, Jr.
Manager, Investor Relations
Mobil Oil Corp.

It was delicate of you not to mention today's price of Mobil stock. I'm sorry there's no one here from Detroit, because I could show him how to get his price-earnings multiple up to 5.

Attending these sessions here, I've been struck with the number of times the oil industry has been mentioned. I feel almost as though I were at another meeting of the American Petroleum Institute. Our industry is very visible, very conspicuous, perhaps more so than we'd like to be right now.

Our industry is also a little older than you might realize. I don't know if any of you from the Boston area have heard of a company called "Jenney." It has no connection with Mobil, but it is the oldest oil company in the United States. They started selling whale oil around 1812, and they're still going as part of Citgo.

In the mid-1850's, Henry David Thoreau went on two walking tours on Cape Cod, and wrote a charming book called *Cape Cod*. He visited the Highland Light at Truro and he wrote that the lighthouse keeper "complained of the quality of the oil which was furnished. This house consumes about 800 gallons in a year, which cost not far from $1 a gallon." Of course, that was whale oil. With a price like that, it's no wonder they started drilling for petroleum. The incident has some relevance today because ours is a price-sensitive industry. Product price weakness is one reason why our stocks were depressed for a good part of the 60's. Of course now the product price has turned up and we have a public relations problem, but we're still not getting a good multiple, so we have the worst of both worlds.

I'm sure many of your companies have higher price-earnings multiples than ours, and I'm also sure none of you think that these are fair valuations.

Mobil did not have a good reputation for communicating with the investment community in the late 1950's. As it happened, our manager of public relations at that time was a man with a Wall Street background—Tom Phelps, who's now retired. Assisted by Dick Cheney, who's now with Hill & Knowlton, Mr. Phelps undertook a program to improve our communication reputation, and this included three elements.

The first was to start a supplement to the annual report. No oil company had one at that time, but it was common in the utilities industry.

The second was to put on a tour, somewhat like a press junket, to our laboratory and refinery, near Philadelphia, for a couple of hundred security analysts.

And the third was to hold a series of courses in New York headquarters—not about Socony, as everybody called the company then, but about the oil industry. The analysts could come up every afternoon at three o'clock for a week, and every day they'd get a lecture on such topics as how a land man signs up leases, how to drill a well, refining technology, and so on. And they learned a great deal about the industry. For years afterward, we kept getting requests to repeat that course. But we felt that the course had achieved its purpose. As the oil business became more competitive, moreover, it was difficult to justify putting more effort and management time into doing something which essentially benefited the industry rather than Mobil.

But putting on such a course is something that a company in some other industry might consider doing. It certainly helps to have security analysts know as much as they can about your industry.

Speaking of security analysts, I am reminded of a remark that the late President Pompidou once made when he was in the business world. Pompidou said there are three ways to lose money. The first is gambling, the second is women, and the third is expert advice. The first is the most exciting, the second is the most pleasurable, and the third is the most certain.

An Open Door Policy

In our company, we have an open door policy for meeting security analysts. Not all companies do. Any analyst can meet virtually anybody in our company he wants to. In fact, not a great many analysts take advantage of this, but they do like the policy.

I have 70 or 80 visits from analysts each year and 200 to 300 phone calls. I make a point of getting out about twice a year and calling on analysts at institutions in other cities who don't get a chance to call on us, and I have found that this is very much appreciated as a courtesy, if nothing else, and they always have questions for me. They tell me, incidentally, that I seem to be the only representative of a large oil company who calls on them in their own offices.

When I speak of institutions, of course, I am thinking chiefly of banks. Obviously, our audience is the institutional investor. To the extent that the security analysts in Wall Street and the ones who work at these institutions are making important recommendations that involve large blocks of shares, our job is somewhat easier than it would be if we were talking to a whole lot of individual shareholders who didn't know much about the business.

The analysts are the equivalent of a press corps, with the difference that they are friendly to our industry and they understand our problems, even when they don't recommend Mobil stock.

I've also had meetings with analysts in Europe about once every two years. As Mr. I yet pointed out, it is important to cultivate this new source of money. But we have no way of knowing who our European investors are. There just doesn't seem to be any way of identifying them. Our stock is listed on the foreign exchanges, but it's not traded there. It's traded by New York brokerage houses on the New York Stock

Exchange for European clients.

Now, let me just mention a few things that we keep in mind in our financial information program.

Be prepared to release information immediately if a fact comes out in response to an analyst's question, and it is a significant fact.

Don't have closed meetings. You can have one-to-one meetings, but don't invite groups of people on a selective basis. Not everybody will agree with this, but we feel this is a safe rule. The SEC is becoming increasingly concerned about closed meetings.

By the same token, don't accept an invitation to a closed meeting. Most of the analysts' groups now do have open meetings. We do not accept invitations from brokerage houses to meet their clients. The brokerage houses that invite us are perfectly respectable people and we look on them as our friends, but we don't feel that this is a proper role for us to play. A smaller company might feel differently. But again, you're back to the problem of the closed meeting.

We don't predict earnings. As you know, the SEC has given companies a choice on this, and our policy is not to do it. I would say perhaps the strongest argument against it is that the prediction then becomes the most important factor, and you might do all kinds of things to make it come true.

Another point to keep in mind is the time that it takes for information to become publicly known. If you're a large company, it may be no more than a half an hour. But in other cases, you might want to wait 24 or 48 hours. The New York Stock Exchange's booklet on timely disclosure is a good basic guideline.

I'd like to quote a couple of sentences here from a state-



LAWRENCE HEYL, JR.

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ment that William Casey made when he was Chairman of the SEC in 1971, before the Conference Board. "Meetings between management and security analysts are important. I have recently noted a controversy over whether these meetings should be open or not. Although we do not believe we're in a position to decide this question, we do feel that open meetings are advisable from many points of view. It seems to me that you reduce the degree of liability by keeping the meetings open, and making full disclosure. However, the only thing the SEC requires is that new information and new developments which are brought out in a closed meeting be promptly disclosed to shareholders and the public, preferably by putting it on a news wire."

Recommended Reading

Now a word about investment values. This is really Bob Colin's subject, but I'll just offer some ideas for what they're worth. Incidentally, there is a book on this that you might enjoy if you come across it. It's written by a professor of economics at Princeton named Burton Malkiel, and the title is *A Random Walk Down Wall Street*. And I assume many of you read the books by George Goodman, who writes under the name Adam Smith—*The Money Game* and *Super Money*. Apart from everything else, Goodman is a very funny writer, which always helps.

Malkiel is an effective exponent of the dartboard theory of picking stocks. He doesn't completely follow it himself, but he shows that there is a lot to the idea that random selection would do as well as so-called professional advice.

He quotes Lord Keynes as saying that trying to pick stocks is like the kind of beauty contest they used to have, apparently, in English newspapers. They would run pictures of a hundred girls and you picked five girls—not the five prettiest girls but the five whom you thought most people would pick. That really is what a lot of people are doing in Wall Street. They're not picking values, they're picking what they think other people will pick. Speaking of beauty contests, Malkiel, writing in another context, says that an income statement like the one put out by National Student Marketing is like a bikini. What it reveals is interesting. What it conceals is vital.

Well, we do have these two points of view on stocks—the technical and the fundamental. Of course, people in my position are concerned only with the fundamentals, and we're very discouraged as the earnings go up and the multiples keep sliding down. I'm not sure that I know what the answer is. We can try to peer into the future, and see if anything is going to change. I like to think we're in a situation now where people will go back to buying undervalued stocks. This is what led to the classic book by Graham and Dodd, *Security Analysis*. That book was published in 1934, and there were a lot of bargains around then. Stocks were very cheap in relation to company assets. You could unearth these values and the idea was to find them and hold onto them. This is the basic element in the Graham and Dodd theory.

Incidentally, Benjamin Graham never would have bought IBM, so that's the other side of the coin. But I certainly hope we'll enter another period where people will be buying values and holding onto them.

I'd like to say a little bit about the idea of earnings growth. It's a fairly recent concept. I happened to see a financial statement for Socony from 1920. The bottom line was not net profit. It was surplus. The statement showed surplus for the beginning and end of the year, but there was no indication of whether net profit was up or down. In fact, our company didn't publish a year-to-year profit comparison until the annual report for 1933.

Over the years, investors have gradually decided that the net income and the net income growth were the important things, not the actual financial value of the company. This has led to phony bookkeeping and phony mergers and all the other things that are done by certain companies. Then you go beyond that to the next stage—not merely earnings but earnings per share. That leads to still more funny business. Some of you probably remember a company called Performance Systems, which started out as Minnie Pearl Chicken.

Now a word about U.S. industry's public relations problem. A poor public relations image may have something to do with low stock prices. The problem has been touched on by other people at this meeting, and it seems to come down to the public's ideas about profits. Our company has been trying to do something about this. You probably have seen our ads that appear every Thursday morning in the *New York Times*. We prepare these in our public relations department. Among other things, we try to explain profits.

Understanding What Profit Is

I have a feeling that people, and even some people who work in business, think of profit as a pile of money that's left over, that's lying there at the end of the year. They don't realize the money is already gone by the time they read about it. Now, that seems like a self-evident idea, but I think that the concept has not gotten across to people, the concept that money is being recycled, and by the time earnings are reported—quarterly or annually, or whenever—that's history. The money has come in and it's gone out again. I think that this idea could be gotten across to people.

There are many unfavorable connotations to the word "profit." One is the Marxist idea that you make a profit by exploiting the worker. This dates from the days when the workers had no freedom of choice and no bargaining power.

Another connotation of profit involves the commodity trader. He buys and sells but contributes nothing to the value of the pile of soybeans or whatever, and he makes a profit on it if he's lucky.

Still another connotation is the idea that you cannot make a profit except at somebody else's expense.

All these connotations and probably more are tied up in that word "profit" and people think it's evil. They don't think of it as money that's come in and already gone out again, most of it for capital investment, which of course is the key to the whole industrial process.

Just one possibly cheerful note. There was a recent item in the "Market Place" column of the *New York Times* to the effect that pension reform legislation before Congress could result in an additional $10 billion annually in the various retirement plans. As you all know, pension plans are the biggest and the fastest-growing part of the stock market, so this could be a plus for the investment climate.

I've talked about getting the price-earnings ratio up. It always makes me think of the story about a fish market where there were two baskets that had live crabs in them. One basket was marked "$1 crabs," and the other was marked "$2 crabs." And one of the crabs lying on top of the $1 basket suddenly started scuttling sideways and got to the edge of the basket, and then just managed to heave himself over into the $2 basket. A couple of men were standing there watching, and one of them nudged the other and said, "Only in America."

Life Style Analysis and Corporate Communications

Dr. Joseph T. Plummer
Vice President, Special Task Force
Leo Burnett Company, Inc.

It seems to me that it's become more important than ever before, in today's complex world, to be able to put yourself in the other guy's shoes, to be able to understand him and *really* communicate. By that, I mean to really share meaning and understand each other. A lot of communication today, including our fraternity, the advertising business, seems to be *telling*, and not doing very much communicating. From my very limited viewpoint, corporate communication needs to really communicate as much as any form of communication, because the stakes are very big. In fact, they're bigger than a box of cereal or a cake of soap. And your audiences, the various publics you're trying to communicate with, are deluged with communications of all shapes and sizes, all the time. So the job is very difficult as well as very important.

Life style has helped us at Leo Burnett, and helped our clients, to put ourselves in the other guy's shoes. As a result of life style research, we feel, we have been able to communicate better with our audiences and in the process to move a lot more of our clients' products.

Some of our more notable success stories in applying life style, in the sense of understanding the life style of the consumer we're talking to, are our experiences on Schlitz Beer, Cheer Detergent, Union 76, Dewar's Scotch, Taster's Choice and Nescafe, United Air Lines, Kentucky Fried Chicken, Wilson's Sporting Goods, Allstate Insurance, American Dairy Association, the Glad Products for Union Carbide, and Pillsbury. That's not our full client list, but it's a major number of our clients who have found this approach to be very valuable in better understanding who their target audience is, and who these people are as people, and their life style.

When Fortune asked me to talk here and share with you our thinking about life style and what it is, I decided that it would be difficult to pinpoint direct applications to your particular job of corporate communication. Although I hope that some of the data and ideas that I'll present this morning will be self-evident and useful. Burnett got involved in life style back in 1967, and we've been involved with it since then. It's been evolving. We're finding broader and broader applications of it all the time.

The main reason that we do life style—and I think it is a basic tenet of which we need to be reminded all the time—is that the more you know about who you're attempting to communicate with, the more effectively you can communicate with him.

We feel that life style is a lot of things. First of all, independent of any kind of research or any kind of observation, just thinking about life style—moving beyond the product, or the service or the story or the corporation—thinking about who the person is that I'm attempting to communicate my message to, and to persuade, can be very valuable. Second, life style is a research method. It was the first time, back in 1967, that anyone put together all the major pieces that are necessary for strategy: information about consumers as people, the products and services they buy, the media that they use, and the promotions that they respond to. It was the first time it was ever put together in a single system, on the same people, and that was a big research breakthrough at that time.

Third, life style is a very rich data bank for us. We can dip into it at any time, whenever we have questions about people or particular media, and so on. I hope to demonstrate that a little bit this morning.

And finally, life style is a way to determine current and future trends. Life style data allows us to better understand what's going on out there in the world of America, or whatever culture you're looking at. A good example of this is an article that Bill Wells, who has been working on life style with me since 1967, wrote in the *Harvard Business Review*, called "It's a Wyeth, Not a Warhol World." Bill demonstrated with life style that those of us who are involved in a very cosmopolitan, corporate, young, bustling, and active environment tend to begin to think that the whole world is that way. Sometimes it's a very refreshing and helpful experience to take a look at the world from another perspective.

Life Style Trends are Evolutionary

We've gotten a lot out of doing life style studies over time, and we have learned a great deal about future trends and what is changing in American life styles. I gave a talk last year to a management seminar, and the life style data pointed to something that I think is very important. That is that life style and social change, contrasted with technological, political, or economic change, are evolutionary and not revolutionary. I'm not trying to put Mr. Toffler out of business. He was trying to sell a book. But frankly, you'll find that many of the revolutionary kinds of statements that have been made about life style and social change, if you examine them very closely, have been based on the popular press, or they've been based on discussions with people who have deliberately chosen a very unique and different way of life.

What constitutes life style? We define a person's life style as made up of four main components. They are (a) basic characteristics, (b) activities: how he spends his time, at work and leisure, (c) interests: what's important to him in his own immediate world, and (d) opinions: how he feels about himself in light of the world in which he lives.

I'd like to make two points about our 4 Dimension Life Style Model. First of all, we feel it's very, very crucial to keep a balance between all four of these dimension—characteristics, activities, interests, and opinions—when we are measuring people's life style. There's a tendency to look only at people's attitudes, and particularly people's atti-

tudes about themselves. But it's also important to understand how they spend their time, what their values are, and their major interests in the world around them. In effect, what we do when we do life style research or even think about a person's life style, is try to fill in each of these categories. For example, under activities—work, social events, club membership, community organizations, vacations and so on. And we measure consumers' life styles primarily through statements.

"I enjoy going to concerts." "I'm a member of one or more service organizations." "Our family travels a great deal." And one of my all-time favorites, "There should be a gun in every home." Now, a very interesting thing about that last statement, "There should be a gun in every home." We've learned in our international life style work that the United States is the only country in the world where that statement means anything. And so it's a very interesting statement, which reflects a cultural difference.

We use anywhere from 250 to 350 of these statements in any study that we do of consumers' life styles. The key point, I guess, about these statements is that they come out of depth interviews with average people. So we are asking people about things that are important and relevant to them, and we're asking them in the terminology of the consumer. We ask people to rate these 250 plus statements on a six-point agreement scale, from strongly disagree to strongly agree.

Participation in Activities

We also pick up frequency of participation in about 100 different activities. So not only do we get their attitudes or orientation toward activities, we also get their participation. And then, of course, in every study we also collect over 35 demographic characteristics. We pick up all the key media data, in terms of magazine readership, television program viewing, promotional orientation, and finally the key things, which are the marketing data on whatever product categories or services we're studying.

Life style research has been evolving since 1967, not only in the United States, but around the world. We've now done three major studies in the UK, for example, as well as other places. In effect, by the start of 1975, we will have conducted life style studies in 14 major countries.

We see great value to multinational corporations in terms of cross-cultural comparisons. We are finding it very interesting to look at the cultural life style similarities and differences across countries.

Now, we think about life styles and we analyze the market two different ways. The first way is to say, well, there's somebody out there who's doing something, or buying something, which is important for us to focus on. This is the traditional way of looking at a market or consumers, and we want to contrast that target group, based on their behavior, with another group. Or it may be a demographic definition. We may want to look at heavy versus light users, brand users versus non-users, or price buyers. We may also want to look at a demographic group, such as college educated versus non-college educated. You may want to look at stockholders, people who own X shares of stock versus people who don't.

We're doing a study right now for General Development Corporation, which is a land development company, and we're exploring the whole life style area of people who buy land as an investment, either now or in the future.

This approach of contrasting groups works very well, and I'm going to show you an example of that in just a moment.

We found that the approach does provide a very rich consumer profile, particularly for the copywriter. He now is able to think about the target that he's writing to, not only in terms of demographics, which was what he had been given before as information, but also life style patterns. The demographic profiles the copywriter was handed tended to go something like 18 to 45 years of age with a high school education, with a mean income of $9,000 a year, 2.1 children, 90% married, and ¾ of a dog. That kind of demographic description really isn't very rich for the copywriter, and life style has added a great deal to his bag of tricks and permits him to communicate a lot more personally.

We made one assumption which, back then, seemed like a very good assumption, but now we've learned different, and that is that any behavioral group is homogeneous—for instance, that heavy users of beer are homogeneous. We found that wasn't true. Also, theoretically, I got to thinking maybe that's not the right place to start, because when you think about it, the average consumer has hundreds of products in his life in the average week, and even though the product, the service, or the corporation is the most important thing to us, to that consumer the most important thing is him.

So I said, "Why don't we start with the people instead of the product?" I had a hunch that there were major life style types of people out there in the world, and if we could quantify that and understand these basic types of people and their life styles, we would have a new tool. And then we could find out how products and brands and services and communication fit into their lives. So this is an approach that we've been taking in the past few years with some success. It's been very revealing and I'd just like to show you briefly some of the life style segments that emerged from our most recent study.

Nine Major Life Styles Analyzed

We found, in effect, nine major life style segments among men. This first segment is Luke, the discontented working man, and to me this is a very frightening segment. Looking at this segment, in one chunk of time, it's not very disturbing, but as I look at what has been going on with this life style segment since 1968, it's a very disturbing thing. He has gotten more aggressive. He has gotten more cynical and discontented, and really has a chip on his shoulder about big business and technology and big government, and all those smart asses who are trying to run things. And believe me, he is very prone to violence. (As we all saw in the trucker's strike.) Based on this data, I would predict that we will be seeing more and more disruptive activities of this kind coming from this life style segment if discontent grows, because I see very little on the horizon that's going to alleviate this man's discontent.

Another segment is Jim, the young pleasure-seeker. The key thing about the young pleasure-seeker is that he's a very young guy, he's experimenting, and he's enjoying life to the fullest (as you can see, he has a cigarette in one hand and a drink in the other). He and his girl just finished painting their little dinghy sailboat. So that's another type of young life style.

Another young life style is Bob, the active achiever. And I think it is very important in understanding this particular life style segment, the young achievement-oriented male in our country, to note that he, in contrast to his slightly older counterpart who has arrived, shall we say, makes a very sharp distinction between his job and the rest of his life. And in contrast to this man, Edward, the urban businessman, Bob works in business and Edward is a businessman, and

that's a very real distinction when you dig deeper into their life styles.

The whole life style of Edward, the urban businessman, in effect evolves from and revolves around his job, his accomplishments, his place in life, and where he's headed. One of the things that life style segmentation helps you do is move beyond the demographics.

This is William, the successful traditionalist. In terms of income, education, occupation, and family size there is very little difference between William, the successful traditionalist, and Edward, the urban businessman. But their life styles are very, very different. William is satisfied with the life he's achieved, he's family oriented, very community oriented, and clings to some very traditional basic values.

The differences between these segments show up in such things as the fact that Edward accounts for 44% of all alcoholic beverage consumption and William accounts for 3% of all alcoholic beverage consumption.

Another segment in the middle stage of life cycle is Norm, the easy-going middle American. We all know Norm. He's a pretty happy guy, who has retreated essentially into his own small world of his home and his family. And he's the repair-



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man that was over to fix our washing machine last week, and I said, "Hi," and he said, "Hi." I said, "How are you doing?" and he said, "I'm fine," and that was really the extent of our conversation. That's basically the way Norm feels about the world.

It's a very intriguing life style.

There are three segments that we found among the later stages in the life cycle. The first is Art, the small town conservative. He's just a little to the right of Bill Buckley, and is a very conservative guy, not only politically but socially and morally. Given this man's income, it's surprising to see the strong price-orientation and caution he exhibits in terms of buying products and reading ads. He would like to think that he's the last of the rational and nonpersuadable men left in the world.

Another segment is Sam, an old-fashioned homebody. There's a lot of these guys out here, and they really aren't Archie Bunker. I'm sorry to tell Norm Lear that, but he has given up ranting and raving and fighting and busting windows. He has really given up, and he's just very discouraged and beaten down, and he has a very narrow life space. It's his home and the factory where he's been working for 30 years, and it's the corner bar and his church. And he goes to bed every night at nine-thirty. He never sees Johnnie Carson. He's against everything that *Playboy* stands for, including the ads, and so he's just got a very simple, homecentered, very, very old-fashioned life style.

It's kind of intriguing that while about 8% of all households in the United States own a wringer-washer, 49% of this Sam segment own wringer-washers. So it's a very interesting kind of life style. They have tried to constrain themselves. They don't have a lot of money and so they've learned how to live within their means.

The final segment is Charles, the older urban sophisticate. The key thing about Charles' life style is that he's simplified it. He's simplified it all the way around. He's cutting out activities. He'd like to get rid of that big home and the yard that he hates to take care of, and he's traveling on a less hectic basis, eating out a lot more, and he's a little less worried and harried and so on. He sees himself, at any rate, as a very sophisticated man. Whether he understands the wine list or not is irrelevant. He will always ask for it.

So these are the nine major life style segments that we've uncovered. I'm not going to go into a lot of detail, but I think you can see that this is a very rich source of information, and a very good way to think about the market out there. What we try to do for a particular product is to look for commonalities and differences and put the puzzle back together, and try to conceptualize the market in a totally different way.

I had a conversation with Jim Hoefer a few weeks ago about this particular seminar, and he wanted me to try to do something that related to corporate communication. After talking with Jim, I felt maybe I could do something that might be a little bit fun, and maybe helpful to you, which is to talk about some data that has come out of our latest life style study, in terms of what may be called a very general target audience for corporate communication.

Clearly, a lot of your communication is geared toward upscale consumers. Now I realize that you have very specific goals and publics within that. So this is going to be very general. But I think, in a general sense, that you are interested in communicating with upscale consumers, people who are involved, who have a say, and are doers and opinion leaders.

One way to look at that would be to pull out of our national sample of 5,000 men, balanced to the census, a picture of the upper income consumer.

Examined Life Style of General Target Audience for Corporate Communications

Upscale Consumers
- ✓ Income
- ✓ Education
- ✓ Occupation

Two Segments
a. Above $25,000 per year
b. Under 35 years of age with $12,000 or above income

I pulled all those men who are earning $25,000 a year or more out of the sample and said that was one segment. I pulled out another group of those men under 35 years of age with an income of $12,000 or more.

Both Segments Are Upscale on Income Compared to Total Men

	Total Males (N = 3700)	*$25,000+ (N = 193)*	*Under 35 (N = 345)*
$12,000-$14,999	18%	0%	54%
$15,000–$24,999	22	0	41
$25,000+	5	100	5

And as you can see, compared to the general population, both these segments are extremely upscale. The younger men are split about 50-50 between the $12,000 to $15,000 and the $15,000 to $25,000 group. Of course, the $25,000 plus is 100% over $25,000. So it is an upscale segment compared to the total population in income, and they are upscale in education.

And Upscale Education

	Total Males	*$25,000+*	*Under 35*
Less than high school	26%	6%	3%
High school graduate	32	19	29
Some college	19	19	27
College graduate	14	27	29
Postgraduate	8	29	12

The main difference between the $25,000 plus and the young upscale guy comes in terms of some kind of education beyond college.

And Upscale On Occupation

	Total Males	*$25,000+*	*Under 35*
Professional	14%	32%	33%
Managerial	15	34	17
Sales	6	8	8

But $25,000+ Group Clearly More Owner/Executive

	Total Males	*$25,000+*	*Under 35*
Owner	10%	33%	8%
President	8	5	1
Executive	5	20	11
Supervisory	15	9	18
Self-employed	13	40	10

In terms of occupation, they are upscale compared to the total population, but the $25,000 plus group is clearly more owner, executive-oriented. In fact, the owner figure is really kind of striking to me. It's an incredible thing. I guess it tells us something about how to get rich.

The Young Upscale Segment Less Likely to Own Home in Suburbs or Be a Two Plus Car Family

	Total Males	*$25,000+*	*Under 35*
Own	79%	92%	72%
Suburbs	38	48	41
City	18	18	26
2 or more cars	49	79	51

One of the things that are kind of interesting is that the young upscale guy is less likely to own his own home, a little less likely to live in the suburbs, a little more likely to live in the city, and clearly less likely to have two or more cars. The minute I saw this, I rushed all this data over to the folks in Detroit to tell them who their target market was for two or more cars.

The $25,000+ Segment More Likely to Be Found on Two Coasts

	Total Males	*$25,000+*	*Under 35*
Middle Atlantic	17%	24%	18%
South Atlantic	14	14	11
Pacific	13	16	14

Another interesting demographic fact was that the over $25,000 group was more likely to be found on the two coasts. I don't know if the ocean is a positive factor or whether it's a tertiary factor, but it does seem to show some correlation.

When We Examine the Life Style Patterns of These Segments a Richer Understanding of the Upscale Target Emerges

a How the two segments are alike and different from majority of men

b How the $25,000+ segment differs from young upscale segment

Those are some demographics, and what I'd like to do now is to move into the life style patterns. First, in terms of how these two upscale segments are like, and different from, the total population, and then second, how the $25,000 and over segment differs from the young upscale segment.

Both Segments More Able to Cope with Change and Less Interested in "Good Old Days"

	% Agreement		
	Total Males	*$25,000+*	*Under 35*
Everything is changing too fast today	44%	26%	27%
I like to try new and different things	54	59	66
It might be better if we returned to a simpler style of life	53	43	39
I have somewhat old-fashioned tastes and habits	63	49	49
I often wish for the good old days	31	17	17

First of all, we found that both upscale segments were well able to cope with change, and less interested in retreating to the good old days. And this shows up very dramatically in terms of statements like, "Everything is changing too fast today." While 44% of all men agree with that statement, only 26% of the $25,000 or more group do, and only 27% of those under 35. And clearly they are a lot lower than all men on statements like, "It might be better if we returned to a simpler style of life," "I have old-fashioned tastes and habits," and "I often wish for the good old days."

So this says something about the fact that upscale people seem to be, or at least feel, better able to cope with the kind of change and the fluctuating environment that we're all living in today.

Part of This Ability to Cope Comes From Strong Self-Confidence

	% Agreement		
	Total Males	*$25,000+*	*Under 35*
I can often talk others into doing things	40%	55%	59%
My opinion on things doesn't seem to count very much in today's world	37	30	23
I have never been really outstanding at anything	19	13	11
If I had my life to live over I sure would do things differently	39	28	31
I think I have a lot of personal ability	66	81	83
I expect to be a top executive in the next ten years	17	42	43
I like to be considered a leader	48	72	71

I feel that one of the reasons they are able to cope with change is that they have a very strong feeling about their own self-confidence. There's a high agreement on the statement, "I can often talk others into doing things." "My opinion on things doesn't seem to count very much today," is a lot lower, and it's intriguing to me that the under 35 group agrees even less than the total population, and less than the $25,000 or over.

Both Segments Are More Tolerant of Social Change Than Most Men – Particularly of "Women's Lib"

	% Agreement		
	Total Males	*$25,000+*	*Under 35*
A woman's place is in the home	41%	32%	31%
Women wear too much make-up	31	21	25
A woman shouldn't smoke in public	34	29	24
There is too much emphasis on sex today	58	45	39
Young people have too many privileges today	45	38	35
Communism is the greatest peril in the world today	41	32	25

Another thing that we could see was that both up groups have a lot of tolerance toward social change. They really seem to be a lot more tolerant, particularly of women's liberation, and this is a finding we find over and over again. I don't really know why that is, but the upscale man is even more tolerant of women's liberation than are women. I don't know if it comes out of a desire to be fair, or a fear, but

at any rate this kind of finding tends to emerge time and time again. And they're less uptight about sex and young people, and they don't see Communists infiltrating every little corner of the world. To me, it's an incredible thing that 41% of the population believes that Communism is the greatest peril in the world today. Apparently Henry Kissinger hasn't gotten through to almost half of the population.

Both Upscale Segments Much More Cosmopolitan and International

	% Agreement		
	Total Males	*$25,000+*	*Under 35*
I would rather live in or near a small town than in or near a large city	73%	59%	61%
I would like to take a trip around the world	49	57	64
I'd like to spend a year in London or Paris	21	32	33
American made is best made	41	29	26

Another thing we saw in terms of the upscale segments versus the total, was that they were much more cosmopolitan and international in their scope. There are a lot of implications here for corporate communication. They are people who are very international. They like change and they're willing to go with change. And so I think you don't have to take a cautious, conservative approach, and only talk to them about the tried and true that you're doing.

There's a suggestion to me, at any rate, from these data that these people are willing to experiment with you a little bit. I think that "American made is best made" is a very intriguing statement. And to me the reaction is very interesting: 41% of all men agree that American made is best made, and only 29% and 26% of the upscale groups agree. So I raise this question:—If the people who are making the products think they're doing it better somewhere else, what kind of job can they do of convincing other people that their products are pretty good?

And Not Surprising Given Their Income, They Feel More Secure Financially Than Other Males

	% Agreement		
	Total Males	*$25,000+*	*Under 35*
Our family income is high enough to satisfy nearly all our needs	55%	79%	62%
In a job security is more important than money	43	27	27
To buy anything other than a house or car on credit is unwise	36	28	27
Investing in the stock market is too risky for most families	50	37	42
I buy many things with a credit or charge card	27	51	41
I don't like to take chances	35	29	22
I would like to own the most expensive things	21	31	31

Another thing we see clearly is that these upscale people really are very secure financially, and they're very credit oriented and investment oriented—which doesn't come to us as a surprise, not to anybody in this room, I'm quite sure. But it again reinforces to me this whole pattern that upscale people are much more willing to take risks and to try change. And it's even more dramatic, I think, with the younger guy.

Both Segments Are More Active Socially Than Other Men

	% Agreement		
	Total Males	*$25,000+*	*Under 35*
I would rather spend a quiet evening at home than go out to a party	55%	45%	40%
I stay home most evenings	70	62	62
I like parties where there is lots of music and talk	29	39	42
A party wouldn't be a party without liquor	19	24	28
I am drinking more now than before	11	18	17
Went out to dinner	47	76	60
Served wine with dinner	12	27	20
Entertained people	33	47	44

Another thing we see is that they are very social people, much more social, particularly in terms of socializing outside of the house, in terms of parties with liquor, and going out to dinner, serving wine with dinner, entertaining people. These last things are activities. The figure is the percent of people participating in the activity 12 or more times in the past year. You have 76% and 60% of the upscale people going out to dinner at least 12 times in the past year.

And Are More Interested in Travel and Vacationing

	% Agreement		
	Total Males	*$25,000+*	*Under 35*
We take our vacation at a different place each year	33%	42%	36%
Our family travels quite a lot	29	49	37
I don't like to fly	21	16	13
I take a lot of pictures	24	35	35
I travel a great deal on my job	18	30	24
Car trip over 100 miles	23	31	28

Another dimension where the upscale people differ from the total is that they are very vacation-oriented and they travel a lot, and again I don't think it comes as any great surprise that upscale people travel a lot more and are interested a lot more in travel and vacations.

It's incredible, when you look at some of the downscale and older segments, the limited amount that they have traveled. There's a large majority of families in the United States that have not taken a vacation 100 miles from their home in the past three years.

Both Upscale Segments Have More Active and Varied Days

	% Agreement		
	Total Males	*$25,000+*	*Under 35*
My days seem to follow a definite routine	52%	39%	37%
In my job I do essentially the same things every day	50	34	37

Most upscale segments are more active and have more varied and hectic days. Again, I don't think this is any great surprise.

. . . And Have A Strong Interest in Sports

	% Agreement		
	Total Males	*$25,000+*	*Under 35*
I was active in sports when I was in school	46%	54%	52%
Attended a sports event	15	23	19
Went swimming	15	25	21
Jogged	6	12	10

	Average Rating		
	Total Males	*$25,000+*	*Under 35*
AFC football	38.5%	50.8%	43.8%
NFC football	40.8	51.2	48.9
Monday football	39.4	49.9	49.7
Pro basketball	22.0	23.9	25.5
NHL hockey	15.5	17.7	19.2

	Average Issue Readership		
	Total Males	*$25,000+*	*Under 35*
Sports Illustrated	12.9%	21.1%	15.3%
Golf	3.0	6.1	5.7
Golf Digest	3.0	7.5	7.4

Both upscale groups are sports oriented and we can see this in their life style patterns, with such statements as "I was active in sports when I was in school," their attendance at sports events and their swimming, and we can see it in their media patterns. In the average rating for pro football, pro basketball, and pro hockey, these upscale segments are significantly higher than the total population of men. And the same holds true for the sports magazines. It's really quite dramatic when you take a look at golf—these groups are literally twice the size or proportion, if you will. So they're very sports minded people, and this is clearly a life style area which separates them from the total population.

Both Upscale Segments More Interested in Style and Shopping for Clothes

	% Agreement		
	Total Males	*$25,000+*	*Under 35*
Our home is furnished for comfort, not style	73+	59%	57%
Visitors often comment on how nice our home looks	68	80	72
I like to shop for clothes	23	31	28
I like to feel attractive to women	48	57	66
The new styles turn me on	13	15	23
Went shopping for clothes	11	14	16

Another thing about the upscale people is they're much more style and fashion conscious and interested in clothes than men in general. I guess you didn't know that you all like to feel attractive to women, but you do, especially in the privacy of filling out a questionnaire uninhibited by social pressure.

So I would repeat that this shows that very contemporary, very modern kinds of thinking and life style patterns are important to them.



Finally, Both Segments Work Hard, But Judge by Results Rather Than Time

	% Agreement		
	Total Males	*$25,000+*	*Under 35*
You can tell a good worker by whether or not he comes to work on time	49%	38%	37%
My job requires a lot of selling ability	24	44	34
I think I have a lot of personal ability	66	81	83
I am really looking forward to retirement	47	34	28
Brought work home	21	42	34
Gave a speech	6	14	10

Another intriguing thing is that when you look at the upscale segments versus the total population, you see that they do work very hard, or at least they tell us they work very hard, and the interesting thing to me is that they judge by results, rather than time. I think it's rather an interesting little finding that the upscale segments agree a lot less than most men with the statement that you can tell the good worker by whether or not he comes to work on time.

The Over $25,000 Segment As We Saw in Demographics Is More of a Decision-Maker and Influential

	% Agreement	
	$25,000+	*Under 35*
In my job I tell people what to do	71%	55%
I would rather work for myself in a small business than for somebody else in a large company	62	53
I am influential in my neighborhood	31	14
My friends and neighbors often come to me for advice	37	22
Rented a car	6	3
Stayed overnight in a motel or hotel	51	24
Took an airplane trip	19	7

Another way to look at these two groups is how the over $25,000 segment is different from the young upscale segment.

First of all, the over $25,000 man, as we saw in the demographics—and his life style reinforces that—is a decision-maker and he is influential, and he does the kinds of things that the busy management person is identified with.

And Relates to a More Specific Peer Group, Primarily As It Focuses on Business

	% Agreement	
	$25,000+	*Under 35*
Most of my friends have graduated from college	57%	38%
I enjoy talking with my friends about the stock market and other investments	37	24
Gave or attended a dinner party	27	13

Another thing we see is that he relates to a much more specific peer group, primarily as it focuses on business. We've all heard time and time again the accusation that business only talks to business, and there seems to be a grain of truth in that. The younger upscale guys seem to come in contact with a little broader range of people than the upper income man. So that's bound to feed on itself, to a certain extent, and it's something I think we all ought to think about.

The Upper Income Segment Is Much More Involved in Civic and Community Affairs

	% Agreement	
	$25,000+	*Under 35*
I am or have been active in the PTA	24%	8%
I have helped collect money for the Red Cross, United Fund, etc.	49	24
I am or have been president of a society or a club	62	34
Did volunteer work	10	5

The upper income segment is more involved in civic and community affairs. This has been one of the important life style trends that we've seen. Young people are very interested in getting involved in doing good things, but they are rejecting, more and more, the traditional activities. I don't know what the figures are for the Junior Chamber of Commerce, or anything like that, but I can guess from the life style data that young upscale people are less and less willing to participate in the traditional kinds of civic and community affairs. This may raise some problems down the road, I think, in terms of ways to find leadership and develop community and civic outlets for these young upscale people.

And Is More of a Joiner or Participant in Traditional Groups or Institutions

	% Agreement	
	$25,000+	*Under 35*
I belong to one or more fraternal organizations	34%	17%
Went to a club meeting	37	25
Attended church	55	38

The over $25,000 person is more of a joiner or a participant in traditional groups and institutions. This shows up in his higher agreement with "I belong to one or more fraternal organizations," in his going to a club meeting, attending church. This is another strong trend that we've seen among young people in general, and it's very dramatic among the upscale as well.

The Upper Income Man Is Much More Likely To Have People Do Things for Him and Less Likely to be a Do-It-Yourselfer

	% Agreement	
	$25,600+	*Under 35*
We always use professional plumbers, carpenters, or electricians for repair projects around the house	39%	17%
I am good at fixing mechanical things	48	58
Repaired something	45	55
We do the painting around the house ourselves	52	82

Another thing is that the upper income person is much more likely to have people do things for him and less likely to be a "do-it-yourselfer." This doesn't mean he's lazy. I think it relates to a function of time and ability to pay for these kinds of things. Clearly, the young guy gets a kick out of doing these things himself, as well as feeling the economic necessity.

Although Both Segments Were Interested in Style, the Upper Income Segment Is More Likely to Own a Very Full Wardrobe, Especially of "Working Clothes"

	% Agreement:	
	$25,000+	Under 35
I have more than six pairs of shoes	65%	44%
I buy at least three suits a year	31	15
The new styles turn me on	15	23

Both segments are interested in style, as we saw before, but the upper income man is much more likely to own a full wardrobe, especially of working clothes. He says, "I buy at least three suits a year."

Primarily Due to Age, the Upper Income Man Is More Cautious About His Health

	% Agreement:	
	$25,000+	Under 35
We have a doctor's examination	21%	11%
There are two types of people in the world: I am a day person	57	42
I am very conscientious about how often their hands before eating each meal	69	51
I try not to eat foods high in cholesterol	37	15
Went to a doctor	11	4

Primarily because of his age, the upper income man is much more conscious about his health than the younger upscale guy. A little more compulsive, too, and a little more habitual. I found his agreement with such statements as, "It's very important for people to wash their hands before eating each meal," and "I try not to eat foods high in cholesterol" very interesting.

The Upper Income Segment Is More Rational and Less Interested in Popular Culture

	% Agreement:	
	$25,000+	Under 35
Classical music is more interesting than popular music	23%	12%
I rely on facts and emotions when I make decisions	71	58
I like to read	64	52
Went to the movies	12	22
Listened to tape or record	63	77
Went to classical concert	13	2
Went to rock concert	2	9

Another pattern was that the upper income man views himself as much more rational than the average. I think this is very important for corporate communication. The younger upscale guy, on the other hand, is a little more willing to say, what the hell, I'm not so doggone rational. And the upper income guy is a little less interested and tuned into what one might call the pop culture.

Perhaps the Most Significant Difference Between the Two Segments Is That the Upper Income Segment Is a Much Stronger Supporter of the "Establishment" Than the Young Upscale Segment Who Appears More "Cynical"

	% Agreement:	
	$25,000+	Under 35
Most big companies are just out for themselves	30%	47%
There is too much advertising on television	57	68
I am interested in politics	56	30
Most people are honest	50	39
We usually display the American flag on national holidays	44	27
If Americans were more religious this would be a better country	50	36

To me, the most significant difference—and this also has relevance to corporate communication—is that the upper income person is a much stronger supporter of the establishment than the young upscale person, who appears a lot more cynical. There may be a good deal of corporate communication that should start at home, because this appears to me to be a very strong pattern and I think it deserves a lot of attention. Probably the advertising experts on the next panel will address this even more fully.

But I found this particular pattern showing the magnitude of the differences very intriguing. Some specific examples: "I am interested in politics," 56% to 30%. Now what this is is regular politics. "Most big companies are just out for themselves," 30% versus 47%; nearly half of the young upscale people feel that most big companies are just out for themselves. The young men are less patriotic. "We usually display the American flag on national holidays," 44% to 27%. And "If Americans were more religious, this would be a better country" shows a big difference.

And the Upper Income Segment Has Less Sympathy with the Counterculture

	% Agreement:	
	$25,000+	Under 35
The U.S. would be better off without hippies	46%	21%
All men should be clean-shaven every day	60	36
There are situations where sex outside the marriage can be a healthy thing	36	24

Another thing we see is that the upper income man has a lot less sympathy with the counterculture. We saw that he did like social change, or at least felt he could cope with it, particularly as it related to women's lib, but apparently there's something very threatening to upper income males in the counterculture. This threat, I feel, in a strictly psychological interpretation, stems from the hippie counterculture or idealist culture men, because that's where the real threat appears to be emerging. And it shows up in reactions to statements like "The U.S. would be better off without hippies," "All men should be clean-shaven everyday," and "There are situations where sex outside the marriage could be a healthy thing," which differ between young upscale men and the over $25,000 segment.

The Young Upscale Segment is More Optimistic and Oriented Toward the Future and Change

	% Agreement	
	Under 35	*$25,000+*
I am happier now than ever before	63%	53%
My greatest achievements are ahead of me	79	48
Five years from now the family income will be a lot higher than it is now	81	61
In the past year we have borrowed money from a bank or finance company	59	44

Finally, I'd like to run through some of the ways in which the young upscale segment has a different life style than the $25,000 plus segment. First of all, the young upscale segment is a lot more optimistic and oriented toward the future and willing to change than is the $25,000 plus. We see it in statements like, "I'm happier now than ever before," "My greatest achievements are ahead of me." Income is going to go up, and they're taking more risk.

The Young Upscale Segment Is Considering Options and Doesn't Appear to Be Tied to His Current Job

	% Agreement	
	Under 35	*$25,000+*
I often dream of leaving my current job and doing whatever I want	34%	23%
I would like to have my boss's job	48	30
I would like to be a pro football player	16	8
We will probably move at least once in the next five years	50	25

The young upscale segment is considering options a lot more. He's a little more restless, a little more experimental, dreaming a little more, fantasizing—whatever you want to call it. He's really just considering a lot of options and he's less tied down to what's important and where he's going than the $25,000 plus segment.

The Young Segment Is More Involved with His Children and His Family

	% Agreement	
	Under 35	*$25,000+*
Played with children	86%	51%
Visited friends and relatives	59	39
Our family is a close-knit group	74	63
I am afraid our community is not the best to raise children	14	7

Another thing is that the young segment is more involved with his children and his family. This is a trend we've seen over time, that young people are re-emphasizing the importance of interacting with and relating to their children in a qualitative, rather than a quantitative sense. I think parents have always spent time with their children, but we've seen a trend, and to me it's a very healthy one, among young parents to want to spend more time in a qualitative sense, and to care more about the personal relationships that evolve therefrom.

The Younger Segment Is More Oriented Toward the Outdoors

	% Agreement	
	Under 35	*$25,000+*
I really enjoy getting out in the country or woods once in a while	89%	78%
I would like to take a lesson in my favorite outdoor sport	58	43
A cabin by a quiet lake is a great place to spend the summer	67	53
Cooked outdoors	59	40
Went on a picnic	7	1

The younger segment is more oriented toward the outdoors. This was a surprise to me. I don't know why that should be, but the young people seem to be returning to nature, or whatever you want to call it. They are more interested in the outdoors, being outdoors, and that bodes well for cities like Phoenix, I guess. It's an important dimension to consider, and we've seen from other social issue data that ecology is clearly a major enduring issue for the young upscale people.

Cars Are a Major Interest for the Younger Segment

	% Agreement	
	Under 35	*$25,000+*
I do a lot of repair work on my car	45%	19%
I like sports cars	51	34
I always have the car radio on when I drive	77	59
Washed the car	37	25

	Average Issue Readership	
Car and Driver	5.3	
Hot Rod	3.8	1.9
Mechanix Illustrated	13.4	6.3

The young guy is interested in cars, in a very involved way, rather than just the biggest car. The car is an important part of his world and we see that, not only in his life style, but in the likelihood of his reading car or mechanic oriented magazines. My own interpretation is that fewer and fewer young people are doing work with their hands in their day-to-day life, and so they find other ways to use their hands, and the car is certainly a nice toy to have.

Finally the Younger Segment Is More Interested in Adventure and Action

	% Agreement	
	Under 35	*$25,000+*
I would like to own and fly my own plane	41%	24%
I would do better than average in a fist fight	35	25
There is too much violence on television	29	49

	Program Rating	
Sunday Mystery Movie	41.3	25.8
The Rookies	26.2	12.1
Kung Fu	27.4	16.3
Streets of San Francisco	27.2	13.8
ABC Tuesday Movie	41.3	23.7
Emergency	25.1	13.4

They are a little more interested in adventure, fantasy, and action. It shows up in the response to statements like, "I'd like to own and fly my own plane," "I would do better than average in a fist fight." They agree a lot less that "There's too much violence on television." And when you look at the TV rating differences, the young upscale guy is much more likely to watch shows like "Sunday Mystery Movie," "The Rookies," "Kung Fu," "Streets of San Francisco," "The ABC Tuesday Movie," and "Emergency" than is the older or $25,000 plus.

In Terms of Television Viewing the Two Upscale Segments Are Similar in What They Don't Like to Watch Compared to All Males . . . But They Are at Odds with Each Other in Terms of What They Like

	Average Rating		
	Total Males	*$25,000+*	*Under 35*
Wonderful World of Disney	24.9%	18.0%	19.7%
The Waltons	23.5	14.9	16.6
The Little People	13.4	8.3	10.6
Brady Bunch	12.5	11.2	10.7
Gunsmoke	20.6	12.9	11.2
Mission Impossible	19.8	15.2	16.1
The FBI	20.2	19.5	17.3
Ironsides	22.7	20.0	17.6
All In The Family	37.5	34.5	33.5
CBS News	23.1	20.5	18.7

In terms of the television medium, both upscale segments tend to reject what I call kind of traditional light family shows and things like "Gunsmoke," "Mission Impossible," "The FBI," "Ironsides." They tend to read upscale magazines and intellectual magazines more than the total population. However, there are some major differences when you get beyond those similarities.

In Terms of Magazine Readership Differences, the Over $25,000 Segment Reads More Traditional News, Cosmopolitan, and Travel

	Average Issue Readership	
	$25,000+	*Under 35*
Newsweek	22.0%	16.6%
U.S. News & World Report	21.7	11.5
Business Week	13.5	7.6
Readers' Digest	41.3	30.4
New Yorker	7.2	1.5
New York	5.7	.8
National Geographic	39.1	23.4
Holiday	4.5	1.6
Travel & Leisure	12.3	5.8
Sunset	5.8	3.3

There are big differences in terms of average issue readership, between the $25,000 plus and the under 35, on magazines like *Newsweek, U.S. News & World Report, Business Week, Reader's Digest, New York, New Yorker,* and *National Geographic.* And the older or $25,000 plus are much more interested in the *Travel & Leisure, Sunset* kind of magazine.

Whereas the Young Segment Is More Likely To Read TV Guide and Male Magazines

	Average Issue Readership	
	Under 35	*$25,000+*
TV Guide	32.9%	21.2%
Playboy	42.2	25.8
Penthouse	17.4	5.1
Oui	9.8	4.3

Finally, the young upscale segment is much more likely to read *TV Guide* and much more likely to read *Playboy, Penthouse,* and *Oui.*

So that's a life style profile of two segments that are possibly a broad target for much of your work. I feel, and I hope you share the feeling with me, that there is some value to understanding the life style and feelings of the people that you're trying to communicate with. And I certainly appreciate this opportunity to be here with you.

Corporate Communications in a Shortage Economy

Richard C. Christian
President
Marsteller Inc.

Nine purchasing executives of major corporations joined several of us at the Mid-America Club in Chicago three weeks ago for a discussion about the current economy of shortages, energy crisis, and rising inflation. While we promised to keep the names of the participants and their companies confidential, I will reveal this: all of the men were senior purchasing managers with companies that had average sales of over $1 billion in 1973 and their capital expenditures averaged more than $60 million per year. By any standards, these men are important buyers—and any company that wants some of their business had better take their attitudes seriously.

We sponsored this dinner and what became a three-hour discussion to test one hypothesis: That some companies are going to emerge from the shortage situation in a stronger competitive position than they went in, because they have adapted their selling and marketing and communication strategies to that situation.

So we were particularly interested to hear from these purchasing executives how they perceive these marketing changes. We asked them:

1. What are smart marketers doing right?
2. What are dumb marketers doing wrong?
3. What's the best way to keep you a customer during the shortage?
4. Can you give us any clues for effective corporate communication?

Here is a short, random sampling of just a few of the comments taken from our three-hour tape recording:

"In today's supply versus demand situation, I think we are going up the organizational ladder. More than we ever have with our suppliers. But now we are getting corporate people involved. We are getting the presidents of companies, the general managers of companies. We are getting all of the top people involved because we are not as concerned as to where we are today as we are about where we are going to be two, three, and five years from now. What are they doing as far as spending capital and laying in brick and mortar to prepare for our supposedly increasing volume five years from now? I think this is important to know. The salesman doesn't know the answer. So it forces him to get other people involved who otherwise wouldn't be involved.

"I have never really believed in starting at the bottom, because really the salesman knows very little. And I am very candid when I say this. He knows very little of what is really going on in his company. So we have really conducted our affairs pretty much at the top with all of our suppliers. The salesman is a good technical man. He usually knows a lot about his product and he knows usually quite a bit about today's situation, but he really has not been brought into focus by his managers on what their forecasts are. So this is the reason you have to get at a level where you can get back the kinds of answers that you are looking for for the long term.

"I think the average salesman first of all is a cockeyed optimist or he wouldn't be in the field to begin with. And he doesn't know how to handle the bad news situation. Supposedly, the good salesman is the one who can walk in with the facts and sit down and say, hey, we got a problem, or I got a problem, how can we resolve it? But this is completely against his personality characteristics or he would never be in the field to begin with.

"We find it's an excellent time to look for new sources. We find that the interest generated by looking for new sources where you wouldn't normally look has been terrific. We've gotten pig iron, we've gotten steel, we've gotten things that you wouldn't have believed because we're looking for new sources and people who are smart today are out on the street selling, and if they've got 50 pounds that they can sell you, and they sell you, this is where they're making their score. They're new sources entirely and we've got a nice red book with a lot of paper in it and on the front it says—The List. And every one of my buyers has that."

Points of Agreement

It seems to us that two unanimous points of agreement came from our discussion—and they have an overwhelming impact on the role of corporate communication.

Agreement No. 1—The most important thing purchasing managers want from their suppliers (if it can't be a product) is honesty. It is candor and straight talk. In other words they're saying, *"Tell us what your company can do for us—now and five years from now—and give it to us straight. We can't afford to hear anything else."*

Agreement No. 2—Purchasing executives today simply don't believe that most salesmen are able to provide the kind of hard management information they need to make long-term purchasing decisions. In a word, during a shortage situation, salesmen lack credentials—and therefore credibility. Why? The comments we just heard tell us the answer.

First, salesmen are salesmen—among other reasons—because of their enthusiasm and eternal optimism. During good times, these are valuable attributes. But during not-so-good shortage times, they can become liabilities. Everybody loves an optimist—except purchasing managers. There's nobody they love better than a realist.

Second, as we've heard, salesmen are seen as *sales* representatives, not *management* representatives. Buyers don't buy the idea that salesmen have the kind of information that will help a buyer make reliable and long-range purchasing decisions.

Obviously, then, we have a problem. The buyer wants candor and he wants company commitment.



But the company representative he knows best—the salesman—often can't provide him with either.

The answer is obvious: The company is going to have to commit on its own behalf. It is going to have to communicate to its customers without depending on its salesmen—or at least without depending solely on its salesmen.

So who's going to provide it? I don't think there's ever been a more clearly defined job for corporate communication—both internally to the salesmen and externally to the customers. Nor do I think there's ever been a more important job than that of a company communicating to its customers how it's going to help them through the shortage problems.

I'm willing to bet heavily that never in recent history have so many company presidents written letters to their customers. And I would guess that they've also personally

visited with many key customers. (If they haven't, they should have.) Obviously, this is corporate communication at its most direct and most personal level.

Back to our Chicago discussion group for a minute. I have to admit that my own personal research background reasserted itself following that meeting. I wanted to learn if the attitudes expressed there might be more widespread.

To find out, we asked an independent research firm—Chilton Research in Philadelphia—to conduct telephone interviews woth 50 top company executives across the United States. Their titles varied—from VP-Operations to VP-Production to Executive Vice President to Director of Purchasing. But before each interview we determined that the man was directly and heavily involved in the purchasing process. We talked to companies like American Oil, Armco Steel, Burroughs, Dow Chemical, FMC, Johns-Manville, Monsanto, Phillips, Pitney Bowes, Timken, Clark Equipment, A.B. Dick, and International Harvester.

Statements Reveal Attitudes

Partly for brevity—and partly to get some quantification into the study—we included a series of *"Agree-Disagree"* statements in our interviews. We depended heavily on our Chicago discussion meeting to formulate these statements. Let's look at some of them—and the responses we received.

The shortage situation is an opportunity for new suppliers to get your future business.

Ninety-two percent agreed with the statement and almost one-third agreed strongly. So there seems to be no question that buyers today see the shortage situation as an opportunity to evaluate new suppliers. Or to look at it from the marketing viewpoint, there is a great opportunity today to key a marketing communication program to the shortage problem.

You want regular contact with your suppliers even though they are short on product.

Seventy-two percent agreed—and strongly. Every salesman who's been tempted to stay away or any company that's been tempted to cut back its communications had better think again. Customers want attention and they want it badly.

You will stick with your traditional suppliers even though you have to wait extra time for material.

The point here has to be that even loyalty has its limits. Only 44% would wait it out, and only one in four of those feels strongly about it. So companies that are depending on customer loyalty for part of their marketing effort could be in for some unpleasant surprises.

There are many important services that a supplier can provide you even when he is short of product.

Here's an important reminder both for salesmen and communicators. Companies can continue to market even when they can't continue to sell. Eighty-five percent agreed —over 50% strongly. Customers look to suppliers for more than product—particularly when product is in short supply. For those of us in corporate communications the message is clear: Search for ways to maintain the customer relationship—and look also for ways to create new ones.

Suppliers are truthful in giving you information.

Eighty-three percent agree with this, but the disturbing fact is that only about one in four agrees strongly. And remember that in most cases these are buyers talking about people they know well, see often, and have seen for a long time. I would have expected a stronger agree vote, and I suspect our results underline what could be a credibility problem.

You need and want more contact with supplier management.

Two out of three agreed—and half of those agreed strongly. It seems to me that this is a clear call for corporate communication—and again in its broadest sense. Whether it be advertising, publicity about increased capacity, a management task force calling on key customers, a different kind of task force helping customers extend their use of product, expanded internal communication to plant and sales personnel—my purpose today isn't to spell out the technique so much as it is to call out the need.

All the evidence we've been able to collect so far tells us that customers want closer than ever relations with their suppliers. And there's also strong evidence that the companies that provide this are going to get recognized in some ways that any businessman understands.

Strains on Customer Relationships

By way of quick summary, my point is simply that product shortages, steady demand, and the energy crunch are putting a severe strain on plant production. But the more serious and long-lasting strain is on the customer relationship—often to the breaking point.

So what your customer thinks about you right now—when you and he and everybody has shortages—is the most important question we can ask. Here's why:

Fact 1: *Your customers never had more reason to do business with somebody else.* Shortages and allocations make old buying habits obsolete—so customer loyalties are being challenged in a way they never have been before.

Fact 2: *Product shortages lead to sloppy salesmanship.* Salesmen respond to quotas, not allocations, so they tend to stay away at a time they should be selling harder than ever. And communication can help do that job.

Fact 3: *Your customer needs your help now more than ever.* He's in a bind because you're in a bind, so help him out. And remember: If you don't have much to sell, you'd better have something to say. (Perhaps the most important point I can make.)

Fact 4: *There's no shortage of what most of your customers buy regularly*—like service and attention and ideas and involvement. Your customers buy a lot more than just your product. So don't let them become unsold on the things you still have to sell.

Fact 5: *The shortages won't last forever.* Here and there, now and then—but not everywhere and not forever.

During these difficult times, growth companies are working overtime to maintain good customer relations. Part of that extra effort has to be a communication program that maintains your customers' confidence.

Finally, a plea for a guy I've pushed around some during these remarks: *the salesman.* Please understand that I'm not indicting him so much as I am the company he works for. If he's a *sales* representative instead of a *management* representative, it isn't because he wants to be. I have a hunch that the growth companies I just referred to are the same companies that help their salesmen to think and talk like *managers.*

In fact, I was even thinking about writing an article on the subject, but *Fortune* and author Michael Rothfeld met the challenge in *Fortune*'s April issue and beat me—and everybody else—to the punch with an article titled "A New Kind of Challenge for Salesmen."

I hope we in corporate communications can meet the challenge as well.

We're O.K.—You're O.K. (A Post-Watergate Opportunity for Advertising)

William H. Genge
President
Ketchum, MacLeod & Grove, Inc.

It's no news to us that business and its most notorious handmaiden—advertising—are taking shots from all sides today.

A recent Harris poll indicates that 77% of all U.S. heads of households believe that the federal government should toughen its regulation of U.S. businesses.

Lewis Engman said last week, "The biggest threat advertising faces today is the parlous state of its public image."

Daniel Yankelovich says that if you put public acceptance of business practices on an index using 1960 as the base of 100, the reading today is 29.

It's scant consolation that business is not alone. There's a wholesale erosion of trust in our country's institutions; it ranges from the churches to the press, the Congress to the courts, the medical profession to the FBI, the White House to Wall Street.

We must ask ourselves, what can advertisers and advertising (as the face and voice of business) do about it?

I think we have a golden opportunity. An opportunity that, in fact, springs from the very problems and uncertainties that afflict all Americans today. And the essence of it is the subject of Thomas Harris' remarkable book on transactional analysis, *I'm O.K., You're O.K.*

Harris is a psychotherapist. As most of us know by now, he defines transactions as any and all exchanges between people—one on one, or one on 10 million. The book analyzes why so many of these transactions present difficulties or go haywire.

He describes four classifications embracing all possible life attitudes which people hold with respect to their interpersonal relationships:

1. I'm *not* O.K.—You're O.K.
2. I'm *not* O.K.—You're *not* O.K.
3. I'm O.K.—You're *not* O.K.
4. I'm O.K.—You're O.K.

Harris postulates that by the end of the second or third year of life, every child has occupied one of the first three positions. The "I'm *not* O.K.—You're O.K." is universally the first tentative decision, based on parental domination and other traumatic experiences during infancy. By the end of the second or third year, it is either confirmed and settled into, or it gives way to position 2 or 3: "I'm *not* O.K.—You're *not* O.K.", or "I'm O.K.—You're *not* O.K." Once determined, it governs everything he does. He stays there permanently, *unless* he is able, in adulthood, to change consciously to the fourth position. Harris believes that the subconscious determination of the position occupied is based primarily on the degree and kind of stroking received—or withheld—during childhood, defining stroking loosely as all forms of noticeable, favorable attention. But we know what stroking is!

The message of the book is that the majority of us go through life in the "I'm *not* O.K.—You're O.K." position, and that we need all the stroking we can get. Stroking also helps build ego and confidence to the point that a conscious change into the fourth situation becomes a possibility.

Only the fourth position—"I'm O.K.—You're O.K."—produces transactions that are easy, assured, and harmonious; and the general infrequency of that state, says Harris, is responsible for a great deal of society's pervasive malaise.

And there is a malaise. Estrangement, alienation, loneliness, antagonism, mistrust, misunderstanding. These are words that crowd contemporary descriptions of our existence. And there are days when the alienation seems almost universal:

between President and electorate
between black and white
between unions and industrialists
between business and consumerists
between husbands and wives
between haves and have-nots

Is it any wonder that our national divorce rate soars, our suicide rate climbs annually, crime rates go higher every year, drug addiction and alcoholism are national scandals, our psychiatric centers packed to the roof beams?

Getting to the Causes

What's the matter? Where's the root cause of all this estrangement? I suppose it derives from a thousand conditions, really, but I suspect that Harris' transactional analysis may be getting at the heart of it. There are too many "I'm *not* O.K.'s" among us: lacking confidence, acting defensively, responding guardedly, suspicious of the other's motives, jealous of our status and our property, unable to react objectively when the other guy initiates the transaction.

We in advertising may be aggravating the situation without knowing it; and subverting our own purposes in the act.

Perhaps the women's liberationists, student and minority dissidents, consumer advocates and disenchanted consumers have something in common, and perhaps we ought to heed it. They are frustrated and alienated by certain aspects of their lot, and they need some sympathetic attention.

So what does a lot of advertising do?

It moves unfeelingly against people. Too much of it is patently self-serving. Often the belligerence and aggression are barely hidden. Even our jargon gives us away. We speak of preparing media "against a market." We use military terms like "strategy" and "tactics." In effect, advertising often attacks its audience.

Most people don't need attacks these days. They are fending off enough already. From events and conditions over which they have frustratingly little control: polluted air and lakes, crowded streets and highways, inflationary prices,

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WILLIAM H. GENGE

dishonesty in high places, kids on drugs or dropping out of school, marital miseries, heavy debt loads, punishing interest costs, tight mortgage money, gas at 60 cents a gallon. You name it.

What everybody in *every* segment of every market wants is a friend. Somebody who will stroke him—often. Somebody who will say, repeatedly, "You're O.K."

I believe that people will respond *positively* to advertisers

who can show that they are in the prospect's corner. And God knows that business needs some friends, and is going to need them increasingly in the years ahead.

I needn't recite the litany of embarrassments and black eyes the business community has suffered over the last two or three years. And new scandals and new criticisms come on us almost daily.

But don't get me wrong. I believe that advertising is, should be, must be ADVOCACY. No one gets more upset than I at the addleheads who claim the only legitimate function to advertising is to inform. That's rank naiveté! The purpose of advertising is to make people BUY things. And when advertising stops making people buy things, our economy, our high employment, our living standard, and most of our institutions are going right down the chute. Let no one forget that business transactions—and the attendant payrolls, profits, and taxes—pay for everything: education, government, art, music, defense, and even the FTC salaries.

Reconciling Advocacy with Affection

So we come to the central question. Is it possible to reconcile this strong advocacy for our products and services, on the one hand, with, on the other, the stroking, or show of respect, or demonstration of concern and affection that will tell consumers we think they are O.K.?

If we didn't believe that such reconciliation was possible this business would hold very little attraction for most of us in this room.

Let's start with some approaches that won't do it. Advertising that is cynical won't. Advertising that blusters or threatens won't. Advertising that strains credulity won't. Advertising that's stuffy or pompous or condescending won't. Advertising that demeans the human condition won't.

Very well, what kind of advertising does stand a chance of bridging the alienation gap and convincing its audience that we think they're O.K. and that we're O.K., too? Advertising that *respects* people's aspirations and longings. Advertising that respects human dignity and extends it to all men. Advertising that is scrupulously honest. Advertising that *celebrates* people and the essential interdependence of mankind. Advertising that clearly shows it is in the consumer's corner *in his* day-by-day struggle against life's vicissitudes. Advertising that says, "I'm your friend and I know what you're up against and I know what your *heart wants*." Advertising that exhibits empathy—that identifies with the feelings and the experiences and the self-perception of its audience. In other words, advertising that helps people respect life and see the best in it, rather than advertising that shames people or adds to their heavy burden of pressing concerns.

If there's a fundamental attribute of the quality of advertising I'm advocating, it is the characteristic of humanity. And that's precisely why I see nothing stultifying or creatively restricting in what I advocate. Humanity, after all, is a multi-splendored thing that can be evidenced in myriad ways. We must only keep asking, is it human? Is a real, I say the way people *want* to perceive themselves? Does it show some love or respect? Is it friendly? Does it make people warm inside?

I'd like now to demonstrate the amazing latitude of "You're O.K." As you'll see, it works with doughnuts, life insurance, telephones, corn flakes, tooth paste, corporate images, and beer. To name a few. Of course, it does have a common denominator. People. I'm now going to run a reel of a dozen spots. You'll see a lot of people in them. But people are what life is all about. And the only thing our business is about.

REEL

Agency	Company	Title
Y&R	Metropolitan Life	"First Day of School"
Compton	U.S. Steel	"Gary, West Virginia"
KM&G	Pittsburgh Brewing	"Polish Wedding"
FC&B	Dunkin Donuts	"Batter Up"
B&B	Crest	"Funny Face"
Compton	Erie Bank	"Black Mother & Child"
Ayer	Seafirst	"Good for a Lifetime"
KM&G	C & P Telephone	"Margie Shoemaker
Lee Burnett	Kellogg's	"Queen Gas
KM&G	Yamaha	"Birthday"

What do all these spots have in common? They all made you feel good. Made you glad and proud to be a *person!*

We hear a lot of carping about our business these days. Attacks and restrictions by the FTC, FCC, FDA, and a host of official and self-appointed consumer protectors.

We hear government regulators proclaiming the need for counter advertising or the fairness doctrine or insisting on the elimination of television advertising to children, or claiming that advertising manipulates people against their will. We hear that television recall norms have dropped 20% in the last five years, and that people are tuning us out because our advertising is heartless, ridiculous, pandering, or downright dishonest.

We hear that over 400 consumer legislation bills are awaiting action in Congress, almost all of them threatening to restrict advertising's license, either directly or indirectly.

And we hear Lou Harris saying that in a time of falling confidence in America's institutions and professions, advertising ranks at the very bottom of the barrel.

I don't hold up my point of view as a panacea. Nor do I believe that all advertising can ever fully reflect it. Or ever be universally admired, for that matter.

But I do submit that it's possible—just barely possible—that

> a little more love
> a little more respect
> a little more humanity
> a little more "You're O.K."

in our copy might begin to change some minds and soften some unfavorable attitudes about us. And I believe it would make our copy a lot more persuasive in the bargain.

I think it is becoming quite apparent that the future of free enterprise in this country will be decided by no superinstitution or superhuman personality, but by each of us, in our personal and business lives. The country can be only as truthful as you and I, only as worthy as you and I, only as self-respecting as you and I.

At a time when so many institutions seem to be crumbling around us, here's a way to look at our personal responsibility—an inscription found a church outside London. It says:

> "In the year 1653, when all things sacred in the Kingdom
> Were either profaned or demolished,
> This church was built by Sir Richard Shirlye, Baronet,
> Whose singular praise it was
> To do the best of things in the worst of times."

I find hope, challenge, and purpose in that.

Lastly, let me say: You're all really O.K. to listen so politely.

50 BRILLIANT ADMEN LOOK AT CORPORATE ADVERTISING
or
Many a Mickle Makes a Muckle

Prior to the seminar, Bill Genge sent a questionnaire on corporate advertising to the participants and presented the data in Phoenix.

Here are the results from the fifty questionnaires that were returned.

PERSONAL ENTHUSIASM FOR YOUR COMPANY'S CORPORATE ADVERTISING

	%
High	76
Mixed	8
Low	7
Nothing running now	4
N.A.	5

Most of the seminar attenders liked their company's corporate advertising. 76% had high enthusiasm; 15% were mixed or low; 5% didn't answer.

ONE OVERRIDING OBJECTIVE

	%
Build awareness/recognition/understanding in general	55
Build awareness/favor in financial community	20
Build recognition of products/services among industry management	12
Sell our products to industry management	4
Other	9

What overriding objective did their advertising have? 55% said to build awareness, recognition, or understanding in general. 20% said to build awareness or favor in the financial community.

MOST SERIOUS WEAKNESS/SHORTCOMING OF MOST CORPORATE PROGRAMS

	%*
Lack of clear, steady objectives	40
Self-serving, introverted	18
Dull, boring, irrelevant copy	16
Lack of continuity (funding)	15
Lack of credibility	12
All others	11

*Multiple responses affect percentages

Surprisingly, 40% cited lack of clear, steady objectives as the most serious shortcoming of most corporate programs.

LEVEL OF OPERATING MANAGEMENT'S INVOLVEMENT, ENTHUSIAM, SUPPORT

	%
Low	18
Medium	59
High	19
N.A.	6

Ranking management's involvement, enthusiasm, or support, 18% said low, 59% medium, 19% high.

LEVEL OF GENERAL EMPLOYEES' INVOLVEMENT, ENTHUSIASM, SUPPORT

	%
Low	30
Medium	54
High	7
N.A.	9

Employees' enthusiasm? 30% rank it low, 54% medium, and 7% high.

SENIOR FINANCIAL OFFICERS' INVOLVEMENT, ENTHUSIASM, SUPPORT

	%
Low	22
Medium	29
High	40
N.A.	9

Senior financial officers' involvement, enthusiasm, or support for their company's corporate advertising is ranked high—40%.

MOST DESIRED INTERNAL CHANGE TO IMPROVE YOUR CORPORATE ADVERTISING

		%
Simplified decision-making authority		34
Line-staff policy agreement	8%	
Reduce number of decision makers	10%	
Eliminate divisional authority	9%	
Reduce senior management involvement	7%	
Larger budget		14
Extend planning/lead time		10
Tighten audience definition		10
Increase divisional/line involvement		8
Miscellaneous		14
N.A.		10

Genge thought this table might be the most interesting. He combined some percentages under the general finding of "simplified decision-making authority." He found that 34% were citing that, in one form or another, as the most desired internal change to improve their company's corporate advertising. Larger budgets, extended planning time, and tighter audience definition also received high mention.

COMPANIES WHOSE CORPORATE IMAGE IS LARGELY THE RESULT OF CORPORATE ADVERTISING

	%
Xerox	24
IBM	16
3-M	10
Eaton	8
Weyerhaeuser	8
AT&T	8

OTHER MULTIPLE MENTIONS
Burlington Industries
Container Corporation
DuPont
Ford
General Electric
GTE
Honeywell
Otis
Rockwell
Transamerica

Xerox, IBM, and 3-M top the list of companies which the attenders thought achieved corporate image largely as a result of corporate advertising.

Exhibit 51: "Crosscurrents, 1975"



Introduction

A chief executive can no more delegate the responsibility for communication than he can for earnings per share.

The quote is from the address by E. Mandell de Windt, chairman of the Eaton Corporation, that opened the regular sessions of the 1975 Fortune Corporate Communications Seminar. It confirms just how important corporate communication has become in the management of major business enterprises.

It was awareness of this growing concern that led Fortune to launch its annual seminars four years ago. We believed that information on the subject available at that time was sparse and, in many instances, too elementary to be of real value. From our own contacts with corporate communicators, we knew that their efforts were becoming increasingly sophisticated. Yet, there seemed to be no single forum where fresh ideas, experiences, and results could be aired and discussed in depth. So we provided one, bringing together the people who create corporate advertising, management representatives, and experts in areas such as finance and government where corporate communication has an important role to play.

This year, the dialogue continued to be lively and informative, as the following pages indicate. We owe special thanks to the speakers and participants who contributed so much to the seminar's success. While they came from different fields and different companies, they joined together to learn from each other, to share opinions—and to provide a new volume of useful information for you and your associates.

James B. Hoefer

James B. Hoefer
Advertising Director
Fortune

Photographs by Guy Gillette

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Corporate Communications–Top Management Perspective 11
E. Mandell de Windt, *Chairman of the Board, Eaton Corporation*
How one corporation outgrew its past and established a new identity through a total communication effort that produced highly beneficial results both inside and outside the company. De Windt's firm commitment to this continuing effort is clearly evident, as is his view that business needs to do a better job of telling its story to the public.

Corporate Communications in Collective Bargaining 17
Theodore W. Kheel, *Administrative Director, Institute of Collective Bargaining and Group Relations, Inc.*
Collective bargaining, being a relationship between labor and management, is totally dependent on communication. It is a joint decision-making process that involves many forms of communication, direct and indirect, on the part of people and organizations on both sides of the table. Kheel cautions, "It is not simply what you say; it's also what you do."

Corporate Communications and Public Attitudes 23
Ben J. Wattenberg, *Business Consultant and Author of* The Real America
The doom and despair rhetoric of the 1960-1974 period cloaked the real gains of society. Objective data shows improvements in income, education, and lifestyle. Our system worked better than we gave it credit for. Is this perceived by the American people? They are the real heroes of this period, says Wattenberg. "They were smarter, tougher, wiser, and shrewder than their critics from both the right and left." Business has played a role in this progress and corporate America ought to be saying that we have accomplished much—and we can do better.

Corporate Communications and the Consumer 29
Don Johnson, *President and Chief Executive Officer, J. Walter Thompson*
While corporate communication is most often concerned with business, government, and financial communities, it should play a stronger role in adding the value of positive parenthood to the consumer brands a company markets. With the product proliferation of the past ten to fifteen years, about the only mass consumer franchise that many companies have is the reputation of the company itself.

Advocacy Advertising–Act II 33
John E. O'Toole, *President, Foote, Cone & Belding*
Advocacy advertising—"issue oriented advertising"—serves business by providing facts and expressing points of view often ignored in the press. This kind of advertising is not, as some critics say, an attempt to control information. It adds to the supply of fact, opinion, and interpretation that shapes public attitudes. "With issues becoming increasingly complex," says O'Toole, "more information has to be better than less."

The Second Six Sins of Corporate Advertising 37
Hugh M. Redhead, *President, Campbell-Ewald Company*
What are the sins? 1. Failure to position the company. 2. Failure to measure advertising results. 3. Failure to hang in there—to stay with it. 4. Failure to provide a benefit for the reader. 5. Failure to amplify corporate advertising with all of the other necessary corporate activities to build a result-producing program. 6. Failure to help the system when the system badly needs help

Communicating Foreign Policy 43
Robert J. McCloskey, *Assistant Secretary of State for Congressional Relations*
The State Department has a "product": foreign policy. Communication—between the Administration and the people, between the State Department and the business community, between our government and other governments—is a prerequisite to foreign policy success in an interdependent world.

Financial Communications 47
James W. Davant, *Chairman of the Board, Paine Webber Incorporated*
The deterioration of positive attitudes toward business and the private enterprise system as a whole is reflected in the decline of individual participation in capital markets. Yet individual investors are needed to support the economy's capital requirements and to prevent total institutionalization of savings and investment decisions. Among the reasons why people are turning away from business is their feeling that they have been misled. Communication practices of the past have contributed to this attitude by focusing on stock multiples rather than corporate capabilities, performance, and prospects.

"The American System" 53
Daniel Seligman, *Executive Editor, FORTUNE*
While the System was under fire in the Sixties nobody seemed to notice that, by the most relevant standards, it was in fact working pretty well. By around 1973, however, when the clamor about the System was on the wane, the System was *not* working very well. At the end of 1974, it became clear that people were demanding more from the System than it could possibly provide without pushing up the price level. At the same time, the electorate and government seemed unwilling to make the hard economic decisions needed to fight inflation. This perspective helped shape FORTUNE's April 1975 bicentennial issue. Seligman also traces the development of Daniel Bell's article, "The Revolution of Rising Entitlements," a major feature of the issue.

New Concerns About the Press 57
Paul Weaver, *Associate Editor, FORTUNE*
Has the press become an adversary? Weaver's investigation around the country indicated a mixed answer. The adversary spirit isn't prevalent in American journalism. "Neither adversary nor buddy" was the formulation heard most often, but some newsmen, particularly in New York and Washington, take a strong adversary position. In addition, what has surfaced in the post-Watergate era as a concern of newsmen is the conflict between the new national press and established institutions. It leads them to worry about the future of press freedom.

The Common Market—A European Perspective 63
Andrew A. Mulligan, *Director of Information, European Community Information Service*
Despite the world economic crisis in late 1973, recent progress points to a realization in Europe of economic interdependence and the need for consultation to harmonize national economic policies. The Common Market countries have created a regional fund to assist industrial development, giving developing nations, many former dependencies, access to the European Common Market. They have also strengthened European institutions for policymaking and legislation. The great problem for the EEC, according to Mulligan, is "that we've been too reluctant about our profile, too frightened of our national sensibilities, and wholly unable to present a credible image of ourselves."

Doing Business in the Sunshine 67
Ernest F. Hollings, *U.S. Senator, South Carolina*
Senator Hollings believes that business demands the impossible: total decontrol and total freedom. "Many businessmen who want government to get out of their way . . .also want the option to call on the government to bail them out." In working toward a more practical accommodation, Hollings calls for better representation of business in Washington so that its views can properly influence the important economic decisions that government is called on to make. Both government and business have to strengthen their communication by getting away from slogans and getting down to substance.

Workshop Session: Selling Management on Corporate Communications 70

Participants

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PPG Industries, Inc

Stephen Baur
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ESB, Inc

E. M. Broene
Vice President-Promotion
Steelcase Inc

Joseph Brouillard
Senior Vice President & Director of Corporate Communications Group
J. Walter Thompson Company

John C. Cailihan
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Albert H. Campbell
Advertising Director
FMC Corporation

John F. Campbell
Vice President Public Relations
Colt Industries

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Advertising Director
American Telephone & Telegraph Company

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Rockwell International

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Reliance Electric Company

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David J. Curtin
Vice President
Xerox Corporation

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Corporate Vice President-Public Affairs
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E. Mandell de Windt
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Joseph J. Doherty
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Advertising Director
FORTUNE

The Honorable Ernest F. Hollings
U.S. Senator, South Carolina

Henry H. Hunter
Vice President Public Relations
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Don Johnson
President & Chief Executive Officer
J. Walter Thompson Company

Arthur M. Jones
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Howard Kaplan
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E. William Kenyon
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Arthur W. Keylor
Group Vice President
Time Incorporated

Theodore W. Kheel
Administrative Director
Institute of Collective Bargaining and Group Relations, Inc

Richard N. Larkin
Director-Communications
National Steel Corporation

Edward Patrick Lenahan
Publisher
FORTUNE

Dr. Robert D. Lundy
Vice President, Public Relations & Advertising
TRW Inc

The Honorable Robert J. McCloskey
Assistant Secretary for Congressional Relations and Ambassador at Large, Department of State

Waldo E. McNaught
Director, Corporate Communications
Public Relations Staff
General Motors Corporation

A. W. Moore
Vice President
Public Relations & Advertising
The Ralph M. Parsons Company

Henry A. Moores, Jr.
Midwest Manager
FORTUNE

Wynn G. Moseley
Public Relations Director
Ingersoll-Rand Company

Andrew A. Mulligan
Director of Information
European Community Information Service

J. Robert Nolley, Jr.
Vice President-Advertising & Public Relations
Richmond Corporation

Anthony J. F. O'Reilly
President — Chief Operating Officer
H. J. Heinz Company

John E. O'Toole
President
Foote, Cone & Belding Communications, Inc.

John R. Purser
Director of Public Relations & Advertising
Jones & Laughlin Steel Corporation

Gary H. Raddon
Commercial Marketing Director
Continental Illinois National Bank & Trust Company

Dean Randall
Vice President-Communications
Honeywell Inc.

Hugh M. Redhead
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Campbell-Ewald Company

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Vice President
Grumman Corporation

David G. Sawyer
New York Manager
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Robert S. Schlesinger
First Vice President
Bache & Company Incorporated

John Sealey
General Manager, Business Services
Shell Oil Company

Daniel Seligman
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Aluminum Company of America

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Vice President of Corporate Communications
Raytheon Company

Dan G. Stevens
National Accounts Advertising Sales Manager
FORTUNE

L. E. Stollenwerck
Vice President Public Relations & Advertising
Gulf Oil Company U.S.

Kevin Sullivan
Director of Advertising & Public Relations
Tiger Leasing Corporation/North American Car Corporation

Michael A. Taylor
Vice President & Assistant to the Chairman of the Board
Paine Webber Incorporated

Gerald P. Thurmond
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Charles A. Whittingham
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Time Incorporated

J. Richard Young
Director of Communications Operations
International Business Machines Corporation

Corporate Communications–Top Management Perspective

E. Mandell de Windt
Chairman of the Board
Eaton Corporation

Talking about corporate communication in a roomful of successful corporate communicators is a somewhat disconcerting task. I'll have to admit that I feel a little bit like Daniel Boone. Someone once asked him—probably on a TV talk show—if, in his many treks through the unmapped wilderness, he had ever been lost. Old Dan'l thought awhile and then replied, "No, I was never lost—but once I was bewildered for three days." Corporate communcation, too, can be somewhat bewildering but I thought that you might like to hear how one company found some milestones in the wilderness of communication and how I, as a chief executive, look at the imposing challenge of communication.

The principal problem for top management in communication is that there are so many facets to the subject that we too often prefer to look at them as so many corporate functions. As a result, we let communication responsibility fall into the skillful hands of a crew of enthusiastic John Aldens who pursue the Priscillas known as publics. The fact is, however, that a chief executive can no more delegate the responsibility for communication than he can for earnings per share.

We communicate, as corporations, whether we want to or not, whether we like to or not, whether we try to or not. The body language of business is projected through our people, our products, and our policies. The trick is to communicate effectively to the varied and myriad audiences that affect our present and future. You don't need a list of these audiences; they are well entrenched in your working world and the subject of corporate image gets massaged daily from breakfast conferences through the cocktail hour. So much so, that image has come to mean something other than an honest reflection of the company, something contrived and projected to meet certain predetermined goals. It's almost like the situation in which a new mother, receiving the traditional raves about the baby, said, "I know you think he's beautiful, but wait till you see the pictures."

I was anxious to meet with you today for two reasons. First, I feel that Eaton has a unique story to tell in the area of corporate communication because we have acquired some specific measurements of the effectiveness of our total communication program through a chain of events beginning with a name change in 1971. Second, I can think of no more important and effective audience with whom to discuss the need for communicating with the public about business and with whom to discuss a program that, I hope, can serve as a model in convincing you and all of business that the biggest selling job of all times is—selling ourselves to a suspicious public.

Let's go to Eaton's program. Up until five years ago, we were so busy growing through acquisition and expansion that we had all but failed to notice that our identity, if we could call it that, was dim and confused. Even within the company, we weren't quite sure who we were. Our acquisition program had brought more than a score of companies into the fold, along with some 256 brand names being marketed through seventeen advertising agencies. Divisional advertising retained the brand identities and a single trade magazine often had up to five ads from the company, none of which even faintly resembled any other.

For years we had gone along merrily as Eaton Manufacturing Company. We acquired the prestigious Yale & Towne Manufacturing Company in 1963 and, in 1966, changed the name of the company to Eaton Yale & Towne. The problems with the name were many. Everybody knew Yale locks and most people had heard of Cyrus Eaton. Locks were an important but small part of our business and Cyrus Eaton has never been on the payroll. His office is down the street in a completely different line of business. (I was once introduced as president of Eaton Tale & Yawn.) People in our acquired companies strove mightily to retain their old brand name loyalties. By 1969 we knew something had to be done.

We're experts in engineering and in metals technology, so we called in the identity experts to give us a hand and retained Lippincott & Margulies. The first visible results were a new logo and a new name in May of 1971. Behind that striking logo were many hours of work and thought—and a commitment to a total corporate communication program. This time, we wanted to have some idea as to the effectiveness of the program. So we hired the Yankelovich organization to keep score. A benchmark study was conducted before the name change, a follow-up study was done in 1972, and last December a second follow-up study was conducted.

Before going into the results of those studies, I would like to outline briefly some of the things that were involved in our commitment to a total corporate communication program, activities that progressed with the growing commitment to total communication.

In advertising, Eaton went into network TV for the first time and embarked on a corporate print campaign. We worked hard to coordinate all divisional and product advertising so that each Eaton ad had some relevancy and rub-off for every Eaton operation. Brand names were reduced to ten highly marketable ones, and we are seriously considering cutting that list to just one. We're also down to a half-dozen agencies. By the way, it is interesting to note that, in spite of this broader program, better coordination permitted us to hold total advertising expenditures to a comparable level.

We beefed up our public relations effort on both the corporate and product levels. I became a traveling salesman for Eaton on soapboxes and podiums from Kenosha

to Rome to Osaka. Product publicity became an aggressive and productive adjunct to the total marketing effort.

We moved internal communication from an industrial relations sideline to a major corporate endeavor.

We transformed our government relations functions from a listening post to a front line operation.

We instituted a more aggressive investor relations program. Once again, I found myself the willing tool of capitalism at investors' meetings and with individual security analysts. In short, we took every tool of communication that we could find and put it in the hands of skilled and talented people. Eaton was tired of being described as the "biggest company you never heard of."

The three Yankelovich studies show that significant progress has been made. I don't believe that I have to attest to the professional reputation or competency of the Yankelovich organization. The studies I refer to were based on in-depth interviews with 700 business and financial people, government and academic thought leaders, and shareholders and non-shareholders of Eaton stock. Many of the interviews involved comparing Eaton with five of its major competitors. Some of the results were most encouraging; some were puzzling; and some pointed out a course of action that could bring more positive results.

> "... we found that since the name change, awareness of Eaton had grown by 13 percent in the business community."

On the encouraging side, we found that since the name change awareness of Eaton had grown by 13 percent in the business community. This was even more significant when we saw that, for our five leading competitors, recognition had dropped or remained even. The studies were puzzling in that, among the financial community, positive impressions of all companies had decreased. This is attributable to the many changes within the financial community itself, where people and programs have undergone tremendous changes in the last few years. Even here, however, Eaton fared significantly better than its competitors.

As for pointing out a course of action, the Yankelovich studies showed that more than half of the security analysts who followed Eaton considered us an automotive supplier. While we value our passenger car business and customers, this is only one segment of our market. Today, our advertising, our investor relations, and our public relations are geared to showing that two-thirds of our business revolves around the capital goods market.

We got high marks for being innovative in management and came out first among the business community as the company in our industry "best equipped and best prepared to deal with unexpected social and economic change."

These were just some of the three dozen findings of the study and I repeat them because they do represent some quantitative measurement of our communication efforts. We were pleased to learn, for instance, that Eaton's reputation as a corporate citizen grew significantly and that more investors thought of us as a growth company.

In the most recent study, we looked into the effect of our sponsorship of the "American Parade" series on CBS-TV. After only two shows, two-thirds of the business community who were familiar with the "American Parade" identified the series with Eaton. The first show, incidentally, produced nearly 10,000 favorable responses from viewers.

Before I go any further, I should mention that our national advertising, the "American Parade," the company name change, and corporate identity program are all under the able command of Bob Whitney. Bob is a regular member of this seminar and if you have further questions on this subject, I suggest that you'll get the answers—and perhaps some deeper insight—from Bob.

Our corporate communication philosophy, guided by these expert studies and implemented by our own communication people, has been to go one step further in each phase.

It makes sense to communicate to employees on a face-to-face basis, but if this is impractical, why not develop a video cassette program so that every employee can see when the chairman blinks? Through video and audio reports, we have reached employees at 150 locations throughout the world with up-to-the-minute news and commentary on the company's problems and prayers.

If it makes sense to sponsor network TV, why not bring programs of the highest quality to the public and tie in with the nation's bicentennial? If a national print campaign is a good idea, why not harness the wondrous imagination of youngsters and let them design the Eaton products of the future?

If corporate responsibility is a real and meaningful goal, why not talk about it—to everybody?

And here is where I change gears. While I can honestly give Eaton and many other companies a well-deserved pat on the back for improving corporate communication, I would like to follow that with an acrobatic swift kick in the pants for all of us for falling down on the most important communication job of all—that of telling the business story to the public.

Way back, and I mean *way* back in 1972, Max Ways outlined the problem in the pages of *Fortune*. He stated: "The reputation of business has been getting worse, while its performance, by almost any economic or social or moral standard, has been getting better."

His knowledgeable and articulate discussion of the problem ended with these prophetic words:

"If business does a better job of cleaning up the messages, intended and unintended, that it sends, if it manages to explain more about what it does and how it works, society may trust business enough to let it have a highly significant share of leadership in tackling the huge tasks ahead. Otherwise, business, known mainly by its scandals and other samples of its pathology, will become less and less able to fulfill its mission."

Have we done that job? Have we earned, through gaining public support, the right to lead? I think we have only to look at the result of government controls, nonproductive mandated product changes, indecisive government, and the general malaise of the economy to see that we didn't take Max Ways seriously enough. Today, business is not leading the way out of the wilderness. We are simply fellow travelers in a frightening economic maze.

But how did we get into this mess? Ask any economist and he'll give you a dozen reasons, none of which is the

same as the next economist's. Ask a politician and he'll blame business; ask a labor leader and he'll blame business and government. Ask the housewife, and she'll blame business. Ask the student and he'll blame business.

Let's take a closer look at those last two, the housewife and the student. Egged on by a legion of consumer crusaders and a cynical press, the housewife finds it easy to put the blame for higher prices on business. And the

> "... Today, business is not leading the way out of the wilderness. We are simply fellow travelers in a frightening economic maze."

student, filled with ideas and opinions from an often poorly informed or antibusiness teacher, easily fingers business as the culprit. Neither the housewife nor the student knows or understands business, but their voices, the voices of the public, are speaking out against business, loudly.

Recently, Henry Ford pinpointed the problem. "We've got to rebuild consumer confidence," he said. I think we have to go back and ask ourselves who destroyed consumer confidence, who eroded the public's esteem of business and businessmen. If we think about it long enough, we find ourselves in agreement with Pogo of the comic strips, who said, "We have met the enemy and he is us."

Business people for far too long have let others do the talking for them. While politicians, legislators, columnists, phalanxes of consumer crusaders and legions of environmental saviors have grabbed the spotlight and the headlines, businessmen and women have remained ingloriously mute, letting the myths and fairy tales about business go unanswered and unchallenged.

We are witty and winsome in conference but befuddled and bemused in the classroom, the clubroom, the corner of the square, and, to be candid, in our own homes.

It's easy to understand the public's fanciful idea of profits when we realize that they believe that, for every nickel of profits we make, we make a quarter. And every news story is spiced with words such as windfall, excessive, exorbitant, by "experts" who wouldn't know a balance sheet from a bedsheet, but they sure know how to get into print.

Does it help to tell the public that profits are the mainspring of the free enterprise system, that without profits there is no future? It sure as hell does, but who's going to tell them?

It damn well better be us!

A curious mixture of sugar and oil has led the public to feel that business creates inflation by raising prices at the whim of the boss.

Believing that higher prices cause inflation is pretty much like blaming a gain in weight on the bathroom scales. Higher labor costs without corresponding gains in productivity cause higher prices. Excessive government spending causes higher prices. Controls and restrictions cause higher prices. Mandated product changes cause higher prices. Material shortages cause higher prices. And on and on and on and on.

Too many people feel that the government is the handsome young prince and that its kiss of controls will awaken the sleeping beauty of our economy. Personally, I'd rather bite into the poisoned apple of inflation than feel the caresses of a government that can neither formulate nor enforce equitable wage and price controls. After our most recent experience with controls, it is almost incredible that there are still those who would press for their return.

The paradoxes inherent in environmental controls serve to point out what just might be the crux of the problem. Chuck Smith, chairman of the U.S. Chamber, put it succinctly when he stated, "We have gotten ourselves into this mess by focusing on the desirability of goals while ignoring the availability of means. We have been so busy bickering about the distribution of the golden eggs that no one has given much thought to the nutritional needs of the goose."

In discussing my role today, Jim Hoefer reminded me that you were an audience of business communicators, that you are already committed to the free enterprise system and you really didn't need to be lectured about the need for public support of business.

While I agreed with his logic, I was also reminded of the minister who greeted his congregation of "believers" with the statement that, "Everyone here knows he is going to die, but some of you need to be convinced."

We in business need to be convinced that public attitudes and opinions and the resultant legislation are far more than routine irksome problems, that growing cries for governmental regulations are far more than another irritant, another bale of paper work.

Barry Goldwater sees it as an ominous trend. He stated recently, "The competitive enterprise system is now under attack by demagogues who would like to nationalize all basic enterprises in this country and there is a greater chance for their success than at any time in our history."

C. Jackson Grayson, Paul McCracken, and Arthur Burns are among many who continue to raise similar warning flags about the economy.

There is, of course, no one answer, no one road or course of action that will reverse the current against free enterprise, but it is my firm belief that one sure way to bolster our proven system of progress is to give the public the facts, to replace the fantasy of fairy tales with the true story of the solid contributions of American industry—and to do it by talking to people, listening to them, discussing with them.

It's not easy to do and it's not without cost—in time, energy, and money. But it can be done, and it must be done, if we want to prevent our children and their children from reading about the free enterprise system as "the way it used to be."

The ways to do this are limited only by the imaginativeness and ingenuity of business people.

For the past two years, we at Eaton have been involved in a program that strives to debunk the myths and fairy tales about business. We would be naive to think that one company could reverse the tides of public opinion, but we believe that one company can serve as a model, or a catalyst. We can make a beginning.

We call our program Comm/Pro, short for community communication program. It involves 180 Eaton men and women including every officer and division manager—and obviously bears the stamp of commitment from our management. After the program was inaugurated in the U.S. our Canadian managers demanded, and got, a program that addresses itself to the

Canadian public.

Through the program, these men and women have talked about business to some 55,000 people in more than 1,000 meetings, and more important, listened and discussed business with students, housewives, community groups, and just about anyone who would listen. And for every speaker our own employees were a priority group.

The presentations are based on simple business facts: profits, productivity, and community contributions. Aided by a dozen graphic illustrative charts, each speaker is encouraged to add his own inputs and experience to the brief presentations. The presentations are designed so that at least half of the time allotted can be spent in discussion and questions and answers. Those question and answer sessions are really why we're there. We feel we have succeeded if the presentations evoke lively, even hostile, discussion.

Each of our Comm/Pro speakers has undergone an intensive three-day training conducted by an outstanding group of instructors from Communispond, a subsidiary of J. Walter Thompson. The training gave our people new confidence in their ability to talk to groups and, more than coincidentally, has resulted in a surprising increase in the level of internal presentations.

It soon became evident that the program would need a full time coordinator and some promotional muscle. Groups simply did not come banging at our door. We needed, and put together, a program to develop audiences, assign speakers, keep them continuously informed and to assure a constant feedback from the classrooms and meeting halls as well as to maintain a continuing audit to encourage and update speakers. In some cities we ran ads saying, "Spend an Hour with a Capitalist." Groups responded and found that the "capitalist" looked a lot like the guy next door—because that's just who he was.

In our striving to teach and to listen, we have learned that our educational system, at all levels, is sadly deficient in preparing young people for business careers, or for that matter, in preparing them for any contact with business.

We have learned that one business person and a room full of students, or housewives, or union workers have more agreement than differences about what can bring about a better quality of life for every American.

We have learned that the program has a tremendous and immediate impact in our smaller communities and that reaching urban audiences takes a lot more planning and coordinating, but can be done. We have active programs with public and parochial schools in Cleveland, Detroit, and Philadelphia.

We don't try to kid ourselves by thinking that we have upset or changed public attitudes.

Our goal is not to change minds, but to open minds. We have seen evidence that this is happening.

In addition to our goal of getting to and with public audiences with Comm/Pro, we wanted to encourage other companies and groups to embark on similar programs.

While we have not sought publicity directly, the program has been publicized widely in the business, trade, and general press as well as on TV and radio, resulting in an audience of millions.

Some 800 companies have asked for information on the program, which we have supplied. On more than a score of occasions we have sent out people involved in the program to work with other companies in their programs. Today, we know of some twenty companies that have embarked on active programs to reach the public. Armco Steel, for instance, has 300 speakers talking to employee, student, and community groups.

Most recently, a story about our program appeared in the *Financial Times* of London. The response was immediate and exciting and recently our people made a presentation to seventy-five English and European executives on how to reach the public. It seems that attitudes about business have no nationality. The fairy tales may be different in England and Europe, but they are just as pervasive and damaging as our own.

I didn't come here today simply to tell you about our program. I want you to join it. The battle rages on and we, businessmen and women, must fight back. These not so funny fairy tales about business can become real horror stories unless we all get to the task of getting them out of print and out of mind.

And you, the corporate communicators in this room today, are just the people to do it, and do it right.

The other day one of our women in world headquarters, a stalwart in our Comm/Pro program, left her high rise office and traveled fifty blocks east into another world. Her assignment: to talk to a group of Cleveland high-schoolers about business and to answer their questions. They asked about pollution and about job opportunities and about what business was doing to help the city and most of all they asked about their future.

> "... what I suggest takes time and energy and money. It takes care and planning—and it takes top management leadership."

Finally one young lady raised her hand and asked our speaker: "Can you tell me how I can get rich, like you, when you're black, like me?"

At that point, my friends, communicating began.

If we don't believe in and have confidence in the American business system, then this is the biggest roomful of hypocrites since the Roman Senators stabbed Caesar. But if we do believe and do have confidence, then I hope that we also have the guts to do what's necessary to save our system. For that, we have to attract the American people to lend us an ear.

It would be nice if we could just go about running our businesses and people would leave us alone. Today, that kind of thinking is the never-never kind, and it only distracts from what we have to do and what we can do.

Sure, what I suggest takes time and energy and money. It takes care and planning—and it takes top management leadership. But, at a time when four out of five Americans have lost confidence in the American business system, it would be sheer irresponsibility to let the matter go by default. I can't set up a draft board, but I sure as hell hope that I can recruit all of you on a voluntary basis.

Perhaps, as you look at the size of the problem in front of us, you feel dismayed, even frightened. I know I did. But I can tell you this: Eaton took the plunge three years ago. And from where we are now, I can tell you from personal experience: "Come on in: the water's fine."

Question and Answer Period

Q: *You told us about this really marvelous program of communicating with the American people, or various segments of it. What is Eaton's attitude toward its employees becoming involved either in appointive offices or running for election, in other words, getting into the mainstream of the political system?*

A: I can answer that very directly and say we're all for it. We have a program where we encourage our employees to take an active role in the communities in which they live. We feel that it's a direct, job-related responsibility of our managers. I'm pleased to say that the best example I can point to in recent weeks is the case of our director of communication, Dick Stoddart, who was asked to serve on the newly constituted Community Transit Board, which has been put together to try to bring some sort of order out of chaos in the Third Cleveland Transportation System. Dick, just before I left the office, came in and said, "Now they want to elect me president of the board." I said, "You've got a hell of a lot to do, but if you can give the leadership that's necessary, go to it." I think that probably gives you the best answer I can think of.

We once made a survey and followed up on it—to see just what our people, not only our management people, but all of our people throughout the factory were doing in the way of community activities—and we were just utterly amazed to learn of the number of people—some of them people you wouldn't think of—who were taking real community leadership roles. To me, this is what it's all about.

Q: *How about elective office? That gets a little tougher.*

A: I suppose I could say we have served in elective offices: school boards, county commissioners, on the city council. We haven't had anybody elected recently to a state or federal office; but I'm sure that, if one were to aspire to that, we would try somehow to work it out so that he or she could effectively serve. There being so many legal ramifications today, I don't know how we'd do it, but we would certainly try to figure it out, so he or she wouldn't suffer during that period.

Q: *How has Comm/Pro affected your own collective bargaining?*

A: Well, we developed a new program, which we call "Earning Philosophy," about five years ago. Most of our customers up to that time had been in the industrial Northeast or Midwest, and we found ourselves being shackled by long standing restrictive work practices and very militant unions. So we decided to move an engine parts factory back to the middle of Kearney in Nebraska, which is in the middle of the country, in the cornfields — and we decided to try a whole new approach. We decided it was time that we returned individual dignity to each of our employees. We put everybody on salary. We did away with time cards. We paid for absences. We paid for tardiness. We don't have any union in that plant, and we don't have any unions in fifteen plants that followed.

We have developed a very strong communication program in those plants. I would say that our Comm/Pro program is far more effective in some of those plants than in some where there was strong union militancy. However, we keep banging away. I don't know whether it's that or the fact that our productivity in these new plants is ranging from 40 percent to 60 percent higher than it is in our older plants, back in the Michigan, Ohio, and Wisconsin area, or whether that's due to dealing with part of the action. We also now begin to see a very marked improvement in productivity in some of the other plants. I don't know whether that's part of Comm/Pro or a realization that their jobs are on the line unless they sit down with us and attempt to reach a mutually beneficial solution to some of these restrictive practices that maybe will have to go by the board. I think it's a combination, and so far we've found some of the union committees among our most interested audiences. I'd say in some cases they are hostile, but in some cases their attitude is, "Gee, I wish we'd known this a long time ago."

Q: *How do you go about selecting, within the company, the communicators that spearhead your program? Do you do this by level of organization?*

A: Well, I guess it was by executive edict. At first, we had every officer and every division manager in every plant. Then we went to department heads and plant people, because of the enthusiasm that the program has developed and the existence of this training program. I'd say that these guys at Communistan, Communispond, under Kevin Dailey, have just done an absolutely magnificent job in developing the program.

We put about fifteen through at a time, and it takes three days. We have a much more expansive program that I'd like to talk to you about, but this one did the job for us, and developed so much enthusiasm that we have a waiting list. We continue to run these programs. I was not kidding a bit when I said that the people up there in Canada said, "Dammit, if it's good enough for the States, we want to have it up here"—and now our people in England are asking for it. We sort of woke everybody up when this fellow came over and wrote up the story for the *Financial Times* of London. I was challenged to debates by several of the more vociferous British labor leaders, but I conveniently found I couldn't get away. I didn't see how I could win that. But we're going ahead with this program over there. I will say it's not without cost. We have a rather substantial budget; but frankly, we feel that it's time that Eaton, along with the rest of you, got off our collective butts and got out and fought for the thing that really made this country what it is. There has been more restrictive legislation passed in the last five years than in the last fifty—and the only way we're going to slow it up is if we get the facts to the public.

Let me tell you that any Congressman or any person elected to office is pretty sensitive to what the people back home are thinking. If they're all mixed up, he's going to get the wrong message. And if we can convert a few each day, it's a long, hard battle, but at least it may help turn the tide.

Q: *In dealing with the financial press – let's keep it local for a moment, the local financial press – is there a special effort or does advertising play a part in it? I find the local financial press cynical to advertising.*

A: I don't find that. As a matter of fact, I wrote my friend Tom Vail, editor and publisher of the Cleveland *Plain Dealer*, the other day, and made some suggestions about his financial page—which I considered very poor. I was very pleased to get a note from him saying I was absolutely right.

I think we've got to go after the financial press people as a start. They seem to accentuate the negative and what we've got to do is get them around to accentuate the positive. But they aren't going to do it unless you get after them and give them the facts. If you can get to the right people with the right story, you have a chance. It isn't

going to happen by itself.

Q: *Mr. De Windt, the National Chamber of Commerce, and the National Association of Manufacturers, and a great many other organizations have been trying to tell the so-called American business story for years and years, and I think virtually everyone in this room belongs to an organization that supports–and fairly substantially–those kinds of organizations. Why do you think the approach that you're making will succeed as opposed to their approach?*

A: Well, No. 1, they haven't succeeded, and for us to give up, I think, would be a mistake. But you know, business for too long has looked to the Chamber of Commerce and NAM to speak for it. Unfortunately, for one reason or another, which I cannot explain, in spite of the fact that we belong to both organizations, the credibility of those organizations has not been established. As a matter of fact, every time one of them speaks, you get the reaction, what are these fat cats after this time?

On the other hand, Nader can get up and make the most irresponsible statements and claims in the world, and probably 50 percent or more of the people that hear his statement say, right on. And the same is true for George Meany or any other labor leader. And frankly, it's high time that the guy that sits at the head of the company got up and spoke, and didn't send out the word that he was unavailable for comment when somebody tried to get hold of him—high time that he confronted the press and the public. The time has come when we've got to explode these myths, and I don't think it's something we've been doing.

I think the business leadership has got to do it themselves. In order to be able to do it, they've got to become informed, they've got to stick their neck out, and they've got to take chances. Until that happens, we're not going to see it.

Q: *Can I comment on that? I think both organizations believe very strongly in the business story, but it seems to me that they're talking to themselves. The difference in this is that we're talking to the public, if the public will listen.*

A: That's true, and I think it's true whether we're talking politics or anything else. It's always true that, when you get together, you can convince yourselves that a Barry Goldwater can get elected, if you only talk to Republicans. But if you get out in the real world, you could see what was going to happen. The same thing is true here.

Q: *I'm curious about the program you mentioned. Can you tell us something about the growth and the size of the staff and the budget?*

A: They are a little smaller today than they were last week. I'd better say that before you hear about it a week or two from now, and say, why didn't that guy level with us? He told us only the good side of the thing.

We've had a rather tremendous growth in our staff. I know when I became vice president and director of sales of Eaton in 1960, Bob Whitney wasn't there. He was working for Yale & Towne. We had one fellow who was handling our advertising on a sort of catch-as-catch-can basis, and we retained an outside public relations firm—a very personable man, who spent part-time working with us on writing up our earnings reports. I would say that we have now, in our combined public relaitons and communication department, close to forty people, and that includes internal communications, which we consider as vital as external. Bob joined us with Yale, and heads up our advertising and corporate identity program. He has a number of people; public relations has a group. We have experts in video and audio technology, and we do about everything ourselves these days. Of course, we use outside advertising help, but most of our publications, and so forth, are developed internally, and many of them are printed internally.

Our budgets, by that score, have increased tremendously. I will say that in the last few weeks, because of the general business condition, we have reduced our corporate budget by about 10 percent for the year. We've kept the basic program, but frankly, to adjust to the times, we've had to look every place. But we have left our total internal communication program untouched—and we have not cut our Comm/Pro budget.

Q: *Eaton is certainly well known for very high employee morale and it's obvious why. You also have a program for political contributions from your employees?*

A: Yes, we do. And I trust it's leaked. We have a voluntary contributions program. I think we have, so far, about 800, mostly our key people. We have come up with what we think is a fair share contribution. It is completely voluntary. We do provide a payroll deduction plan that goes from a quarter of a percent up to one and a half percent of total compensation. Those are the fair share levels. The funds go into the trustee, which is the local bank, and only the employee himself has a right to disburse those funds. They are disbursed directly by the trustee to the recipient or the check comes back to the individual, and he himself can present it. We have tried to encourage our people to believe that they have a very direct responsibility in maintaining an active two-party system. I would have to guess, although I don't know, that the majority of our funds do go to those who are advocates of the free enterprise system.

We get no reports on the candidates to whom the contributions are made or by whom. This way, by having this individual fund, we find that when solicitations are made by either party, for any type of candidate, the person is much more apt to give if he knows that he has a few hundred dollars in an account. He doesn't have to worry what's going to happen to this week's budget if he makes a contribution. This is our program. We hope to expand it, but we're moving slowly, and we've encouraged others. Having been a finance chairman in the community, I know how hard it is these days to get people to look favorably upon this.

Q: *Did I understand you correctly, during your speech, that you were able to add national television to your advertising budget, without increasing the budget?*

A: That's exactly what I said. Bob Whitney may take issue with what I said. I think, the first two years that we moved into our program, we had television. We did a far better job of coordinating our efforts. We stopped picking up a magazine and finding five unrelated Eaton ads in it. By consolidation and spreading out, we were able to do a much more effective job, I think, using the print media as well as television. In the first two years, we held our budget exactly stable. And I wasn't kidding when I said some of our friendly competitors raised hell, saying, "You're going berserk, you're making us look bad." I'd have to say that it took about six years for me to be convinced that a company like Eaton should be on television. But someone finally convinced us that people don't spend all their time reading newspapers and magazines, that a good share of the time is spent looking at television, and that, if we could get the right programs, perhaps we could make a more significant impact.

Corporate Communications in Collective Bargaining

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I have been thinking, ever since *Fortune* was kind enough to invite me to come here and talk to this seminar on Corporate Communications, just how my particular thing, which is collective bargaining, would fit in with your program, and how what I could say might be of use and interest to you. I was impressed, in that respect, by the definition of corporate communication Jim Hoefer gave at the outset of this conference, namely, that it consisted of any public statement that fairly represents the position and the purpose of the company. And I thought about how the fair statement of purpose and position by companies fits into collective bargaining, where you are essentially and primarily dealing with your employees who are part, of course, of the relevant audience that you seek to reach through your communication.

I recall, in that regard, a set of recommendations I made in 1965 in a dispute between the New York *Times* and the Newspaper Guild, which had resulted in a strike of some twenty-five or thirty days. My recommendations, which came near the end of this dispute, were rejected by the Newspaper Guild. This was reported extensively on radio and television, all through the night and into the early morning, and the reports also stated that the New York *Times* had not taken a position on the recommendations.

Now, the thing about recommendations that I should mention, as distinguished from the decision of an arbitrator, which is final and binding, is that recommendations are effective in resolving a dispute only if they're accepted. If they're rejected, obviously they haven't served their purpose. And in this instance, my recommendations had been rejected by the Newspaper Guild, and the *Times* had not spoken.

When I heard this on the radio early in the morning, I immediately called the New York *Times* and said, would you please do yourself and me a favor. And they said, what is that? I said, reject my recommendations. But they said they were fair and reasonable, why should we reject them? I said, because there is no chance there will be a settlement on those terms if you don't reject it. And within about ten minutes, I heard on the radio a quotation from the *Times*, this time a statement saying that the New York *Times* had rejected my recommendations and had said they went far beyond anything that was reasonable or fair or sensible. And I breathed a sigh of relief. Two days later, the Guild and the *Times* accepted the recommendations.

How do you make a fair statement of your position and purpose in collective bargaining, and how do you communicate your position in collective bargaining? I should point out that collective bargaining, being a relationship between labor and management, is totally dependent on communication, because you can't have a relationship without communicating, whether you communicate orally or whether you communicate by your conduct. And I should also point out that collective bargaining today, not originally, but today, is a joint decision-making process, with the name of the game being agreement. The way our laws are structured, the way the practice and procedures of collective bargaining are conducted, the aim and purpose is an agreement, an agreement on wages, hours, and working conditions for a period of years at the end of which time the agreement is renegotiated.

Although they don't always succeed, the laws are designed to precipitate bargaining in good faith within the framework of certain Marquis of Queensberry type rules, all designed to bring about an agreement.

Now, an agreement is a joint decision, and before you make a joint decision, you have to make an individual decision, and then ultimately you have to make the same decision as the other fellow makes, so that when you talk about communication in collective bargaining you are talking about the communication of a series of decisions. Incidentally, I am not talking today, although I could very well, about communication where there is no union, where conceivably the employees are seeking to organize. That involves one type of communication. Nor am I talking about the administration of the agreement that is entered into collectively. This is another matter which involves communication. I intend, instead, to zero in on the process of communication in negotiation of an agreement. I think perhaps this will give me, in the short time available, a better opportunity to analyze the elements, and thereby give you some insights into the problems of communication in collective bargaining that may have more general application.

Incidentally, there are some 150,000 collective bargaining agreements in the United States, covering 20 million employees, and they are, for the most part, located in six heavily industrialized states, New York, Pennsylvania, Ohio, Michigan, Illinois, and California. Some of your companies are unionized and some are not, but I hope that what I have to say about the decision making in the collective bargaining process will be instructive to all of you.

To repeat: collective bargaining is a joint decision-making process, conducted through communication. However, you don't start out with an agreement. You start out with a position, and a position that has to be taken, and that involves a decision. In trying to analyze the process, I think it might be instructive and useful to use the terms newspaper people do in describing how to frame a story. They say you should have in your story the who, the what, the when, the where, the how, and the why of a story. That might be applied to the decision-making process and the communicating process of collective bargaining.

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The first question, of course, is what do you want to communicate? That applies, not simply to collective bargaining, but to all corporate communication. What is it that you want to communicate? Then you have the question of who decides what it is you wish to communicate. Who do you communicate it to? How do you communicate it? When do you communicate it? Where do you communicate it? And why do you communicate it?

In our collective bargaining tradition, the focal point is the so-called bargaining table, and the procedures to gear up for it, under rules that say that bargaining must begin some sixty days before the expiration of a contract when demands are served and counterdemands can also be served. Both parties prepare for this process, which in many companies, in fact all companies, involved in collective bargaining is a very important and often traumatic biannual or triannual experience.

The practice is, of course, for both sides to prepare initial positions in advance. Now, within the company, there is a decision-making process. I would assume that usually it is the chief executive officer who makes the ultimate decision on what the company's position is to be. However, it is rare that the chief executive officer communicates that position at the collective bargaining table. There is, usually, a spokesman for the company, most frequently the industrial relations director, who does the communicating. But he does not necessarily have the decision-making power beyond the decision that has been agreed to in advance. And this decision is not likely to be, nor it is intended to be, the final decision. Nor, for that matter, is the communicating process confined to the bargaining table even though the purpose of the activities of the bargaining table is to precipitate a joint agreement. But it is very rare that agreements are reached at the bargaining table. The reason for that, I think, can be found, if you analyze what is involved, in that we have in collective bargaining a decision-making process involving groups, rather than individuals, and group bargaining and group decision making are entirely different from individual bargaining and individual decision making.

The process of group decision making must, obviously, involve all parts of the groups that have any input into the decision. Further, since the parts of the group are not necessarily in the same place at any one time, there must be communication between and among them.

That communication process is a lot simpler on the company's side, although it gets a little sticky and becomes complicated where there is more than one company on the employer's side, where there is multiple company bargaining. Then the process of decision making between and among the companies can get rather sticky. Indeed, I recall Walter Thayer, who represented Jock Whitney and the New York *Herald Tribune* in some newspaper negotiations in which I was involved, saying that getting a decision out of the Publishers Association of New York was like walking in a barrel of molasses. And that was a problem. But for the most part decision making on the employer's side is comparatively less complicated because communication can be internal, it can be in a room, it can be direct between the people that do the decision making. But I do point out to you that it is an oversimplification of the decision making and communicating process to think of either the company or the union as entities by themselves, rather than as a complex of people who have an input into the decision making process.

I pointed out before that the chief executive officer, who probably makes the final decision on the yes or the no of what goes into the agreement, is not at the bargaining table. He does not feel the pressure of the bargaining table and the arguments that are made. Nor does he experience the inevitable reluctance to appear unreasonable in response to the pressures of the bargaining table. When an argument is made, your capacity to say no exists, but there is, in the minds of most people, a reluctance to merely say no without offering a reason. And it's a lot easier to offer a reason when you're back in the executive chamber and there's nobody shouting at you, than to offer a reason when there is somebody at the bargaining table pounding away. And very often you find that the spokesman for the chief executive officer begins to negotiate a little bit with the chief executive officer in order to strengthen his ability to return to the bargaining table and to be more relevant, to be more reasonable, to be more decisive in his arguments.

However, it is of particular importance to you, in the matter of corporate communication in collective bargaining, to look at the decision-making process on the union's side. And that is, indeed, very complicated. It's further complicated because we haven't yet got clear in

> "... I must underscore the importance of communication of the company's position in collective bargaining in a form that reaches the employees."

our own minds whether we prefer a decision maker on the union side who can say yes or no, or whether we believe that everybody should participate, the everybody being, most particularly, the employees. In the final analysis, the most relevant audience is the employees, and the way the bargaining process is conducted is largely for their edification. Further, they must, in some way, most often through ratification of what is agreed to, participate in the joint decision-making process in collective bargaining.

That being so, I must underscore the importance of communication of the company's position in collective bargaining in a form that reaches the employees. The problems that I see in that regard stem from the fact that both sides start out with positions in bargaining which both know are not their final positions. Rather they represent decisions deliberately made which both sides recognize the need, in this process as it has developed, of changing.

Incidentally, it is possible at the bargaining table to work out problems of restrictive practices that Del de Windt referred to. It is not easy but it can be done. It is not easy because it's not easy to change habits and practices once they've developed. It's a lot easier to start all over again, as the Eaton Corporation has found, than to make changes.

But it is possible, through the bargaining process, to make changes. I would point out that the New York *Times*, and the New York *Daily News*, and the New York *Post* have recently entered into an agreement with the Printers' Union removing every single restrictive practice that the International Typographical Union de-

veloped since Horace Greeley first started publishing the New York *Tribune* in 1840 or thereabouts. They paid a price for it. The price was a lifetime guarantee of employment for the existing staff plus incentives to retire at an early date, but the employees are retiring. The staff is decreasing in size and the newspaper's costs are coming down in that way. But a lifetime guarantee is a very substantial obligation. It carries with it a wish to continue in business in perpetuity, because unless you do, you won't be able to fulfill the obligation.

Now we come to the question of how you communicate with the rank and file. Bear in mind that they are not at the bargaining table. Nor can they be as a practical matter. That is why the law commands that the bargaining be done with the representatives of the employees. Being a group relationship, collective bargaining has to be conducted through representatives. And it is at the bargaining table that the information is exchanged.

From there, the information goes to the rank and file through the representatives. This may be done at meetings or through other means of communication. It is often done, in the case of large groups, through the newspapers and the other media. But they are not particularly interested in the communication problems of either the company or the union. They're interested in getting the story that is important to the public. As a result, skilled representatives of both labor and management have learned how to send their message along, a little carrier pigeon, with the information that is made public for the benefit of the newspaper readers, not for the benefit of the relevant audience in collective bargaining, the employees.

There are lots of methods of communicating with the representatives, apart from the bargaining table. A telephone call can be a very important instrument of communication with the representatives of the employees. Off the record meetings, which take place more frequently than not in collective bargaining, are another means of communication with representatives.

As I said before, even though the focal point of the communicating and decision-making process is the bargaining table, it's very difficult for a representative, a committee, a spokesman, or various officials of the company or union, who come to the table with a position previously taken, to arrive at a new position at the bargaining table. Usually what happens is that arguments are made, there is a give and take, and then a recess to reformulate and to restate. Then comes the question of how does this reformulated and restated position get communicated to the most relevant group, the rank and file, who are not present. Further, it becomes very important to have that communication timely, because in this process of group decision making that goes through stages of development in which changes take place, what you find is that although the changes themselves are logical and flow from the discussions, when they're communicated back to the rank and file, at an unsuitable interval, they can be shocking. By that I mean that if positions have gone through too many changes and appear totally different in kind and quality from the position originally taken, you've got the shock of the unknown, the shock of the new and different, and that usually results in misunderstanding and confusion.

> "... What we have to recognize in the communication process of collective bargaining, a group relationship, is that groups don't think the same way as individuals."

What we have to recognize in the communication process of collective bargaining, a group relationship, is that groups don't think the same way as individuals. For one thing, they can't think as fast as individuals. Therefore it is undesirable to hurry up the bargaining process or the process of group decision making.

This produces frustration that many chief executive officers experience with demands that are unreasonable and excessive, when they have problems to face, particularly nowadays, because of the economy. They see clearly the thing to do. The reluctance and unwillingness of the other side to see the problem produce terrible frustration, especially the inability to get to the solution quickly. This becomes a very annoying and irritating thing. Nevertheless, we have to recognize that the group cannot come to the point of decision making in the same way that an individual can. You just can't sit down with someone, even if a union leader is available for that purpose, and say, look, here it is, it's as clear as a bell that unless you do this, your people are ultimately going to get laid off.

And even if you do do that, and even if the representative is convinced, he has the problem, in turn, of convincing his membership. Very frequently I have found that union leaders have an ambivalent position in such circumstances. They want to protect the jobs of their members but they want to get re-elected and they don't want to suffer a defeat by making demands that are unrealizable. Sometimes they will encourage the employer, directly or indirectly, to take a strong position so that the rank and file will know that it isn't simply a bed of roses to go in there and say we want more.

In that regard, I would point out that communication in this respect, through the various mechanisms that I have briefly mentioned, is under way, is taking place, even when you say nothing. Saying nothing is a communication as well as saying something. Further, you are communicating by your acts probably more effectively than you communicate by your words.

For better or for worse, the rank and file employees in this country do not believe corporate financial statements. The arguments frequently made by companies in collective bargaining that we can't afford this, that we're losing money, or that this will make us noncompetitive since our prices will have to rise and so forth, fall on deaf ears. Rightly or wrongly, the rank and file of this country believe that you can do anything with a financial statement. I must say that there is a basis for that conclusion, and when I say that, I don't mean in any way to question the integrity of financial statements. But there are methods of accounting, perfectly proper, that can mislead and confuse. For example, a company that I am associated with just switched from FIFO to LIFO. As a result, our earnings declined by $1.50 a share, but we made six additional million dollars, which we now have in our treasury. This represents a very substantial advantage to us. But could we say that we are in a difficult financial position because our earnings have dropped by $1.50 a share?

The rank and file doesn't understand the difference

between FIFO and LIFO but they do have an idea about financial statements. When a company says we're not making money, it's not believed. However, what is believed is action. It is interesting to me, and I'm not advocating this as a matter of establishing credibility, that General Motors and Chrysler and Ford have laid off 200,000 employees without any effective challenge, without any challenge at all from the union, without any complaint by Leonard Woodcock that GM and Ford and Chrysler have done something wrong. The union is addressing complaints to Washington, together with Mr. Ford, Henry Ford, that is, and that, of course, is the proper place for them to go. (Indeed, I heard Mr. Woodcock on television say that it was uneconomic for the automobile industry to cut prices, because it couldn't afford to turn out cars at a lower price.)

The rank and file believe the layoff action. They understand from the layoffs that the companies are in financial difficulty. They would not have believed it if they were merely told the financial information. I may have overemphasized this point because I have stated the two extremes, but I mention this to indicate that in the communicating process, it is not simply what you say; it's also what you do.

Question and Answer Period

Q: *Without getting you too deep into it, how about parity, a practical problem in New York?*

A: It is a problem, not only in New York, but in any multi-union situation, and indeed it is a problem within a single union situation, because nothing disturbs people more than unequal treatment. It takes the form, or is expressed by such words as discrimination, inequities, and so forth. I have found over the years that workers are more disturbed by getting less than somebody alongside them than they are by getting a lower rate of pay. They would sooner accept lower pay than disparate treatment with their peers. They feel that if the other guy is getting it, why shouldn't I? And you find the same problem between and among unions. New York City moved into collective bargaining in the 1960's and discovered, all of a sudden, that it had a multiplicity of unions, and that each one had to prove that it was at least as good as, if not better than, the other and therefore was seeking more than the next union was getting.

The fact is, however, that from a practical point of view, at some point a relationship has to be established. Whether it has total equity or not, you have to stick with it. I think we're at that point in the relationships in the City of New York. The railroad industry, construction industry, the newspaper industry, and many other industries have the same problem. As a result, they always take the view that once they settle with one organization, that's it. They must remain firm. It's a matter of course.

Q: *What do you think of the continuing direction of fringe benefits?*

A: At this point I think the emphasis will be on wages, rather than on fringe benefits. Perhaps, also, we're near the end of the line on new fringe benefits, but not necessarily on the level of fringe benefits. So we will have pressures in that direction when the opportunity exists.

With regard to wages, to my way of thinking the most significant factor is not so much the union-management relationship, although that is a factor of significance, as the state of the job market. We had far greater pressures during the late 1960's and early 1970's when there were manpower shortages.

But you find that the pressures for economic improvements diminish when the prospect of unemployment exists. I don't advocate that as a way of shrinking economic costs, but it is a reality of collective bargaining.

Q: *Would you forecast what you think Dunlop will do regarding wage freeze?*

A: Dunlop is a pragmatist. He'll do whatever he can get away with. He's a pretty good operator. In the building construction industry he had influence restraining some of the wage pressures at a time when they were tremendous. On the other hand, he knows the limitations of what he can do. I doubt very much that he will go for wage and price controls because the reality of it is that the unemployment situation acts as a counter force on economic forward thrusts. And also, you see, the notion that collective bargaining is an inflationary force calls for some analysis. Unions are an inflationary force, obviously. They exist to get more money for their members, and if they didn't try to do that, the leadership would be changed. But employers don't exist for the purpose of making wage increases, and generally they will seek to resist them. They are not always successful. They may have to face a strike as a consequence. But the collective bargaining process is not, per se, an inflationary process.

What it is, however, is a process by which the lower pay and the middle pay workers tend to do better than the skilled workers. This was most critical in an earlier period, after the CIO in its inception in the 1930's had pursued a policy of cents per hour increases instead of percentage increases. That altered the relative differentials within a plant between skilled and unskilled.

During the 1960's the practice changed pretty much to percentages, which maintained relative differentials by granting greater increases to the skilled, as compared to the unskilled. Nevertheless, the collective bargaining process has tended, over the years, to be more beneficial to the lower paid worker. You will find, if you analyze the scales of nonunion companies, that they tend to stretch out more. They pay less to the lower paid worker and more to the skilled worker, for better or for worse. So we have to look at the job market, analyze the job market, as well as the bargaining process, in deciding what the inflationary impact of wages might be. At a time when you have unemployment climbing to 10 percent I don't think we're about to get into a wage and price stabilization program.

Corporate Communications and Public Attitudes

Ben J. Wattenberg
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and Author of The Real America

Today I wanted to talk about what has happened in the United States in the last dozen or so years, with the idea that in reviewing it, I might suggest a strategy for business in the second half of the 1970's. Moreover, that happens to be what my book is about, and I have found that there is absolutely no sense in asking an author to talk about anything but his most recent book.

What I set out to do, in 1972 when I started working on *The Real America*, was to try to step back from the day to day newspaper headlines, and take a more objective, dispassionate view of what happened in this country. I asked myself, first, how does one go about attempting to assay whether a society has made progress or stayed the same or, perhaps, regressed. Suppose a man from Mars came down to Earth, and wanted to know how to judge our society; how would he go about it?

Now, for a while the most embarrassing thing that such an extraterrestrial visitor could have asked us was, "Take me to your leader." For the moment, it looks as if we've solved that problem.

It seemed to me there were three prisms that made some sense, through which to observe our society: to try to gain some kind of sense of what had happened over a period of time, in this instance roughly from 1960 to the middle of 1974. The first was to observe and read and recount what the smartest—allegedly smartest—most articulate, most publicized members of our society were writing and saying about how we were doing.

Second, one ought to go to the objective data of our society, because we have developed in the last forty years or so a remarkable data-gathering machine, both within the government—the Census Bureau, the Bureau of Labor Statistics, and a number of other agencies—as well outside of government through trade associations and industry groups.

And finally, a third prism, a third lens through which to observe our society, would be the simple one of asking people in America. In America we have machines for everything, and one machine is called a public opinion poll. And while it is not nearly as sophisticated a tool as the data-gathering machines for the hard data, it seems to me that if you ask the right questions—particularly, if several polls ask the same questions—the results can provide some sort of sense of what changes are going on.

So that, in brief, was the roadmap of this book.

When you look through that first prism, the prism of the rhetoric—what people *say* is going on—we seem to have lived through a dialogue of doom and a rhetoric of enormous despair and despondency. What I did in the book was to present some actual quotations of what people had been saying. Here are a few—to provide a flavor.

"*The whole country is one vast insane asylum and they're letting the worst patients run the place.*" That was said by Robert Welch, the president of the John Birch Society.

"*American society is an explosion of insanity. The problem is not who are the madmen, it is the society that's insane.*" That was said by Professor Herbert Marcuse, the Communist philosopher at UCLA. So you have, at either end of the political spectrum, people telling us that the rest of us are nuts.

But such a feeling, perhaps in language somewhat more moderate but not much, was found toward the center of the political spectrum, as well. "*There is a vague anxiety that the machine of the 20th Century is beginning to run out of control.*" That was written in *Time* magazine.

"*The evidence is strong that human society is in a stage of comprehensive breakdown.*" That was written, on one of his more optimistic days, by Norman Cousins.

"*Right now, the soul of America is so sick that even the overthrow of a political regime may be insufficient.*" Those words were uttered by that great social philosopher, Shirley MacLaine.

"*And while each of us pursues his selfish interests, and comforts himself by blaming others, the nation disintegrates. I use the phrase soberly, the nation disintegrates.*" That was said by John Gardner, of Common Cause.

"*We seem to be in one of those long periods of civilization's decline.*" That was written in the *New Republic*.

"*I think* The Godfather *is really about the corporate mind. In a way, the Mafia is the best example of capitalists that we have. John Corleone is just an ordinary American businessman who is trying to do the best he can for the group he represents and for his family.*" That was said by that other great social philosopher, Marlon Brando.

"*Almost every aspect of the American dream is lost.*" That was written by a man whose book sold so many copies that if I had written it I'd be convinced that every aspect of the American dream was working fine—Charles Reich, in the *Greening of America*.

And finally, my favorite quote from an earlier era: "*You have to be an intellectual to believe things like that. No ordinary man can be such a fool.*" And that was said by George Orwell.

That whole line of thought has been referred to recently as "bleak chic."

When you turn to our second prism through which to view what's happened in the United States—the lens of hard data—you find an entirely different picture. I'll go through the numbers and the subjects fairly quickly, because I know we're running short of time. If you look at the data about *income*, you'll find that in this roughly fourteen year period that I'm talking about—discounting for any effects of inflation, and after all the talk during those years about the miracle economies of Japan and Germany and Italy and Taiwan and Hong Kong and Israel and what have you—real income in the United States

for a typical wage earner, that's real income for college educations and medical care, travel, for anything you can think of, *was up by 50 percent!*

The amount of real dollars went up more in the United States and Canada in those years than in any other country in the world, save one—Japan. And we've still got a 60 percent higher standard of living than the Japanese.

If you look next at the census data about *occupations*—and we've all heard the rhetoric about the dehumanized work place, the blue collar blues and white collar woes, brutalization on the assembly line, and so on—there are five trends, when you compare the '70 census with the '60 census, that stand out very very clearly, and they're all salutary. The first is a striking increase in the percentage of professional and technical workers. The second is a striking increase in the percentage of women in the work force. The third is a striking decline in the percentage of poor farmers in the work force. Fourth, a sharp decline in the percentage of women who work in other women's homes—maids. And fifth and finally, a sharp decline in the percentage of unskilled male workers.

> "... from 1960 to 1970, we built and opened in this country a new junior college *every ten days for an entire decade.*"

If you look at *education* in the United States, you should note, first, that when you review the results of opinion polls in this country, it is apparent that the No. 1 "regret" of the adult American is "I didn't get enough education." And the No. 1 "hope" is "I want my kid to go to college."

Now, in 1960, there were 3½ million American kids in college. Today there are not 3½ million kids in college, but 8 million kids in college. Some of this is due to some changing demographics, and I'll talk about that later. But in large measure it's due to the fact that far greater percentages of our young people go on to college. That reminds me of another cliché: "Our institutions don't work." When you consider the ideal of a democratic and self-determining society, one of the ideals is to provide what the people want, and what the people want in America is to send their kids to college. And then you find that from 1960 to 1970, we built and opened in this country a new junior college *every ten days for an entire decade.* There were 370 new junior colleges built in this country in ten years! Maybe our institutions were working.

Moreover, what you find is that the kids going to those colleges come from households that are poorer, and households where the head of the household did not, himself, go to college. The kid is more likely to go part-time. He's far more likely to be a nonresident student. He's more likely to be married.

In short, what happened in the realm of higher education was really a replication of one of the most remarkable things that happened in America in an earlier era—a development that distinguishes us, in many ways, from every other country in the world. I'm referring to the advent of the Land Grant College Act in 1870, which opened up to an entire new class of Americans the advantages that a college education could give to one, which in our society are substantial.

The land grant college did that in the 1870's. About a hundred years later the advent of the junior college has done it again for an entire new economic class of Americans.

If you look at the census data about *goods*, I can rattle off a bunch of rough numbers to give you a picture. Usually, I can claim great precision—but I dare not before this audience of experts. What I'm doing is taking the 1960 census data, which are accurate, and then instead of taking the '70 census data, doing some sort of a rough extrapolation to 1974. Roughly speaking, we're talking about a fourteen-year period, and this is what happened: Washing machines in 1960, 40 percent of our households; today, 65 percent of our households. Dryers, 17 percent and 50 percent. Air conditioners, 12 percent and 50 percent. Freezers, 18 percent and 40 percent. Automatic dishwashers—were not calculated in the 1960 census. They are now in more than a third of American homes.

Cars remained roughly constant in American households. About 80 percent of our households have cars, but second cars went from 22 percent to 38 percent.

Now, I would suggest that these possessions, although they are frequently scorned as merely materialistic, are in fact—particularly the household goods I talked about—perhaps the most profound agents of liberation in this country, particularly for women. It is nice to theorize, as the women's movement does, that men and women ought to share the household chores. But in fact, as most of you know, that is not what happens. And when you suddenly put into a suburban dwelling a washing machine, a dryer, a freezer, a dishwasher, you have made life easier, put less drudgery into the operation, and in fact freed up a good deal of *time* for women. So, among other things, if they choose to go out and get a job in the modern economy, they can do it.

I would suggest then, that those data, too, are highly salutary.

Finally, a last item on this list, without which such a national summary could not be complete: *race*—the comparisons between whites and blacks. That surely has been one of the great economic issues that have confronted our society since its very inception. I think there are two things that ought to be said about it. The first is that there is absolutely not a scintilla of doubt that blacks are still far behind whites in the United States. There's no question about that, in every field you look at.

The second thing is that there has been an enormous amount of progress, of catching up, that has gone on in the last decade and a half or so. Here are some numbers in current dollars, rather than constant dollars, but the relationship is the same. White family income in 1960 to 1970 went up by 69 percent, and black family income from 1960 to 1970 went up not 69 percent but 100 percent. The Census Bureau had a calculation by which they put people into sort of "good jobs" categories and "not such good jobs" categories. The rate of blacks in the good jobs category in a decade went up from 40 percent to 60 percent. Seven years ago there were only 225,000 blacks in colleges in America. Today there are not 225,000, but 725,000. Home ownership rates for blacks have also been climbing far more rapidly than the white rate.

I think this gives you a flavor of that second lens, the lens that lets you see the objective data in comparison to the rhetoric.

Looking back at the two views through the two prisms you come up with: view one, that everything is terrible, and view two, that things are getting much better.

In an attempt to resolve that apparent disparity, I thought it would be useful to turn to the public opinion poll and see what the American people *thought* was happening in this society—was it going up, was it going down, or was it perhaps staying the same. Thus, the third prism—public opinion.

We've heard a great deal in recent years about malaise and alienation and about how people are fed up, and there's a great deal of truth in that. But there is also a great paradox about that sort of statement and it's this: when you ask people in this country, *personally*, when you ask "how are things going with you, how is it in your neighborhood, how is your job, how is your income, how is your kids' school, are you happy?" that sort of thing, you find an extraordinarily high affirmative response, usually in the 80th percentile. People say *personally*, things are pretty good.

> " . . . you find an extraordinarily high affirmative response, usually in the 80th percentile. People say *personally*, things are pretty good."

If you then ask the very same respondents "How are things going in the country?" generally they will give you a list of complaints as long as your arm, the last one usually being that people better stop poor-mouthing this country.

That's the strange dichotomy that we have to deal with.

In an attempt to bring some sort of sense to whether the gloom-and-doomers were right or the numbers were right, I looked at the public opinion data concerning some of the biggest issues that were brought to the anvil of public opinion in these years, and attempted to see which way the American people leaned. Were they going toward the catastrophe school, were they still saying this is a great country—or was there some mix in between?

That era, particularly the latter part of the Sixties and the early part of the Seventies, was a great "cause" era. This is when women's liberation, the environmental movement, the civil rights movement, the peace movement, the so-called counterculture, as well as consumerism, all started—roughly at the same time. As I looked at these causes, to see how Americans had responded, it seemed to me that a certain consistent pattern was apparent.

For example, if you look at the women's movement, you find that the great majority of the American people *do* accept the central core notions of the women's movement: equal pay for equal work, women ought to speak up for their rights, women ought to have options in our society, to work or not to work. But at the same time, the American people sharply rejected some of the more extreme notions of the women's movement: that this was a sexist society, that women were mere chattel, and in fact the public sharply rejects the idea that the only way in which a woman could lead a meaningful life was through a job. The vast majority of women say they could lead good, meaningful, and creative lives by creating a happy home, a decent family, and through some sort of community involvement, perhaps. When you think about it, you see in these opposing attitudes a great class bias. The women who were saying you've got to have a job are the women who go out and become the editors of great national magazines, engineers and doctors, or whatever. The women who are saying one can lead a meaningful existence at home are the women who if they did go to work, would probably have to work in a widget factory, putting piece A into slot B, for eight hours a day and forty hours a week. Compared to that, the idea of opting to create a decent and meaningful home life seems to me to be a wise decision.

If you look at the environmental movement, what you have there is the beginnings of this same kind of pattern. Yes, says the public, we would accept certain of the core notions, but we reject the ancillary and peripheral sorts of notions, the far-out notions, coming from the same people. It is clear to the American people, as it is clear to me, and I think it is probably clear to most of you, that for too long this continent had, in fact, been raped, plundered, and pillaged. Americans being, among other things, very active hunters, fishermen, and outdoorsmen were at least as aware of this as were the people who were writing about it in the universities. And the public said: this ought to stop. In fact, the public opinion polls show that the movement we know as environmentalism swept across the American public probably faster than any movement we've ever seen before.

At the same time, however, again you see this pattern of people rejecting the more far-out notions. The whole idea, for example, that materialism itself is a culprit, that materialism itself is something evil, was sharply rejected. I would suggest reviewing some of the numbers I gave you before. Americans still want their automobiles, their air conditioners, and their washing machines and dryers, and they're convinced, as am I, that there is absolutely no reason in the world why they can't have both a clean environment and a high material level of life. Again, that pattern emerges. They accept the basic antipollution notions but they reject certain of the ancillary and far-out ideas.

The same pattern is true about race. If you look through the public opinion data about this subject, it is very hard to avoid the thought that as late as the late 1950's this was a racist nation.

And then there was a stark change—and it is chronicled by some of the best public opinion polling, polls which often come from university sources, polls using identical samples over time, asking the same questions. There is simply an astonishing amount of change. Today almost everything that is now grouped under the word "fair" is accepted by the American people. This includes public accommodations, equal opportunities for hiring, equal opportunity to move into a home of one's choice. But at the same time, again, the pattern re-emerges. A second series of further-out civil rights demands, perceived of as being "unfair," are vigorously rejected. This includes busing, welfare, quotas, scatter-site housing, and so on.

So too with the peace movement in this country. The whole idea that we ought to get out of Vietnam, that we were overextended around the world, was accepted by the American people. But the ancillary idea that we ought to go to some form of unilateral major disarma-

ment, that America was no longer the world's policeman, and that we really ought to pull back into some sort of neo-isolationist shell was thoroughly rejected. The best poll about that was the 1972 presidential election. I think the one that hurt Senator McGovern more than anything else was when he said he'd go to North Vietnam and *beg* for the return of prisoners. Well, this was perceived to be a very, very un-American un-presidential sort of notion. And the voters found themselves with a choice between a beggar and a bugger. And opted, often reluctantly, for the latter.

I'll talk about consumerism later and the impact of this sort of pattern on the business community.

When you come down to what all this means, it seems to me that as you look at this dozen or so years, you find that the real heroes on this equation were the American people. They showed an enormous amount of common sense. They were smarter, tougher, wiser, shrewder than their critics from both the right and left. They didn't say,

> "... as you look at this dozen or so years, you find that the real heroes ...were the American people."

no, we have no problems, but they just said, yes, we have great problems and we'll go about solving them. In fact, if you look at the data, it was, in terms of the objective circumstances, a terribly tumultuous decade. It started with assassinations, and went on to race riots, a terribly unpopular war, the worst political scandal we ever faced, and we're now in the middle of a combination of recession and inflation. Most people, including myself, are bewildered. And yet, one gets some sense in looking at the American people—how they responded to this sequence of events—that *they learned how to cope*, and that they still are coping, pretty moderately and pretty intelligently.

Just a word about the political implications of this. It seems to me that we have left behind life in the political fever zone, and that we have gone back to some kind of common-sense sort of politics. Some of the very exotic hothouse flowers that bloomed a few years ago in our political landscape have wilted. No one that I know of is coming out four square that busing is the way to solve our problems with school integration. Nobody is saying that law and order, in a country with probably the highest crime rate in the world, is merely a code phrase for racism; no one on either side of the issue chooses to make marijuana a major issue.

What is happening is that we have returned to basic economic politics. And when you return to basic economic politics, that's when Democrats win elections.

Pundits sometimes think of the New Deal coalition, the so-called F.D.R. coalition, as a strange demographic Rube Goldberg kind of machine, with the intellectuals here, the blacks here, the Southerners here, the labor movement here, the Jews here—all put together with spit and baling wire. Wrong. It was, and is, a coalition around an idea.

The genius of what Roosevelt set up politically in this country was that he had an idea about how to define the parties. The Democrats, he said, are the party of the little guy; the other party is the party of the fat cats. And once you can make that stick as a Democrat, and you usually can if you've got a Republican Administration and the economy is faulty, you're going to win an awful lot of elections—as we saw in 1974.

And I would suggest that there has been a great return to social and economic pragmatism, despite what you read about the new Congress being extremely liberal. There is very little institutionalized extremism in Washington today. The people in Congress are prepared, I think, to accept with a fairly open mind rational sorts of thought from anyone, including the business community.

Let me just talk briefly about what this sort of analysis of what's happening in the country means for the business community. It seems to me that you fit in pretty clearly in most of the trends that I've been talking about. On one hand, you have surely faced that rhetorical gloom-and-doom syndrome. The antibusiness language, after all, has been very extreme in many instances.

Second, when you look at the objective data, you find that this economy, in part at least owing to the activity of the business community, has in fact accomplished a great deal. When you look at the worst of our problems, they are really not business-generated. When you look at the objective indexes of our time they all get better except one, which is crime. I can't see a way in which you can link crime with the business community.

Surely the race riots, the assassinations, Vietnam, and those sorts of things did not derive from the business community. Yet the economic growth—of which we've had plenty—surely did.

And again, you see the same sort of attitudinal pattern regarding the business community—the same sort of results from the public opinion polls—as you do in these other sorts of "cause" issues. That is, people accept the basic core notions of the consumer movement. When the public opinion polls ask the question, "What do you think about Ralph Nader?" the answer that comes back is "He keeps big business on its toes."

And if you have seen as many corporate executives tiptoeing into Washington as I have, you will, I think, accept the notion that there is a good deal of truth in the statement, that in fact the whole consumer movement has kept big business on its toes. It reminds me of the story about the parents of a very, very bumptious eight year old boy, who took their child to a child psychologist. They were very concerned about him. The psychologist talked to the kid for about an hour, and came out of the

> "...despite a great deal of disenchantment with business on a lot of issues, 84 percent of the people in the country still say that large companies are essential to the nation's expansion."

office and talked to the parents, and he said, I want you to spank that kid every night, and if you don't know the reason, don't worry, he does.

That's about what the American people think of business. Give them a rap every once in a while, that's all right, they know the reason.

I think there's a certain measure of truth to that.

At the same time, the same sensible pattern takes ef-

fect again. The far-out notions, the ancillary notions, in my judgment, are not being accepted. The most recent Opinion Research Corporation polls show that despite a great deal of disenchantment with business on a lot of issues, 84 percent of the people in this country still say that large companies are essential to the nation's expansion. This is an index that has been above 80 percent for the last twenty years. So, again, it's this kind of pattern that says, yes, there's truth in this "cause," but folks will not buy the more far out implications. You find that the American people are still highly materialistic—and only business can cater to that—and you find also a very discriminating sort of view about Ralph Nader. Americans say that they think he keeps big business on its toes, but you also get a response—a rapidly rising response—that Ralph Nader shoots from the hip, which is also accurate.

The key point, it seems to me, is that the American public is able to discriminate, and discriminates in a pretty sophisticated manner. I know that you find this in the commercial world. Ken Galbraith seems to be of the opinion that anything that Madison Avenue chooses to sell the American public, it can sell. But you all know that that is not so, and I know it's not so. You can sell people junk once, but not twice. That's the evidence I got from everybody in business that I've ever spoken to.

And I think the same thing is true in the world of ideas. People may buy junk ideas once, but as we've seen from some of this data, the American people are very discriminating and will sort out and pick out the best of certain ideas that are proposed, and disregard the others. This process is already going on, and there are a lot of examples I can give you, but the most important one—and it's hinged to this idea that we are in economic trouble right now—is the idea of no-growth, of a solid-state economy, of zero economic growth. All these things, two years ago, were really hip in the intellectual community. In my judgment, that is the public enemy No. 1 of the business community, and I would say that it's not only public enemy No. 1 of the business community, but public enemy No. 1 of the labor movement as well. In this country, both business and labor are dedicated to economic growth and expansion. People are getting fed up with the idea that economic growth was all right when it took place among the upper middle income class and gave them one car or two cars and single family houses, a vacation house, and sent their kids to college. Suddenly, when because of the tremendous rise in American income, these sorts of things started being available to great masses and great millions of American people, the same people who had acquired these things themselves, said, well, that's very materialistic and we really ought to improve the quality of life and forget about these other things.

So it seems to me that what Mr. Mulligan said yesterday, with his wonderful two word formula, "at tack," ought probably to be regarded as valid to most corporate communicators. I would suggest forgetting some of the standard sorts of lines, like "It wasn't our fault." I would suggest forgetting the one about beating up on big government, it's really their fault. And forget the one about beating up on big labor, it's their fault.

(My own view—I do a lot of political work with the labor movement—is that what happened in the 1930's, when mass unionization went on in America, was very good for business even though it was vigorously resisted by many businessmen. In fact, it accomplished for the corporate community the one thing they could never have provided themselves: the creation of a truly mass consumer market in the United States. And I would say that's still what the goal and the role of the labor movement is—money for their workers.)

I find, in talking to both sorts of groups, that when we turn to this gut issue of economic growth, there is an enormous amount of agreement between labor and business as against what you might call the environmental liberals on the other side. I would suggest, then, that there is room for an alliance there, rather than confrontation between business and labor.

It seems to me that the things corporate America ought to be saying are, first, that we have accomplished much, and second, that we can do better.

The American genius that is aped all over the world is the ability to make poor people into middle class people. That's what all the politicians in Washington—liberals, moderates, conservatives—are looking for: ways to make lower middle class people and middle class people better

" . . . the things corporate America ought to be saying are, first, that we have accomplished much, and second, that we can do better."

off. You can't resort to attacking the other guy, but simply say, there has developed in this country a very remarkable instrumentality called the corporation, which has developed our ability to provide goods and services to people at a level heretofore unseen. It's a method of institutionalizing greed to harness the intellect of man. That's about what the corporation does. It has pursued a profit motive to harness the intellect of man, to give to people, all kinds of people, goods and services that they want.

Business also ought to take note that that's about all it does know. I think it's wrong for business to regard itself as a great social service agency.

I worked for President Johnson, when they set up the National Association of Businessmen, and I was leery then, and am much more leery now, of putting Henry Ford in the welfare business. I know people in Washington. Wilbur Cohen was a great Secretary of HEW. But I wouldn't want a car built by Wilbur Cohen, and I don't want a welfare program run by Henry Ford.

Henry Ford's job, and you can take that generically, is to make good, safe, quality automobiles, and make them as cheaply as possible, and to make a good profit—and then to give Wilbur Cohen in Washington a good fat share of that profit. And once we get those profits in the form of taxes, you'll be surprised at the wonderful things we'll be able to do with them.

Question and Answer Period

Q: *Because of the enormous increase in higher education, are you personally involved and concerned about rising expectations and concerned about our ability to deliver satisfactorily? Particularly at the junior college level?*

A: I'm concerned about rising expectations, but when I look back at what's happened, I see that we haven't had only *rising* expectations, we've had *realized* expectations. And I think, to some degree—a fairly substantial

degree—we will continue to have it. The mere fact that somebody coming out of an educational institution with a piece of paper qualifies for the sorts of jobs that very often his parents' or her parents were unable to qualify for, leads me to believe that there will be a continuation of the sorts of numbers in the occupational realm that I spoke of before.

The reason kids go to college is that they think they get a good deal out of it, and I really think they do, and I think they will see that as the years go on. Their expectations will rise, and will be realized.

Q: *Maybe I didn't understand, but on this social service agency question, aren't we moving in that direction? Consider EPA toxic substance regulations, environmental controls enforced upon the packager, the Kaiser Health Foundation etc.*

A: Surely corporations must be "good citizens." But I'm saying that it seems to me that a corporate executive, by training and temperament, is best able to go out and produce goods and services efficiently and effectively, and that ought to remain his most important goal. Maybe when things get a little better, corporate executives ought to remember that that's the thing they do best, and that when they start diverting large amounts of time, energy, and money to "do-good" projects, these turn out to be frequently cosmetic and optical projects anyway, and they are frequently trumpeted by corporate communicators who say, look what wonderful fellows we are. The people in Washington, in my judgment, are not interested in what good fellows you are, in terms of helping black people or in helping poor people. They want to see if you can make this economy run and run right, make goods and services right. They will take care of all the other things, including welfare and the environment.

Q: *Del de Windt and others in previous years have expressed a lot of concern about the attitude of the American people toward American business, and I think we all agree it's pretty bad, and you would agree, too. Are you really saying that it ain't going to change, there isn't a damn thing we can do about it, and we shouldn't be so uptight about it, and worry about it; is that what you're saying?*

A: Well, that's half of what I'm saying. I didn't disagree with what Del de Windt said, but again, from my perspective, it isn't only big business that's being beaten up on. I think Mr. de Windt mentioned something about how the people regard the government as a handsome prince who can solve all problems. I don't hear that in Washington. People are beating up on government at least as much as they are on business.

They're beating up on the media. Most of our institutions are under challenge, which is not necessarily an unhealthy situation. We get a lot of ferment and a lot of change that way. All I'm saying is that business ought to go about and tell the one basic story it really can tell, that people are interested in, and that is, the one that says we can do it better. Forget all ideologies, and say, look, if the game is to provide lots of goods and services to people, and the game is to continue making poor and lower economic class people into middle class people, that's our game, that's what we know how to do better than the government can.

I think most people in the government, although they're very interested in delivering that ritual spanking to business, some of it deserved, are prepared to accept that case when it is demonstrated, and I think it *can* be demonstrated, because the American corporation is a unique institution, and there is a mountain of data that, in my judgment, can prove this.

So I think the answer is both. Don't get quite that uptight about it, but go out and tell your story. The climate, it seems to me, is very propitious for that kind of story. The American people are prepared to discriminate. They're prepared to accept the core notion that there have been abuses, and at the same time they are prepared to reject the far-out and extreme sort of notions. That's what in some instances, as Del pointed out, we are being assailed with.

Corporate Communications and the Consumer

Don Johnson
President and Chief Executive Officer
J. Walter Thompson

My experience is primarily in consumer advertising. This morning I hope to convince you that corporate communication must become more and more like consumer advertising.

And in thinking about what I might be able to contribute to this forum today, I finally came to the conclusion that it might be most useful to you and to me if I tried to share with you some questions and speculations I have about marketing and advertising today and for some time into the future. From a selfish, personal point of view, I hope the answers to some of my questions come out in the workshop sessions that follow!

Last October, the J. Walter Thompson Company hosted a seminar in Chicago for senior executives from forty-two major companies.

On the premise that United States companies were relatively new to marketing in an economic climate of Inflump, that's our current mixture of inflation and economic slump, we thought we might be of service by letting our managers from England, Germany, Brazil, Canada, and Japan discuss with them how the marketing process worked in countries where inflation, recession, and varying degrees of nationalism had been operative for some time—where marketing under such conditions was a mature way of business life.

You don't need to worry. I'm not going to try to summarize the many valuable insights that this conference provided. I refer to it because probably the single most often repeated concept at the conference was that in an Inflump economy, the consumer would seek—increasingly and demandingly—*value. Value for money.*

Price is, and will be, important. But price alone won't be enough in most categories. The motivation of value for money is a combination of benefits, including an emotional one, which makes a brand unique. As a result, it is likely that leading brands will prosper in this new American market, while "me-too" brands will be replaced by less costly "price brands."

Against this picture from overseas, it is interesting to remember how well Tiffany's did last Christmas, compared with Korvettes and Macy's.

Now, the fact that I'm talking about brand marketing at a corporate communication conference may seem strange to you. But since people buy brands, not companies, my first question wonders whether we are paying enough attention to the role corporate communication must play in adding meaningful value to the brands the company markets. The value of positive parenthood.

A short time ago, our London office put together a discussion entitled "What Is a Brand?" I'd like to show you an edited clip from that presentation which, in almost primer fashion, discusses the changing relationships between manufacturer, wholesaler, retailer, and consumer.

I'm sure you will recognize that this situation is not unique to Great Britain.

Interestingly, although private label or store brands are usually thought of as less expensive than nationally advertised name brands, the economy in which private label prospered was one of consumer optimism, affluence, and the desire for personalization in the things they bought. No shopper in recent times needs to be told about private label brands.

But, aside from personal observation, I should give you a statistic that interested me. It comes from the *Fortune* reports of business volume done by leading companies.

In 1955, these *four* major marketers of branded merchandise—General Electric, Procter & Gamble, Kraftco, and General Foods—had a total sales volume of 6 billion, 146 million dollars. By 1973, their aggregate sales had risen to 21 billion, 716 million dollars. An increase of 253 percent.

Comparatively, in 1955, these *three* major marketers of private label merchandise—Sears Roebuck, J. C. Penney, and Marcor (or Montgomery Ward)—had a total sales volume of 5 billion, 497 million dollars. By 1973 their aggregate sales had risen to 22 billion, 627 million dollars. An increase of 311 percent. In other words, in 1955 the sales volume of the three private label retailers was $649 million *less* than the four brand marketers. By 1973 the sales volume of the three private label companies was almost a billion dollars more.

This same period of affluence, cheap energy, apparently limitless raw materials, rising population growth, and rising expectations also brought on brand proliferation, product parity, and the marketing millennium of psychographic market segmentation.

To take an extreme example to make the point, twenty-five years ago R. J. Reynolds, Philip Morris, Brown & Williamson, American Brands, P. Lorillard, and Liggett & Myers offered the American smoker seventeen different kinds of cigarettes to choose among. Today's American smoker is deluged by 101 different cigarette choices from these same companies. And God knows how many other brands have been introduced and later abandoned in the meantime. You can trace the same kinds of histories by looking at automobiles, soft drinks, razor blades, cereals, and so on and so on.

With psychographic or life style segmentation, marketing bets were made against smaller potential consumer franchises, and advertising budgets in behalf of brands were smaller.

Instead of relying on marketing persuasion to pull products through retail establishments, manufacturers spent marketing dollars on the retailer (in trade deals) to try to ensure distribution and keep their brands on retail shelves. In fact, as of 1973, a Booz, Allen, Hamilton study

of grocery trade dealing showed that manufacturers were spending *more* money to *push* products into retail distribution than they were spending in advertising to persuade consumers to *take* brands *off* retail shelves. With the advantages of 20/20 hindsight, is it any wonder that the retailer has become so disproportionately important in the chain from manufacturer to wholesaler to retailer to consumer?

Questions. Of course, the need to identify and market to the most potentially profitable consumer demographic and life style groups will continue to be very important. But can we any longer afford the intellectually stimulating game of psychographic marketing that leads to fragmentation instead of segmentation? Can we any longer afford brand proliferation at the rate of 10,000 new products per year? Can we any longer afford a marketing system in which about seven out of ten of those products fail in the marketplace every year?

I suggest that one of the reasons for the growth of retailer brands was the fact of market fragmenting brand proliferation. National advertisers were not identifying large enough market segments so that they could afford to build all of the elements of value into their brands so that consumer franchises could be established as protection against the incursion of private label. It is a fact that the most successful and most profitable brands show the highest proportions of repeat purchasers among last-time buyers. And it is a fact that product categories that are dominated by brands with strong consumer franchises are much less vulnerable to private label incursions.

Aside from consumerist pressure on the manufacturer to build real, provable product differences into his advertised brands—the real consumer in today's America is disenchanted. As Lou Harris has said, "After three decades of hearing about the miracles of American know-how, consumers feel cheated on a mass basis. Consumerism represents shaken confidence in the American know-how system." The consumer's faith in our institutions is at an all time low. He is spending his money with extreme care. In terms of investment, according to Roper, he is just as likely to put his cash in a sock as in speculative stocks. He is twice as likely to keep *cash* in a safe deposit box as he is to invest it in blue chip stocks.

And I know that I don't need to remind you that the manufacturer also lives in Inflump, with expensive energy and shortages of many, many materials, as well as something close to zero population growth. For several years now, the psychographic marketers have claimed that because of the way the consumer market is made up, there could never be another mass franchise brand like a Tide or a Blue Blade or a Coke.

Speculation. With the current state of the consumer mind, with the current need for product, distribution, marketing, and media efficiencies, I have to believe that the time to start searching again for products, product attributes, product values that meet more rational, more broadly based consumer needs and desires—is now. The days of building a variety of whims to meet a variety of consumer whims are past. We must start again to try to build national consumer franchises.

As we have noted, today's consumer questions most of our institutions, and is saddled with rising expenses and declining incomes. And as we noted, he and she are shopping more carefully and looking hard for value in what they buy. Obviously, there are many ways in which consumers try to determine the relative values of the brands they buy. But one of these ways is by how they feel about the company that makes the brand. And it is my speculation that the degree to which companies provide decision-influencing information about themselves for the consumer has been less than adequate in recent history.

Just for reminder purposes, here are some corporate advertisements that are now running in publications like *Fortune, Business Week, U.S. News & World Report,* etc.

(Advertisements)

While most of these advertisements are aimed directly at the business, financial, and government communities, many of them could be made to be interesting

> "... in his search for value, the consumer needs to believe that he knows a lot more about the companies that make the brands he chooses among."

to the general public. But because of the media in which these kinds of messages ran, consumer exposure has been relatively minimal.

Now, I'm not saying that there is anything wrong with this kind of advertising. It is important and it should continue. But I do not believe that it is sufficient in today's marketing climate. Today, in his search for value, the consumer needs to believe that he knows a lot more about the companies that make the brands he chooses among. What he thinks he knows about the parent company can become a tie-breaker between brands that seem to offer about the same value.

We know that the consumer believes that the most important characteristics of a strong corporate reputation are such attributes as size, leadership, modernity, citizenship, product quality, investment in research and development, service, and humanity. The financial community rates a company's R&D capability not by the *size* of the investment, but by the number and kinds of successful products that come out of it. The consumer rates R&D by the quality of product the company makes. But the other side of this is that the consumer also tends to believe in the quality of the product—value—if he believes that the company is committed to investing in research and development.

And beyond the relatively rational, we also all know that companies, like people, have personalities. And very often the tie-breaker comes down to whether or not a company, like a person, is just plain liked.

On the personality point, some of you may remember that our London office people tried an experiment over a year ago. They thought that if companies have personalities, then the average citizen ought to be able to describe companies as though they were people. Since that experiment worked out so well, I thought you might be interested in seeing how some American consumers reacted when they were asked to describe American companies as though they were people. *(Film)*

We covered more than fifteen companies in those tapes, and we just pulled out a few to make a point. People can relate to companies as personalities. Companies have rational attributes and human personalities and it probably is better to be liked than disliked!

All right. By way of summary, I have two speculations.



First. Soaring brand proliferation cannot continue in today's marketing world. By that statement, I do not mean that R. J. Reynolds can ever again market just Camels, nor am I calling for a return to the days when Henry Ford could say: "You can have any color car you want, just so long as it is black."

The search for viable new products must continue. But they should be marketed, not just spewed out. And by marketed, I mean that they should be built to have some value to a large enough population segment so that the manufacturer can afford to communicate their value to consumers with enough advertising weight, over a long enough period of time, so that the manufacturer regains control over his own destiny and halts the trend toward retailer dominance.

> "... about the only mass consumer franchise that many companies have is the reputation of the company itself."

Second. While corporate communication should continue to be concerned importantly with the business, government, and financial communities, corporate communication must become much more concerned with the consumer community. With the product proliferation of the past ten to fifteen years, about the only mass consumer franchise that many companies have is the reputation of the company itself. And as consumers look harder for value in the things they buy, the reputation of the parent company can be a very necessary brand attribute.

As we have watched consumers' belief that they can generally depend on what they are told by business leaders slip to a 7 percent vote of confidence, according to Roper, we have whimpered that business must speak out. Did we mean the AMA, the Chamber of Commerce, the ANA—who? It has been like saying that it must be done and George should do it. Only there is no George. I know *I* never had George Meany in mind.

Business must speak out. But I believe that it must speak out one at a time, business by business, in exactly the way it does it best—competitively. The cumulative effect of businesses expressing themselves, their attributes, their beliefs, and their commitments to the American public in the competitive marketplace will do wonders for overall public confidence in business.

And as support for the value of brands, the communication techniques involved have just got to be better than the comparative commercial that claims that brand *A* is better than brand *B* because brand *B* is no good.

Advocacy Advertising–Act II

John E. O'Toole
President
Foote, Cone & Belding

A year ago this month I gave a talk that brought me a good deal of mail, both sacred and profane; that brought me into a running debate in print with a Chicago columnist and into chastisement on the editorial page of *Ad Age;* that brought me invitations to a number of additional platforms such as this; and that brought me nary a nickel's worth of business.

All of those developments—save, perhaps, the last—convinced me anew that the subject was as fascinating as I had felt it to be.

For it seemed to me that it was almost a new form, while not a new medium, of mass communication; that it filled a vital need exposed by the burgeoning information requirements of a complex society; and that it offered corporations a means of fulfilling their obligation to, or social contract with, that society.

I use the adjective "new" although several oil companies were already embarked on such programs, and my research showed that advertising had been put to such a use in 1936 by the California chain stores to fight a discriminatory tax.

I'm referring, of course, to the whole subject of "idea advertising," "issue-oriented advertising," or as I called it—with a pathetic proclivity toward alliteration that once led me to write, "There's a Definite Difference in Delsey"—advocacy advertising.

The premise is simply this. There are two major forces involved in an increasing number of issues affecting all of us: the system and the adversary culture.

The system is made up of industries, businesses, financial institutions that provide people with goods, services, jobs, and a unique way of life. It's not perfect. It breaks down in places. But, all in all, it's served us pretty well.

The adversary culture is composed of those in intellectual and academic pursuits, some political activists and "consumer interest" groups who seek basic changes in the system. They aren't perfect, either. But they aren't always wrong.

Both groups are fulfilling legitimate and essential functions. Each seeks to affect public attitudes toward its point of view on the theory that governmental decisions reflect the will of the majority. But in these complex and impersonal times, the campaigns are waged, increasingly, in the media.

So the press enters the equation as a third element. And here, I believe, is where a warp occurs.

It is neither surprising nor entirely reprehensible that the voice of the adversary culture is more dominant in the media than that of the system. One role of the press is to question established institutions, directions, and processes. The adversary culture provides the questions. They deal in crisis and confrontation, the stuff of which news is made.

The responses of the system are seldom characterized by excitement, immediacy, or human interest.

Nor can "objective reporting" be relied upon to balance out the issues. First of all, I never really believed there was such a thing. Any complex event, processed by a human mind into a logical sequence of words, becomes altered. And when those sequences are selected, shortened, and given relative emphasis by a fallible editor, objectivity becomes diluted at least.

Objectivity is an ideal to be pursued but never captured. And, despite the new journalism, there are still many reporters who see their jobs this way. But television news specials seldom even attempt that much. The program has to be held together by some point of view or it's like watching paint dry. And the point of view is seldom that of the system.

So the press, by and large, is an advocate for the adversary. It seemed to me last March—as it does this March—that advertising is the only means available to provide the balance: an advocate for the system and for individual corporations within that system. It is a different kind of advertising than most of us are used to, but it is a legitimate and, for the times, a highly appropriate mutation.

Advocacy advertising is not, as some critics objected, an attempt to control information. Quite the opposite. It adds to the supply of fact, opinion, and interpretations from which the public shapes its own conclusions. And with issues becoming increasingly complex, more information has to be better than less.

Indeed, the issue of advocacy advertising itself quickly became more complex. First, the fear engendered by the fairness doctrine of the FCC caused broadcasters and networks to shy away from commercials that, in their view, treated controversial subjects. So stringently have they applied their interpretations of what is controversial that they've all but ruled out broadcast as a medium for advocacy advertising.

In addition, I have doubts as to whether issues as involved as these often are can be fairly or adequately dealt with in a sixty- or thirty- second commercial.

Second, and incredible as it may seem, questions have been raised as to whether companies should be allowed to put forth their points of view in paid space.

In this regard, the ANA filed an *amicus curiae* brief in a case, unrelated to this issue, against the E. F. Timme Company which revolved around its commercials for imitation furs. The brief was intended less to influence the outcome of the case than to nail down some issues for the future. It posed this question: "Does the fact that an utterance is in the form of a commercial advertisement expel it from First Amendment territory, especially when its subject matter is one to which there is a public interest?"

Third, Senator Hart called for an IRS and FPC investigation of oil companies and utilities, claiming that their advocacy advertising is not a legitimate business expense and should be paid for with after-tax dollars. This is on the basis that the advertising sought to influence legislation in favor of the companies.

The 4A's has filed a position paper with the Hart subcommittee, pointing out that this kind of advertising is essential to corporate social responsibility.

So the path is not without its brambles. Still, a number of companies and associations have been engaging in advocacy advertising in the past year. Without benefit of inside information about the results, let's take a look at some of it.

SLIDE#1: Pan Am

One of the best single-shot efforts of 1974 was, in my opinion, this ad signed by the employees of Pan Am seeking public support for their beleaguered employer. It talks of the governmental policies that place Pan Am at a competitive disadvantage with foreign carriers and about the fact that a foreign nation can purchase a U.S.-made jet for substantially less than Pan Am can.

Some of these things we've heard before, but they become more credible, more personally involving, when presented by a group of hard-working people concerned about their jobs.

SLIDE#2: American Electric Power Co.

The American Electric Power Companies Association launched a campaign early on advocating the exploitation of our coal resources as a partial answer to the oil crisis–or crises.

SLIDE#3: American Electric Power Co.

This series has been characterized by rational, well-documented, persuasive arguments and by that rarest of all virtues in this field, consistency.

However, it is marred by the manner in which it seeks to involve the casual reader. They have chosen to set up a "villain," the oil-rich, insidious Arab sheikh. The tactic reminds me of the fat, grasping American capitalist we used to see caricatured in Russian journals. It's too facile a simplification for today's reader.

SLIDE#4: American Electric Power Co.

I'm happy to see the nasty Arabs seem to be diminishing in importance as the program progresses.

By and large, however, advocacy advertising has belonged to the oil companies, and the quality has varied considerably.

SLIDE#5: Texaco

This ad by Texaco, a response to the rage that greeted the oil companies' first-quarter earnings statements last year, did little good, I think.

Bar charts and dollar figures too big to have any personal meaning to him are not going to entice even an educated reader into your story. He has to perceive immediately some pertinence to his life and his problems or he'll never plunge into the body copy.

SLIDE#6: Conoco

On the other hand, here's one from Conoco's series that does present the company's case in terms of the reader's interests, that does speak with warmth as well as reason. Unfortunately an art director and illustrator have conspired to deter all but the most assiduous from ever reading it.

SLIDE#7: Exxon

Here's a good combination of reader-oriented headline and factual copy from a company that's been doing a very good job, Exxon.

But the clear-cut leader in the category was from the beginning, and is today, Mobil.

Theirs is a coordinated, well-planned program working on several levels. I don't know if that's the way it started, but good fortune and good direction have caused it to develop that way.

On one level is the company's support of much of the best in public broadcasting. For a company that claims a social conscience, this is visibly putting its money where the mouth is.

In addition, Mobil is sponsoring high-quality programming on commercial television using its commercial time—often not all it's entitled to—for documentary depictions of the company's people seeking new sources of petroleum.

More feisty in print, Mobil started a magazine series last year with ads like this one. Interesting, provocative, and with a point to make.

SLIDE#9

Here's the first ad in the somewhat revised 1975 series, calling for a "YEA," Year of Energy Action. While that kind of acronym makes me cringe a bit, I won't quibble.

SLIDES#10 and#11

And here are some subsequent ads in that series.

SLIDE#12

Mobil's op-ed newspaper campaign featured, in the beginning, ads like this well-remembered, unassuming entry, "Musings of an Oil Person." These were very direct counterattacks against the adversary.

Many still are, but an increasing number of their op-ed ads treat subjects broader than the energy crisis.

SLIDE#13

This one, for instance, never mentions oil or gasoline.

SLIDE#14

Nor does this one. The subject is the problems of business today.

SLIDE#15

My personal favorite is this one, an opportunity to make a point for business seized when Phillippe Petit, the French tight-wire artiste, felt compelled to tiptoe his way between the tops of the World Trade Center towers.

That's a very cursory review but enough from which to conclude that the era of advocacy advertising is here and that it has progressed sufficiently to define some standards for an effective campaign.

Number one, the program should clearly communicate, through subject matter, copy style, and graphics, a unique, credible, and personal identity for the company. People listen to, and buy from, someone they know and like and can recognize. This holds as true for an idea as for a product.

Number two, the dialogue with the public should begin long before the company or industry is under siege. It's just good business to let your various audiences know

who you are and what you stand for, and the acceptance and credibility built up through this kind of long-range program are beyond price should you suddenly have to present the reader with your viewpoint on a highly controversial issue.

Mobil began its corporate dialogue with the public four years ago. A number of our clients, Hallmark being a notable example, have, through their communication programs, created a personal identity and an acceptance that not only help sell products but can be of enormous value should they have to enter the lists with an aggressive adversary.

And who can tell, these days, what industry or corporation will be next? Who would have thought, last March, that the sugar companies would soon rank slightly below Adolf Hitler on the housewife's popularity list? Or that AT&T would be hit with a Justice Department suit?

Number three, the program should be based on a healthy respect for the reader's intelligence. Flag-waving, posturing, and preaching the virtues of the free enterprise system are not going to work today. Facts and persuasive reasoning will. Herb Schmertz, vice president–public affairs for Mobil, is convinced there's a great hunger for information about the oil crisis on every level. His program is successful because the ads satisfy that hunger.

Number four, to be effective, the program must interest, involve, and persuade the reader in terms of his own life and the things that are important to him.

Simply shouting "foul" won't do that. Throwing a bunch of numbers at him in a headline won't do it. Talking about your earnings and your costs won't do it.

But talking to him about *his* costs might. Talking to him about *his* needs and *his* home and *his* family might. And since most public issues are directly related to those things, you can involve him personally in your problems and your programs because, in that sense, they are his as well.

Finally, if it were my program, I'd want some measure of its effectiveness. This requires a definition of target audiences in both demographic and life-style terms and it requires a clear set of objectives.

Then, before the program began, I'd do a benchmark study to determine levels of awareness among those audiences and their attitudes about the stated objectives. A subsequent study every six months would give a pretty good indication of how well the program was attaining its goals and where it could be strengthened to attain them faster.

"... there's high risk in a low profile these days."

I realize, though, that even with this kind of measurement, a program of advocacy advertising for a company demands a certain leap of faith, a commitment, a kind of courage from corporate management.

But I'm convinced that we're going to see more and more corporate managers displaying that kind of courage. Because, as the seven oil company executives who were roughed up in public by Senator Jackson's subcommittee last year discovered, there's high risk in a low profile these days.

The Second Six Sins of Corporate Advertising

Hugh M. Redhead
President
Campbell-Ewald Company

It says here—draft number eleven.

I warmed up to that as a title for this talk with you. But when I showed it to some of the saner heads around Campbell-Ewald, they insisted that this speech needed a proper beginning.

So, now the official title of these remarks is—"The *Second* Six sins of Corporate Advertising."

That title is more carefully calculated and more beautifully functional than it might seem to be.

First, it gets me off the hook. It assumes that there were an original six sins of corporate advertising. And I'm sure there were, even as I'm sure that most of you in this room have either written, spoken, or read about the pitfalls of corporate advertising. After all, this is the fourth Fortune Seminar on the subject. And after today, all of us may just have flogged this mouse to death.

The fact that I have uncovered the second six sins presupposes something new. And this may keep some of you on the edges of your chairs for a while.

The title even has benefit for those who would like to ignore the next twenty-four minutes. Just tell your neighbors to wake you up when I get to number six.

Maybe the savingest grace of this speech, however, is that you asked for it.

In preparing for today, *Fortune* Magazine helped us send a list of questions to those invited to these seminars. We wanted to know what you are currently thinking about with respect to corporate advertising—what problems and questions are bothering you. About a third of you replied, and here's what you said.

Over half of you saw the role of corporate advertising to be greater in today's depressed economy. Over one-third saw it to be at least the same as it has been over the past several years.

You may be surprised to learn that 88 percent reported that their companies plan to spend as much, or more, on corporate advertising than in 1974.

We asked the question—"How would you rate the level of your operating management's involvement, enthusiasm, and support for corporate advertising at this time?" That identical question was asked last year. Here are the results:

The managements who are heavily involved in corporate advertising rose from 19 percent to 33 percent this year. Medium involvement stayed about the same: 59 percent vs. 58 percent. Low involvement fell from 18 percent last year to 3 percent this year. Six percent failed to respond both years.

Those figures seem to be saying that management's interest in corporate advertising is in *in*verse proportion to the state of the economy. Not very surprising when you think about it.

Twenty-seven percent of you feel that some portion of your corporate advertising programs should be devoted to promoting the role of business in the free enterprise system. More about that later.

Heartening as all those responses may be, the overwhelming question you have about corporate advertising is the perennial problem—"How do we prove its effectiveness?" "How do we convince top management that it works?" In one way or another, 42 percent of you say that you are worrying about that problem. And another 30 percent are wondering what approaches to use in their corporate advertising. What should the advertising say?

All of which brings us to the second six sins of corporate advertising. So here goes—in no special order of importance.

Second Sin #1: *"Failure to position the company."*

With all the flap over the past three years on the subject of positioning, this sin is mildly surprising.

I plastered two large walls of my conference room with tearsheets of corporate advertising from a year's supply of *Fortune* magazines. *Fortune* people say that about one-third of their 1,700 pages of advertising each year could be considered strictly corporate or institutional in nature. I'm sure I have samples of all of it. And you'd be amazed—when you look at the bulk of it—how *few* companies and how *few* campaigns really work at establishing a position in the reader's mind for the companies involved.

It seems as if both client and agency advertising people who would never think of putting a product in the marketplace without a positioning strategy have no such restraints when it comes to their corporate efforts. Why should this be so?

Surely the major problems of *product* positioning are present in *corporate* advertising. The clutter is there—the fight for people's attention is as great. The battle for share of mind is as fierce as for share of market.

During my first tour of duty in the advertising agency business, one of my clients from a giant corporation was haranguing a member of the New York Stock Exchange. His beef was that the security analysts didn't really understand his company. The broker said, "Well, there are about 1,600 companies on the New York Stock Exchange, about 1,300 companies on the American Stock Exchange, and 3,200 or so companies whose shares are sold over the counter or on regional exchanges. Many of those 6,100 are multi-industry companies, conglomerates like yours. They are so involved and so complex, we don't even bother to try to understand them."

Consider that there are about 1,800,000 companies in the United States—literally hundreds of companies in every major industry classification. And more and more of those companies are fighting for a position in the minds of business leaders, government leaders, financial leaders, leaders in education and foreign trade.

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A clear understanding of the company behind the name may be the single most compelling objective of corporate advertising today. Especially now when many company names read like a bowl of alphabet soup.

Twenty-two of *Fortune*'s first 500 and twenty of the second 500 have chosen to be known simply by a set of initials. Most often the reason for this is that they've outgrown their original names. What a great opportunity for positioning.

Many a well-known company has had a terribly difficult time establishing a position in fields beyond the one in which it built its original reputation. You can see corporate carcasses strewn all over the large-computer battlefield, the cable-television battlefield, and the home-appliance battlefield, to name a few.

The rules of positioning—whether product or company—are really the same.

1. *Find out what the situation is now.* What position does the company hold in the minds of the people who are important to it? Benchmark research is the only way I know to find that out for sure.
2. *How should the situation or position be changed?* In answering that question it is imperative that the doors of top corporate management be opened to the marketing management of the company and the management people of the agency. There are both clear and subtle reasons for this.

Most top executives have come up through some field of specialization. And even though they are now looking at things from the top of the pile, it is often tough for them to articulate what their company stands for and where it is going. Much of that is buried in their unconscious, even though it is often strongly and brilliantly reflected in what they do and what they think.

It is a cinch bet that the senior management people of most companies could not independently write down their corporate objectives and what their companies stand for with any degree of unanimity within the company.

It is precisely in *that* area that corporate marketing and communication people and their agency counterparts must play an insightful role—must function as true catalysts—to help give birth to singularly accurate expressions of corporate positions.

Even when corporate top management people are fully articulate about their problems and goals, there is a great benefit in an open-door policy. From it will come

> "... write down the advertising objectives. Make them *specific.* Make them *measurable.* Make sure they are *attainable.*"

the kind of agreement, the understanding, the unity that must underlie a strong campaign that never veers off the target.

Still another value of such summit meetings is this: It's quite possible that the need may arise to alter what corporate management wants the state of mind of its publics to be. In other words, to want a leadership posture is not enough. The leadership must be warranted and must be capable of substantiation. Ditto for product quality. Ditto for financial strength. Ditto for enlightened management.

The operating principle is that effective and believable corporate advertising must accurately reflect the true nature and the actual endeavor of the company running it. No amount of advertising can make a company what it isn't today or won't work to be tomorrow. No way.

3. *What part of the job can advertising do?*
   There is an overwhelming temptation—even among sophisticated and experienced advertising professionals—to expect too much from their advertising. A sure cure is to write down the advertising objectives. Make them *specific.* Make them *measurable.* Make sure they are *attainable.* Get them agreed to by everybody who has a hand in the communication process. And make sure your objectives can fit changes in the marketplace and changes in your own corporate capability.
4. *Lastly, did the advertising do its job?*
   If you set some realistic objectives up there in Step #3—then the odds are pretty good that you can measure how well you're achieving them as the advertising is running.

Those four steps, as we see it, are the nuts and bolts of positioning. Putting together the machinery of positioning is where the genius comes in.

On my walls full of corporate advertising, and on my television tube, I see some companies that position themselves very well.

I like the way Greyhound has positioned its metamorphosis from a bus line to a fully diversified corporation. I think this advertising oozes with corporate stability.

I like the crisp way that GTE positions its triad of corporate effort.

IBM—especially the new television series done by David Wolper—is simply great positioning by the leader, and tough to do.

Ditto Merrill Lynch and its "Bullish On America" series. No other stockbroker could say that and have it fit.

Let me dig a little deeper into the *way* corporate positioning is done well. And here I'll have to use an example that I know firsthand—Rockwell International.

Back in the late Sixties, Rockwell Standard, a $600 million name in durable industrial goods, took over North American Aviation, a $2 *billion* aerospace giant. Since then, Rockwell has been on a path of tremendous growth and diversification through internal expansion and through acquisition.

Yet Rockwell was *not* well known. And those who did know it, knew it for the wrong reasons. It was positioned in people's minds as an aerospace company, or as an electronics company.

Clearly, there was a need to position Rockwell correctly with the investing public and security analysts. A shorthand way of describing this complex organization had to be found.

We worked with top management people at Rockwell for a long time trying to find out what it was that knit this company, with all of its disparate businesses, together.

We found that Mr. Rockwell's goal for the corporation—and therefore the thing that was happening *inside* Rockwell—was technology transfer: the taking of Rockwell's enormous scientific abilities and turning them to the production of an almost mind-boggling variety of

improved everyday products supplied to dozens of different industries.

So, science became the key to positioning Rockwell. Here is how we used it.

(Three commercials shown)

Now, is it all working? I think that the answer can be found in this single chart comparing a 1968 research study with one in 1973. The numbers represent percent of people interviewed.

ASSOCIATION OF ROCKWELL INTERNATIONAL WITH INDUSTRIES

	1973	*1968*
Increasing associations		
Auto, truck components	53%	41%
Electronics, micro electronics	46	41
Industrial gears, etc	43	37
Textile machinery	27	18
Printing and graphics equipment	24	17
Pollution control equipment	21	13
Decreasing associations		
Rocket engines	41	46
Missiles	39	46
Military aircraft	34	74

Rockwell wanted the increasing associations to *increase* and the decreasing ones to *decrease.*

So, the needles moved the way they should, didn't they?

Also, the slogan "Where science gets down to business" is one of the best-known corporate slogans extant today. A pretty fair example of positioning.

Speaking of corporate slogans, I have a homemade, down-to-earth yardstick. It's a pretty good way to make sure a slogan is free of hot air and puffery and other idiocies which slogans seem to attract. Take that corporate slogan and imagine that your newest, pink-cheeked salesman is making his first call on the toughest purchasing agent in your entire customer mix. Imagine the first words your salesman utters go something like this: "Mr. Schultz, I'm from Consolidated Padding Company—you know—there's a wonderful world of *tomorrow* in the *padding* of today." If he doesn't get thrown out, the slogan may be OK.

> "... 42 percent of the people answering our questionnaire said they have trouble getting their managements to understand the *value* of corporate advertising."

So much for the sin of failing to position.

Second Sin #2 strikes me as a natural outgrowth of positioning. It is, *"Failure to measure advertising results."*

This sin is also strange when 42 percent of the people answering our questionnaire said they have trouble getting their managements to understand the *value* of corporate advertising.

Some of those people may be saying they are having trouble getting management to *spend money* for advertising research.

Others may be saying management won't believe the research after it is done.

I hope those are the root problems, because they are relatively easy to work against. I hope the problem is not one of having no specific objectives. I hope it isn't the problem of not doing benchmark research to uncover the precise attitudes about the company in the minds of the people important to the company. Because if those fundamentals haven't been tended to—*all is lost.*

The need to have outside, professional research firms—independent of both the company and the advertising agency—conduct ad tracking studies and attitude studies has been thoroughly documented by *Fortune* and by every other worthwhile business publication that I know of. One finds it very difficult to believe it *is* a problem—yet nearly half of you say that it is.

Second Sin #3 is especially relevant in today's depressed economy. Advertising is often a company's largest variable cost. And when dollars get tough, corporate advertising is usually the first to get the ax.

Corporate advertising— if its value is not well documented—seems to offer the least tangible returns. Therefore, it becomes the easiest to postpone.

So, **Second Sin #3** is *"Failing to hang in there—to stay with it"*—to present a consistent and continuous position to the target market.

I suspect one reason that corporate advertising seems so easily postponable has to do with the cause and effect relationship of advertising.

You want to sell a litter of kittens, so you put a want ad in the paper. Someone calls, and you sell three of the seven kittens. Quick cause and effect.

Or you advertise your line of inclinable-bed punch presses and sooner or later you get on the approved list of a lot of purchasing agents. Longer time lag, but still cause and effect.

Now when the advertising gets involved with trying to affect the company's P/E ratios—explaining its diversification policies or changing attitudes in government—the effect takes a lot longer to achieve.

Also, when you try to influence attitudes of people important to your company, there may be need for an *un*-learning process. Deep-seated convictions may have to be changed. And that takes time.

Unlike product advertising, which may be intentionally pulsed or run sporadically to take advantage of seasonal product demands, *corporate* advertising should be continuous and consistent to be effective.

All of this seems self-evident until you see what happens to corporate budgets when times get tough—or when there is insufficient documentation of advertising results.

Second Sin #4 may seem to be hard to reconcile with the need to position the company accurately. It is simply the *"Failure to provide a benefit for the reader."*

Back to my wall full of ads. Every one is chock full of information. Facts about earnings. Facts about product lines. Facts about everything that your average advertising committee can dream up. How about a picture of the founder? That's good—throw him in, too.

The problem is not what to include in corporate advertising, but what to eliminate. The average corporate ad probably assumes more interest in the company on the part of the reader than logic and sweet reason could ever permit. The corporate message must exactly fit the needs and interests of the people you are appealing to.

Too many copywriters, I suspect, write for *Fortune* magazine rather than for living, breathing bankers, fund managers, government procurement officials, or poten-

tial employees.

I suspect that this is why your average creative person does a lot better when he writes ads for cancer research, United Fund, or some other Ad Council project. He writes to people in terms of those people's interests. And he doesn't have an ad committee to help him.

Second Sin #5 doesn't deal with advertising at all. It is simply the *failure to amplify the corporate advertising with all of the other necessary corporate activities to build a result-producing program.*

It is an unfortunate fault of too many advertising-agency people simply to make the ads and figure the job is done.

The difference between success and failure in a corporate communication program can often be measured in all the other important activities that supplement the advertising.

For example, shareholder meetings—are they well planned? Are the questions anticipated?

Ditto for meetings with the investment community. Are they frequent? Do the speakers rehearse? Are the visuals good? Do your top people participate?

How about your annual reports and quarterly earnings statements? Are they inviting to read? Are the disclosures and explanations absolutely believable?

Is the public relations effort tightly geared to corporate objectives? Are the public relations one-sided, or is there a free two-way flow of information and questions?

Are the employees geared in? Ditto for distributors, dealers, and franchises. They all work for you; they should be aboard.

Are the boards of directors used as a working communication tool?

We could go on, and on, but you know the supplemental activities at least as well as I do.

Here we go with **Second Sin #6**—and this is the wakeup call for all those who have nodded off behind their wide-open eyes.

It is simply a *failure to help the system when the system badly needs help.*

I am well aware of the developing situation in Washington, where many government people are coming to realize that they may have overregulated industry to the point of a specific adverse effect on our GNP.

> "... business has to work at telling the vast numbers of our fellow citizens what business is really all about and how it benefits them."

All that notwithstanding, I am glad that at least a quarter of you answering our survey agreed that you *do* believe that it is the business of business to defend the system.

There is a fundamental need for business to explain itself. Not merely to fight back to clear itself when a one-company scandal breaks or when there is an industry-wide problem to cope with. I'm saying that between those two extremes, business has to work at telling the vast numbers of our fellow citizens what business is really all about and how it benefits them.

Again, I must draw on an example that I know firsthand. And that's a Campbell-Ewald ad we ran last fall—the one which you now have. This advertisement has resulted in many hundreds of congratulatory letters to Tom Adams from the great and not-so-great. It has been picked up and run by nearly a dozen other publications free of charge. It has been read into the Congressional Record. And it has drawn some 15,000 reprint requests.

We made it and ran it because it genuinely reflects the strongly held viewpoint of the management of this advertising agency. Our business is really supporting other businesses. We *were* and *are* sick and tired of the unfounded or ill-founded attacks that have been and are being made on the business sector. We are sick of the misunderstandings and misleadings that are going on. We are unhappy with government overregulation and attendent idiocies that keep proliferating and surfacing in one field after another.

Yet no matter in what fields you look, you'll find that too few companies are picking up the cudgel against such idiocies and taking industry's story to the decision makers and to the ultimate judge—the one with the vote—the guy on the street.

Those government idiocies come under the heading of poorly-thought-out, precipitate, or otherwise well-intentioned actions that can harm business, can harm consumers, and can screw up the free enterprise system and the government itself—or all four.

Three fairly current examples come to mind. Let me touch on them briefly and then generalize for a minute.

Federal new-car regulations began to be felt in 1967. They have now swelled to a chorus of hundreds of standards covering everything from the location of controls, to seat belt harnesses, to seat belt interlocks and bumpers. Estimates of cost additions between 1971 and 1976 run anywhere from $1,380 to $1,800 per car.

Just look at bumpers and interlocks. Standard bumper heights are *not* fully workable. When a car's brakes are locked, the front dips down, neatly thrusting grille and headlights into the standard-height bumper of the car ahead. The cost of repairing a '74 bumper vs. a '73 was three times higher.

The cost of replacing an intermediate's '74 bumper vs. the '73 was $140 higher. The added weight contributed its bit to higher gas consumption. And a study showed that while there was less front and rear damage in low-speed accidents, structural damage was greater in high-speed ones.

Now the value and the content of the whole bumper program are in question—as they should have been before the program was launched, if indeed it should have been launched at all.

As you know, the seat belt interlock that was legislated into existence has now been legislated right back out. Meanwhile, it has contributed its full share of additional cost and almost universal owner vexation morning, noon, and night, seven days a week to a public that was, unfortunately, getting all the government it was paying for.

In another field, another kind of vexation.

On the basis of cyclamates being fed to rats in extraordinarily high levels for an extremely long period, the FDA banned cyclamates in 1970. That's not so bad. FDA should guard our health and our welfare. Thank God for the thalidomide ban.

But the cyclamate ban was precipitous and was issued despite the fact that many scientists were uncon-

vinced that the studies were applicable to man.

The ban caused great havoc and expense in the dietetic industry. Coca-Cola's Tab and Fresca brands were put in trouble overnight, and Coca-Cola incurred changeover costs of over $3 million.

The very existence of Royal Crown Cola was threatened because of the high percentage of its sales represented by dietetic pop.

One farm co-op alone was caught with between four and five million cases of dietetic food in cans, out of a total of 24 million cases. All in all, it's estimated that farm co-ops, processors, and canners took a $100 million to $135 million loss. The tale grows even more bitter, because the poor taste of cyclamate substitutes is blamed for a rapid decline of the total dietetic market by 50%. And while the market is now better, the wounds in that industry are deep.

Yet today more than twelve scientific studies in the United States, England, Japan, and Germany have unanimously concluded that cyclamates are *not* cancer-causing in human beings and have no other adverse side effects.

Cyclamates are still banned in the U.S., although considered safe in Canada, in Germany, and in Switzerland. But no one has told the public here the other side of the issue. And no one is telling the public the other side now.

A third bit of government regulation that could conceivably be more far-sweeping than it appears now faces the tire industry.

After much delay because of technical difficulties, the Department of Transportation has proposed a standard to take effect in May of this year. It involves the grading of tires on the basis of tread wear, traction, and high-speed performance.

Under the standard, control tires of various types would be built for grading purposes. The tires of the various manufacturers would then be matched against control tires in on-the-road tests. On the basis of the tests, the tires would be grade-labeled. The labeling would consist of numbers, stars, and letters to identify mileage projections, stopping ability, and heat resistance at high speed. These symbols would be molded into the sidewall of every tire.

In trying to think this through, it seems to me there is an excellent chance that this particular standard may destroy all brand differences. It just may destroy the incentive to work for brand superiority and bring on price standardization as well as quality standardization. It could severely reduce research and development in the tire business. It could also bring on the necessity for going to a tire dealer and telling him we want a number 80 slant 3 star slant B polysteel belted AH 78 dash 15 radial with white sidewalls.

The reason I've cited those three cases, out of many, is to remind you that there is both past, present, and potential fallibility in government regulations. Therefore, there is also past, present, and potential harm to business. To remind you that the public generally is either ignorant of the regulations until they happen, or that at best—or maybe I should say, at worst—the public has heard only one side of them.

I think an urgent case exists for business to fight publicly against harmful legislation *before* it can become law.

I think business has the right and the duty to fight for repeal of precipitous or unthought-out legislation that is causing more trouble than the trouble it was designed to fix. I think business, if it is to survive in the environment of what's left of the free market system, must get tough, stay tough, and go all out to present its side of every important issue involving it. That fight must be carried to

> "... business has the right and the duty to fight for repeal of precipitous or unthought-out legislation that is causing more trouble than the trouble it was designed to fix."

the public by individual corporations and industry associations doing a more vocal and statesmanlike job to help the public understand the full spectrum of what government is doing to us all.

Whatever your own field, I am as sure as I am standing here that you've already had your interlock legislation or your cyclamate legislation or your grade labeling legislation—or else you will have it.

If you already have it, tomorrow is none too soon to begin dealing with it in corporate advertising. And if you don't have it yet, tomorrow is none too soon to begin preparing against the day of its arrival.

I leave you with two thoughts I hope will be indelibly stamped on your memory.

If not us, who?

If not now, when?

Communicating Foreign Policy

Robert J. McCloskey
Assistant Secretary for Congressional Relations and Ambassador at Large, Department of State

I understand I am the first State Department official to address a Fortune Corporate Communications seminar. I attribute this to business' increasing concern with foreign policy and the growing awareness of the role American business can play in the formulation of that policy.

Your presence at this seminar is indicative of a concern with communication. You are interested basically, I assume, in transmitting effective messages about your companies' products and services and in building a positive climate of understanding and acceptance of your organizations' policies and actions. You also seek to create public awareness.

The State Department also has a "product": foreign policy. We are well aware that this nation cannot have an effective foreign policy without broad public support and acceptance. And it is axiomatic that in a free society foreign policy must be based on a broad national consensus. This consensus can be achieved only through honest and effective communication.

Communication—between the Administration and the people, between the State Department and the business community, between this government and other governments—is a prerequisite to foreign policy success in an interdependent world.

The State Department is deeply concerned with communicating our foreign policy to this nation and the world.

One of the problems basic to communicating foreign policy is the inherently dual nature of policy. First, there are the broad, philosophical policy guidelines, and second, the specific policy issues. In communicating philosophical foreign policy we are, in fact, dealing in concepts or building blocks—the long-range objectives which guide our approach to specific policy issues.

Any listing of global American foreign policy objectives would have to include: First, the need to foster a new spirit of restraint and responsibility among all powers. Second, to limit and ultimately reduce nuclear weapon competition. Third, to build global cooperation to meet unprecedented global problems, many of them economic—energy, food, and access to scarce commodities are but some examples.

To the extent we successfully communicate and build support for these overall objectives, we establish a constituency for foreign policy and prepare the nation for specific policies which follow logically from these goals.

One impediment to communicating philosophical foreign policy is that many of the issues involved lack mass-media appeal. We frequently seek to publicize these objectives and fail because they are not deemed newsworthy. Tomorrow's goals cannot compete for space or air time with today's news.

The State Department attempts to overcome this obstacle through direct contact with the public, particularly those already interested in foreign policy. We also have a more structured program to encourage a dialogue on foreign policy, which I shall discuss later.

An additional difficulty in communicating long-range policy objectives is that we are speaking to a multi-audience: America and the world, which includes adversaries. In dealing with energy issues, for example, we must relate directly to the fifteen OPEC countries and to our seventeen consumer allies in the International Energy Agency. We cannot present our policy objectives in narrow, nationalistic terms.

We are, instead, engaged in a difficult educational process, frequently calling upon this nation to accept change and to ensure that it becomes change for the better. We cannot take the simple path and present détente as the road to ultimate victory over the Soviet Union. To do so might whip up some initial jingoistic support domestically, but in the end it would doom the policy to failure. The main lines of our foreign policy must be illuminated in such a way as to render them understandable and reasonable both to this nation and to our friends and adversaries abroad.

This is a difficult long-term task, but I believe that, in the main, we have been successful. Concepts such as détente and interdependence are becoming increasingly a part of the daily vocabulary of America.

The second aspect of communicating foreign policy involves explaining and justifying the day-to-day activities of the State Department and our reaction to specific events abroad. When there is a crisis in Cyprus, a civil war in Ethiopia, or a war in the Middle East, the United States must determine how it relates to these events and be prepared to explain any policy it may develop. Here again, we speak simultaneously to America and the world. Our responses to the issues of the moment have immediate and serious impact in foreign offices and executive mansions around the world. The press corps, then, is the prism through which day-to-day foreign policy actions are refracted to America and the world.

Perhaps the fundamental problem in communicating specific foreign policy to the press involves striking a balance between the public's right to be informed and the government's need to maintain a degree of confidentiality in certain dealings with other nations.

It is obvious to anyone who considers the problem that we cannot conduct our diplomacy in the press. There are frequent legitimate requirements for confidentiality between states. It is, however, precisely these areas which harbor the stories—stories that highlight the controversy and often miss the main point—that sell newspapers or attract viewers to a television newscast.

The press is our primary vehicle of communication

and when the State Department appears to be on the defensive in its relationship with the press it is generally because we are attempting to guard, and the press is attempting to penetrate, areas of confidence between nations. We are called upon to be as accurate and open as possible to satisfy our own press and public. At the same time we must maintain that flexibility necessary to conducting our relations with other states.

Despite this inherent dilemma in our communication effort, the Department of State has established an enviable reputation for getting out the news. I have observed how other nations conduct their press relations and can state unequivocally that we put out more information and on-the-record comment than any other foreign office in the world.

"... We are called upon to be as accurate and open as possible to satisfy our own press and public. At the same time we must maintain that flexibility necessary to conducting our relations with other states."

I should also add, or admit, that silence is an additional factor in communicating our day-to-day foreign policy. As there is a diplomatic illness, so there is a diplomatic silence. It is the subject of as much interpretation, criticism, and analysis as any statement we make for the record. In deciding what will be communicated to the world through the State Department spokesman, we must constantly be aware of what we communicate by silence.

No discussion of our communication problems and objectives would be complete without some reference to that primary target, the Congress of the United States. The State Department is devoting an extraordinary amount of time in an effort to respond to congressional inquiries and to make sure that our policies are explained to Congress.

Our relations with Congress are particularly important at a time when the legislative branch is determined to reassert its foreign policy prerogatives—in Southeast Asia, in the Trade Act, and in the Cyprus negotiations. It is no secret to anyone that the past few months have graphically demonstrated the importance, indeed the vital nature of congressional support and understanding. The rejection of the trade bill by the Soviet Union and the cutoff of arms aid to Turkey are just two examples of the difficulties that can arise when two branches of government are not completely in concert. We will make a major effort to improve our relations with Congress—so that "this new partnership should not seek to make either branch a rubber stamp for the other."

Rather the partnership should be based on the principles outlined by President Ford in his first address to the Congress, the principles of communication, conciliation, compromise, and cooperation. To my mind it was no random selection that made communication the first of those four principles. If we are able to communicate effectively with Congress and win support for our policies, we go a long way toward ensuring the ultimate success of these initiatives.

That phenomenon known as the communication explosion also bears directly on our efforts to relate foreign policy decisions to a worldwide audience. As with most technological advances, we have learned that the incredibly rapid pace of information flow creates as many problems as it solves. Today it is literally impossible to isolate oneself from the news or from foreign affairs. But the volume of daily news and the competition for space and time in the media have left little opportunity for the in-depth coverage vital to an understanding of the broad outlines of our policy. Conversely, the failure to appreciate long-term objectives has made it increasingly difficult for our audience to view our policy actions as a coherent, consistent program.

This surfeit of information has increased our awareness of problems, but has not contributed noticeably to a sense of community. We are so busy reacting to news that we have little opportunity to sit together and decide where we are going and how we want to get there. Our communication has become more and more a creature of the moment whose only constraints are technological.

I do not have to impress upon you, as businessmen, the fact that the difference between national and international affairs is becoming increasingly irrelevant. Economics has become the language of international relations today, and we are not going to meet the challenges posed by an interdependent world without the support of the business community in this country.

What happens abroad—the energy crisis or multilateral trade negotiations—can affect the annual statements of the corporations represented in this room. Foreign policy today is directly related to gas lines, unemployment lines, the price of bread, and the tariffs you pay on your exports.

"... Economics has become the language of international relations today."

Recently the Secretary noted: "The American business community has interests which are increasingly global. Indeed, I doubt that any other element of our society has a more important stake in congenial international order." It is clear that a successful American foreign policy is going to require your ideas, counsel, and understanding.

It is not enough for us to speak about foreign policy through the press or through speeches and pamphlets. Communicating foreign policy cannot be a one-way process. What is required is a dialogue between those charged with the responsibility for formulating and carrying out the policies of this nation and those whose interests are ultimately affected by those policies. Business has a responsibility to make its views known to the State Department. Indeed it is in the interest of business to do so. I think you will be agreeably surprised at the economic expertise and business sense we have developed at State. Deputy Secretary Robert Ingersoll and Under Secretary for Economic Affairs Charles Robinson are both former businessmen who make it a point to communicate with the private sector.

In addition, the State Department has a formal program of three-day executive-diplomat seminars every few months. The purpose of these meetings is to bring



corporate executives and State Department officials together so each can better understand the other's problems and concerns. If any of you are interested in participating in this communication process, please let me know and I will see that you have an opportunity to attend. Outside the formal contacts with the State Department, I would think that business leaders can and would be well advised to devote more of their time and attention to promoting active discussion of world events within their own corporate community.

> "... business leaders can and would be well advised to devote more of their time and attention to promoting active discussion of world events within their own corporate community."

Finally, business can contribute to the broad national debate essential to the development of a foreign policy consensus. You can do this by supporting organizations interested in foreign policy. Recent studies have shown declining business support for the foreign policy organizations in this country. They have shown that less than 1 percent of all corporate donations are directed toward activities even remotely related to international affairs.

Few segments of our population have the capacity to influence the activities and views of others as effectively as American business. Many of the organizations represented in this room are located both in this country and abroad. In both places they are in constant contact with leadership elements. The American business community, with its stake in a stable, orderly, and peaceful world, must ask itself if it has done all it can to further the broad goals of American foreign policy. The Department of State is ready and eager to cooperate with the business community in establishing closer and more effective communication programs. Our Bureau of Public Affairs, along with the Bureau of Economic and Business Affairs, has established a special task force to move rapidly ahead to expand our relations with the business community. Renewed efforts are being made to expand our speakers' program and our participation in and sponsorship of seminars and conferences.

Despite what you may have read, the Department of State does not pretend to have a monopoly on foreign policy wisdom. A successful communication effort leading to the development of a consensus and support for policy must involve all of us. Communication in the face of indifference is a difficult proposition. We seek your support and your more active involvement in the field of foreign affairs and your ideas on how we can improve our communication effort. We welcome your advice and your cooperation.

Financial Communications

James W. Davant
Chairman of the Board
Paine Webber Incorporated

The new chairman of E. I. du Pont said the other day that the restoration of public confidence is the principal task confronting business today. I agree. Business cannot survive without public support.

We cannot get along without the money the public invests in business.

We cannot get along without public understanding of the purposes and practices of business.

We cannot get along without the public's moral and political support.

Right now, as everybody in this room knows, we have far too little of all three.

Ten years ago the public, by actual measurement, considered business leaders more credible than *any major leadership group in the country*, including ministers of the Gospel. A majority of Americans believed that if our pressing social problems were going to be solved at all, business was going to solve them. By most measures, business was America's favorite institution.

Now that picture has changed completely. My strong personal impressions are confirmed by the polls. Lou Harris' measurement of public confidence in major U.S. companies fell from a high of 55 percent in 1966 to 27 percent in 1972. And it is still falling.

I've been in the securities business for thirty years. The degree of today's cynicism is intense. Although there are hopeful signs of a turnaround, the American public has been turned off to Wall Street.

Predictably, attitudes toward the private enterprise system as a whole have deteriorated in the same way. Fewer than half the people think profits have a socially useful function. Three Americans out of four think too much power is in the hands of too few companies. Public attitudes toward business are as negative as they have been since the pollsters began to track them.

In short, American business is, along with most other American institutions, on the public blacklist. And restoring confidence will be more difficult than it was after the great depression. People don't believe what we tell them anymore.

The consequences are far reaching and deeply alarming. The result I see at closest range is the decline of individual participation in our capital markets.

Individual investors are withdrawing from our capital markets by the hundreds of thousands. At the end of 1971, after years of steady growth, 32.5 million Americans owned shares in corporations and investment companies. In 1972, the shareholding population dropped 800,000. In 1973, another 800,000 individual investors dropped out.

But we need the individual's participation in capital markets. They won't work without him. Independent investors, measured by odd-lot trading, have withdrawn $9 billion from the stock market in the last seven years. Some of that money–no one knows how much–was returned to the capital stream in one way or another. But some of it clearly was not.

The raw dimensions of our capital requirements are familiar and frightening. The New York Stock Exchange predicts a $650 billion gap or shortfall between our capital needs in the next decade and our present ability to raise capital. The American economy is starving for capital. The current recession is more than anything a symptom of the capital shortage.

Jim Needham, the chairman of the New York Stock Exchange, says American business will need nearly $2.6 trillion in new capital between now and 1985. Until recently, he pointed out, business has met all but 8 percent of its capital needs internally–through depreciation and retained earnings. But inflation has weakened that internal capacity. Now business will need to raise 30 percent of the money it needs from outsiders, a historic half of it in equity.

This equity must ultimately come from individual investors because–as Willie Sutton said when asked why he robbed banks–that's where the money is.

But I believe there are larger, more compelling reasons why the role of the individual investor must be preserved and enlarged.

The alternative to direct individual investment is the total institutionalization of savings and investment decisions. And that invites government control over the allocation of capital. Individuals, by their very numbers, add up to a powerful political force. They can resist the impulsive changes so often proposed by politicians as "solutions" to whatever problems seem most pressing at the moment. The power to allocate capital is the ultimate economic power. Politicians can hardly keep their hands off it. And a system of capital markets consisting of a few hundred or a few thousand institutions is far less able to offer political resistance. Moreover, an institutionalized system would establish in practice a partial precedent for further centralization.

But it is not just shareholders who are turning off to business. It is practically everybody. And business cannot breathe in a hostile public environment. Public animosity can be quickly converted into legislation that further restricts business' maneuverability at the very time it needs most urgently to be extended.

The question is why. Why did business lose the public's goodwill? Solving the problem will depend on defining it precisely.

Some of the reasons are, of course, outside our control.

Attitudes toward business always tend to move up and down with the index of industrial production. Because we are the visible operators of the business system, we get the blame when it isn't working well.

I read in the *Wall Street Journal* the other day that a lady supermarket shopper, when told the total of her grocery bill, stormed around the counter and hit the checkout clerk with her umbrella. The clerk was not to blame for inflation. She was simply available. The public sees business raising prices and laying off workers. We are the most convenient target for the public's worried animosity.

But there are other reasons people are turning against business. A lot of people have taken a beating in the market. But much more important, they feel they have been misled.

Mark Twain's reminiscences about his Mississippi boyhood reveal a special quality of the American character. Again and again, the citizens welcomed the confidence men who worked those Mississippi towns with a trusting and innocent warmth. But when they found their trust had been abused, their reaction was savage.

"... In the Sixties, we somehow got the cart before the horse. We began to view the *purpose* of financial public relations as *promoting the price of stock.*"

The American people have tended, at least in the past, to be trusting. But they react ferociously when they believe they have been betrayed. And many Americans feel business has misled them.

And they are not entirely wrong in this appraisal. If business has not deliberately deceived the public, some of our attitudes and practices have had a deceptive effect.

In the Sixties, we somehow got the cart before the horse. We began to view the *purpose* of financial public relations as *promoting the price of stock*. The effectiveness of financial public relations was measured by its success in the games business played with multiples.

(I have seen this phenomenon from both sides. Paine Webber is both a consumer and a producer of the financial public relations product. Our analysts and brokers rely heavily on the information companies produce about themselves, and we, as a publicly held company, engage in financial public relations on our own behalf.)

It's clear now that the focus on multiples was cockeyed.

The purpose of business is not to make profits, any more than the purpose of life is to breathe. As Corn Products' former chairman, Mac MacFarland, used to say: Profit isn't the name of the game, it's only the score of the game. The purpose of a business is to produce products and services people want and need at competitive prices. One *result* of these activities, but not their purpose, is profit. It is, of course, an absolutely necessary result. Business cannot survive and grow without profit.

Proficiency at golf is measured by the score. But that is not the game's purpose. A pro puts his energy into mastering the game. The *result* is a low score.

Neither is the purpose of financial public relations to promote stock prices. It is to present the capacities, performance, and prospects of a company clearly, fairly, fully, accurately, and promptly. The work of a company's financial public relations department should no more be measured by the company's multiple than should the activities of the accounting department.

The obsession with multiples was a special aspect of the American corporation's recent regrettable obsession with "image." "Corporate image," a phrase which worked its way into the business vocabulary in the Fifties, subtly shifted corporate consciousness toward appearance. It is perfectly obvious that a company should pay some attention to what it looks like. But most of the emphasis must be on the *accuracy* of that image. Public relations cannot be perceived as an activity–disconnected from reality–which seeks to alter public attitudes by altering appearances.

Image consciousness invites an empty and superficial pretentiousness in corporate communication. And the American people are fed up with pretense–in their political leaders, in most of their institutions, and emphatically in the communications of American companies.

There is another more basic deficiency in our approach to the public. Corporate communication has to some degree been based on an archaic perception of the audience–the American people.

The American public we speak to in the Seventies is not the same public that a century ago was taken in by shell games and snake oil salesmen.

Americans are not only the richest people in the world; they are also the best educated and informed. There is, according to industrial relations expert Leonard Neal, "a shortage of morons."

Yet business still tends to deal with Americans as country doctors once dealt with patients in the backwoods. Perceiving people as ignorant, superstitious, hysterical, and self-destructive, doctors withheld unfavorable information, wrote prescriptions in a Latin code, and excluded the patient from any but the simplest involvement in his own care.

If Americans ever were that way, they are no longer. But our communications still tend to be patronizing, condescending, and simplistic. Our audience has matured in the last two generations, but our communication practices have tended to lag behind that change.

Product advertising, possibly because its impact is much more exhaustively researched and carefully analyzed, has been visibly adapting its methods to the maturing American audience.

Ads, on the whole, are more direct and informative than they were even ten years ago. They appeal to reason. They treat the reader as a grownup.

My own company's approach to advertising is beginning to reflect this change. For years we used a broad image-building strategy. Our advertising featured a series of slogans: "Stockbroker to Know"; "More Than Just a Stockbroker"; and, more recently, "I Didn't Stop Investing, But I Did Switch to Paine Webber." We used big pictures and very little copy.

Now we are in the process of revising that strategy. The advertising material we are now producing gives highly detailed product information. The slogans and the appeals to status are secondary. But we have not gone nearly far enough. Corporations, my own included, are still communicating to today's public with yesterday's methods.

So business needs now to begin the painstaking process of winning back the confidence and goodwill of the public. The question is how to go about it.

There is, of course, no single answer. People form

their attitudes about business in many ways, and the corporate response to the present crisis in confidence will have to be a broad response.

It will involve the way we advertise our products and services. It will involve how we perform. It will involve how we explain and interpret our behavior. It will involve our response to community issues. It will involve how we deal with our employees.

But one aspect of the corporate response–and one which will depend heavily on the effectiveness of financial public relations–is rebuilding the public's direct, individual, independent participation in our capital markets.

Our capital markets are becoming institutionalized. In 1960, individuals did 70 percent of stock market trading. Now, fifteen years later, that crucial proportion has been reversed. Institutions, while they control only 35 percent of all outstanding shares, now do 70 percent of the trading; individuals do only 30 percent.

Joseph Schumpeter, in arguing that socialism–whether it works or not–is inevitable, wrote that "the capitalist process, by substituting a mere parcel of shares for the walls of and the machines in a factory, takes the life out of the idea of property." Now we are moving to devitalize the idea of property even further. When they invest through institutions, individuals can no longer decide whether or when to buy or sell.

There is much more to it than the simplistic slogan which invites people to "own a share of America." Direct investment is a real rather than an abstract link to the economic process. It gives the investor a *reason* to study, understand, and care about capital markets and the larger economic process of which they are a part.

Businessmen are forever climbing on soapboxes and preaching the abstract gospel of free enterprise to anyone who will listen. I've done it myself. But I'm afraid I have paralyzed more audiences than I have persuaded. The prodigious efforts of business to teach economics to the public have had little perceptible effect.

Leonard Silk wrote in Sunday's *Times Magazine*:

"Those who think they understand [the profit system] are constantly berating those who they think don't."

But shareholders, as direct participants, are demonstrably better informed about the economic process and more inclined to support its legitimate ambitions. Opinion Research Corporation has gathered the facts. Shareholders are consistently somewhat more sympathetic to business than nonshareholders.

> "... top management will have to assign a new, higher priority to the practice of financial public relations."

Much of our success in regaining public participation in capital markets will depend on effective financial communication. But I think some changes will have to be made. I think, for one thing, top management will have to assign a new, higher priority to the practice of financial public relations.

If everybody in this room made a list of the ten large companies whose financial communication was "best" and the ten companies whose financial communication was "worst," I have no doubt there would be at least a rough consensus.

If we sought the cause, I think we would find it partly in budgets or personnel or philosophy, but we would find the priority top management has assigned to the function to be a major factor.

Some chief executives tend to be reticent and reclusive. Old Henry Ford finally and reluctantly authorized advertising only because all his competitors were doing it. In the same way, some managements have considered financial public relations nothing more than an unpleasant, defensive necessity. This kind of corporate attitude doesn't work. The practitioner of financial public relations becomes a functionary. The practice of financial public relations becomes merely a repetition of everybody else's mistakes.

But this is changing. E. I. du Pont's chairman calls building public confidence business' top priority. As more and more executives come to share this view, financial public relations will get the support it needs to function effectively.

Second, public relations in general and financial public relations in particular need to develop a solid body of positive knowledge on which to base their policies and by which their effectiveness can be measured.

Aside from a growing tangle of legal mandates, nothing comparable to the rich body of tradition and convention which guides accounting practice exists for financial public relations. As a result, we are often adrift, unable to distinguish sound from unsound practice.

I am not suggesting that the practice of public relations can ever be reduced to a book of rules. It will always be something of an art. But it is a specialty in search of an ethic and a more solid sense of its legitimacy.

Finally, we need to confront the full intensity of public disaffection.

The public has lost faith–not just in business communication–but in formal communication in general. Some Americans, I understand, believe that the moon landings were staged in a television studio.

Business has become part of the mysterious "they" who run the country for their own private purposes.

We must find ways to determine the degree of the public's discontent, regain first their attention, and then their confidence.

But most of all we need to rebuild public participation in the economic process. And our success in this essential endeavor will depend more on financial public relations than on any other corporate specialty.

Question and Answer Period

Q: *With the size of the federal budget approaching us–I'm sorry, the size of the federal deficit, what would be your fears with regard to capital availability for industry in competition with the federal government, from that deficit?*

A: Well, the budget deficit was, I think, when first announced, a great shock. It was not that anyone didn't believe it, but they were shocked when reading it in print. One result has been a tremendous outflow of debt issues, which are in the mill now. Almost every account we have and certain others we'd like to have are in the process of raising debt capital. This inflationary process devours capital. Companies find that it now takes almost twice as much working capital as a year ago to produce the same unit of output.

Many companies can't raise equity on any terms now, and it's difficult to raise, on any reasonable terms, debt. So this is a serious problem. I think you're going to see more and more of it.

Q: *Are we going to have to have some new laws to provide incentives to capital formation?*

A: I think the most important thing is to change the tax laws. I don't know whether Mr. Ullman is sympathetic to this. I thought Mr. Mills was beginning to be.

Q: *You just mentioned a bear market. It has become a bull market.*

A: I think it's a little too early to tell, although we're very happy about it. I don't want to examine it because I don't want to drive it away.

Q: *You were mentioning the small investor, the small stockholder. I've seen a number of stories recently with respect to the uptake in the market. Many of the small investors are coming back. Do you find that to be true?*

A: Yes. With the recent upsurge, I think the largest improvement was in foreign business, but institutional business has more than doubled. I think the retail business is about the same. It has increased substantially.

Q: *How much do you think General Motors has to pay for that 600 million dollars?*

A: I'll go out on a limb and say 7¾ percent.

Q: *Do you think the full disclosure laws are tough enough or too tough?*

A: Well, I'm in complete agreement with full disclosure. You can't make investment decisions without full disclosure. I'm a hardened critic of the SEC, but not on full disclosure. I know it causes a great many problems, but nevertheless I think the public and the stockholders are entitled to know, even if it does cause problems.

Q: *In terms of the companies represented here, in communicating their financial performance to Wall Street analysts and brokers, could you discuss some of the instruments they use, those that you find effective and those that don't help very much? Such as the annual report and security analysts' meetings?*

A: I've always though that the most effective way of getting the story around to individual analysts is by a series of meetings around the country. The New York Analysts Society is fine for a couple of dozen Dow Jones companies, but it really doesn't get too much coverage. But I think that with a series of meetings around the country–we have recommended it to many of our clients–you get the attention of the people. We're dealing with the public and it's a great sales tool for a representative in Peoria to say, "Well, as I was saying to the President of General Motors the other day–"

As to annual reports, they are mostly not being read, except by professionals. I always thought it wasn't necessary to spend an awful lot of money preparing them. Getting the figures out is the most important thing.

Q: *How about the role of advertising?*

A: Advertising, like public relations, is a principal factor, but it's got to be truthful. To me, that's the most important thing. You can only sell a concept when it happens to be a true concept. I think, in our business, we haven't done enough advertising, not nearly enough. We haven't been consistent with it. Our senior managements have chickened out in periods of adversity, when they shouldn't have. I've been one of the guilty.

Q: *A while ago, you mentioned that it looked fairly bleak for many companies to borrow capital to reduce debt. If that's the continuing case, it seems to me that our economy would continue to stagnate. I was thinking about alternate sources of funds. Would you comment on the Mideast? Where is that money coming from?*

A: Actually, the money is there in the hands of the public, if we can get it out. There has been, as you know, talk of the revival of the RFC.

The Arabs might be investing in this country in strange ways. They haven't yet been buying equities of

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major corporations. They have been buying islands in South Carolina and individual establishments. We haven't yet seen the influence of Arab money that we had anticipated.

Q: *In line with the tax question on that same thing, on full disclosure, do you think the SEC has made it clear just what it is they can or can't buy. They can buy 50 percent of Coca-Cola, but not 50 percent of Lockheed.*

A: No, I don't think they have made it clear. Perhaps each situation is going to have to be handled separately. If they let them buy Pan American, would they let them buy United Aircraft?

I think it's important, though, that we have some reciprocity in dealing with foreign countries.

Q: *I certainly agree with your idea of taking it around the country and talking with the various groups. What do you think or what do you recommend about going to see established societies in the various towns, cities, or inviting a broad spectrum of the financial people in?*

A: I think you'd do better by selecting your own audiences, inviting businessmen over for a cocktail party. I think at your security analysts' society meetings around the country, and probably in New York there's one every day, you don't get as much attention unless you are a huge corporation. You get a great deal of attention in Boston with the institutions, particularly. Usually, I have two meetings. I have a large meeting and bring in as many people as I can, and then I have a small one.

Q: *In these meetings, do you think it's necessary to take a high-ranking officer of the company or would you take knowledgeable people?*

A: I think that in most cases it's desirable to have a high-ranking officer, although he may not be the principal speaker. You certainly should have as a speaker a financial executive. I think if you have too many junior officers, people feel that they're getting a brush-off, or that you're not giving them enough attention. Obviously, if you're a very large company, you can't have all key officers, so you just have to choose carefully.

We have one next week, I think, in Chicago, for AT&T, which is something rather new for them.

Q: *I'd like to speak to that point. We set up in AT&T twenty such meetings when we offered a debenture warrant, to explain what warrants were, in twenty different cities across the nation, and put it on in twenty-two days.*

A: I guess what I'm saying is that holding more and more

of these meetings is the most important thing you can do. People are afraid to buy when they don't understand. The more you can bring them to understand the situation, the more apt they are to be purchasers.

Q: *On the switch in control of invested capital from the individual shareholder to the institution, a two-part question occurs: A, is it healthy, and B, do you see it coming back to any sort of balance?*

A: Well, first, I'd like to emphasize that "control" is the key word. Individuals still own about two-thirds of the securities in the country, and one-third is controlled by institutions. This situation has remained fairly static, which is surprising, because the institutions are more volatile in their trading, and they have been trying, I must say recently rather unsuccessfully, to produce better results. If you have a 5 percent economy, it's hard to get a 20 percent return consistently. No, I don't think it's changing. I think you will see a continuation of the institutionalization of savings, over time.

One of the probable results of competitive rates is a further institutionalization of savings. It's a good deal cheaper to buy in bulk. It may not be as much fun, but I think there will be fewer securities firms that will establish branch offices throughout the country to service the public. If this occurs, you'll have fewer individuals buying. I think it's a trend and I don't think it's going to reverse itself. I deplore it, but we'll have to live with it.

"... I think you will see a continuation of the institutionalization of savings, over time."

Q: *Isn't there legislation about now to limit foreign capital to 5 percent of the outstanding shares of stock?*

A: I've seen that proposal, but I don't think any of us have taken it seriously to date. At the present time, we have such a shortage of capital that I think we would welcome it well beyond the 5 percent.

Q: *What do you see for the future of the mutual fund industry, and especially the equities?*

A: I think mutual funds will revive, but I don't think they'll soon again have the importance they did five or six years ago. The Dreyfus type operation, I think, will continue to grow, unless interest rates drop even more precipitously than they have. But I don't think they will. I think the removal of the protection of a fixed rate for mutual funds probably is going to make it more difficult.

Q: *Do you feel that the option market is a tool for getting the private investor back in or is that too complicated a mechanism?*

A: I think the net result of it is going to be to bring more speculative investors back into that market. We were out there Friday, and I was amazed at the activity on that Chicago Board Options Exchange. It was unbelievable, 500 people all shouting, trading.

I've had some ambivalent feelings about options trading. It has a definite value and a definite purpose, but I have felt that our principal job was to put the savings of Americans into industry, to produce goods and services. To the extent that this tends to make investing more speculative and remove it from that purpose, it causes me concern. But nevertheless, it has a useful purpose, and I must say that listed options are exceeding anything I had ever anticipated.

Q: *You said earlier that you thought the profit of a company should be viewed as a score, rather than a reason for that company's being, per se. You also said that very few people, and I tend to agree with you, read annual reports and other financial communications, except for the numbers. How might we communicators begin to shift that and get some of the words and the reasons for the businesses being read?*

A: I think if I were writing an annual report I'd try to make it simple. The simpler the better, so people can really understand it. I don't see any particular advantage in having pictures of the chairman of the board, but I do think that proper illustrations are quite helpful. I don't know whether it's just my own observation, which may be in error, but it seems to me that often, the poorer a company performs, the more it spends on its annual report. I notice that some of the European companies publish very good reports on just plain blank paper.

Q: *If there's any silver lining in the cloud of the bear market, it is perhaps that the yield of some stocks has increased tremendously, and indeed, if your job, as you describe it, is to get the savings of the American public into business and industry, why hasn't any company like yours mounted an aggressive campaign to show, in competitive terms, what a better deal it is for somebody to put his money into some of these now high-yield and relatively secure stocks than into savings accounts or savings and loans or some of the competitive institutions?*

A: Well, part of the reason is, from a selfish point of view, that a very substantial amount of income is produced from fixed income securities, and in some quarters they probably make a lot more from fixed income securities than they do from equity transactions.

Q: *I don't mean the fixed income. The yield of some stocks is up to 12 percent, 15 percent.*

A: I think what you're getting at is the dividend, rather than the expectation of future return in the form of capital gains. I agree with that.

"The American System"

Daniel Seligman
Executive Editor
Fortune

I thought it might be helpful if I said a few words this morning about this upcoming *Fortune* special issue, which is dedicated to the Bicentennial, and which is about the future of the American System, and then went on to talk about some of the things that we've learned and are still learning in the course of bringing out this issue.

The issue is by no means put out yet. Indeed, there has been a certain amount of comment by my colleagues to the effect that the Executive Editor should be staying in New York and working on the issue, instead of going off to Florida to make speeches about it. We finally put down that line of talk, and I persuaded my colleagues that it would be useful for me to address this prestigious group, but then there was some additional muttering by some who said that I didn't have to take my tennis racket to do it.

But I think that if you go to an elegant place like this, you should take your tennis racket. That's part of the American System too.

Let me start off by talking a minute about what we mean by "the System." The word has, in fact, a fair number of meanings. Our editors were recently searching around in dictionaries for some definition that we could all agree on. Oddly enough, we found that none of the dictionaries do quite right by the phrase, which came into use in the late 1960's, and which in general refers to the democratic capitalist order in the United States. Perhaps the closest we came was in the Random House dictionary, which gives you sixteen different definitions of "system." The one that seemed somewhat relevant to our purposes was number 10, which is "the structure or organization of society, business or politics, or society in general." Luckily, Random House gives you an illustrative sentence to go with that definition. The sentence is, "She could never adapt herself to the system."

My own view is that that sentence could also have been used to illustrate the fifteen other definitions.

Actually, the sense in which we're using the term "system" is in some ways close to the one in which it was commonly used back in the late Sixties. But there is a difference about context. If you will recall, the context in which the term was used in the Sixties was almost invariably unflattering to the System. There were a lot of references to young people losing faith in the System. There were repeated assertions that the System was not responsive to the needs of the people. Adults who talked about the System often seemed not to have much faith in it either: typically, they were rather defensively beseeching young people to give the System another chance and, even if they didn't believe in it, to "work within" the System—instead of, presumably, going down into the basement to build bombs.

This dialogue about the System in the late 1960's always seemed kind of phony to me. People on both sides were essentially striking attitudes rather than trying to solve problems; and almost nobody seemed to notice that, by standards most of us would regard as reasonable, the System was in fact working pretty well.

At this point, let me define what I mean by our system "working." Democracy is working when the major decisions of policy reflect the convictions and preferences of some kind of majority. Capitalism is working when the economy is expanding somewhere close to its potential, and when incomes are rising correspondingly.

Was democracy really not working in the 1960's? Our involvement in Vietnam, which was usually held to be its greatest and most obvious failure, by those who talked about the System not being responsive, actually reflected the convictions of the great majority of Americans at just about every point in time. At the time of the original Vietnam buildup, in 1965, there was overwhelming support for the policy. The decision to intervene was not really controversial. During the remainder of the Sixties, as the nation got progressively unhappier about our involvement in Vietnam, there was still no demand for any kind of unilateral pull-out—the unhappiness was focused on our military and political tactics. And by 1970, when the country *was* getting ready for a pull-out, we had Vietnamization—that is, a gradual pull-out. In retrospect, I would argue, the course we pursued in Vietnam was at every stage the only course that an unhappy and bitterly divided country could have accepted.

It was also argued during the late 1960's that our economic and social systems were not working. To a great extent, I think, this conviction reflected the terrifying annual spectacle of riots in our cities—the sense that we all had, as recently as 1969, that every summer large numbers of cities were sure to be in flames. To many Americans it seemed obvious that the rioters and burners were making a point about economic deprivation and social injustice. And there certainly were plenty of injustices that black Americans could point to.

Nevertheless, when you turned to the economic and social indicators, there were numerous signs that things were in fact getting better during this period. I'll just mention a few indicators. From 1965 to 1969 the unemployment rate averaged 3.8 percent; in effect, we had five straight years of "full employment." Meanwhile, real per capita disposable personal income was rising steadily: from 1965 to 1969, the average rise was 3.2%, which is pretty close to the economy's annual potential. The number of Americans living in poverty, by the official definition, was declining sharply in every one of these years, and the rate of decline was far greater for blacks than whites.

Given the unhappiness about Vietnam and the explosions in the cities, it is not hard to account for the widespread sense that the System wasn't working in the

late 1960's. In fact, however, by the standards that seem most relevant, it was working pretty well.

Now, let me mention what seems to me to be a large historical irony. In 1973 and 1974, the dialogue I have been describing was pretty much over. There has been no widespread bemoaning of the failure of the System in the last couple of years. Young people have not been carrying on about their loss of faith in the System, and whether they should be working within it or not is no longer an issue. Most young people appear to be trying hard to find a place in it.

And yet, by around 1973 it began to seem to me, and to some of my colleagues at *Fortune*—and this does help to explain the special issue we've been undertaking—that the System was in fact *not* working very well.

To a considerable extent, this impression rested upon our quite inadequate response to the problem of inflation. Our response to the problem thus far raises very serious questions about the ability of modern democratic societies to manage their economic affairs.

I think that by the end of 1974 a sizable number of thoughtful and concerned Americans would have agreed to all the following propositions:

1. People were demanding more from the System than it could possibly provide without pushing up the price level.

2. People were unwilling to take the painful medicine that's needed to cure inflation, and their elected representatives weren't willing to vote for it. Almost any imaginable policy to cure the inflation that was gathering momentum all through 1973 and 1974 would have involved a lot of suffering by a lot of people, and any Congressman who supported any such policy would be up for election long before the benefits of the policy were discernible. So the dynamics of the political process encourage irresponsibility in economic policy.

3. This is a corollary to No. 2. Our policy makers, both in the White House and at the Federal Reserve, were increasingly lacking in credibility when they talked about curing inflation. From the mid-1960's through 1974, the White House talked incessantly about the need to combat inflation while fiscal policy was more or less continually inflationary. The Fed also talked a good game against inflation while expanding the money supply at steadily higher rates. By mid-1974 it was almost impossible for thoughtful businessmen to take seriously any government statement of determination to fight inflation. At every point of decision, it always turned out that government was more concerned about unemployment than about inflation—even though it was apparent, as *Fortune* among others kept insisting, that feeding inflation in order to reduce unemployment would only make the bust worse when it finally came. Our editorial writers are certainly feeling vindicated on that point nowadays.

But the main point I want to make here is that a large new problem for democracy surfaced in 1973-74, as we became more aware of the propensity of the electorate to be irresponsible with respect to inflation. In the last year or so I've heard, and I suspect others in this room have heard, serious and influential members of our society speculating privately that perhaps there was no solution to the inflation problem in a modern democracy—and that we might ultimately have to turn to a dictatorship to get responsible leadership. This kind of talk was something we had simply never heard in modern times, except from low-level rabble-rousers.

Let me turn now to a report on one of the main articles in our special issue on the System— an article that deals with some of these concerns. It's by Professor Daniel Bell of Harvard, who is, incidentally, a former staff member of *Fortune*. His article is called "The Revolution of Rising Entitlements." The phrase is, of course, adapted from the well-known Revolution of Rising Expectations, but it means something quite different.

The Revolution of Rising Entitlements culminates a process that began back in the 1930's and 40's. In that period, Bell observes, the American government undertook responsibility for the health of the economy. In the 1950's, the commitment was expanded to cover science and technology. And in the 1960's the government's responsibility was expanded dramatically, with a new range of commitments in the realm of social policy. What it came down to was an expanding effort by government to remedy all the inequalities and injustices of our society. This commitment was made piecemeal. And it was a while before Americans began to realize that there might be some common themes in the different government programs involved. But the direction of events is now clear and, Dan Bell argues, the process is irreversible. We've come very close to a situation in which the federal government has an almost unlimited commitment to underwrite the happiness of the American people.

"... We've come very close to a situation in which the federal government has an almost unlimited commitment to underwrite the happiness of the American people."

This commitment has its roots in the powerful American belief in equality—a belief that's always been an engine of change in this country and that's always distinguished American from European society. This belief in equality has been viewed by some historians as absolutely central to any understanding of the way in which our society has evolved. The belief in equality has its roots in the "expanding frontier" of the nineteenth century, which endlessly created new opportunities for the less well-to-do. And America, unlike Europe, had no feudal traditions; egalitarian ideas came naturally on this side of the ocean.

The Revolution of Rising Entitlements adds some new dimensions to our traditional concern with equality. In the process of furthering the revolution, the government has, to a considerable extent, enlarged the meaning of equality. Until the last few years, the word generally referred to equality of opportunity. Nowadays, that isn't enough: the emphasis is more and more insistently on equality of results. The federal government, and this is true of many state and local governments as well, is committed to a process of equalizing the outcomes—that is, with respect to jobs, incomes, housing, etc.

One conspicuous manifestation of this process in business life today is the use of employment quotas to satisfy the claims of ethnic and other groups to a larger share of the better jobs. But we can expect the Revolution of Rising Entitlements to affect differentials in many other areas as well. It occurred to me a few moments ago, in listening to the discussion of the Consumer Protection

Agency, that it too is based on the kind of claim for more justice that the government is now underwriting. It is a kind of claim that would never have been underwritten in the 1950's.

Now the first thing to observe about all these new demands to erase inequalities from American life is that there's no natural limit on them. Traditionally, when people have tried to keep up with the Joneses, the market system has put some limit on their ambitions: there is a limit to the amount of money a family can spend or the amount of credit it has. But when a process is politicized, when the keeping up with the Joneses is done through the government process, there is no natural limit: the government can always redistribute income more, can pass new tax laws, spend more money, incur larger deficits.

> "... the first thing to observe about all these new demands to erase inequalities from American life is that there's no natural limit on them."

The point about deficits is an important one. Dan Bell argues that the Revolution of Rising Entitlements represents new, insistent, and very important claims on government finance. And he suggests that these expanding claims very largely account for the government's increasing role in our economy. By 1974, government at all levels accounted for 22% of all purchases of goods and services (versus 15% in 1950).

The cost of the Revolution of Rising Entitlements is not only economic. The process sometimes looks as though it would overwhelm the political system, presenting more claims and grievances than it can cope with. Furthermore, the proliferation of claims works to break down the party system. American political parties have always endeavored to attract large constituencies and to compromise their various special claims. Most Americans, in most of this country's history, have identified themselves with a broad party whose members included a fair number of people that they themselves didn't agree with, and didn't feel obliged to agree with.

The process that Bell is now describing is one in which loyalty is transferred from the political party to a very narrowly focused "interest group." He argues that more and more Americans are identifying themselves with these interests, which are regional or ethnic or focused on some relatively narrow issue, like abortion or the rights of Indians; and fewer are loyal to political parties. One-third of Americans now identify themselves as independents—that is, not affiliated with any particular party.

The rise of the interest group, and the corresponding decline of loyalty to parties, has some poisonous effects. One trouble is that we have no agreed-upon procedure by which the claims of the different groups can be negotiated. There are no rules; there are only claims backed by power.

Bell argues that it is now a major task of the American polity to develop some rules of procedure, to gain agreement on criteria by which the claims of the interest groups can be sorted out and compromised. He adds: "The mechanisms of compromise still exist. The question today is whether there is a will to use them. Here, too, there is a prior condition for their use—the need for some transcendent tie to bind individuals sufficiently for them to make the occasional necessary sacrifices of self-interest."

It occurs to me that almost everything I've been saying sounds grim. I don't want to leave you with the impression that this special issue of *Fortune* is uniformly depressing. It's true that we've got a lot of long-term problems on our plate, and we do view them seriously. But there is also some good news in the magazine. I think *Fortune* readers are aware that our staff economists have been about as bullish and generally optimistic as any economist you can find these days. Our "Business Roundup" has been arguing that we are going to get sharp and continuing reductions in the rate of inflation. And accompanying the reductions, there is going to be a powerful surge in business.

None of which, of course, banishes the problems described by Dan Bell in our special issue. But it is surely worth something that there will be a period in which we can deal with those problems in a healthier economic environment.

New Concerns About the Press

Paul Weaver
Associate Editor
Fortune

Escoffier said that a chicken is to a great chef what canvas is to a painter—the *tabula rasa* upon which his artistry and personality make themselves known. If that's really so, then clearly the press is America's chicken. There is hardly an American who doesn't have an opinion about the press, and in every American's view of the press, one finds a good litmus test of who this person is, of what he thinks of himself, and of how he sees himself in relation to American society.

In the last several weeks I've been on the road, as a researcher, trying to take a look at this chicken, and I can report to you that it is in a very interesting and complex condition just now. All of us know, of course—who hasn't seen the famous Ron Galella photo of Robert Redford and Bob Woodward walking down the street together?—that the press today stands at a modern high point of influence, status, and glamor. I had been aware of that when I went on the road, but what I wasn't prepared for was the way in which this fact of journalistic life is most concretely symbolized out there across the country. All of you, I assume, have seen at least one of the several versions of the movie, *The Front Page*. And having seen these movies, you know that the city room in which the newsman works is a harshly lit, low industrial environment, with dirty metal desks, old typewriters, and lots of paper strewn around, and that it's occupied by lively, generally quite disreputable persons, drunk most of the time, hung over the rest. All in all, an amusing scene, but one you'd rather watch through bars, as at the zoo, than participate in.

Well, in going about the country, I made an astonishing discovery. City rooms have become extremely elegant environments. Most of them, it turns out, have carpets and are beautifully lit and decorated. The desks are quite handsome, and many of them are stacked with books, symbolizing the rise in the educational level of reporters. Today's newsman works in a very impressive environment, and to me this reflects as well as anything the new status and importance of the press in America today. I did become a bit less impressed, I'll admit, when I asked why it was that executives of newspapers were going to such huge expense to make their reporters' work environment so attractive. It turns out that carpeting is cheaper to install and maintain than vinyl tile, let alone wood. So maybe things aren't all that good. Still, it was impressive and I didn't expect it.

Another thing I was reminded of, while on the road, was that Americans, when they think of the press, usually have one or two journalistic institutions in mind. They certainly think of the television networks' nightly news programs. They probably also think of the New York *Times*, other major news publications, their home-town newspaper—and that's about it. Well, it's important to remember that we have 1,750 different newspapers in this country, counting only the dailies. There are 800 television stations and thousands of radio stations, all of which produce journalism and thus are part of the press. The same is true of the nation's thousands of magazines. And this is my point: the press is *extremely* diverse. It is quite impossible to make sweeping generalizations about it. Indeed, in a very real sense there isn't any such thing as "the" press at all. The term "media" is not a singular noun, not only grammatically, but also empirically. The media are many and diverse; America possesses a variety of presses.

There's a lot of change going on out there in our pluralistic press. One of the most interesting of these changes is the increasing use of new technology. More and more newspapers, including some very small ones, are moving to something called cold type, which is set by computers and turns out to be much cheaper than the old way, which involves a bunch of guys sitting at linotype machines, putting together beds of type from which the actual newspaper is made.

Being cheaper, it has significantly lowered entry costs, as I discovered recently in Las Vegas. Las Vegas, with a population of some 200,000, has got to be one of the smallest U.S. cities to have two independently owned competing daily newspapers. In a matter of weeks it is scheduled to have a third such newspaper, under the leadership of an extraordinary man named Bob Brown. One reason Bob Brown can hope to start a successful daily in Las Vegas in an age of growing newspaper market concentration nationally is that the city has all those casinos, which have lots of money to spend on advertising, and which like to "side" their bets. But another reason is simply that cold type makes it possible for Bob Brown to put out a daily paper with a very small staff.

Another technological change was discovered by my researcher when he visited the fabled city of Dubuque. It turns out that Dubuque not only has one of the most elegantly carpeted and decorated newsrooms in the entire country, it has also gone totally computerized. They have the local population and their newspaper circulation all in the computer banks. Any time they want to know something about the character of their audience, they push some buttons and out come instant answers. They also have their reporters doing something called "precision journalism," which is basically the use of computer technology in which the reporter acts essentially as a social scientist, describing in statistical terms the current condition of the population as a whole, how it is changing, and so forth. In other words, some newsmen in Dubuque have in effect become part-time demographers and are writing stories about local demography—which is interesting in itself, and certainly very different from the way things were only a few years ago.

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But the main reason I was on the road wasn't to find out about all this. It was to take a look at the press "after Watergate." Now, Watergate was a very traumatic experience for the country, and an extremely dramatic one for the press. We wanted to find out what effect it has had on American newsmen.

One of the questions we asked was, has the press become an adversary? Do newsmen think of themselves as adversaries of governmental institutions and politicians? The answer to that question, it turns out, has to be a mixed one. Yes, some do think of themselves that way—primarily in Washington and New York, but also in a few isolated places across the country, such as Boston and, most interesting of all, Denver. A Scripps-Howard newspaper in Denver, the *Rocky Mountain News*, has been taken over by the thirty-one-year-old grandson of old Howard, who founded the chain. And believe me, young Howard is something new in local journalism. He believes his job is to be an adversary. Indeed, he thinks it's the job of his newspaper to attack every incumbent politician for the simple reason that he is an incumbent. I'm exaggerating a bit, but not much. If I recall, his paper supported one candidate for governor last fall, and the minute he was elected—even before he had been sworn in—they started running a series of stories exposing the poor man's misdeeds!

> "... I was struck by the balance and the self-critical quality of most newsmen's conception of the proper relationship between the press and government and the rest of society."

But for the most part, one doesn't find that sort of adversary spirit in American journalism. On the contrary, I was struck by the balance and the self-critical quality of most newsmen's conception of the proper relationship between the press and government and the rest of society. "Neither adversary nor buddy," was a formulation I heard often. You have to be close to your sources, they say, but on the other hand you have to lean back a certain distance, because you can't be in anyone's pocket. Most newsmen neither think nor act like adversaries—and they don't apologize for it. Only a small minority of newsmen see themselves as does Seymour Hersh of the New York *Times*, who told me, "Not only were we adversaries during the 1960's, we were right." So at least in this respect, the Watergate experience hasn't had much impact on the way most newsmen and news organizations work, though certainly it has improved morale in the journalistic community, and this makes things seem more changed than they really are.

My researcher recently interviewed a newsman who works in Salt Lake City and who was sure that Watergate had made a big difference in the way his news organization operated. Not long ago, he explained, a judge was caught, I think as a result of a fire, in a hotel room with a prostitute. A local newsman got word of this and wrote it up, but the story was quickly killed by his bosses. Shortly thereafter, for one reason or another, the prostitute appeared as a defendant before the same judge, who dismissed all charges against her. Again the story was written, and again it was killed by the higher-ups.

Well, my researcher said, what was so different? Despite Watergate, the story was killed, just as it would have been before Watergate. Yes, replied the newsman, it was killed, but it wasn't killed as *quickly* as it would have been before Watergate.

In Washington, it's clear that Watergate has made a much greater difference. For one thing, Washington reporters have a very close and very personal relationship with politicians and with the institutions of government, a relationship that is intimately bound up with their personal sense of professionalism, and that is, potentially, very threatening to their sense of self-respect. In such a milieu, events like Watergate—and the Nixon experience—cannot fail to have consequences. And since Watergate, in the judgment of some of the most experienced and savvy political reporters, the press has printed stories about politicians that, in their opinion, it would not have printed before Watergate.

For example, when General Haig flew off to assume his new duties as commander of the NATO forces, he took along some cases of liquor for his personal or official use at government expense. Somehow the press got word of this, and it was printed as a "scandal" type story. Previously, reporters agree, such incidents would not have been considered newsworthy—and they also agree that it was Watergate that made the difference.

In general, one has the sense, in interviewing Washington reporters, of an intense unwillingness to let something happen to them again that used to happen to them fairly often. That something is what they call being "spun." Being spun is what happens when a reporter has a report he wants to check out with a source in government. He goes to the Assistant Secretary of State, or to the President's press secretary, and asks, is there any truth to this? Do you confirm it, do you deny it, do you want to say nothing? And the guy will say, there is nothing to this. Believe me, there is no truth to it at all. The reporter accepts such statements at face value and drops the possible story. Often enough, two weeks later, it develops that the information was absolutely right and that the source was lying. Then the reporter knows that he has been "spun"—around the little finger of the official in question.

After Watergate, Washington reporters are determined—passionately determined—not to be spun ever again.

I also came away from my travels with a further observation. Despite the fact that the press is more powerful and independent and glamorous than ever before in American history, many members of the press are oddly pessimistic, even fearful about the journalistic future. Generally, they define this as a worry about the state of press freedom. But in fact this is misleading. All newsmen agree the press today is freer than it's ever been before, and despite various threats to it over the last several years press freedom has not been restricted.

For instance, even while Watergate and White House hostility to the press were at a peak, all over the country states were enacting what are known as "sunshine laws." Today some forty-seven or forty-eight states have such laws, which specify that if there is a meeting between two or more public officials, and if public business is being discussed, a reporter, by law, has a right to be present at that meeting and to listen and report what's going on.

That's an extension of press freedom, and it has happened within the last several years.

What newsmen are really worried about, fundamentally, is the conflict between a newly important element of the American press and certain very important parts of the American system as a whole. This new element is the national press.

Historically, American journalism has been decentralized. Until the beginning of the 1960's there were only one or two or three serious journalistic news operations that had a national audience: the *Wall Street Journal*, *Time*, and *Newsweek*. In 1960, America acquired, practically overnight, a national press. In 1963—and this was the crucial year—two of the three networks went from fifteen-minute to thirty-minute nightly news programs. They soon acquired an audience that now stands well above 40 million people, and they also found in the thirty-minute program a new and much more sophisticated and powerful journalistic vehicle. All of a sudden, the nation was getting all of its news, its primary news, from one national source. At the same time, the New York *Times* saw its out-of-town circulation rise; today, more than 200,000 copies of that paper are distributed outside the New York area every day.

Not only did the U.S. acquire a national press in those years, but the journalistic institutions that acquired this national audience also underwent an internal reform, as a result of which they redefined news and reoriented the image of American society that they projected every day through their front pages. This new image or map was controversial in some very important respects. It had important political consequences, not least of which was a series of increasingly bitter attacks against the press, the most famous of which were Spiro Agnew's.

The press denied those charges, and yet one interesting thing I discovered out there on the road is that it is an open secret in the journalistic community that Agnew was sort of right, that the national press does in fact have a controversial political position and that Agnew's description of it wasn't entirely off balance. Now for the most part this admission comes reluctantly—Agnew did not exactly qualify and make perfectly precise the charges he leveled against the press. But there *is* a new political vision implicit in the new kind of journalism being practiced by the national press.

> "... One of the most intense criticisms was that traditional journalism had been too much in the pocket of established institutions."

This new kind of journalism does not arise, as I see it, out of a direct politicalization of the press. On the contrary, what happened in the Sixties was that a new generation of journalists came to control the organizations that make up the national press. By and large this generation had a very critical idea of the traditional newspaper. One of the most intense criticisms was that traditional journalism had been too much in the pocket of established institutions, and that by defining the world as an assemblage of institutions every day, it ignored the poor and the unorganized, and allowed the press to be manipulated by institutions.

One of the driving passions and impulses of these journalists—and it's a good and decent one, too—was to put an end to that state of affairs. The serious press, they vowed, would no longer be in any institution's pocket. And so it happened during the Sixties, when we got a national press, that we also got a press that started to redefine what American society looks like. Instead of an assemblage of institutions, it tended increasingly to look like an assemblage of groups that were powerless and of movements that were attacking institutions or objecting to what institutions did.

This change, which continues to this day, has very important consequences for you as institutional communicators. It also has important consequences for government.

It is this conflict between this new national press and established institutions that, at bottom, worries newsmen today, and that leads them, despite their current prestige, to worry about the future of press freedoms.

It's a very serious problem for you and for your institutions. It's very important that you be able to communicate, to put your actions and your views on the record and in the public eye. This new journalism makes it hard for you to do that. I believe that difficulty is one of the root causes why Americans have an ever lower opinion of institutions. It's harder for them to see what those institutions do, and harder still for them to appreciate what they do right. For the national press has tended to focus more than traditional journalism on the failure of institutions, on their mistakes and misadventures.

It's a very serious problem. I certainly hope that it doesn't lead to any diminution of press freedom. That would be a disaster. It would be the worst thing that could happen to American institutions as well as to the American press.

What I do hope for and what does seem possible, as one talks to some of you people and also to the press, is that this problem will be resolved by a sensible political process. This is, after all, a political problem—the condition of American institutions and of the American democracy. And I think I see a growing, or at least emerging, sense of moderation on both sides, perhaps most especially in the press.

You may recall a speech made by Katherine Graham last year, in which she said it would be a disaster if all reporters started to think that the highest and best thing a journalist could do is what Woodward and Bernstein did—help uncover a Watergate story and see the rascals thrown out. The press is worried about that. They have a feeling that perhaps they've gone a bit far. They have begun to draw back a bit, I think.

I think institutions and politicians are also drawing back a bit on the issues and on their criticism of the press. That would be no bad thing. It would open the way for rational discussion of this problem and create the possibility of a solution by persuasion, moderation, accommodation, and compromise, as opposed to coercion or capitulation, which it seems to me would be very sad indeed.

Question and Answer Period

Q: *First, Dan, about the article that you described by Professor Bell. Is that going to kind of be the theme of the issue? Is that article an island by itself, or is that the theme throughout the issue?*

Seligman: Some of both. It's a separate article. We're not

organized so that other projects of the issue are being spun off that. But it has, yes, a shadow over the issue.

Q: *A question to Paul Weaver. When you were out on the road, what is your opinion of the economic or the business capability of the wire services that they feed to those 1,700 newspapers, the front page stories that come out of Washington on the economy and so forth? Are they all very dependent on the capabilities of those people, other than the great metropolitan areas? Did you find any—do you have some views on their capabilities?*

Weaver: The short answer is no. I didn't take a look at the wire services. I had to limit myself in some ways, and so I simply can't answer the question.

Q: *Do you have an opinion?*

Weaver: Not really, I'm sorry.

Q: *Do you have a feeling for trends, for more or less business page emphasis in the newspapers? In other words, are there publishers wanting to have more coverage or less coverage or anything at all?*

Weaver: Let me say I have a few impressions. One is, there is some question that the national press, the people who are engaging in this post-critical or this counterconventional era—in talking about whether to reverse the American society—there are some things that are happening in various parts of the journalistic community. One is, some of them have begun to think that they have excessively excluded established institutions, corporations and so on. They are going to start, I think, moving a bit back the other way, moving back from the extreme reactions to a situation.

The other thing is there is no question that all parts of the national press believe that the days of the social question, of poverty and of dissent and the powerless, and so on, those days are over. That was the issue of the Sixties. The issue of the Seventies is the economic problem. And because the issue of the Seventies is the economic problem, they're going to be paying more and more attention to business and to economic conditions, but it's not clear that they are going to be doing it in the business section. It's not clear that they won't be doing it from the point of view that business is an important thing to cover, and we'll cover it more. On the contrary, it's going to be more on the front pages. It's going to be written about more from the congressional and political side, by the White House correspondents.

So I think it's fair to say that the likelihood is that business is going to be presented, to the extent it is going to be presented, on the front pages, on the political side. So that there will be more attention and it will tend to be more critical, business embroiled in political and public policy controversy.

Q: *I have a question for Dan Seligman, about what Daniel Bell was writing in* Fortune. *I must say I agree with your analysis of what happened in the Sixties but question what you're saying about this system not working in the last three or four years. Is that not really an incident or a spasm, rather than an ongoing process? A couple of examples come to mind. Your own editors are now writing that the economic upturn is coming. We sit here and we listen to a very honest and straightforward presentation by Senator Hollings, which talks very directly to the business community, and shows a great, very remarkable give and take going on between business and government. It seems to me that something in this system is, in fact, working.*

You mentioned this equality, the idea of entitlements. I don't think there is a more unpopular political or social idea in America right now than quotas and I would doubt greatly that they are to be enacted in legislation. I see now the HEW guidelines coming down the other way, as a result of this political process.

And you talk about this massive redistribution of wealth. In the numbers that I've looked at, the census numbers at least from 1950 to 1970—and I don't think there has been any great change since then—show that there really has been no major redistribution of wealth, only a point or two, really.

So I'm wondering, as I said at the beginning, is this perhaps just a spasm or incident in a long flow that is still an optimistic and a progressive one?

Seligman: It may well turn out that way. Conceivably, we will somehow find, a year from now, that the inflation rate has backed down to 2 percent or 3 percent or less, and we've got a healthy growth of output, incomes are rising again, and all the economic nightmares of the last few years will simply be dissipated. But what Bell is arguing is that there is a lot of institutional momentum behind the inflation, and that the things that brought it on really haven't gone away. The commitment to the values of the Employment Act seems as great as ever, and the pressures on practicing politicians to place a high value on employment and a low value on inflation seem to me still very much in place.

I suppose one could always ask why the Employment Act, which was passed in 1946, is suddenly creating all these problems for us in the late 1960's, early 1970's. And the answer is that there were two events in the past decade that made the act a powerful instrument of policy.

One of them was the tax cut of 1964, which was supposed to "gun" the economy, which did or certainly seemed to have exactly that effect, and which gave policy makers, as well as businessmen, Congressmen, and everyone involved in this process, the sense that we know how to turn the economy around, we know how to reduce the unemployment rate, and we can do it any time we want to. In that sense, it made it far more difficult to pursue policies that led to unemployment. When you know how to get rid of it, it's very hard not to do that.

In addition, there was a real change in the public philosophy in the 1960's, when our country embraced what Westbrook Pegler used to call bleeding heart liberalism or what Herman Kahn calls secular humanism. One could talk for some time about the meaning of these doctrines, but what they both really come down to is the sense that we can't allow people to suffer. During the Sixties we suddenly became very indignant about all kinds of suffering that previously had been taken for granted. People became indignant about poverty. They became indignant about capital punishment. And about young men having to fight in wars they didn't approve of. In short we came increasingly to believe that human suffering should be abolished wherever it was found—and unemployment, of course, is one source of suffering. When you put that feeling together with our newfound ability to reduce the unemployment rate, you have some kind of powerful inflationary engine.

The Common Market– A European Perspective

Andrew A. Mulligan
Director of Information
European Community Information Service

Addressing the Fortune Seminar on Corporate Communications tonight makes me think of many things, and before a formidable assembly of people who are deeply involved in communication, most of all of a team talk which I listened to before taking the field in the West of Ireland. It was a game against a visiting team from South Africa, and everyone walked into the changing room before we went out onto the field. They were all very small men in Ireland, and in order to look big, they wore those big brown coats, such as the one that Pat Lenahan is wearing tonight, those big tweed coats, so that at least they'd look big.

Then they began to drink the wintergreen, which would make them smell fit. And the team captain said to us, "Well, Jesus," he said, "I have very few things to say to you lads this afternoon." He said, "All I can say is they all go like whores. I have only two words for you," he said, "At-Tack."

You've asked me to talk about the situation in Europe, and I think that I could say the situation in Europe is not unlike the situation in Ireland, as described by Winston Churchill in 1941; in those dim, dark days, Winston Churchill said, "The situation in England is serious, but not hopeless. The situation in Ireland is hopeless, but never serious."

In Europe, the president of the Common Market Commission very recently addressed the Parliament of Europe, and he admitted that we couldn't possibly paint a rosy picture of Europe today, but he said that we refused to be unduly pessimistic. I felt that he must have had a good Jesuit upbringing in order to come out with that!

The fact is, in serious terms, that in 1972 there was general euphoria in Europe at the thought that what was originally a group of six nations was about to become nine, and that benefits would inevitably accrue from the fact that the British, Danish, and Irish would bring to the European community all the wisdom of their democracy and all the wisdom of their pragmatism, which it was felt Europe had lacked.

Enlargement of the community in the beginning of 1973 was achieved, with all its difficulties. But progress in late 1973 was hindered first by a shattering world economic crisis, by inflation of raw material prices, and by shortages. This was followed by the oil crisis, which smashed all the projections and plans of those people who hoped they were leading Europe into a new period.

Europe's first reaction was to manifest a kind of squabbling nationalism with which you're probably all too familiar. Two member states immediately beat a six-lane highway to the tents of the Middle East in search of bilateral oil deals, and everyone was shocked at the way Europe had managed once again, in spite of all the lessons of the First World War, the Second World War, and everything else, to manifest monumental division at a time which really required monumental unification.

In spite of this, however, and especially in the last four months, some progress has been made. In Europe there's been a realization that the reality is that we're all economically interdependent, and that we have to consult each other if we're going to harmonize our national economic policies. Systematic efforts are being made to make these compatible and complementary, and now for the first time we've shown a united stand on economic and monetary matters.

Second, we've managed to create a regional fund. Many of you in America might wonder why that's important. It's important because there are great differences among the various countries of the Common Market in their ability to regenerate their economies, to make old and rundown industries modern and able to find their way in the world, and to make them competitive. A regional fund has come into being, within the European community, to make this possible for all. With it, there's a social fund, which deals with such problems as the enormous number of migrant workers in Europe, who come from Morocco, Algeria, even as far afield as Jordan, Portugal, Greece, Turkey. The social fund will enable Europe to cope with social problems which are raised by these people.

Third, late in April, Europe signed a historic agreement with forty-six African, Caribbean, and Pacific nations, many of them former dependencies of British, French, and other European nations. As a result, they will have access to the European Common Market and nothing will be required in return, no reverse preferences or anything like that.

That was a phenomenal step in the direction of trying to ensure that the developing world will be looked after, to some extent, by Europe.

And the fourth area of progress which Europe has made, which I think is important to record, is that it was decided at the Paris Summit Conference that something had to be done to strengthen European institutions. In order that you may understand Europe, perhaps I could draw a brief parallel between European institutions and the federal government and federal administration you have in this country. That's what we're striving for in Europe, but haven't yet achieved, but we do have a commission which proposes policy. We have a Council of Ministers of the individual member states, of which there are nine, which decides on policy, and a commission which is entrusted with the task of executing policy. There is also a legislature, the European Parliament, which will be, from 1978 onward, elected by direct universal suffrage.

So in those four areas, in the last four months, Europe has made some progress.

On the other hand, during the last two years, certainly in the period that I've been involved in personally (from July of 1973), Europe really has been rather like the man from Tralee who was driving up to Dublin. When he arrived at Limerick, which is approximately fifty miles east of Tralee, he asked a bystander, "Could you tell me how far it is to Dublin?" And the fellow from Limerick said, "Well, I'd say it's about fifty miles." And he drove another fifty miles, about two-thirds of the way across Ireland, and he asked again, "Excuse me. Could you tell me how far it is to Dublin?" and the fellow said, "Well, it must be about fifty miles." And the man from Tralee said to himself, "Well, Jasus, at least I'm holding me own anyway."

Progress in Europe is very similar, I feel, to that story. There is light at the end of the tunnel, and we in Europe hope that it isn't a train coming the other way. There are signs, though, of renaissance, in Europe, and I think we're moving out of the period of the slow weaving together of an economic tapestry, into the much tougher, more difficult period of shaping and defining a lasting, unified Europe that has its own distinct identity.

But where does Europe stop? Does it also include the Iberian Peninsula? Does it include Norway and Sweden and the states of the Mediterranean? Or is it, in President de Gaulle's phrase, a Europe that stretches from the Atlantic to the Urals? Actually, these are concepts with which we, who live and work daily in Europe, need not be overconcerned. The reality we have is an economic bloc of nation states, which are ready to agree to pool some of their sovereignty in certain areas, such as multilateral trade. When America trades with Europe, it does not make a bilateral deal with Britain, France, or Germany. It deals with nine nation states together and it deals directly with the commission of the European communities, on matters of agricultural policy too. In the Nixon round, for the first time, agriculture was included as one of the areas in which America would be able to deal directly with Europe, as opposed to the individual nation states.

We have an embryonic energy policy, as you probably have in the United States. On aid and development to the third world, we have a single policy. We have a regional policy, we have a social policy, we have a competition policy, that's to say an antitrust policy; as one of the members attending the seminar from IBM pointed out to me today, the commission has just taken IBM to the European Court on the question of antitrust.

> " . . . this Europe of nine nations already conducts 40 percent of all the world's trade."

The Europe we have is a very frail creature, but it's the only one we've got. It is significant, perhaps, that this Europe of nine nations already conducts 40 percent of all the world's trade. We have a larger population than that of the United States. We have greater currency reserves, although that doesn't mean very much these days. We equal the U.S. in aid to the developing world, and we provide a market which is about twice the size of the United States to those people who want to trade with us.

But what then is this Europe? What is a European? And does such an animal exist? Well, someone recently defined a European as a man with the reliability of a Frenchman, the flexibility of a German, the punctuality of an Irishman, the warmth of an Englishman, the prudery of a Dane, the discipline of an Italian—in other words, a Japanese.

When you are trying to pull all these dissident peoples together, in Europe, you run up against all sorts of problems. I remember well a man with whom I used to play football. I suppose he would have been a linebacker in your parlance. He was a front row forward in ours. This man was a Welshman, a bulldozer driver from a little Welsh town called Pontypool. He said to me, "I'd bloody hate all those overseas games. The moment I cross the River Usk" he said, "for me it's an overseas game, and I just bloody hate that." And he said, "Don't confuse me with any of these sophisticated ideas you have in the big out there, because I hate you'm university guys," he said. "You'm always using long bloody words, like marmalade and corrugated iron."

> " . . . What isn't always understood in the United States is that Europe is very much a child of the United States. In order to understand the Europe that we have today, you have to go back to the Second World War."

What isn't always understood in the United States is that Europe is very much a child of the United States. In order to understand the Europe that we have today, you have to go back to the Second World War. The commonality of Western Europe's and the United States' interests has always manifested itself in times of crisis. In the postwar years, Europe was rebuilt through the Marshall Plan, through American munificence, which helped Europeans to help themselves. Europe was a mess—its industry was incapacitated, its economy shattered, its land devastated, its people hungry. But politically, there were statesmen of stature and wisdom, at that time, who set up a variety of "fora" in which traditional tribalism, which had always divided Europe, and outdated nationalism would be finally eroded and the jealousies diffused. Future historians might regard that period of Marshall aid, creation of the OEC, the Bretton Woods Agreement, NATO's stabilizing effect, as one of the happiest quarter centuries in humanity's history. All this is changed.

Bretton Woods is going, the stability of currencies is gone, prices and interest rates are soaring, the economic growth rate is falling. The problems caused by high oil and commodity prices have been compounded by drought and by floods, and we've been living through an economic tempest.

Once again, in time of crisis, Europe and America are coming closer together. Two years ago Europe and America were fighting over soybeans, and two years before that they were fighting over chickens. Both Europe and America would be happier, I think, if the European community were as unified as the oil producers, and the oil producers as divided as we appear to be.

The new solidarity is to be found, I think, in a $6 billion money box at the IMF, as well as a $25 billion safety

net which Mr. Henry Kissinger has been very keen to push. But attempts at redefining the Atlantic partnership have led to hundreds of hours of squabbling, useless squabbling, over the definition of a new relationship which is acceptable on both sides of the Atlantic. Now such talk, happily, has been shelved, and the hatchets have been buried. We're in an age of reality, and that reality, for us Europeans at the moment, is a Europe which, though unifying, is still composed of nation states. So America, in its relationship with Europe, deals at three different levels. First of all, it deals directly with the European Community—that's to say the commission—on matters of trade and farming, energy, etc. It deals with one voice, from the nine member states, on matters of political cooperation, and it deals directly and bilaterally with the nation states.

One of the nation states, Britain, has been conducting an exercise known as the "renegotiation." Europeans, in a beautiful euphemistic way, call it the "British request." And Europe has shown great flexibility and probity in dealing with these British requests. It's widely thought that negotiations, real negotiations, will be over and accepted by the heads of state or of government in Dublin shortly. It will be the first time that anyone has accepted anything in Dublin, in my memory.

However, the British requests are gradually being dealt with. They deal with four areas. There's the signature at the Lomé Convention, which has just taken place. The British were worried that not enough had been done for the underdeveloped countries. Well, that is being dealt with very satisfactorily. We've got a very good agreement with the forty-six African, Caribbean, and Pacific nations. Britain also had a number of objections to the common agricultural policy, which in fact, during the last year, has shown that community prices for commodities such as wheat, sugar, and beef were considerably below world prices. The commission has also been able to arrive at a regional policy, which Britain was very keen on. The last and most difficult problem was the whole question of how much Britain would contribute to the community budget and still be able to survive. Britain's arguments were that projecting forward to 1980, it would be producing something like 14 percent of the gross national product of the nine member states and would be paying into the kitty something like 24 percent.

"... One of the real problems that we're dealing with in Europe today is the whole question of national sovereignty."

It was apropos of that, that Christopher Soames, Vice President of the European Commission, said, well, whatever happens in Britain, Britain in its present state is not fit to leave a Christmas Club, let alone the Common Market.

The referendum will take place in June. The question of how Mr. Wilson's government will recommend the terms of renegotiation is already being posed, and the answer could mean that all three British political parties are likely to accept the terms, and recommend them to the electorate.

One of the real problems that we're dealing with in Europe today is the whole question of national sovereignty. In some ways, it's very close to something that you would understand very simply and easily in the United States, which is the sovereignty expressed by any single member state of the United States, as opposed to the federal government. In many ways it's a question of states' rights. But the feeling among pro-Europeans is that sovereignty, in the serious operational sense of the word, really means that decisions pertinent to the lives of the people can no longer be effectively exercised on a purely national scale. Sovereignty is only available by sharing decisions with partners, and that means for Britain its partners in the European Community.

As we see it, the question is whether the British people will want the whole of an illusion or a share in the reality of world events.

One of the countries of the European Community is my own country, Ireland. It's the smallest state in the community, apart from Luxembourg. The benefits of community membership have not been negligible. In many ways, membership has justified the confidence that was shown by the Irish people in a referendum prior to joining the European Economic Community. In that referendum, in 1972, out of a 70 percent voter turnout, an overwhelming 83 percent voted in favor of joining, in the belief that the European Community will provide the economic stimulus that a close economic relationship with Britain had never been able to provide.

Ireland derives more benefits from the Common Market, tangibly and intangibly, than any of its other members, old or new. Payments from Brussels form a large part of the Irish budget, and a significant part of the Irish gross national product. In the first year of membership, Irish industrial production grew by around 10 percent, and the Irish government expected the effects of the common agricultural policy alone to raise the annual growth rate by 1¾ percent.

Ireland has attracted more foreign industrial investments, lured by Irish tax incentives, low wages, and access to all of Western Europe. Ireland can now imagine an economic life which is distinct from Britain's, and is very excited at the prospect. Even if Britain were to withdraw from the EEC, Mr. Liam Cosgrave, the Irish Prime Minister, in a magazine not unknown to you, called *Fortune*, stated recently that Ireland would remain in the community. These are very different days from the days of 1963, when, the joke was, Ireland sent its application to join the European Economic Community in an understamped envelope which was returned, addressee unknown.

Three short months ago, the long awaited Community Energy Policy got under way. The policy set precise targets for diversifying supplies and reducing demand by 1985. I only mention this to you because I think that energy, in my short experience in the United States, happens to be something that exercises all of you and all of us very greatly. The policy guidelines cover the coal, oil, electricity, nuclear fuel sectors. One of the major goals is to divert to nuclear energy by having nearly half of the European Community electricity supplied by atomic energy by 1985. Last Wednesday the European Commission put forth two documents summarizing the counterproposal to Mr. Kissinger's plan for a floor price under oil, which they intend to present to the United States and to other members of the International Energy Agency this week.

This European Community energy plan accepts the floor price idea, but as only one aspect of three provisions which are aimed at protecting investments in non-Middle Eastern fuel supplies. The floor price we would like would probably be set very low, something like $6 a barrel. No concrete prices have been agreed upon as yet. The plan calls for flexible floor prices, an economic price and a political price.

The great problem that the European Economic Community faces, and this is a personal view, is that we've been too reluctant about our profile, too frightened of national sensibilities, and wholly unable to present a credible image of ourselves. We've relied on the unpredictable outcome of events, and on a naive optimism about the inevitable progression toward European unity.

May I quote the well-known British journalist, Mr. Peregrine Worsthorne, who recently said: "Belonging to a great community should not only mean wider markets for material goods, but should also mean an expansion of cultural stimuli and satisfactions. It's time that Europe ceased to be associated in the public mind with arguments about tariffs and quotas, committees, headquarters, taxes, important as all these are. We should become again synonymous with La Douceur de Vivre."

There is no corporate body in my experience which is more in need of finding out how to make itself relate, whether to the unbelieving and indifferent populaces of the European member states, or whether to a far more, paradoxically, believing and yet uninformed America, than the Commission of European Communities.

I'm reminded very much, in this area of corporate communication, of my great friend, who will be addressing you tomorrow evening, Mr. Anthony John Francis O'Reilly. During a certain period in his life he was involved in promoting a certain butter which is called Kerry Gold. Now, he thought he'd done a great job for Kerry Gold in the British market, with a test marketing in Lancashire. He went back to report to 400 disbelieving farmers in county Tipperary, and he got up to address them. There were all sorts of problems with Kerry Gold, not least because some unmentionable object found its way into a pat of butter, which never should have been seen in Ireland at all. He told the farmers: "We've really got to get out there. We've got to sell the Kerry Gold." And he gave a whole spiel about modern marketing methods and backing them up with advertising. At the end of it he sat down, and he said, "Are there any questions?" And a big Irish farmer with a big, red face got up and he said to him, "Well, I'm very interested all together with the things that Mr. O'Reilly has been saying to us," but, he said, "the things that he has been saying to us perpetrate yet another injustice against the Irish farmer, because there's no doubt about it, at least 85 percent of Irish farms is above the average." And O'Reilly is scratching his head, looking for an answer. And he got up and he said, "Above the average of what?" And the Irish farmer said, "Above the average of the other 15 percent."

I've come to Tarpon Springs to learn and seek advice, as to how best a monumental human endeavor in building Europe can be encouraged and midwived in America, and how it can be realized and understood in the Western World. With speakers with names like Lenahan, O'Reilly, O'Toole, and many others, I feel that there's no question that I'm in a fountain of information, a fountain of great sagacity, and I thank you all for your attention.

Doing Business in the Sunshine

Ernest F. Hollings
U.S. Senator, South Carolina

Some twenty years ago when Jimmy Byrnes was governor, I was his floor leader in the South Carolina legislature. We were debating a sales tax bill. After many long speeches a colleague asked if I would yield. I did. He said: "You have an impediment in your speech." Thinking he could not understand my Charleston accent, I asked him, "What do you mean?" He said, "The trouble with you, Hollings, is that you can't listen."

I jumped at the chance to be at this forum so that I could listen to businessmen. Hearing firsthand is important—for in Washington the message of business has been garbled. And certain it is that Washington's message to business has been less than clear. We need a new level of communication. We are a nation that has passed over the doorstep of crisis. And today business and government face the situation that the sage Ben Franklin described in another revolutionary era of high risk and high opportunity: either we'll hang together or most assuredly we shall hang separately.

For decades, the United States has attempted the impossible. Playing global policeman since World War II has cost us $1 trillion, 200 billion. Playing the world's banker and Santa Claus has cost us $235 billion in foreign aid. In the mid 1960's we turned to focus the largess of government on the domestic front with the Great Society. And trying to correct inequities, we started buying such ideas as a volunteer Army, which has given us the same number of troops for $22 billion more.

One aspect of Watergate was the tragic spectacle of big business trying to buy the government. But a less publicized aspect, even more tragic, has been the spectacle of government trying to buy the electorate. I was sure we had reached the ultimate in budget limits under President Johnson. When he left town the budget was $184 billion. We've just about doubled that in the past six years with the one-upmanship games played with the public treasury by President Nixon and the Congress. Now we have inflation, recession, and depression. The government is not only divided. It is broken in both body and spirit. Many feel only draconian measures will put us on our feet. I resist these extremes. I prefer well-timed and more commonsensical programs. But they are possible only with the participation and support of business.

Business, as many of you know, demands the impossible: total decontrol and total freedom. For twenty years, the natural gas industry has been making a good profit and has become America's seventh largest industry. But for twenty years it has sought decontrol to expand these profits. President Eisenhower had to veto this idea—and it has been turned down by each President since Eisenhower. Now President Ford picks up the chant—decontrol gas. The broadcast industry, tired of paying Washington lawyers, argues for decontrol. Trucking lines, dissatisfied with an industry-controlled ICC, beg for decontrol. Last fall the airlines took up the chant. Their leaders claimed that if Pan Am had been permitted domestic connections, the airline could have competed, it wouldn't be in this financial jam. Solution: let airlines fly and serve the routes they wish—decontrol. The drumbeat of free enterprise, free markets, and complete freedom from government mounts.

Just last month the chairman of the board of General Motors wrote to each stockholder declaring: "We favor the basic reliance in the President's program on the free market mechanism." Walter Wriston, chairman of the First National City Bank, also raised the cry in a recent speech to the Commercial Club in Boston. I quote: "Just as thought control is the great enemy of freedom of inquiry . . .in the press, economic controls are the great enemy to the entrepreneurial spirit." Wrapping himself up in the Constitution , Wriston concluded that the First Amendment guarantee of freedom of speech also guarantees freedom of the market.

Let there be no doubt—we are not moving toward a laissez-faire economy. We are not moving to sweeping decontrol. We are not about to shrink government back to the size of the Coolidge era because nothing else is shrinking in this complex modern era: not business, not labor, not global markets, and certainly not the governments of our allies, adversaries, and economic competitors.

The cry for total freedom, I submit, is the expression of a desire to escape complexity and responsibility—a desire to have the world completely on our own terms. When I listen to what visiting businessmen actually want, it usually turns out to be "freedom" for their own particular interests within a political and economic system that will remain otherwise unchanged and safely predictable. This desire is human and perfectly understandable. Like human nature, it is contrary and inconsistent. For many of those businessmen who want government to get out of their way and off their backs also want the option to call on the government in an emergency to bail them out. You simply can't have it both ways—Adam Smith one minute and Norman Thomas the next.

Business wanting it both ways never used to bother us in the U.S. Senate. Because business didn't bother us. You see, the constitutional provision that requires revenue measures to derive in the House of Representatives absolved us of any responsibility. This belonged to Wilbur Mills. Foreign affairs and defense costs—in these the Senate has been the leader. But in budget and economic matters, we have been historically weak. Watergate and the economy have changed all this. The Federal Election Campaign Act requires complete disclosure from us politicians. We can't buy an election anymore. And with the limitations on contributions, you can't buy a politician. Both of us have been drawn into the sunshine of the



Senator Ernest F. Hollings

public process. Closed committee meetings and secret votes no longer are the order of the day. You can't depend on your Washington representative to quietly insert or delete a provision at the last minute. Bluntly put, you can't depend on your Washington lawyer for legislation. Today you must depend on your chairman of the board or president to come and present industry's concern in open session. We in government need—the public needs—something infinitely more important than your campaign contributions every few years. We need your experience, your informed perspective and your dispassionate advice on how to make our political-economic system work. Only you who are familiar with the day-to-day demands of a market economy can breathe practical wisdom into our legislation. But many times, witnesses sent by the business community are so lacking in information that they do not even know the dividends of their corporations. As communicators, you should know that the best and the brightest of business have not appeared in Washington. We have been losing the considerable influence that properly belongs to American business in national decision making.

President Ford has just brought the United States Senate into the twentieth century on the economy. On

January 15th, he announced his comprehensive energy and economy plans, and without pause, gathered up the White House china and some exotic foods and boarding Air Force 1, he raced to Atlanta, Houston, Kansas City, and all points declaring to Congress back in Washington: I have an energy plan and a plan for the economy—Where is yours? This put us on our mettle. We organized the Congressional Budget Office. We have appointed a

> "... We don't want to run Penn Central. But the people demand that these and other essential services continue."

Budget Committee. And we have been in hearings around the clock on the economy. It has been a new experience. We have learned that the distinguished economists have all been consistent in one regard—they have been consistently wrong.

I want to assure you that an open and dedicated Congress is trying its level best to do the right thing. You ought to see us struggling, trying not to take over a railroad. Or trying to avoid other needless interventions in the free market system. We don't want to run Penn Central. But the people demand that these and other essential services continue. We are proud of the expansion and the development of new markets offshore by the great names in American industry. We tilted the tax laws to make it possible. But now many of these industries have become multinational superstates. Their gross incomes exceed the gross national products of many countries and most of their profits and interests lie outside of the United States. No one really believes that the best way to create jobs in America is to send America's capital and industrial capacity overseas. Should we continue to subsidize the competitor overseas? Should we control the American bank in New York but not in London? Were it not for Federal Reserve's regulations, were it not for government controls, were it not for the FDIC insuring bank deposits, our economic situation could well have deteriorated and produced panic. The people depend on government guarantees of the banking system and our society benefits from government controls and the public confidence they inspire. There are, however, no Federal Reserve regulations over the vast pool of Eurodollars. During the 1960's, the volume of Eurodollars remained constant at $30.1 billion. This amount has now jumped to $278.1 billion. As one result, we are more deeply caught up in the economic cycles of foreign lands. And the American taxpayers are being dunned for some remote extravagances—hundreds of millions in the Franklin National Bank case. Clearly some greater degree of Federal Reserve controls of international banking is in order.

Oil is a national commodity—government-controlled in every land. Our own government for years has guaranteed a domestic price for oil higher than the world price. Now that the Arab sheikhs have raised the price 400 percent, every oil company is calling for "freedom." For years Big Oil has controlled the Congress, and has had plenty of freedom for its narrow interests. I know because I have been struggling for five years to create an Energy Policy Council. I have been blockd at every turn. Big Oil refuses to give the necessary information upon which to base a realistic national energy policy. Big Oil is more secretive than the CIA. It insists on being sold the American people's oil and gas under a system where it alone knows the amount and value. Big Oil insists on owning the American people's energy-related facilities such as superports. Right now we in the Congress are approaching a showdown with the oil industry like a scene from the film *High Noon*. Big Oil has won so many battles, it stands in danger of losing the war.

Can American industry really cope with the total free market that the chairman of the board of General Motors and others seek? Not if you listen closely to the plastics manufacturer, the fiber manufacturer, the fertilizer manufacturer, and the institutional heads, who face soaring materials costs. Paul Ignatius, representing scheduled airlines, begged that we not give the airlines that kind of freedom. This would mean discontinuing 600 scheduled flights and firing 50,000 employees. How can government make it attractive for industry to develop natural gas without bankrupting industry and homeowners? How can government make the FPC, the ICC, the FTC, and the CAB more responsive to consumers without injuring the regulated industries? How does government revive a railroad without nationalizing it? How does government gain control of this monster oil without nationalizing it? How does government regulate multinational corporations so that they can continue to grow and prosper and yet not have a destructive effect upon the domestic economy? How does government—and how do I, as a Senator—give at one and the same time subsidies and freedom to Pan Am, Lockheed, Penn Central, and the taxpaying utilities?

Obviously, we have problems. Reginald Jones, chairman of the board of General Electric, recognized this when he recently told the Economic Club in Detroit:

"None of us, I'm sure, expects a return to the laissez-faire doctrine in which government plays no significant role in the economy. That day is gone.

"Nor can we afford the kind of divisive adversary relationship between government and business that so frequently has us working at cross purposes . . .

"We'll need to have a proper understanding about who does what, with government determining national objectives and policies, and private enterprise getting the economic work done."

Mr. Jones asks how this can be done. There is only one way. That is, by remembering that we all have the same boss—the American consumer. The American consumer isn't complaining of overregulation. He's just complaining that the regulations don't help him. He feels that the ICC, the CAB, the FTC, the FCC, the FAA, the SEC are all industry-controlled, and he is demanding that we give government back to the people. Business should welcome the dawn of sunshine in government. And it should welcome displacing the downtown lawyers with the best and the brightest of its spokesmen. The Congress solicits—the Congress needs—your best ideas. But let's stop all the shouting of slogans so we can both hear. Each of us has gotten too big for our britches. Each of us can stonewall. Each can veto the program of the other. Yet if we fail in the years ahead, I lose my trust from the people—my office—and you lose your trust from the people—your corporate charter. The people, however, lose even more. So there must be a truce. We are, after all, each the servant of the people—and it is time that we started behaving as though we realized it.

Workshop Session: Selling Management on Corporate Communications

(Three workshops were conducted as part of the seminar program. With the agreement of the participants, the proceedings of one of the workshops were transcribed. The highlights are summarized here.)

Hugh Redhead, president of Campbell-Ewald, the moderator of the workshop, raised the subject of selling management on the value of corporate advertising. In response, Kevin Sullivan, director of advertising and public relations for Tiger Leasing Group, went into the background of how his campaign was developed and what happened in terms of results and management support.

Tiger Leasing Group is a subsidiary of Tiger International, as is Flying Tiger Line. The leasing group originates from North American Car Corporation, a company that dates back to 1905. It was primarily in the business of full service leasing of rail equipment. After its acquisition by the Tiger organization in 1969, North American Car Corporation quintupled in size. In August 1973, Sullivan began planning a 1974 ad campaign. His starting point was this message from management: "We're not going to spend a nickel on ads."

But Sullivan knew that Tiger International was profitable because "for the first time in the airline business, it stopped trying to give the world what it wanted, and instead, Tiger began to give the markets it served what Tiger judged the market needed."

Sullivan and his agency decided to respond to his management in the same way regarding advertising: stop listening to what they say they want—and give them what we think they need.

Management was approached on the basis that North American's corporate identity had been completely muddied by expansion to nine separate companies. It was engaged in the entire gamut of leasing, and was now a worldwide enterprise. Sullivan knew the company needed an identity that would reflect these changes and encompass changes to come. The solution was "Tiger Leasing Group."

The advertising campaign followed, funded at a half million dollars, with a schedule in *Fortune, Business Week,* and *The Wall Street Journal.* "We generated about 3,000 sales leads, over half of which were judged by our member companies to be potential prospects. By the end of 1974, we closed about a quarter million dollars in business, and we have over four million dollars pending." Sullivan added that inquiries weren't the primary objective of the campaign; the major purpose was awareness.

Despite the campaign's success, Sullivan's 1975 budget was "the first thing to go in this year of consolidating our balance sheet position and our recent gains. We've been able to salvage a $300,000 campaign which will last for five months, but it's just not going to do the job for us . . .and I've not been able to get the budget back to where it was."

(At this point, the workshop participants responded to Sullivan's presentation. Some of the participants forgot to identify themselves for the tape as the discussion ensued, so some of the comments in the highlights that follow are not attributable to specific individuals.)

Participant: One of the things that occurred to me was a problem similar to yours. We were doing corporate advertising which was strictly image and awareness, a year or two ago. We began to find as we moved into some new markets that the best thing we could do was to help some of the product areas by incorporating a more pointed view regarding product in our corporate advertising. The ads almost began to look like product type ads.

The reason for that, in our case, is that we had very little identity in the public or consumer world. Most of our products are sold under 17 other different names. So by tying that in, and supplementing what was being done in the product area, we found that the corporate campaign got more support from top management. And that's one switch that you can probably take that might be more intriguing as far as getting some more of those dollars.

John Doriss, Ass't Advertising Director, Fortune: I think everybody here would agree that Kevin has an incredible problem, because it's damn few corporate campaigns that are ever designed to bring a return or to demonstrate sales. Here is a campaign that was not initially designed to do anything but build awareness. Yet that coupon produced business, and he can go to his management and say we made a few million dollars out of this. Most ad directors for corporate campaigns can't do that. And now, his management questions it.

Sullivan: That's the weakness of the whole thing. That's why I was caught unprepared. I would follow one of the profit center heads, and he would walk in and hand out a great big chart, and it would say, here are the dollars I want you to invest, and here's my rate of return. At the end of the first year, this is what you're going to realize, and these are how many assets we will have placed on the books, etc. And I didn't want to follow him by saying, "Well, gee, our competition advertises, and you know advertising does an awful lot of good for you. So this is kind of what we'd like to do and it would be really snappy."

We wanted to demonstrate something specifically for them. We wanted to lay out our own charts. But the pitfall is that 1975 is a year, throughout the financing business, of consolidation. The capital crunch that has hit you, obviously, is hitting us, because in order for us to generate the capital to lease the things you need, we have to have the capital. That's why you're coming to us, because we have capital and you don't want to use yours.

So we're in a situation right now where we have all



the business that my company can do in 1975. Our problem is not finding the customers, it's finding the capital to fund that business.

Because I took the tack last year of trying to demonstrate statistically how coupons turned into business-generating results, management now says, well, we already know that some of our backlogs extend well into 1976, what do we need ads for?

Participant: You're not trying to attract equity financing?

Sullivan: No. As a matter of fact, the whole financial job is supposed to be done in Los Angeles by Tiger International. We're free to advertise just for image and sales.

Participant: Can't image advertising, though, affect your capital market and lay out an image so that that one-on-one contact can be carried out?

Sullivan: It does, it does. Tiger Leasing Group, being part of Tiger International, and Tiger International emanating from the airline results in the fact that in most investment houses we're followed by an airline specialist and not by a generalist. The airline specialists don't have much understanding of the leasing business. Really, we would like to have any investment house analyze the two aspects of our business and assign different multiples to each, and then come up with some kind of common multiple with which to judge the company. We're not being stressed as a leasing company, you see.

Participant: Has that problem been considered as an objective of corporate advertising?

Sullivan: In Los Angeles, yes, but not in Chicago; on a subsidiary level, no.

Gary Raddon, Commercial Marketing Director, Continental Illinois National Bank & Trust Co.: I'm going to talk specifically about what you brought up here, getting management behind institutional advertising. We don't try to sell institutional advertising based upon a pay-

back, whether coupons are going to be clipped and sent in. I use benchmark research, and I find it very effective. We're able to go in and say this is the acceptance among the various publics. This is our image. This is where we stand in relation to First National City or First National of Chicago, and this is where we want to move to on our perception map. And this is the kind of dollars it's going to take to move us closer to the ideal bank, if that's the direction you want to move in. And getting that kind of commitment, based upon the research, we then go back in at six-month or nine-month intervals, and talk about how well we're doing in relation to moving closer toward the ideal bank.

So I use research to help sell advertising, and to sell the corporate advertising. We cut off product advertising. We don't want coupons coming in. We don't have the money to lend. But we're dealing with a different kind of message here, the awareness message, the movement toward the ideal bank, the attributes the public should be aware of, and corporate advertising is the only way I have of selling these ideas.

> "... I find that research is most impressive and most important to a financial manager, and I find he enjoys getting into it."

I find that research is most impressive and most important to a financial manager, and I find he enjoys getting into it. And rather than dollars and cents on how many loans were made as a result of corporate advertising, we talk about an entirely different matter. We talk about image, the image of Continental Bank, which is what we're competing for in terms of public attitudes with respect to our organization.

Participant: What other advertising does your company—not your group—do, other than this advertising?

Sullivan: Last year, Tiger ran an identity campaign of its own, because the same logic that applied to us, applied to the Flying Tiger Corporation. We pointed out to them that if all you do is fly, then Flying Tiger Corporation is a good name, but if half of you flies and the other half of you leases, then you also need a broader name. So at the same time, we were trying to contribute to their effort, as well as have them contribute to ours. They were working on a name change beginning in June of last year, just as we were.

Participant: But this, being what you consider to be a corporate campaign, has to be a selling campaign.

H. Walton Cloke, Vice President, Public Relations & Advertising, Rockwell International: Very definitely. In terms of how most of us around this table define corporate advertising, this is unique. My corporate advertising doesn't have to sell, in terms of product. It does indirectly, although there have been some sales made directly as a result of the corporate program. But basically, it's there to present the total picture of Rockwell. And the point that was made by Continental Bank is absolutely true. The one way that I keep my management sold, assuming we've got the dollars, is on the basis of research. Without research, without Yankelovich, we wouldn't keep them sold for ten minutes. In our public relations side, we use PR data. We can show our management the precise results of our public relations activities in the form of clippings and each clipping is evaluated. That is the research that is done on the public relations side.

I'll be frank to say that if the money is available, it's research in public relations and advertising that keeps our management saying yes, because they can understand the figure. They don't understand the news releases or the approaches to public relations, really. They know they're there, but they don't understand them. They do understand research very clearly, and Yankelovich does the same thing for corporate advertising.

I think all of us at some time or another have been confronted with the kinds of problems that you're confronted with, with management saying, "Why do we need to advertise? We had a pretty good year and we've got about as much business as we can conveniently handle, so why do we need advertising?" You can keep banging away at your management, trying to explain to them why you need to keep some kind of visibility, even when you're doing well. Whether you succeed or not, I guess, depends to a great extent on the receptivity, understanding, and appreciation of your management. They're smart guys and they'll soon be able to get the message. I guess that it's just a matter of a drop of water on a rock, but I think around the table, most people would depend on research.

As you say, you've had a pretty good return, from the standpoint of sales, and it would seem to me that that alone ought to get your management's support. They're not going to say, at any given time, we've got as much business as we can handle. They're going to say: if we've got more business than we can handle, maybe we ought to consider some expansion. So the logic of the whole thing seems to me to be, the campaign has done what it was designed to do, and it can do more—why cut it off?

Sullivan: I wish I had a good answer for you, but I think you've articulated it. This whole matter of research is something we haven't really gotten into. For example, I made my '75 presentation in Nassau last month, and in about 30 seconds we dispensed with the success of that campaign which we've been looking at. I said, I don't have to tell you people how well that worked, do I? and they all said, no, but go on to the next topic.

(Several voices at one time all saying, "That was your trouble. You didn't spell it out!")

Participant: Let me ask you this: Your company is an amalgam of several disparate businesses. Is there a feeling on your management's part that some time in the future you will want to add more companies, acquire more businesses? If the answer to that is yes, then there may be a whole other reason for corporate advertising.

Doriss: There's another reason, too. In particular, Tiger happens to be in an industry, leasing, that is still very new, and the scramble for dominance is on for the next X years. So the companies that do the early positioning job have got an edge on that. It's very, very competitive. There are not really a lot of companies well known in that field.

Sullivan: Let me back up to tell you what sold the '74 campaign. It was *Fortune*, November, 1973. *Fortune* did a story on leasing. Fortune sold my program by leaving us out of a box chart listing major leasing organizations. We did some figuring, and talked to the *Fortune* researchers and the others who were involved with the article. Using their criteria, we figured we were ninth on the chart. Even at that time, we were the ninth largest leasing com-

pany in the world, with assets near a billion and a half dollars, or control of assets, I should say.

Well, it didn't take management very long to decide, on the basis of that alone, because I asked the researcher why we were left out, and she said, "We never heard of you." And so that's all it took to sell management.

Now, what you're telling me is I shouldn't have let it go at that. I should have spent '74 developing the kind of research so that in January '75, I could have walked in and said, here are the numbers.

Participant: It seems to me there's a chance for some projective research here, if it is possible to get your management to invest a little bit of money for research. I don't think it has to be a large sample, but I think it has to be done very carefully and probably with personal interviews. Set up the target market of your leasing customers. Ask them not what leasing companies come to mind for them, but who they would recommend and why if an associate of theirs was asking for a recommendation of a company to lease your kind of equipment. Because the field is so tough and competitive, and because you have a relatively low profile position, I think that kind of research might do much to sell your management on the need to be better known, as a good leasing company, in terms defined by your prospective customers.

I'm leaning on something that the Continental Bank said they did. I'm assuming, when you said you find an ideal bank or a good bank, that came out of research.

Raddon: That's right. That's what the market was telling us, what they want in a bank. And interestingly enough, not many banks were close to that idea, so it opened a real opportunity for us, and we took those attributes or characteristics and developed them into our advertising program. To me, that's what management understands. They don't get too excited about an ad. They want to know about the objectives of the campaign, will it move us closer to what we consider to be an ideal bank, and how will it do it? We really don't get into copy detail, which makes it very nice from our point of view.

Participant: I think the premise of research is part of the answer to your problem. I think the fact that you're in a relatively new business and that you're looking for visibility is or should be an even more important argument for your management. You can say to them; "Do you want to be left out of the box the next time around? One way you'll avoid that is by maintaining the visibility that this program will give you."

John Sealey, General Manager, Business Services, Shell Oil Company: I've handled the product side of our company's advertising for a number of years, but I inherited the corporate side last year. And the budgetary problem was a sticky one. I might say that we're spending more money in this area than we ever have in our history. And I think part of our success was to get our senior management to really lay in some advertising objectives.

They always left the product objectives up to market-



ing, but they really have never gotten too involved in the corporate advertising.

Participant: How did you go about it? What did you do?

Sealey: We had a series of meetings at the executive vice president level, and eventually got to general executive officers, and got concurrence on four very simple advertising objectives. We then conducted a series of research studies. We had continuing monthly in-house research going, and we started tracking ourselves and we started tracking our competition. And when you see the curve going in the wrong direction or the right direction, that helps.

Something that you might find useful is that we started using focus groups, and we found this very helpful in the developmental period, because we were getting so many negatives on our advertising.

We went to the focus groups to look at the campaign before we got it out, to see if we were doing more harm than good, or whether or not we were getting across the points that we had in our advertising objectives. We do these in about a week. We do them in Los Angeles, Chicago, St. Louis, Boston, New York, and we get a pretty good feel. And then we go to our management and say, here are the objectives, here are the trends, and here's the campaign effect on a focus group. Then we follow it up to see whether the focus group is right. They're now getting some confidence that our research is close to our objectives.

Participant: You quantify those focus groups with field research?

Sealey: Yes, we do. I was very skeptical, frankly, of focus groups. I still think they're a little spooky, but we have modified them and they have proved to be amazingly accurate.

Participant: Apparently, a lot of you are saying that you do use research in one fashion or another, to substantiate the need for and the validity of your corporate advertising.

I'm interested in how many of you have trouble getting your management to believe research results once you get them.

Participant: You're reading my mind. I've got a management that says you can make figures say anything.

Raddon: One way we got around this was to do internal research before we did the external. We asked management what they thought, their feelings about the bank, and what we were doing to service the customers. We had 12,000 people in the organization, and about 4,000 participated in the survey. Then we did the external research. They're not that far apart. It was really quite interesting, depending on the level that you're in, to see the difference.

John R. Purser, Director of Public Relations and Advertising, Jones & Laughlin Steel Corp.: I'd like to amplify that point on research. For those of you who are not familiar with Jones & Laughlin Steel Corporation, there is a great deal of difference between the way it was and the way it is today. Some people in steel companies—in most heavy industry groups—who have been together a long time tend to think that a particular company has fine attributes or they would like to believe it has, because they've been there for thirty odd years, They don't want to think, perhaps, that my God, this company is not the kind of place in which I should have invested thirty years.

So we did some internal research. The basic findings are very interesting. The young middle-management group, relatively new, thought of the company completely differently than the older group which had been there thirty-five or forty years. I think this was probably pretty obvious.

Then we did research with editors, with community groups, with analysts, and what we finally found was that the perception of the real world, those outside the company, as to what the company really was and what we were really trying to do, was totally different.

This was in the latter part of '73. We started getting our management out, getting them out as opposed to speaking at AISI meetings where everybody has the same problems: coke oven batteries, steel production, new rolling mill, where are we going to get the capital, the environmentalists, and so forth. We got them out into the real world, and very quickly, we found that the research could be validated and driven home to them, in quite a fashion.

Another thing that we started was what we call the President's Forum, and this was extremely effective. We brought in young management types every month for informal question and answer sessions of about two hours, and then dinner with the president. No monitoring, no feedback, no crucifixions following it, just a real open forum.

"... when you combined all the research, what you really had was a total communication effort that had to be built to do a certain job, and the job was to change the image of J&L..."

To get back to advertising and communication, it seemed to me that when you combined all the research, what you really had was a total communication effort that had to be built to do a certain job, and the job was to change the image of J & L as a dirty, smoky, old, archaic, run-down, on-the-brink-of-bankruptcy-type steel company.

Anybody who has lived in Pittsburgh in the last few years, I think, could pretty well substantiate my conclusion.

I think my coming from the outside was very beneficial, as opposed to growing up within the system. I could get up and say, the mill in Pittsburgh is a dirty, ugly, terrible place to work. It looks like hell. Let's paint it.

Well, okay, we'll paint it black. Why paint it black? Because we've always painted it black. Come to Pittsburgh now and you'll see an orange mill, and you'll see a big blue and white sign out there that says J & L.

Now, this forces a different identity. That simple painting job, which was 49,000 gallons of orange paint or however much, has done a lot to people coming in on the parkway to change the image of J & L.

Getting back to the total communication plan, we also realized that we're in a cyclical business, which I think Tiger Leasing is probably in, too. Late in 1973, the surge for steel was coming full blast, and it looked as if there would be a seller's market for some time to come. But looking a little further out, at the amount of capacity available and the growth demand in steel, it seemed to



as, quite frankly, that somewhere down the line it would be a buyer's market again.

So what kind of image of the company did we want to establish with this group of customers that we were trying to lock in for the long term? We didn't want to be selling two hot bands, scrambling around, doing that kind of thing. We wanted long term commitments. We didn't want to be just a big warehouse.

Participant: That's very appropriate, because after summer has to come winter. You don't wait until the snow starts falling before looking for supplier preference.

Purser: We started on a campaign slogan which has been very valuable to us and it's "J & L helps you make the most of steel." I know that probably sounds pretty corny, but when you look at the internal attributes of the company, you have good, strong research, good product development, good facilities, and so on. Somewhere down the line, believe it or not, they're going to be very valuable. And the entire communications—corporate identity, corporate advertising, product advertising, product publicity, corporate PR, community relations—is geared to that type of image. J & L helps you make the most of steel through its people, through its service, through its quality, through whatever we can bring into it that's appropriate.

And we have had no problem with budgets. No, I qualify that, in getting back to the remark made on the cutting of budgets. It's obvious that in a buyer's market in a heavy industry, the one thing that sells above anything else is price. Any kind of advertising in a buyer's market does very little for you, strictly product advertising, because everybody has it and it's based on price. What we've done is cut the budget in the product areas, and put it back into the corporate area, because we're still trying to reaffirm our identity, and it's going to take a long time.

But research is fundamentally the building block for doing all of this.

Participant: Was the program started under Bill Roesch, or when he left?

Purser: If you read the *Fortune* article in March, you can pretty well determine when Bill decided to leave. We were changing horses in midstream, so to speak, before he actually left. So it took place prior to his leaving, and with, I might add, Bill's full cooperation. Fortunately, the new management, Tom Graham, the president, and Roscoe Haynie, the chairman, are super people, and they realized that even though you are now a financial success, it is not the whole ballgame, and so they give full cooperation. We still had to prove to management that research, corporate advertising, corporate public relations, community relations, employee relations, were valuable, that they would come to some kind of beneficial end down the road.

So we changed our entire employee communications. We're big in video tapes, which has been an extremely effective way of communicating with 35,000 employees. We went in, put the program together, estimated what it would cost somewhere down the line and proposed that this would be just like building a steel mill: it could not be stopped and started. We put it on a businesslike basis. Once you've undertaken this, we told management, you have to maintain this posture through thick and thin.

When most of us in a capital intensive industry start on an expansion program we fund it in hopes of getting results for the corporation. We don't stop because the market turns down and leave the superstructure there, and then pick it up two years later and put in another piece of machinery, and so forth. That's just inefficient and ineffective management.

You do the same thing from a communication standpoint; put it on a very businesslike basis. You have to achieve results, just like the accountant, the operator, the engineer, the salesman, anybody else. And the one way of showing results is to start out with benchmark research. We're doing this on a piecemeal basis rather than trying to do the second phase of it all at one time. So far, eighteen months after the original benchmark, in those audiences that we surveyed again, we've made substantial progress.

Now, we're going to continue at quarterly intervals, making these same evaluations.

Participant: Question: Do you have problems of corporate people believing the research results? Is there any validity in saying to the research group that you happen to be working with, that it should come in prepared, not only to discuss the research itself, but the validity of the research, and why management people who have no knowledge of research can feel comfortable with the findings.

Does management believe that the methodology is good, that the responses are accurate, that the findings are projectable? Do they feel comfortable with the figures?

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Purser: I think they do now, but believe me, it has taken at least three years to get to this point. I think the more sophisticated means that are being used and are understood are beginning to get through. You just don't do it overnight.

Participant: I have a feeling we're going to over-promise research if we're not careful.

Participant: There's a good reason for an executive manager to be suspicious about research. The research he sees is a benchmark, always identified with communication.

Raddon: That's the reason you present the research, interpret it for him, and identify, for example, that we are a good deal away from the profile of the ideal bank. You identify a few of the characteristics of the ideal bank, which you would like to improve awareness of, or a perception of, in an advertising campaign. You select a good, creative execution for that ideal. You give it exposure. You go back and survey the audience you expose to this new idea, and you measure an awareness improvement. And I submit to you, what else are you going to measure?

I guess what I'm getting at is that research is a very useful tool and to try to begin a program like this without it, would seem to me to be pretty superficial. But to make that tool become the entire justification and the sole measure, is to over-promise research, as we often over-promise the benefit of corporate advertising. There's a judgmental factor here that you've got to say, management's got to say, "In our opinion, we will get a bottom line benefit, if we can get more people to think of us in this way." I thought all three of you were really saying the same thing this morning. You really need a unique identity as the first prerequisite for your campaign, and most of us think that's the greatest difficulty. Most of the advertising we see on the table, and we're exposed to, lacks that. And then the second thing we've got to have is some continuity. And most of the time, the promise of continuity exceeds the tenure of the guy who gave you the budget in the first place.

> "... most of the time, the promise of continuity exceeds the tenure of the guy who gave you the budget in the first place."

That's a great difficulty, so that you have to constantly re-establish that this unique identity has bottom line value to the business, and I don't think research is the exclusive tool to do that. I think it requires an understanding of that unique identity.

Obviously J & L was something other than what people had thought it was and the leasing business is similar. If you really are different from the way people think of you, there ought to be a way to change that thinking. Research or no research, that seems to me to be sound justification. How many dollars you put into it is going to vary with the size of the pie. That's just a fact of life.

Participant: I think the research still gives management something to get hold of. A lot of the rest of it is conversation and just pure faith, and as you say, continuity.

Purser: But I think it's also establishing yourself as a businessman, rather than as a communicator. And once you've established yourself as a businessman, understanding the problems and being very attuned to what happens when a blast furnace goes down and what impact that has on the marketplace, and what it's going to take in rejiggering your particular communications—and I speak of communications as opposed to corporate advertising. I don't look at one as being the sole means of getting anything across. But I think once you've established yourself as a businessman, you establish yourself in the same way as an engineer, as a salesman, as an accountant, as a professional individual who is trying to do a bottom line job for the corporation. You just happen to be a communicator, but you're still a businessman, and that's the thing I think you have to articulate, you have to drive home and reinforce constantly. You are at a disadvantage, as opposed to a lawyer, or an MBA. They assume he's a businessman, which is not always a valid assumption, as we all know.

But this would help you, I think, change management's view because there may be an operating man who likes the operating concept, as opposed to the sales concept. You're always going to run across that. By no means is research the only means to an end. It may be a means to an end, but it's not an end in itself. I think it's very valid, however.

Exhibit 52: "Crosscurrents, 1976"



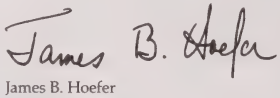
Introduction

This year, our fifth annual corporate communications seminar presented such diverse speakers as Gordon Dunlop, head of the worldwide Commercial Union Assurance Company, and Charles Schulz, the affable and brilliant creator of "Peanuts." What they have in common, however, is the ability to interpret and make use of the ideas, words, and art that contribute to effective communication. For the 91 communication executives in attendance, Dunlop, Schulz, and the other eminent speakers provided the spark for what became an interesting and valuable dialogue on all aspects of corporate communication.

As participants have told us from the very first seminar in 1972, they believe the greatest benefit of the meeting is the opportunity to exchange views with their peers in other companies. In fact, our program is designed to help bring that about. In addition to the usual question and answer periods following talks, this year's seminar also included three workshops where participants could explore communication strategy, research, results, and get a close look at what works and what doesn't.

The benefits of the seminar are not confined to those in attendance. The seminar is really a starting point for the dissemination of new ideas and perspectives to a wide audience of people involved in corporate communication. The medium is the report you now have in hand, which receives wide distribution.

I know that after you read the pages that follow, you will join me in thanking the speakers and participants for providing such useful information for all of us.



James B. Hoefer
Advertising Director
Fortune

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Harold M. Williams, *Dean, Graduate School of Management, University of California, Los Angeles*

The key to any corporate communications program, says Dean Williams, is corporate conduct itself. Corporations need to have purposes that are in harmony with those of society, and the public must regard business institutions as contributing to what society judges to be its purposes. Business needs to recognize the moral implications of its actions, and to set standards and establish a philosophy that will bolster private enterprise in ways that are compatible with public policy.

International Communications 17
Gordon Dunlop, *Chief Executive Officer, Commercial Union Assurance Company, Ltd.*

Commercial Union Assurance operates in more than 100 countries where it does $2 billion annually in premiums for property and casualty business, $360 million more in life premiums. Dunlop says his company needs communication to make the company's activities known, to promote company policy aims, and to involve the company's 25,000 employees in a worldwide exchange of ideas and information. He also comments on the need for more precision and clarity in the language of communication, and he suggests that action speaks more clearly than words.

How to Change Your Name Without Losing Your Identity 23
John F. Boomer, *Director of Advertising, United Technologies Corporation*
Ray Gaulke, *President, Marsteller Inc.*

United Technologies had its beginnings in aviation and was known, until 1975, as United Aircraft. In recent years, the word "aircraft" in its name limited recognition of the company's expanded involvement in important industrial and commercial markets—from elevators to automotive systems. How United Technologies established its new name, developed strategic and creative objectives with its agency, and executed a highly successful and carefully researched communications program is detailed in this report. It is a step-by-step case history of how good communications planning pays off.

Aesthetics and Corporate Communications 31
John M. Diefenbach, *Managing Director and*
Dale L. Brubaker, *Vice President, Landor Associates*

Landor Associates has consulted on the corporate identity and communications problems of accounts as varied as the Cotton Council and Isetan, the Japanese department store chain. Diefenbach and Brubaker explore the objectives, programs, and communications solutions involved in a number of assignments. Four major points are prominent in Landor's problem-solving techniques: 1. Individualism in business is a marketing necessity. 2. Effective corporate personality is marketable, day-to-day. 3. Corporations must think beyond conventional mass media to meet the overall communications challenge. 4. Corporate identity is a continuing process—not manuals that gather dust.

Report from No Man's Land 37
Louis L. Banks, *Thomas Henry Carroll—Ford Foundation Professor, Harvard Graduate School of Business Administration*

Banks, a former managing editor of *Fortune*, sees some basic changes taking place that could alter the way corporations communicate. He says there is a new kind of support building for business in this country. A large segment of the young, in particular, are now coming to see corporate enterprise as an effective force and government less so. However, business needs to respond to this support in a way that recognizes individual values and rights.

Business and Television 41
Dan Cordtz, *Economics Editor, ABC News*

How the general press reports on business is a subject that prompts heated debate at any meeting of executives. The seminar was no exception. Here Dan Cordtz takes on the subject and sees the central problem in doing something about television coverage of the economy to be not bias or hostility, but indifference. Despite the limitations of 30-second news segments, Cordtz thinks management executives don't respond readily or openly to TV news gatherers, and they are ill trained for on-camera interviews. Cordtz is critical, too, of how little time and support the networks give to business news. One reason for their indifference is that when there is solid business coverage, response from the educated segments of the TV audience—and particularly from those who are businessmen—is practically nil. The debate goes on in the Q&A excerpts that follow the Cordtz talk.

Accountability in Corporate Communications 47
Robert P. Zabel,
President, N W Ayer ABH International

Executives responsible for managing corporations and corporate communication should be accountable for creating advertising that is truthful, that aims for precision and clarity, that is targeted to the right people, and that is continuously measured for effectiveness. Zabel pursues the theme of accountability, suggesting that "before we act and before we speak, we question whether our deeds and words are in the best tradition of our enterprises and how they will affect the future, not just the next quarterly statement, but the long term future of the viability and nature of an organism that should continue to flourish long after all of us have left."

"Capability" and Advocacy Advertising 54
Graham H. Phillips, *President, Ogilvy & Mather (Canada) Ltd.*

Phillips' agency believes that the best approach is to advertise the technological capability of the corporation when the objective is to enhance consumer attitudes toward the corporation. O&M calls it "capability" advertising. Phillips details

what capability advertising can do, explains how to create it, shows how it works for a number of companies. He also makes the case for advocacy advertising as a way for business to answer important issues, influence public opinion, and educate the consumer.

Communications and the Cartoonist 61
Charles M. Schulz, *Cartoonist and Creator of "Peanuts"*

A masterful communicator, Schulz tells how his wonderful characters came to be, revels in their adventures, and provides a rare view of the brilliant imagination that created Snoopy, Lucy, Linus, and their cohorts. Read, enjoy—and learn.

Does Corporate Advertising Affect Stock Prices? 67
Eugene P. Schonfeld, *Assistant Professor of Advertising, Northwestern University*
John H. Boyd, Jr., *Assistant Professor of Finance, Northwestern University*

Boyd and Schonfeld present a fascinating report on research they have conducted, using three years of data, that indicates that corporate advertising does have a positive statistically significant effect on stock prices. They also conclude that many companies can probably benefit from spending more on corporate advertising than they now do, if their intention is to affect the price of their stock. The professors believe their study opens the way for more intensive and highly focused analysis that could provide valuable information for corporate communicators.

Narrowing the Gap with Dividend Reinvestment 74
W.L. Mobraaten, *Vice President and Treasurer, AT&T*

Growing concern about capital shortage in the U.S. has prompted suggestions for resolution of the problem through tax reform. While Mobraaten agrees that tax reform that sparks investment is needed, he also suggests that companies can narrow the capital gap through dividend reinvestment programs. Of the $32.8 billion in dividends paid by U.S. corporations in 1975, only $1.3 billion was reinvested. Some 665 companies, including AT&T, now have dividend reinvestment plans of some kind. Mobraaten provides a detailed analysis of how AT&T's plans in each year since 1969 have helped the company attract participants with increasing success.

Communicating with the Financial Community 81
Carl Tiedemann, *President, Donaldson, Lufkin & Jenrette, Inc.*

Some of the significant trends in the securities industry are institutionalization of capital, the propensity of institutions to create their own investment research departments, and the emergence of an oligopoly in the industry as a result of profitability problems and structural changes forced by Washington. The number of NYSE member firms has shrunk from over 700 in the Sixties to about 475 today. With these trends in mind, Tiedemann suggests corporate messages that fit the current toned-down environment. The key words, he says, are "strong, dominant, conservative, solid, stable, quality." The corporation should also discuss clearly its business philosophy, its strengths, its objectives. And do it with candor.

Communicating with Money Managers 83
Stanford Calderwood, *Director, Endowment Management and Research Corporation*

Calderwood analyzed the companies attending the seminar and found out that as a group they had clearly outperformed the market in the five quarters prior to the seminar. Calderwood's firm owned shares in only ten of the forty-eight companies analyzed. His point was: "You didn't get to me or to my firm, and we manage about a billion dollars." He reports the ways in which money managers get information, what serves them best, and how companies can communicate with them more effectively. Says Calderwood, "Money managers are human and thus subject to all of the communication techniques you use on other people. Money managers are not a group apart."

Some Thoughts on Financial Communication 87
Ray Garrett, Jr., *Gardner, Carton & Douglas*

The former chairman of the SEC, Garrett discusses the underlying statutory and regulatory apparatus which shapes so much of what must and can be done in financial communication. He concludes that "Management *must* regard itself as accountable to its stockholders—and this means full and truthful reporting of its stewardship on a regular basis—in order to sustain the legitimacy of its own power."

A View of the Securities Market 92
Richard E. Cheney, *Executive Vice President, Hill and Knowlton, Inc.*

Stringent reporting requirements, a decline in U.S. shareholders, and a narrowing in the number of companies being followed by institutional investors call for more effective forms of communication. Cheney says investors need to get better information, and more sensible efforts by companies and government regulators can help. "Communications are constructive if they're responsible, whether a company is about to sell securities or not."

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Corporate Conduct and the Bicentennial

Harold M. Williams
Dean, Graduate School of Management
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When Chuck Eidson and Jim Hoeter asked me to speak at this seminar, we agreed that the primary objective of my talk should be to contribute perspective to the meeting and that my theme probably should be economic. I thought I might talk about the economic outlook and the improving economic scene. But, in terms of comparative advantage, while I may have some edge on perspective, I do not have that much to add relative to what you already know.

Since you are going to be concerned much of your time with earnings reports, financial relations, and possibly future debt or equity issues, I thought I might discuss the durability of the economic recovery and some of the underlying factors that might determine its magnitude or cause it to abort. I thought about the prospects for return to double-digit inflation, the limits on capital formation, the persistent level of unemployment, our dependence on energy imports, the decline in U.S. technological leadership, and international trade policy. In terms of perspective and comparative advantage, this appealed to me more. But, as I thought further about some of these issues, I found that my real concerns were at a more basic level, and I hope yours are, too.

For example, how do we go about creating the urgently needed tax incentives for capital formation and for investment in technology in the context of a strong anti-business climate and so long as pro-business legislation is not politically popular? How do we develop a vitally needed national energy policy and program so long as we have so much distrust of the energy industry and the public continues to doubt whether an energy shortage or energy crisis does, in fact, exist and is not willing to be inconvenienced by any attempt to deal with the problem?

How do we deal with unemployment? We know that 8% to 10% unemployment is socially and politically unacceptable. The proposed solution is some version of the Humphrey-Hawkins bill, which furthers the concept of national economic planning. While such planning is not inevitably all bad, the answer to unemployment is not to be found by enacting legislation to guarantee each person a job and establishing the U.S. government as the employer of last resort.

On the international scene, what kind of competitive activity is acceptable in pursuit of international sales and a favorable trade balance? What is the value of trade in relation to the "sensitive payments" necessary to generate it? How do we rationalize conflicting moralities and business practices?

Corporate Conduct Is the Key

These very vital and very complex problems involve trade-offs—trade-offs we do not know how to make—among social goals, economic growth, and political feasibility. Each has a direct impact on business; and, in each, the public and political response contains a judgment about the role and attitude of American business.

Recently I received across my desk, as I am sure many of you did, a Conference Board publication entitled *Management Confronts External Relations: Changing Perspectives and Responses*. Two paragraphs read like this:

"The dearth of public confidence in business is the paramount external problem facing corporate management today, according to most of the chief executives, as well as a great many of the external relations executives, contacted for this survey. And amid the growing concern over the deterioration of business' credibility, management is placing a greater priority on the company's relations with its external publics.

"In fact, most external issues troubling companies are closely linked to, and in some cases the direct result of, this primary problem of credibility. The increasing legislation of business operations, for example, evolves in large part from the public's demand for government control because the public distrusts business. Other issues of grave concern to corporate executives are the nation's economy, the corporation's financial picture and need for capital, and the survival of the free enterprise system."

Well stated. The publication then goes on to describe what public relations or corporate communicators should be communicating about and how they should do it. All worthwhile advice as far as it goes, except that this is not where corporate communication policy is made nor where the credibility problems are created.

The substance of a corporation's communication policy is created in the process of evolving and developing corporate positions on issues, not for public communication, but for the operation of the business. Regardless of whether you or the chief executive ever sees a legislator, a representative of the media, a consumer advocate, a security analyst, or a shareholder, policy is being made on the quality and safety of the products the company will produce, on sensitive payments, on information disclosure, on compliance with the spirit as well as the letter of the law, on the kind of advertising the company will run, on the citizenship expected of its people, etc. The key, then, to any corporate communication program is the corporate conduct itself. This is where we are in trouble, this is where the credibility gap is created; no amount of external communication can explain away insensitive or inappropriate corporate conduct. This is the issue, along with its ramifications for the survival of our economic and political system, that I want to explore with you today.

Three Perspectives from 1776

I do not believe in a detailed code of conduct or of "do's" and "don'ts." It is not possible to anticipate every problem or situation. Also, prescribing a list is like passing a tax law;

it legitimizes the process of looking for loopholes, and there are no loopholes in appropriate corporate conduct—just damned difficult, very troubling, very conflicting, often very expensive, and sometimes very painful judgments.

Corporate management has responsibility for its conduct and must make its own judgments. But how? We need, but lack, a philosophical framework within which to define our responsibilities and interpret the consequences of our decisions and actions. We lack a philosophy of democracy or capitalism, even though we talk glibly about both. We lack it as a society, as a polity, and certainly, therefore, we are not in a position to make it operational at the corporate level.

It took the bicentennial year to cause me to realize that the year 1776 marked the appearance of not one, not two, but three master works with far reaching insights for all of us. The best remembered, the Declaration of Independence, announced a revolution—a commitment to the establishment of a democratic society unlike any other the world has ever known before or since, created by free men and dedicated to preserving their freedom.

The second work, also revolutionary, was Adam Smith's *An Inquiry into the Nature and Causes of the Wealth of Nations*. It is described, in essence, as a critique of the heavy hand of government regulation and a testimonial to the power of economic freedom, checked by competition, to generate maximum wealth for nations and for individuals. But it is much more.

In his day, Smith was a revolutionary. In the history of economic thought, only *Das Kapital* and Karl Marx are in the same league in depth and breadth and brilliance. Smith's book is the application to a given society of his more fundamental premises with respect to man and the universe. Contrary to much popular comment, Smith was concerned primarily with society and with the freedom of the individual, not with the freedom of business. He was concerned with what approach to economics was most beneficial and compatible with free men in a democratic society.

He used, and perhaps even introduced, the phrase "the great society." His fundamental concept was that a society driven by the self-interest of its people competing against one another can generate more wealth than the same society ruled by a government that tries to regulate the minute details of economic life. His masterpiece offered reason without rhetoric for moving away from the mercantile system which was then choking England. He recognized a *social* world of economics, a self-regulating natural order.

But Smith did not entirely trust businessmen to compete rather than collude when they met behind closed doors. And he worried about the moral deterioration and alienation of workers that could result from the division of labor he visualized as necessary for economic growth. He was concerned that democracy itself could be undermined by the advent of the mass production system, where workers would be forced to repeat the same simple operation all day. The "torpor" of the mind of such a worker, he wrote, makes him incapable of "forming any just judgment concerning many even of the ordinary duties of private life. Of the great and extensive interests of his country he is altogether incapable of judging." Smith was a humanist and moralist even more than he was an economist.

The third classic of 1776 was Edward Gibbon's *Decline and Fall of the Roman Empire*, a scholarly study of a period in history to which students often turn today for guidance and insight into the future of this nation and Western society. I will draw from this monumental work only one quote, in which Gibbon describes the demise of another, earlier democracy, Athens: "In the end, more than they wanted freedom, they wanted security. They wanted a comfortable life and they lost it all—security, comfort, and freedom. When the Athenians finally wanted not to give to society, but for society to give to them, when the freedom they wished for most was freedom from responsibility, then Athens ceased to be free."

Combining these three timeless works of 1776, a clear picture emerges for me of what this society *ought* to be about if it is to thrive and flourish. Note that I said society, not economy. The Declaration of Independence does not talk about an economic system. I believe it is clear that

> "The substance of a corporation's communication policy is created in the process of evolving and developing corporate positions on issues, not for public communication, but for the operation of the business."

Adam Smith, too, was concerned primarily with the future of man and society rather than an economy. Gibbon describes for us the consequences of opting for a "secure" society.

With this backdrop, we can return to today. As with any two-hundred-year-old, our national vision has dimmed, memory plays tricks, and some of the organs do not work. We remember the Declaration of Independence as guaranteeing rights but not as imposing obligations. We remember Adam Smith as advocating private enterprise and big business, but we forget his social concerns and their grounding in democracy. And who was Edward Gibbon? Athens? What do they have to do with us?

One point, however, that does continue to ring clear through the two hundred years is that in this society, so long as it is a democracy, the majority will prevail, however confused their thinking, vague their memory, or incorrect their judgment. While they may become stupefied as Smith feared, and they may not appreciate the implications and consequences of their judgments, and they may opt for security without adequate awareness or appreciation of the freedom they are sacrificing, they will continue to have the clout and the power.

Events Lend Support to Public Apprehensions About Corporate Conduct

Where does corporate America fit in all this? In the minority. We may think we know what is "right," but we will not prevail. While the majority respect our economic prowess and accomplishments, they see us as lacking perspective and a sense of responsibility for how that prowess should link into building a *society*.

Events over the years lend support, albeit not unqualified, to that view. The front page of the newspaper on Thursday, February 19, 1976, the day I decided to begin working on this talk, included three articles. In one, the former president of Phillips Petroleum reported having delivered a $50,000 cash campaign contribution directly to Richard Nixon in 1968 at the latter's apartment in New York. The article was of interest not only because of the illegal payment, but also because it contradicted President

Nixon's statement during the Watergate inquiry that he had never personally received any cash campaign contributions.

The very next column reported a federal grand jury indictment of twenty-three producers of paperboard boxes, including the industry's three largest, charging them with conspiring to control the production and pricing of a billion dollars worth of paperboard boxes per year. The indictment covered companies aggregating 70 percent of the industry's output.

The third article reported that grain exporters in the United States have defrauded foreign customers by about $120 million a year over the last five years through techniques including forged certificates of weight or grade, tampering with weighing machines and account sheets, and, in effect, deliberately falsifying the quantity and the quality of shipments.

The financial pages of the same newspaper reported the latest chapter of the Lockheed story involving a total of more than $22 million in payments the company has admitted making since 1970. That day's news was particularly interesting in that, despite the fact that our government is guaranteeing $195 million in loans to Lockheed, Treasury Secretary William Simon, chairman of the Emergency Loan Guarantee Board, reported that the board had been unable to obtain from Lockheed the names of those to whom the payments had been made.

The same day, the board of directors of Northrop Corporation unanimously re-elected its chairman and chief executive. Several months earlier a committee of the board composed of outside directors charged with conducting an investigation into the misuse of corporate funds, particularly into unusual and improper overseas payments and illegal campaign contributions, filed its report criticizing its chief executive for failing to cooperate fully with the special panel and also expressing concern that he "did not communicate fully and openly with the Auditors, with the Committee and with the Board of Directors itself," did not recognize "the seriousness of his involvement in the matters addressed by the Committee," and "failed to acknowledge his familiarity with matters which the Committee is persuaded he knew or should have known." It is not often that a board of directors puts in print that quality of criticism of its chief executive. Several months later, without reference to the report, the public justification for re-electing him chief executive appears to have been that the company had done well financially. (The company earned a record $24.7 million in 1975, its backlog rose to $1.17 billion, and, a director noted, the chief executive has long been regarded as one of the most able executives in the risky aerospace business.)

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When events such as these occur, it is not the behavior itself alone nor the ascendancy of economic goals over moral values with which the public is concerned. The behavior calls attention to the power of corporations to act solely in their own interests and by their own standards, and to injure members of society and the social structure itself. This in turn stimulates fear of corporate power.

Distrust of the American Corporation Leads to Hostility and Regulation

An institution such as the American corporation is legitimate to the degree that its purposes are in harmony with those of the society of which it is a part, and its legitimacy is accepted to the extent that the public regards the institution as contributing to what the society judges to be its purposes.

Alternatively, any institution, including the American corporation, which is today incapable of making an acceptable case for its legitimacy or generating public confidence and support cannot prevail. The public is entitled to know what means the American corporation is prepared to use to accomplish its purposes, and what means it excludes because it regards them as contrary to public social and moral values. This nation cannot survive, nor can the American corporation, on suspicion and hostility. Congressional investigation, regulatory agencies' demands for full public disclosure of even the most sensitive issues, a multiplicity of laws and endless litigation are among the devices being invented or carried to intolerable excesses in a futile attempt to replace the missing glue of confidence which alone can make this nation a smoothly functioning social organism and the American corporation a thriving one.

The public is convinced that big business is ripping everybody off to get what it wants for itself. The public has little confidence in the truthfulness of corporate leaders. They do not know chief executives as persons; they know them simply by their positions. They believe that the chief executive arrives at his position because he is able and prepared to serve his corporation above everything else, and that corporations and those who run them will say and do anything they can get away with if it promotes the goals of the corporation. And, since corporations do not state in any credible way what their goals are or the limitations they place on themselves as to the means they will use to accomplish their goals, the public thinks of corporate goals in terms of profit and power and believes that the corporations will use any means that outside agencies, such as the government or consumer groups, do not *prevent* them from using. The public *believes* the charges leveled against corporations and does not trust those who speak for corporations. No wonder, then, that it is so difficult to win public support for legislation that benefits corporations even when that legislation is essential to the economy, to workers, to consumers, and to the entire nation.

To paraphrase Mark Twain, the American corporation cannot face the future with the confidence of a Christian with four aces.

This is not to suggest that business is alone. Elliott Richardson, Secretary of Commerce and chairman of the President's committee to investigate the misconduct of American corporations overseas, writing recently in *Atlantic* magazine about the "Saturday Night Massacre" observed: "The second ingredient of Watergate—an amoral alacrity to do the President's bidding—was traceable less to flaws in his own character (though it was reinforced by them) than to the political and cultural evolution of twentieth-century America. It was, in significant ways, a symptom of the times. The heads-up, get-ahead, go-along organization men recruited for the White

House staff were not uniquely evil. American politics, business, sports—in fact many, if not all, of the enterprises to which Americans turn their hands—are riddled with the same type of organization man. He takes on the coloration and the value system of whatever organization—whatever game—he happens for the time being to be associated with."

Some of you might be tempted to find an easy way out. Blame the "other guy"—the press, economic illiteracy, the federal bureaucracy, or even speakers like me—for the negative climate that exists. That will not wash. Yes, there is a great deal of misunderstanding of American business and a lack of appreciation for its contributions and the complexity of its problems. But that is not the basis for the public distrust. And no one other than American business creates its misconduct. In order to change that condition we need to address the corporate misconduct squarely.

Economic Justifications vs. Moral Values

Some time ago, Charles Percy, Senator from Illinois and former president of Bell & Howell, stated, "Corporate corruption is the dry rot of capitalism." He went on to express his confidence that the extent of this corruption was "minuscule" but evidence to the contrary is substantial, and many of those caught contradict the view by contending that *most* companies engage in such behavior. To their credit, some corporate leaders are in the forefront of those expressing concern about business ethics and about the "dry rot." But a recent Conference Board survey of corporate attitudes toward what it calls "unusual foreign payments" makes it clear that such concern is not universal. Many of the businessmen questioned responded that competition required them to conform to local practices and expectations. While this is only the latest in a long series of public and corporate confrontations, it is around this issue that much of the current public and corporate attention is focused. While the common occurrence of clearly illegal political campaign contributions is a clear-cut case of illegality and abuse of corporate power which goes far to confirm the public distrust, it does not raise the difficult questions of conflicting values posed by the foreign payments. In combination, however, they must cause the public to wonder whether those who are so willing to pay, may also be willing to receive.

The Economist, the prestigious London weekly, argues that the fuss about bribery is naive and that any realistic businessman knows that bribing is part of the process of bridging two cultures. My view, in turn, is that this is the kind of logic, expediency, and rationalization that has brought Great Britain to its present disastrous economic and social condition.

We need to choose between values by which to guide our own lives and run our society and those by which other nations, cultures, and societies will choose to guide theirs. This choice has been the underpinning of our nation since its inception. As the world becomes increasingly one, the ability to be separate becomes increasingly difficult. The choice of higher standards than those around us may select becomes increasingly a matter of deliberate decision and calls for conviction because it exacts a price and is difficult to maintain. By the same token, we cannot succeed as moral imperialists in persuading the rest of the world to play by our rules. The key question probably is, can they get us to play by theirs. The answer lies in the trade-offs we are consciously prepared to make between moral values and economic growth, and how we define the equilibrium which maintains the essence of our democratic society and the economic system that supports it. Or, as Peter Drucker put it, "Are you willing to see a pimp when you look in the mirror in the morning?"

By focusing the issue in this way, I do not mean to ignore or oversimplify the problems presented by threats of expropriation, physical violence or kidnaping, refusal of government functionaries to do their duty unless they are paid to do it, and the many other ways in which officials, both public and private, can endeavor to extort payments by refusing to conduct themselves in a manner which is expected in a society where discharging one's responsibility, honoring a contract, or keeping one's word is more established and expected. Nor am I suggesting that there are no circumstances under which such payments would be justifiable. I am endeavoring rather to suggest a frame of reference related to values within which these difficult, often economically desirable, decisions should be made.

The pollsters tell us that the American people have the highest regard for American business as an economic institution. The characterization of business as economic, rather than a force for a moral and ethical society, is perhaps best captured in some of the bribery episodes in which the justification is an economic one expressed in terms of America meeting competition and getting the business rather than its going to a foreign competitor, of maintaining the viability of our defense industry, of benefiting our balance of payments and balance of trade, and even of the need for companies such as Lockheed to get the business in the interest of their own survival. At the same time that the justification is in economic terms, the public reaction is in moral and ethical terms and deals with our concepts of acceptable social behavior. While the justification may salve the corporate conscience, it has nothing to do with fundamental morality. The confrontation between the two is perhaps more crisp on this issue of bribery than it has been on any of the so-called social responsibility

"The sobering fact is that most of the people in the world would probably trade freedom for security and have, indeed, done so."

issues that have confronted American business over the last decade.

Out of the stream of these confrontations between American business and our society's often ill-defined but growing social expectations has come a deluge of social legislation and regulation, a credibility level for business among the general public of only 19 percent, and a political environment in which, to be acceptable to the electorate, politicians will be increasingly anti-business and legislation will be increasingly both restrictive and punitive to enterprise. It is most important how we assess the current confrontation and respond to it. We can treat it as an isolated issue, overblown, of limited and only momentary concern, and economically justified. It will indeed fade away over time. But rather than disappearing, it will take its place as part of the permanent backdrop of our society, and of the cumulative history and public memory of American business. It will leave its residuum, which will then, in turn, make all the more certain the negative public response and governmental reaction to the next problem, whatever it turns out to be. The cumulative impact is for our society to seek "security" from the power of the American corporation by more punitive and restrictive legislation.

The Future of Democracy at Stake

The ultimate stake in such an ongoing confrontation is, I believe, the future of democracy. The question is whether indeed it can and will survive and whether the restriction and/or demise of private enterprise may or must carry with it equal and commensurate restraint and destruction of personal freedoms and parliamentary political institutions. No one can be certain until we play the scenario out, but I believe that private enterprise is a necessary condition for individual freedom and that to destroy the one is to destroy the other. I am concerned about the price we might pay in the process of proving or disproving that theory. I believe that the market is the only means of organizing a complex social and economic order without employing recourse to the power of the state and that the connection between the function of private free markets and the preservation of freedom itself is inseparable. It becomes clear from examining the functioning of state central planning systems that the price for state planning is the

"Private enterprise and public policy are neither necessarily compatible nor inevitably antagonistic. Our objective must be conciliation."

suppression of freedom. Such systems cannot operate without a significant degree of sacrifice of individual freedom, because it would be impossible for them to handle centrally the order of complexity that would be necessary in order to permit freedom. In a free society, an important benefit of the role of free markets is that they permit individuals to exercise a choice, which in turn governs the decisions of business managers without intervention by government. If we did not have the free market, those decisions would have to be made by government.

But we cannot depend on the logic that private enterprise is essential to democracy and is preferable to the regressiveness of state-run systems. Logic does not necessarily prevail. The sobering fact is that most of the people in the world would probably trade freedom for security and have, indeed, done so. Edward Gibbon described the decline of Athens. Robert Hutchins expresses the concern, "Not that we are not free, but that we may increasingly not want to be free." John Gardner brought it closer to home, writing about the insidious way the choice of security takes hold in an established society, of "how organizations and societies tend to reach a plateau of maturity, and when that happens, they begin to defend the status quo, they lose the pioneer spirit." He speaks of twentieth-century institutions "caught in a savage crossfire between uncritical lovers and unloving critics." Those who love their institutions, he says, "tend to smother them in the embrace of death, loving their rigidities more than their promise, shielding them from life-giving criticism." This is the way many approach the various institutions of our society—government, academia, business, the professions, etc.

Joseph Schumpeter told us years ago that if capitalism were to die it would be because of its successes rather than because of the threats of any other economic system or ideology or of uncontrolled business cycles. His view was that capitalistic affluence tends to create an anti-capitalist mentality among the children of the well-to-do. He observed that it was inherent in the nature of capitalism to produce people who are inquiring, dissatisfied, and innovative and to create an intelligentsia hostile to it. Schumpeter's great phrase was "the creative destruction" of capitalism—capitalism is constantly creating dissatisfaction with things as they are. This unsettling quality of perpetual dissatisfaction—of belief that this too can be improved upon—is its essential strength, its source of perpetual renewal. Overdone, without appreciation for the essential characteristics of the system itself, it can be destructive. Yet, to put down criticism and to prefer the security of things as they are is to smother the very essence of capitalism.

In 1942, Schumpeter wrote a volume entitled *Capitalism, Socialism, and Democracy*, in which he described capitalism as the process which progressively raises the standard of living of the masses. He makes a very strong case for why capitalism is so strong and effective. Then he goes on to state that in no case is rational argument a match for the extra-rational determinance of conduct. *If capitalism is to survive, it must defend itself in the arena of ideas and emotions.* The masses, not the businessmen, are the principal beneficiaries of capitalism. A businessman with aggressiveness, ability, desire to get ahead, ambition, and ability to get things done would thrive under any kind of economic system—would end up running the factories in Russia. It is only under capitalism that all of this energy and aggressiveness is channeled into the service of the masses of the people. Why, then, do the people not defend the system? Because, according to Schumpeter, they do not connect their affluence with the capitalist system; because they are incapable of understanding *any* economic system as such, because they are more aware of their daily frustrations and insecurities under the system than they are of the long run gains from the system

The Responsibility Is Ours

With this backdrop, I submit to you my belief that, to the extent that this system of ours is diminished or destroyed, it will happen from within. For we do not understand it well enough to believe in it or know how to protect it, and we may lack the courage. We are all party to the destruction process, and we had best understand our participation in it and what we contribute to it so that we can be more conscious and deliberate in our actions and choices. Aided by the awareness of perspective and conscious choice, we can all go about making our own beds. Each instance of corporate conduct not acceptable to the majority contributes to the alienation from business, to the wave of corrective legislation, to the demand for enhanced "security," and to the destruction of the system. If the "dry rot" is to be eliminated, it is the business community itself which must have the power and the self-interest to do so.

The tragedy would be if we began to look upon where we are with tolerance. For everyone dealing with this problem, there must be a better understanding of why a great market economy cannot afford to tolerate shoddy conduct in business, and particularly in the business-government relationship. It does not help to say that only isolated companies engage in such activity, thereby excusing the business majority. Nor is it accurate, on the other hand, to say that such activity reflects the underlying corruption in the capitalist system, however much the critics of business would like to use that argument. In fact, few economic systems have greater experience with corruption and under-the-table dealing than the Soviet Union. The primary difference is the impact on the system. In a market economy, in which the market functions highly efficiently when it is functioning properly, these activities interfere with the market.

So long as we hide behind a collective morality, that collective morality will reach the lowest common denominator. So long as we justify our existence and our conduct on economic and competitive grounds, we are accepting that price-cutting, price-fixing, and shoddy business practices are necessary at home. Short term, it is a lot easier to survive on price than it is on quality. But there are plentiful examples in American business to prove that the companies that succeed over time, the quality companies as measured by any standard—in the marketplace, in their profit performance, in their managerial achievements, and in their contributions to the betterment of our society—are those companies whose products are quality, whose management demonstrates integrity and competence, companies that set their own high standards for their operations, standards which in most instances are the highest in the industry. This is true whether the industries are high technology or basic commodities.

Moreover, the company that retreats to the lowest common denominator sows the seeds of its own self-destruction even if its conduct is never publicly disclosed. It establishes a pattern of behavior of cutting corners, of getting away with what it can, which over time pervades the very essence of its being and erodes the sense of dignity and responsibility not only of its executive leadership but, ultimately, of its entire structure. Beyond this, it contributes to the taint and demoralization of the entire enterprise system.

Private enterprise and public policy are neither necessarily compatible nor inevitably antagonistic. Our objective must be conciliation. Unless we achieve this objective, private enterprise and society will be the losers. This does not mean that business must just do the bidding of society. It has the responsibility and the opportunity to influence what that bidding will be and to influence the point at which the conciliation occurs.

I recognize that this is easier to talk about than to do anything about. As Shakespeare put it, "I can easier teach twenty what were good to be done than be one of the twenty to follow my own teachings." I have no illusions about the difficulties inherent in the challenge. But neither do I have any illusions about the consequences of our failure to renew public confidence in and support of our enterprise system.

It is eminently clear that the government we get is the government we deserve, that the image we have is the image which we ourselves in great measure create, and what happens to American society in this and the remaining decades of the twentieth century will be a product of our own individual efforts.

One approach to solving this problem was proposed several years ago: "The real moral crisis in this country is the leadership crisis. The trouble is that the leaders, not the country as a whole, are weak and divided. By the leaders, I mean the leaders of industry, the bankers and the newspapers. They are irresolute and un-understanding. The people as a whole can be led back to some kind of consensus if only the leaders can take hold of themselves." This statement was made May 19, 1969, by then President of the United States Richard M. Nixon.

We badly need inspiring leadership, but we will not get it at the top unless we as individuals demand and earn it. We must, each of us, carry the soul of this country first and foremost in our minds and on our consciences, and remember the many opportunities we have that directly touch that soul—in our business and professional activities, in political activism, and in the thoughtfulness of the opinions we express and the positions we advocate.

Our ability to survive rests with each of us as individuals and nowhere else. There is no society except as a composite of its individual members, and it is in that context that we as individuals are not succeeding.

A hundred years ago on the eve of the *first* centennial of our country, in the shadow of the Civil War and its aftermath, the assassination of President Lincoln, the attempted impeachment of President Johnson, and the scandals of President Grant, Walt Whitman wrote:

> O I see flashing that this America is only you and me,
> Its power, weapons, testimony, are you and me,
> Its crimes, lies, thefts, defections, are you and me,
> Its Congress is you and me,
> Its officers, capitols, armies, ships, are you and me,
>
> "By Blue Ontario's Shore"

What many of us fail to perceive is that our institutions, all of which are said to be in trouble, are made up of you and me and people just like us. The American system has been built not upon the worship of institutions, but upon a belief in the worth and integrity of the individual. The future of that belief and our system depends on your conduct and mine. What will it be?

International Communications

Gordon Dunlop
Chief Executive Officer,
Commercial Union Assurance Company, Ltd.

I find that the subject of communications is one of the most difficult I have to deal with. I know of only one case where communicating was easy; last month, I had to announce a "bottom line" loss for the first time in my company's 100 year history. There was no difficulty in communicating that fact, nationally or internationally. The news aroused instant and almost intense attention in the insurance industry, among British investors, and in all the different parts of the media.

However, getting many of the same people to understand *why* our results were so bad was much more difficult.

I mention this at the beginning because this recent and somewhat trying experience brings out two particularly important aspects of communication. One, the harsh fact of a company's bad results is easy to communicate—it's news. The other, the explanations, are much more difficult—yet the audiences are substantially the same.

The features of communication that are difficult are so because most people—both the givers of information and the receivers—are not, I believe, well enough schooled or disciplined in the processes of communication. I am not an expert in this field and I therefore feel somewhat apprehensive in addressing you expert corporate communicators about your own subject. *Fortune*, however, has been kind enough to invite me here, as they believe that our own difficulties and experiences in communicating as a multi or international insurer, based in Britain, may be of some interest to you.

First, a word about Commercial Union Assurance. Our name does not convey much about our activities, especially in the United States, where the word "assurance," in the British sense, is not known. A simple and realistic distinction between the more familiar "insurance" and "assurance" is that one insures against a possibility or risk, and assures against a certainty, hence life assurance. We *in*sure and we *as*sure.

Commercial Union Assurance is also a name that conjures up a variety of images, not all of which are helpful in projecting a corporate profile of extensive responsibility for other people's money. We are one of the world's largest multi or international insurance groups. We operate in more than 100 countries. We do $2 billion annually in premiums for property and casualty business. We have 25,000 staff. We have 120,000 shareholders. Our life business is worth about $360 million annually.

Geographically, our property and casualty business is split, a quarter in Britain, nearly 40 percent in the United States, 20 percent in Western Europe, 6 percent each in Canada and Australia, and about 7 percent in other countries. In our corporate organization, we have given as many of our territorial operations as possible the largest measure of autonomy, with considerable freedom to act. At the center, in London, we have our central or international management, to determine general policy, to provide guidance, and where necessary, to give direction.

This decentralized system depends on good relationships among our senior men. The mechanism of these relationships is oiled by the communication methods that we practice, which require much human effort.

We have, in our hundred year history, sought the wider spread of our risks, both by geography and by class of business. We believe that this is the best way of immunizing ourselves against severe losses. The principle of spreading risk in every individual insurance market, as in the allied reinsurance markets, means that while we have a share in many large risks in many countries, each share is small. Consequently there are very few large plants, major constructions, engineering projects, and so on, in the world in which we do not have some share of the insurance. Our recent bad underwriting losses do not come from property risks but from the more difficult third party risks which are aggravated by social and economic inflation.

The company was formed in London in 1861, and it appointed its first insurance agent in San Francisco in 1869. We have shared in the subsequent unique development that spread throughout the United States, and while we have prospered in some years, we have had our share of natural disasters, such as the San Francisco Earthquake in 1906 and Hurricane Betsy in 1965, but more particularly of the more recent self-imposed and much more costly financial disasters, caused by social legislation, fueled by inflation. It is the effects of such legislation, plus inflation, that have caused insurers to suffer such large underwriting losses in recent years.

> "...we think that our communication must be related to our company policy and aims and to our corporate attitude of mind. We believe that action speaks more clearly than words."

We rank twenty-fifth in the U.S. insurance market. Many of the 3,000 insurance companies that operate in the United States are not known to the public. This is due to the fact that a large proportion of insurance business in this country is transacted through the independent agency system. Those who insure through such agents seldom know the name of their insurer or carrier, unless there is a claim or dispute.

This lack of identity in the minds of the public makes good external communication more difficult here and, indeed, in other countries.

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In trying to decide what to say about communication this morning I came to the conclusion that my best contribution would be to set out the criteria we try to

follow in dealing with this subject. First, we think that our communication must be related to our company policy and aims and to our corporate attitude of mind. We believe that action speaks more clearly than words. When we have to use words, we try to relate them directly or indirectly to our aims and our policies.

A word about the aims. We aim to achieve the best results at home and in the many countries where we operate, in the context, always, of their local laws and customs. We aim at encouraging our young and looking after our old. Because of the economic and political uncertainties of recent years, we aim at surviving in times of crisis, as well as succeeding in better times.

Though it has become increasingly important to achieve these aims, we think it is also essential to understand them clearly, for the sake of our efforts in communication.

Next, we have attempted to define what we are trying to do by communicating. The objectives are extensive. We believe in what we call "openness." I give you a few examples of this. Our central management is expected by me to debate freely the major issues and problems of the day. Individuals with a contribution to make are encouraged and expected to participate. This stretches senior people's abilities and imaginations to their optimum, and assists better decision making. We expect this debating and participation to be practiced by each of the many territorial managers we have throughout the world.

This leads to involving our staff in the business.

The information that we give to shareholders, staff, government bodies, and, consequently, the public, is probably greater than that given by many others in our industry. We do this, and are prepared to debate the subjects, because we believe it is in the interest of ourselves and of these various groups of people.

Shareholders have to be made aware of the reasons for results as well as the results themselves. Staff need to be made aware of the problems of the company in order to do their jobs properly. The public and government need to be made aware of the reasons why the prices or premium rates for insurance go up. We think openness is a good way of achieving these objectives.

Now, to the methods of communicating. We try to use language that is as simple and as clear as possible, and free of jargon. At first sight, this may not seem difficult, but when we talk or write about particular problems that we and other insurers are faced with, the aim of simple and clear language is less easy to practice. Expressions such as no fault, punitive damages, malpractice, tort, products liability, contingent fee, and so on, are understood by some people in this country, but not many, and by even fewer, elsewhere. The money value of claims arising under some of these causes is, however, understood by most, if only because so many of the claims are so large. In fact, as far as money is concerned, insurers have a particular problem in explaining the true meaning of the large sums of money they handle. The complexity of the financial structure of the insurance industry itself is not easy to understand, even for some within the industry. Moreover, unlike the manufacturing industry, where there is a concrete or tangible product you can see and touch at the end of the day, ours is, in its essence, abstract, and therefore that much more difficult to explain and express.

Most ordinary men and women are really interested in their own homes and families, their own problems, work, enjoyment, and so on. Few can understand the complexities of a business; jargon invariably confuses them. By contrast, your space program has been a successful example of a situation where a complex technical vocabulary and much jargon has been used, but where it has proved possible to communicate effectively both within the space industry itself and with the general public at large. This success must be because the leaders of the space program were not only capable of controlling its conception and its execution but, at the same time, were able to project to the general public their faith in their aim and their competence in achieving it. This was done through excellent communication.

The process or method of communication is rather like an arithmetic equation. On the one side, a person has to think about what he has to say or write. Then he has to transfer that thought into a message which requires speaking or writing. On the other side, someone else has to receive the message by listening or reading. Then he has to understand the message and respond in some way. The best communication is that in which the efforts on each side of the equation are equal.

"Today, communicators must be renaissance men."

Unfortunately, this equality seldom exists. There are many reasons for this. I would suggest two. First, the physical and technical achievements of the last seventy years have created a society of unprecedented complexity; increasingly, individuals are becoming specialists. As the number of specialists increases, there is a corresponding need for more generalists who can bridge the gap in understanding. Today, communicators must be renaissance men.

Second, radio and more particularly television have mangled or abused words, often for reasons originally to do with advertising a product, so that a whole new range of expressions has grown. They have become a sort of shorthand which many people use from day to day in all kinds of communication.

In these circumstances, words can become a barrier to effective communication. I would explain that my company does relatively little advertising to sell its own product. This is mainly because we have a sufficient share of most of the markets, and a larger share could only be obtained by having to accept more unprofitable business, certainly in the climate of today.

Now, before leaving the communication of my own company, there are one or two other small aspects that I would like to mention. First of all, we encourage our young thirty to forty year-old men and women to spend two to five years in a country other than that of their birth. This widens their horizons and gives them additional experiences, largely through communication. We take seventy or eighty of these young men and women each year, from various parts of the world, to a university, for a two to three week postgraduate type of course. There, they have to study finance, behavioral sciences, and all the subjects you would expect. The main object, however, is that as they communicate with one another, they find that their own problems in their own country are not too different from those in others. In bad or difficult times, natural in-house communication can be of help and, indeed, comfort.

A few years ago, we started an international corporate magazine of a somewhat different type. We produce 15,000 copies of this each quarter. It contains articles of interest to

insurers and to the public on a variety of subjects, including fire, inflation, windstorm, earthquake, economics, and so on. Contributors include people from outside. We think this helps our external communication.

We also advertise our corporate identity through *Fortune* each month, though it is becoming increasingly expensive. (*Laughter*)

Turning now to the subject in a more general way, the communicators of today have to face the major problem of the decline in the level of precision attached to the meaning of words, or even of sentences. This contributes to misunderstanding between people. It is a communicator's responsibility to use words with sufficient clarity, precision, and lack of ambiguity to enable people of different backgrounds and different levels of education to understand their meanings. Earlier statesmen, diplomats, and so on, including those of 1776, used French, a language of great precision. Many intergovernment documents, including agreements, even today are in French.

A notable historic exception to the use of French in diplomacy is to be found in the peace treaty that formalized the end of the War of 1812, between our two countries. It was written in the English of that time. Since then, there have been few, if any, risks of conflict between our two countries because by 1812 we had reached substantial, if not total, understanding, and it could all be committed to paper. I imagine that if such a treaty were needed today, those responsible would find the task of wording it very much more difficult.

> "...communicators of today have to face the major problem of the decline in the level of precision attached to the meaning of words, or even of sentences."

Some men can become good communicators by training and by experience. Only a few are born with the natural gift. Winston Churchill was one of the few. As a wartime leader, his words, "In war, resolution; in defeat, defiance; in victory, magnanimity; and in peace, goodwill," aroused a nation to fight on to final victory. These words have simplicity and depth. This was superb communication, quite apart from the quality of leadership.

In your country of freedom and liberty, you have also had many leaders who were good natural communicators. I would choose Abraham Lincoln, for two reasons. First, because we are here today to talk about communication, and second, most, if not all of us, come from the private enterprise sector.

I think a particular message of Lincoln's is opposite to both these reasons: "You cannot prosper by discouraging thrift. You cannot strengthen the weak by weakening the strong. You cannot help the poor by destroying the rich. You cannot establish sound security by borrowing money. You cannot keep out of trouble by spending more than you earn. You cannot build character by taking away a man's initiative and independence. You cannot help men permanently by doing more for them than they can do for themselves."

These were vital concepts to this country in the mid-1860's. They are equally vital today, both here and in the other countries where freedom, liberty, and enterprise should be as treasured as they were a hundred or more years ago. Lincoln's message, through its simplicity of expression, as well as of meaning, was easily understood by all. Again, an example of superb communication.

Since Lincoln's time business has become more complex. The need for business to establish its case with its many publics is greater today than ever before. Every chief executive must be involved and must do much of the communicating himself. He has no alternative if his company is to have any standing. Some study of expert natural communicators, such as Churchill and Lincoln, may help because both of them demonstrated that the substance of any communication can usually be made simple enough for the ordinary man to understand.

All of us in the business world who have the responsibility of communicating would do well to try to follow that principle.

Thank you very much. (*Applause*)

Question and Answer Period

Hoefer: Lawson Swearingen, the new president of Commercial Union, U.S., is with Gordon on the podium, up here on the platform, and he will be joining Gordon in answering any questions you might have about how Commercial Union organizes itself to communicate around the world, or whatever. So don't be bashful.

Voice: Could you comment on the problems you experience through government regulations. How do you experience those difficulties? Are they regulators and legislators in the United States? Compare that to the way it's done in Britain.

Swearingen: Our problems here in the U.S. are different from those in Britain, and Mr. Dunlop will explain. The fact is that they have fewer problems than we, from a regulatory standpoint—we, as you know, deal with state regulators primarily, some of whom are elected, some appointed. Regardless of the manner in which they found themselves in their position, there is a political influence, and this has been the difficulty of insurance companies, dealing with this type of regulation.

It seems that in my thirty years in the business, which included experience with various states, we always found ourselves needing rate improvements at an inopportune time, usually around election. And then after the election, the insurance commission or regulators failed to recall that we were present. We found ourselves in that position more so in 1974 than in 1975. We now feel some effect of the pressures from the outside on these regulators, and they have been quite helpful this past month.

But the primary problem we find here is the fact that the benefits that are being extended by our legislators throughout the country are such that they are above any proportion of insurability, and this is a problem. I maintain that we're trying—I say "we"—some people are trying to develop a perfect environment in which to live, with imperfect human beings, and this is beyond the proportions of insurance. We find ourselves almost with a barrier in front of us.

Someone mentioned last night that from the utility standpoint you're dealing with environmentalists. We deal with them, and it's almost an impossibility to deal with some of the consumer attitudes and environmental attitudes when you're trying to pay what you would normally consider an exposure up to $100,000, where the award is $5 million. How do you do that? It gets to the point of dealing with the government.

I think sometimes people think of insurance companies as they do the government, particularly if they are

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dealing with their personal tax situation. So this is a problem. I would say that our situation, from a regulatory standpoint, is much better now than it has been in my experience in business.

Voice: There are several major American businesses that have had their operations in Canada attacked over recent months, if not years—AT&T—to the extent that they are modifying their operations or have withdrawn from Canada. Is this attack based upon political reasoning or economic, or both?

Dunlop: I don't think it's political. As far as we're concerned, we have operated in Canada since about the same time as we came into the United States, about a hundred years ago, and our Canadian operation is owned by London, rather than by the American arm. So this is an area that we are bystanders to, rather than involved with, for which one from time to time is very grateful.

Voice: I was interested in the program you mentioned of taking younger people and sending them to countries other than that of their birth. First of all, I'd be interested in knowing how well it worked, and second, has it resulted in the more outstanding of them eventually reaching the top of your company?

Dunlop: I think the answer to this question has to be divided into two parts. We have, for many decades, staffed and managed many of our operations in places like Africa and the Far East, with British people, and they are known as the Foreign Legion. They go—I'm talking historically about it—they moved freely from one country to another and became very widely experienced in insurance matters in these parts of the world.

In more recent times, we have been nationalized in many of the countries of Africa and in India, and our operations in the Far East have not increased as much as they might have done, partly because governments have set up local companies and there are restrictions of one kind or another on the amount of business we can transact in these countries. Malaysia is an example, Singapore is an example, and so on.

Now, the men who were in these operations have come back into other parts of the group and, generally speaking, have fitted in very well. We embarked, about 1971 or 1972, on a more extensive program, swapping people from Australia and America with countries in Europe and vice versa.

Each case is different. There are all kinds of problems with salary differentials, schooling, taxes, and so on. Our success rate is in excess of 50 percent, but it's nearer to 50 than to 100—I think because we have not yet had enough practical experience in doing this. But it is something that we intend very much to continue, because we feel that with the progress there has been in the world in the last thirty-odd years we will increasingly need men in countries with knowledge and experience of other countries.

But I think, considering that the second leg of this development is only five years old, it's been as successful as I suppose one could reasonably expect, but we will be looking five years hence to be much nearer to 100 percent.

Voice: Is there a man in your firm in charge of financial communication—in marketing, advertising, public relations? What yardstick do you use to measure his performance?

Dunlop: Well, at the moment, I don't have very many, because the man who does the job, except insofar as I do it from time to time, is here—Victor Head. He's been with us for three years, and we have been engaging in a number of activities to try to improve knowledge of the company and its identity.

Now, I think I mentioned that we do not do a great deal of advertising to sell insurance. We do spend money and we spend roughly, about ¼ of 1 percent of our total income, on advertising the identity of our company. That's quite a lot of money, although it may seem little as a percentage of volume. The tasks that we have set ourselves, namely, to get our name known and to get greater understanding of the problems we face in many of the countries where we operate, those tasks have become smaller, as a result of the activities we've engaged in.

We had an opportunity in 1972 to sponsor some tennis, and that has helped to get our name known in about fifty or sixty countries for a relatively small cost. We feel, now, that the commercial reasons for this sponsorship are exhausted and it is probably going to come to an end before long. Also, the fact that our results were so bad in 1975 probably gives us a lot of otherwise free publicity to get our name known for quite a number of years to come.

But forgive me, to measure his performance, I have to say, in his presence, that it's been very good to date.

Voice: You mentioned that the basis of good communication, corporate communication, could relate to the aims and policies of the company. I wonder how those are communicated to your various publics, and what is the timetable, how do you evaluate those and how quickly?

Dunlop: Well, I think these are very difficult to evaluate. What I was trying to say was that the way we go about doing the things we do in communication and, indeed, in such advertising as we do, is related to the aims of the company. Now, one of the things we try to do is, we try to be a good citizen in each of the countries in which we operate. Sometimes it's quite difficult. But the man in charge of that particular company, who may be beset with all kinds of obstacles and difficulties and rules that he might ignore or break—he knows that the company's policy is to be a good citizen.

So when confronted with this situation he will come and talk to us, or to one or another of my friends in London, and try to decide how to remain in business in that country, and be a good citizen. Now, it may not be possible to do this and we may decide to come out.

The trouble I find with so much of this activity of communication is that measurement is subjective, 99 times out of 100, and what we do is simply to discuss among ourselves, our American management, our Australian management, our British management, whether they feel that what is being done is of benefit to them, and whether the return is worth the cost.

We have this difficulty because we're not advertising to sell goods. We are advertising to establish our case, and our case is somewhat varied in different places. We are advertising or promoting the company's name, because in so many places, up until recently, the name was just not widely known.

Now, to be the twenty-fifth or the twenty-fourth company in the U.S. insurance league and not be known outside the lawyers and investment bankers and Wall Street, we do not think is a good thing. Our aim has been to correct this situation. I think we've had a certain amount of success. How to measure it, I don't know. Victor, you are very much more skilled in this than me. Would you like to add anything?

Head: We do business in more than a hundred countries. In each of them the communication problems are different

and the objectives may also differ. When you ask us how do we measure the effectiveness of a particular campaign, I think you also have to consider the particular problems in the States, where we operated under various names. So one of the steps we took was to use Commercial Union Assurance as the umbrella name and bring the other companies under that umbrella. So obviously that had to be effective, because people referred to us as Commercial Union Assurance rather than one or another of the names. I think, in that respect of identification, we are succeeding. Mr. Swearingen can give you some recent examples.

Swearingen: Of all of the industries operating in the U.S., I think the insurance industry has poorer public relations than any other. People understand less about the insurance business than they do about other businesses. Over the years, we have tried to convince ourselves that this really isn't so. But we insurers have been noted for the fine print in our policies and such; and sometimes there doesn't seem to be any possibility of a person understanding what the policies are.

We are facing this issue. One thing that impressed me about this type of meeting is that communication is vital to your businesses and it's more vital to our business. Since we've had a change in management in recent days, we've determined that we would try to overcome this image, ourselves, as Commercial Union, and as an industry. We have established in our U.S. operations a public affairs unit, under which we plan to go into all sectors of the country through our agents. The insurance agent in most towns is a responsible individual. He is usually highly regarded as one of the men who are active in their communities. I've been with them, in and out of the various towns over the country, for many years, and I know that they are usually widely respected. We want to go with them into civic and social clubs, and tell people about the insurance business, and let them know how they pay premiums, what happens to their premiums—that when someone has a $5 million award as a result of some injury, in time this comes back into the insurance rate and they pay the fare.

It's easy for someone to receive the award, but if he understands at the time that he has to pay as a result of it—this is one of the things we're doing.

The other thing we, ourselves, are doing through our current agency system, is that this year, through our regional and branch offices, we are holding operation communication meetings, with all of our agents throughout the country. I have spoken thus far to about 1,500 and expect to speak to another 1,000, which will be about half of our agents, before the end of our sessions this year. We go to these people and explain to them what we did last year.

Most of you are aware of the action taken by Commercial Union, which was rather drastic, but vital to our survival and to our continuing to provide a stable market to those agents who were concerned enough about us to try to write profitable business. We have now gone to these agents to tell them what we did, why we did it, what our plans are for the future, and to give them a feel of what we, as Commercial Union, can be in their future. At the same time, contrary to what some companies do, we give them an hour or so to tell us what they think of us. And we think this is good.

In fact, we have gone to the length of planting a person among them to ask a question or two, to give us a bad time about some aspect of our business, so that they feel free to talk. This is a big problem in any business, to get people to express themselves and be frank. That has been one of my bones of contention throughout my experience in business, the importance of encouraging people to say what they think, and then to be willing to accept it.

I feel that we've made tremendous inroads. There's one thing that impresses me—about 95 percent of the people invited to these meetings have attended, and this tells me that they realize the need for better communication. It's been highly successful.

Voice: Mr. Dunlop, can you describe for us the quality of the financial press in the United Kingdom as compared to the United States

Dunlop: When you have bad results they kill you, and when you have good results, they kill you. (*Laughter*) One of the things I do is to see the five or six leading British newspapers when we publish our quarterly results, and we go to a great deal of trouble to answer their questions. The standard of financial journalism in Britain, there is no doubt, is a great deal better than it was, but basically, newspapers are out for news. Journalists have to sell papers and the financial condition of the newspaper industry in Britain is somewhat dicey. So they want to get the circulation up. People like us, two months ago, were manna from heaven.

How to Change Your Name Without Losing Your Identity

John F. Boomer
Director of Advertising, United Technologies Corporation

Ray Gaulke
President, Marsteller Inc.

Boomer: (Film shown) As you have seen in that glimpse of history, United Technologies has had its beginnings in aviation, and became well known as United Aircraft. That name, in fact, was one of the synonyms for aviation for more than four decades. At one time, it included not only the present aerospace divisions that you saw on the screen, Pratt & Whitney Aircraft, Sikorsky Aircraft, and Hamilton Standard, but hard to believe though it may be, some of the other giants of aviation: Boeing, Northrop, Chance Vought, United Air Lines were all once a part of our company, then known as United Aircraft & Transport Co. Today we have more than 130,000 employees, working for six divisions and six principal subsidiaries. And we do operate more than 170 plants in the U. S. and overseas—and maintain marketing representation throughout the world. The company moved through the early years of aviation to World War II, a period that saw aviation boom. United Aircraft and its divisions grew to meet the incredible demand for Pratt & Whitney Aircraft air-cooled engines, Hamilton Standard propellers, and the famous gull-wing Chance Vought Corsair. Sikorsky helicopters, flown first in 1939, saw very little use in World War II. But the famous Sikorsky flying boats, proven in transoceanic service before the war, joined the service.

After World War II came the jet age and United Aircraft was just as much a part of that new world of flight as it had been in the piston age. United Aircraft provided the engine power for the new supersonic fighters of the U.S. Air Force and U.S. Navy that began flying in the 1950's, and the first intercontinental strategic jet bombers, the B-52's, and their jet tanker support fleet, and then the commercial jets of today that you're familiar with—707's, DC-8's, 727's, DC-9's, Caravelles, 737's, and recently the great 747's and the most modern of military aircraft, the F-14's, the F-15's, and the new F-16's. All are powered by Pratt & Whitney Aircraft engines.

And United Aircraft became a part of the space age, too—a big part, with its RL10 liquid hydrogen space engines for Centaur, its great strap-on boosters for the Titan III-C, the Apollo fuel cell, and the backpack that provided life support for men on the moon.

United Aircraft was a major name in aerospace. With this solid aerospace history, we had become increasingly concerned, in recent years, over the inappropriateness of our United Aircraft name. It no longer reflected all that we are and all that we do. The word "aircraft" in our name identified us as a company engaged in designing and building products for flight. We are that, to be sure, but we are more than that. Our business interests span important industrial and commercial markets—electrical power generation and transmission, elevators and escalators, electronics, communication, marine propulsion, appliance and automotive systems, laser technology, automotive diagnostics and controls, and other fields of activity requiring products of high technology.

By our corporate name, we were not recognized for what we are, or, even more important, for what we are rapidly becoming. In May 1975 our shareholders approved management's recommendation to change our name to fit our future, from United Aircraft to United Technologies. By retaining the word "United" in our new name, we kept an identifying bridge to our proud past. The word "Technologies" underlines our technical heritage and links it firmly to our future.

And now Ray Gaulke will tell you how Marsteller entered the picture at an exciting time, when our objective became one of "seating" the new corporate name.

Gaulke: When we became United's agency in January of '74, the initial assignment was divisional advertising, so this is where we first went to work. Although the divisions participated in the early agency selection process to a degree, they didn't see the agency's final presentation, so United's corporate staff wisely suggested that we make our final new business presentation to every division.

This made divisional management more aware of our capabilities and served as a good introduction to the agency. After this, we went into each division, to find out what they made, their various strengths. While finishing up our divisional audits, we had meetings with the corporate communication people to explore the company's communication desires.

We met with Chairman and President Harry Gray and his senior management staff to get their views on how the corporation should be positioned. We were pleased to find that among Mr. Gray's degrees was one in journalism, and I think it's very unusual to find a chief exectuve officer who understands and appreciates communication as Mr. Gray does. We also found that his senior staff understood the value of corporate advertising. We found that the company's point of view was that corporate advertising should be structured to specific corporate objectives and should be related very strongly to the products that the company made.

At that first meeting, we talked about the misconceptions that some members of the financial community and investors had about the company, and the need to get it better known for what it was becoming, rather than for what it had been. It was a major industrial product company involved in the development and management of high technology businesses serving many markets.

We were told that the company was considering a name change. There were two schools of advertising thought about when to renew corporate advertising, which had been suspended. One school held that corporate advertis-

ing should begin immediately to pave the way for the name change and to give it credibility. Frankly, that was our school of thought, because we wanted to get things started quickly. We also felt that name changes can take a considerable length of time and it would be best to do a campaign that would run first under the old name, United Aircraft, and then change over to the new name. The other school of thought held that the program should wait for the name change and then go all out. That school prevailed.

So while the name change was being considered, the agency was instructed to develop a campaign to position the company even though at that moment we didn't know the new name. We assumed that any new name could work with our strategy. A meeting was arranged with the company's corporate identity and design consultant. You can just imagine the lack of eagerness of our creative staff to show our proposed advertising to corporate identity consultants! But, it turned out very nicely. They even liked our creative approach and we continued to work closely with them.

During this meeting, we were told the new name, shown the new graphic symbol, the logotype, and the identification manual detailing its use. Although the name did not yet have final shareholder approval, it did have top management support. Then we developed our strategy, a two-phase program. We recommended that there should be a short-burst name announcement phase, to be followed by a multi-market program with the objective of "seating" the new name, and properly positioning the company.

Boomer: The announcement phase was in May and June 1975. Our objective was to "seat the corporation's new name and ever widening capabilities and interests among selected target audiences, in order to influence favorably the sale of the corporation's securities, and influence favorably the sale of the corporation's products and services."

We had several well-defined target audiences. The financial community was important to us, as were our shareholders and prospective shareholders. Obviously, we were interested in alerting the customers of all the divisions of the corporation, and prospective customers. These were our primary target audiences.

In addition, we had a secondary grouping very important to us: government officials, employees, prospective employees, media, suppliers, subcontractors, community and business neighbors, acquisition prospects, and educators. These were the target audience groups that we set out to reach.

One of our objectives was to begin to design and then project a family resemblance for all of our divisions and subsidiaries so that when they signed their names there would be some commonality. This was new for use.

Here are just a few advertisements from various divisions mainly to show you how they now sign their names. *(Series of divisional advertisements shown, with the new logo design, and the commonality of corporate signatures demonstrated.)*

In the announcement phase, the first thing was this full-page advertisement which appeared in newspapers around the world, saying: "The shareholders of United Aircraft are pleased to announce that they have changed the company's name to United Technologies Corporation, for a lot of obvious reasons." And then we showed, in pictures and captions, what those obvious reasons are. The fact that we are a company whose world has widened beyond just that of flight, that we are into many industrial and commercial products, but with no lack of dedication to flight products. We showed our financial results over the last decade in the box at the lower right—sales, net income, and business backlog growth over the last ten years.

Our new name is prominent, and across the bottom we listed all divisions and subsidiaries so you could see all the members of the corporate family.

This was the opening announcement. In addition, we ran this advertisement in financial newspapers. It is on a background of the stock tables, and shows that United Aircraft is now listed in the stock table between U.S. Tobacco and Unitel, because United Aircraft is now United Technologies Corporation, ticker symbol, UTX. We reprinted this, mailed it out to 17,000 members of the financial community, and got some good mileage out of it.

In addition, we did something slightly different from a media standpoint. Many of the financial and business people in the New York commuter area are important to us, of course. Literally thousands of them pass through the New York commuter terminals and stations each day on their way to and from work. So we took a series of signs like these in the area. At virtually every terminal and station we said, "Hi, Wall Street, United Aircraft is now United Technologies, so our new ticker symbol is now UTX." We did the same in Chicago, another major commuter market, with "Hi, LaSalle Street," and used these attractive signs in San Francisco, saying "Hi, Montgomery

"If you're going to goof, goof with class."

Street, United Aircraft is now United Technologies, so our new ticker symbol is UTX." And finally, we posted right outside the front doors of six of our major customers, signs like these: "Hi, McDonnell Douglas, Pratt & Whitney Aircraft is now a division of United Technologies, because that's the new name for United Aircraft." We had fun with this one, and that's why I've shown it to you, because some of you will recognize that McDonnell Douglas has made a great effort over the years to keep people from ever putting a hyphen in their name. The sign painter got carried away and put a hyphen in. In the next mail we received a copy of their graphics manual where on its cover is a verse which says: "In print, it's proper that you mate us, but as you praise us or berate us, kindly never hyphenate us."

If you're going to goof, goof with class.

This, incidentally, is the view out of Mr. McDonnell's office window. And finally, from the advertising program itself, we received 35,000 requests for our annual report, up substantially from the number requested in the last two years, reflecting, we believe, an increased interest in the company.

So this was the announcement phase, and now Ray will move you into the multi-market phase.

Gaulke: The multi-market phase had several objectives. We wanted to explain why the name change was made. We wanted to demonstrate that the company was truly very strongly positioned in the technology business now. We think simplicity is very important and so we recommended and then used a very simple headline to explain the name change, which said, "It took a lot of technology to change a name like United Aircraft." And then we simply used a subhead, which said, "Because we're now a multi-market company, our old one-market name no longer fits." We added illustrations of the major market areas that we were involved with—automotive, communication, power generation, flight—and this is the way the ad went together. We

used subheads alongside each one of those illustrations to give a little more detail about each one of those divisions. So that was the way the introductory ad put all the technologies together. Then we prepared ads on each of the technologies. This is one, for example, on power generation. This is one on communication, and this is one on automotive. We did not want United Technologies' aerospace customers to feel that the company was de-emphasizing that part of its business. Far from it. So an all-flight version was prepared and run in markets reaching United's aerospace customers. We developed some one-page versions.

International advertising was a very important part of our communication program. Obviously we were interested in telling the story to United Technologies' customers overseas, and the format adapted well to translation. We had to use some seventy-two publications in nine different languages, and since translation was going to be a problem, we developed a format which accommodated it very well.

Boomer: Well, as we got down to fall, we wanted to know how we were doing out there. We wanted to know if our message was really coming across and, if not, how should we modify and strengthen it. So, very early in the game, we called in Yankelovich, Skelly and White, whose credentials are strong in corporate identity measurement. We sent them into the field to take a look at our two most important audiences, the financial community and customers.

> "...98 percent of the financial community knew that we had changed our name from United Aircraft to United Technologies."

We prepared for them a list, drawn from each of our divisions, of a specified number of names of people who were most important to our company. The names were drawn from our own records, from the financial community, and from customer groupings. Yankelovich used those names, plus some of their own, to go into the field to do some personal interviewing. The objective was to learn if certain identified groups of people knew that we had changed our name, from what to what, and why, on an unaided recall basis.

The results, which I'll show you on this slide, will probably surprise you as much as they surprised us; and as much as they surprised Yankelovich: 98 percent of the financial community knew that we had changed our name from United Aircraft to United Technologies.

The Yankelovich people tell us this was a *very* strong result in a *very* short period of time.

When asked why they thought we had changed our name, 90 percent of the interviewees said "to portray current diversification and to show that we were not just aircraft." The very message that we were trying to pound home, the fact that our world had widened, that we were active in commercial and industrial markets as well as flight.

Here are just a few of the comments. From the financial community: "People looked at them as aircraft alone, and ignored their diversification into other areas."

"To identify the company as having broader product line and not solely related to defense."

"The name was changed to get away from the idea of a one-product company, though it was a respected name."

"The old name was not completely descriptive." "They are no longer just an aircraft company; they are now into many other areas, so the name United Aircraft would be a misnomer."

"The name change was to better define the company, although it is still mostly aircraft."

"Essex and other activities diversified and broadened their markets."

"Obviously, Technologies is a more encompassing term, gets away from the one-product image."

And from our customers, much the same kind of comment:

"To establish themselves as the leading supplier in industries other than aircraft and aerospace."

"They are going into markets beyond aircraft, broadening their base, although they are still primarily in aircraft and engine manufacture."

"The name change suggests that they want to indicate their capabilities for serving broader markets than just aircraft."

So it seemed to us, as we drew to the close of 1975, that maybe now we did not need to shout quite so loudly that we had changed our name. Research showed that we had made our point. People seemed to have that message, and now our problem was to begin to tell them more about why we changed our name, and to make it meaningful.

Here's how we have modified our approach for 1976—how we moved from the straight name-change message.

Our objective for 1976 is "to continue to explain and simplify (very key phrase) the corporation to growing and changing target audiences, in order to influence favorably the sale of the corporation's securities, and influence favorably the sale of the corporation's products and services." After extensive discussion with our top management people, these are the strategy points that we are weaving into our communication messages. Not only advertising, but all communication messages coming out of the company.

We want to show that we will continue to be a strong, results-oriented company. We want to show that we are easy to understand and are not complicated and difficult. Our many product lines fall neatly into three basic categories—power, industrial, and systems. Technology is our basic strength and we want to demonstrate that this is so. It is the common denominator of everything we do, and managing technology is our business. We make technology work, and in many ways, and we will show interesting examples in our communication messages of the technologies we are involved with. And, finally, we want to show that we do get results. Now, with these as the main points we want to drive home in explaining why we changed our name and what we're doing, Ray will show you how we've woven that into our advertising.

Gaulke: I think the key was to simplify as much as possible, and so again we used a simple headline, "High technology is our basic strength; managing it is our business." We again used a strong corporate and name illustration, with all of the divisions listed, and again we used illustration to support our message. This time, to simplify, we talked about power, for example. And one part of the ad says: "Power—generating it, distributing it, applying it, a growing outlet for our technologies in products like industrial and marine gas turbines and fuel cells, now under development by our Power Systems Division."

We talked about the systems end of United's business: "Systems for flight are an important category. Our Hamilton Standard Division makes the pressurization and air-conditioning system used in the Boeing 747's and Lock-

heed L-1011's." In the industrial area, we talked about controls: "Industrial controls reflecting precision engineering and manufacturing are a major and growing market for us. The controls for this microwave oven come from our Essex group."

Now, we also wanted to be very specific about this business of making it work, and so we devoted equal space to results, where we said, "By uniting basic technologies we have accomplished these results. They give us a solid foundation for constructive growth." That's the way the ad looks all together, with the various parts.

At the bottom, it says, "Tune in Sundays to Meet the Press on NBC Television, sponsored by United Technologies."

As an agency we feel that print is the primary medium for corporate advertising, but, with a good program going in print, we felt we should look seriously at other media, too.

Now, since this was an election year, with heavy interest in the political scene, we decided to buy sponsorship of "Meet the Press." This is a program with a presumed viewing audience that nicely complemented our print schedule, plus very heavy viewership in Washington, D.C.—an area of considerable importance to United Technologies Corporation, of course.

Here are two of the commercials —sixty-second commercials, in this case. Simple, direct, and consistent with the print message. And although it would have been easier, and perhaps more dramatic, to cover only one part of United Technologies' business at a time in these commercials, it was felt that because of our limited television exposure we should really tell a complete story each time. So here are two commercials where we highlight three units of the company in each commercial:

First—"Meet the Press is brought to you today by United Technologies Corporation. To make your travel as dependable as you want it, 197 airlines depend on our Pratt & Whitney Aircraft engines. In peak periods, nearly 1,500 of their aircraft throughout the world make some 20,000 take-offs in a single day.

"To show what's wrong with your car and what's needed to fix it, car dealers, garages and gas stations use our Autosense engine analyzer. It's an electronic computer system that gives you a printout, showing not only what's wrong, but whether the repair has fixed the problem.

"To help you cook in minutes, Amana uses our computerized controls on its Touchmatic Radarange Microwave Oven. It thaws frozen food, holds it to the right moment, cooks it precisely, and with a quiet beep, tells you that it's ready to enjoy.

"We're the technologies of Pratt & Whitney Aircraft, Hamilton Standard and Essex, three units of United Technologies. High technology is our basic strength. We make it work for you in many ways."

Second—"Energy. We need so much. Yet new sources like nuclear fusion or solar are years away. Meanwhile, we're developing fuel cell power plants similar to those we built for the Apollo space flights, which can generate up to 30 percent more electricity with little or no pollution.

"At the same time, oil companies are searching for still more energy. Without the 280 mile range of this Sikorsky helicopter, offshore exploration for oil and gas would be impractical.

"Keep talking. We hear your need for trouble-free telephone service. One way to meet that need is by putting cables underground. This one packs 6,600 conductors into a moisture-proof unit, only four inches in diameter. We're the technologies of Power Systems Division, Sikorsky and Essex, three units of United Technologies. High technology is our basic strength. We make it work for you in many ways."

Gaulke: The title of our presentation today was "How to Change Your Name Without Losing Your Identity," and since we've just gone through that particular activity, we thought it might be interesting to share some things we've all learned about name changes.

Boomer: I'm going to take the first four points. I think the first thing is to attempt to develop a fast, efficient approval process with corporate management. All of us suffer with clearance processes—and in this particular name-change year, we worked directly with our division presidents and right to our top management. Anything could be cleared in just as short a time as necessary. We had fine cooperation.

Second, keep key management people informed. One of the things we did for the first few months, after the name change, was to spend much of our time in front of management groups, telling them what the program would be and why. It took a lot of time to do that, because we had to travel around the country to do it, but we felt it vital to let everyone know what the game plan was, and what they would be seeing.

> "One of the reasons that we've had what we believe to be a successful name seating program—and the research bore it out—was that everyone was totally committed to it,"

Third, after doing that in person, we mailed heavily inside the company. We made a list of some 250 of our top management people and possibly used a dose of overkill. We probably told them more about what we were doing than they really cared to know, but we kept it up and we told them what we were doing, and why and where.

Fourth, develop a special effort in your home town. If we were doing it again, we would do more advertising in our home town area, and for an interesting reason. In the Hartford, Connecticut, area, for example, we have approximately 50,000 employees. Here, the company has been called "the Aircraft" since the Thirties. You have a built-in reluctance to any name change. Some of the old stationery is still being used, some old signs are still on a few buildings, not all of the trucks have been painted, many of the old symbols are still visible in your home town, while you're selling the new name very hard to the rest of the world.

Gaulke: The fifth thing may sound obvious, but I think too few companies do it. Designate one full-time person in the company early on to handle all the inevitable questions and the implementation. United appointed a full-time person about three months before the name change was implemented and that's been a full-time job for the last fifteen months. Otherwise, all of the questions pile up on top management's desk.

Establishing realistic timetables for implementation is also a key move. In this case, although the name change was announced in May, 1975, the division managers, the profit center managers had until January 1, 1976 to implement. That made them very much more enthusiastic about the program, because some had thought that they were going to have to change all their signs and buildings and letterheads and calling cards, everything, the next day.

When they found out they had eight months they established some realistic timetables and, frankly, almost everything was accomplished by January 1. Pretty good.

When we first heard that the research was going to be done six months after the advertising program started, the agency became very nervous, simply because we think things like that take longer. But it did show that we were all moving in the right direction, and so helped to build management's confidence in the program. So I'd now recommend early research in name-change advertising and communication.

Boomer: The next point. One of the reasons that we've had what we believe to be a successful name seating program—and the research bore it out—was that everyone was totally committed to it, inside, and so lots of forces worked actively together. The people interviewed by Yankelovich, when asked where they heard about it, mentioned the advertising. They also mentioned press releases, editorial articles that they'd read. They had heard it directly from top management executives of United Technologies, because many of our people made themselves available and appeared before financial groups. They went out to answer questions. They were available to the press. All company forces worked on what management regarded as a critical objective, to get this new name seated, and everybody pulled together.

I think that is the key if you want to achieve sound results, and quickly.

Question and Answer Period

Q: *Your timing was excellent on Wall Street, but could you give any data as to what happened to the price of the stock?*

Boomer: Back around April, when the shareholders approved the name, I think the stock was selling in the low 40's. Today it's in the low 60's.

Q: *What happened to your product advertising?*

Boomer: It went on just as usual. This was a special corporate program for the new name. Divisions went about their normal advertising activity. The only change was in working in the new graphic identity and new logo throughout all corporate and divisional advertising.

Q: *Did you find any synergism between the two?*

Boomer: Yes, very much so. There was excellent cooperation between the two, between corporate and division. Everyone was eager to do the job right.

Q: *Do you use just one agency, or several?*

Boomer: Marsteller has most of the total account. We have one or two exceptions, smaller divisions and subsidiaries. But the major divisions are handled by Marsteller. We felt that important, especially at that time—in the year when we were just beginning to build a family look, a common resemblance. It's easier if you work with one agency handling the whole program.

Q: *Will you continue to research your communication program?*

Boomer: Yes, we will. Probably yearly. The company is a very objective-oriented company and everything is measured. So we like to measure our advertising results.

Q: *Was there much resistance inside to the name change?*

Boomer: Really remarkably little. First, Chairman Harry Gray had made it clear that it was a major objective for the year and virtually everybody got behind the program. There were, of course, some individuals who had lived with and loved the old name for a long time—but they cooperated, too.

Q: *Did you have a special budget for advertising the name change? Did the divisions get assessed?*

Boomer: Each division has its own advertising budget, and is responsible to its division management for that. The major task assigned corporate advertising last year was to seat the new name. If it had not been that, the budget would have been invested with an eye to some other objective. The corporate budget was not increased dramatically, just devoted totally to that task. The divisions were not assessed specifically for the program.

Aesthetics and Corporate Communications

John M. Diefenbach
Managing Director, Landor Associates

Dale L. Brubaker
Vice President, Landor Associates

Diefenbach: We feel almost everyone here in this room has had some experience with "corporate identity." Since United Technologies covered the subject so thoroughly in a "how to" sense, we will speak primarily to the simplistics, and the changes in communication.

The title of our speech is "Aesthetics and Corporate Communications," or to put it another way, "How Design Affects (or should affect) the Day-to-Day Business of the Corporation and its Publics." The presentations by Gordon Dunlop and then John Boomer and Ray Gaulke gave testimony to the fact that our *overall* understanding and ability to utilize corporate communication have come a long way, particularly in the last five years, since the inception of this seminar.

Yet, in the same period, we've had the debacle in Vietnam, Watergate, and a general erosion of consumer confidence in the business community. Corporate identity has come under attack, and perhaps justly so, adding fuel to the general criticism and distrust of business communication in general.

In recent weeks, Landor Associates has been quoted in the *New York Times Business Week*, the *Christian Science Monitor*, the AP and UPI on the general subject of individualism, and the need for a reinforcement of personality in business. We are, frankly, very concerned about the sameness of things. Hotel rooms look the same (and as you heard by those air miles, we've been in a good many hotel rooms); banks look the same; supermarkets look the same; as do many corporations.

If there is, in fact, heritage and individualism in many of our companies, many don't reflect it in their communications. Mary Wells Lawrence, the advertising agency executive, recently made this point in *Marketing News*. She said, "It is ironic that we celebrate the Bicentennial during one of the most uncreative periods in our history. Our resistance to change and innovation, a horror of taking risks, of being too different, of standing out and being criticized and an acceptance of mediocrity seem to lie heavy on all layers of our society."

Individualism in business is a marketing necessity.

Now, we all recognize that standing out and being an individual not only are part of our heritage, but must be our very survival in an over-communicated world, where various publics are both cautious and concerned. Today, the commitment to personality is not only a right, but a business necessity. Much has been done by the people sitting here to develop strong, effective communication. Much also has been done to add understanding to the concept of interrelated communication, basic identity linked to public relations, to advertising, to architecture, to interior design, and so on.

The basis of our expertise is, naturally, visually related. We view all communication from a short- and long-term implementation of basic marketing policy. Dale and I are going to speak to these points, giving examples of changing corporate communication in action. But first, we'd like to show you a few slides, and then a short film on the subject of changing business personality.

Slides begin here.

Personalities have been changing at an accelerated pace. There was a time when you could tell a Ford from a Cadillac. It's hard to tell, now. And you knew a paint company symbol from a credit card symbol.

Products were represented by friends and enemies alike. Customers were friends of business and associated the product with the maker that stood behind it.

The gap has widened between the product and the maker and the consumer and the corporation.

And through this depersonalized process, we have often lost the confidence of those we were in business to serve.

Obviously, we cannot go back, but the professional management of change can re-establish communication, visibility, and believability. Let's take a moment to look at a time capsule of change and our perspective on it. This is a minor media presentation, a very short film. *(At this point, a film was shown.)*

We believe in business personality, and this simple visual expression says it. Cotton is a natural wonder. It grows from the earth.

This story began with a marketing problem. Landor was retained by the Cotton Council through a recommendation by Booz, Allen, Hamilton to develop a personality competitive with the Woolmark and polyester fibers. It was agreed that the old cotton identity was pretty weak. It was also agreed that cotton couldn't match the perceived properties of synthetics, particularly on, say, ease of care. Cotton just didn't have this property, as is the case with many corporations that claim they are certain things that they are not.



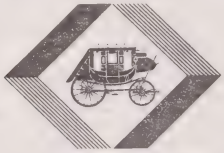
We decided to turn this seeming weakness into strength and stress the naturalness of the product. Communication is simplicity, straightforward simplicity, necessary in this over-communicated society.

Effective corporate personality is marketable day to day.

We believe in the development of identity that is not just identity, but identity that is promotable—that has an "echo" effect in day to day marketing. And this ad plays back "an earth sign, the symbol of purity." Comments

made by consumers, reacting just to simple design research. We believe in emphasizing an individualism that is already there, inherent in all products, in all associations, and in all corporations.

Everyone knows the Wells Fargo stagecoach now, but not everyone knows that at the time of their merger with American Trust there was a strong feeling for adopting the name "American Trust Company." Research indicated that it said bigness, national. The recommendation was to build an identity around the stagecoach and the Wells Fargo heritage. Everything was designed to create a period look.



Why? Wells Fargo couldn't out-big Bank of America, the No. 1 competitor, but Wells Fargo could develop a marketing position and personality that could be built on through the years with retail marketing programs that stem from the basic heritage of the company. The "Gold Account" and the Wells Fargo Reward are two examples.



Isetan is the fourth largest department store chain in Japan, with an annual volume of $400 million. On each and every Sunday, 250,000 to 300,000 customers swarm into the 600,000 square foot Tokyo store. Can you picture Bloomingdale's with that traffic!

They needed to develop a position distinct from the competition. In a country where symbolism and tradition date back 500 to 1,000 years, the decision to adopt a new personality was, indeed, a difficult one. Today, Isetan is positioned with new Japan. Landor counseled them on every subject of communication, from identity to store interiors to employee-customer relations and morale, how the telephone was answered and every aspect of their business.

It is a hard design task to distinguish companies and services that are difficult to differentiate. All of you who go to Hawaii know that it has a distinctive and romantic personality. Hawaiian Airlines needed to find this personality.

The marketing situation was really a classic one. Two regional airlines vying for feeder business from the United States—Hawaiian and Aloha. Hawaiian's personality was what we call "airline traditional"—safe, but nondescript.

To a mainlander coming in from Los Angeles on United Air Lines, this translated into a second-rate airline. These objectives were set with John Magoon, the president of Hawaiian Air. The word, of course, in airline transportation is "safety," and then the second objective is safety, and the third objective is safety, and so on. In effect, Hawaiian gambled, breaking the rules, stressing sophistication and excitement over the look of safety.



We sought the personality for Hawaii in the hibiscus flower—in Hawaiian, "pualani." And the silhouette of a Hawaiian girl. The basic personality was supported with a design system evocative of the colors of Hawaii. The design system would, of course, look a little silly on a snowy runway at O'Hare Airport in Chicago, but it is apropos for its environment. The advertising developed for Hawaiian builds off the basic identity, stimulating employee and customer pride.

A marketing system at work is basic identity, connected day to day with advertising and promotion, and is of prime importance in business areas difficult to differentiate, such as corporations.

Dale Brubaker will now speak to this point in the corporate sector.

Brubaker: Thank you, John. The crisis in public confidence exists in all areas of our society, including media, because the media have become concerned with sensationalism and "news" rather than being an area where philosophy and concepts and realities share equal time and receive equal reader interest.

So the media that we have to communicate these messages to our selected publics have been jammed with all kinds of communication chaff that make it difficult to get through.

We are at the point where we are thinking of media in much broader terms.

I'm not criticizing media in the conventional sense, but to communicate our corporate message today, we have to use all the tools that are available and coordinate them in strongly management-oriented programs.

We'd also like to make a point about management. We believe that management has gone through a series of evolutions. We had sales-oriented management of the fifties—well directed by those who could move the product. In the sixties we found people who could put together large conglomerates, who knew how to work the tax system to maximum advantage, to manage a different kind of management structure.

In the early seventies we found people who could take all these acquisitions and extensions and put them together to make them work, and get back to worrying about the

bottom line and the declining market.

In the remaining part of the seventies and into the eighties, we will need to find people at the top levels of our corporations who are, in fact, communicators as well as businessmen.

Unless we are capable and find a way to get the story of industry and economics, of what makes our system click across, we're indeed going to find ourselves in a hostile environment.

I'm going outside the United States for a case history because of the unique things we're learning from our foreign projects. In some of these environments where socialization is deeply affecting management attitudes, we're finding companies like Grupo Industrial Alfa, the largest industrial complex in Mexico, deciding to come out from behind the hacienda walls and publicly proclaim who they are, what they are, what their goals are, and how they contribute to their country's economic and social well-being.

The Alfa group decided to proclaim their role as a model for private initiative in Mexico. This takes guts. One of the founders of this group was assassinated by the terrorists two years ago on the anniversary date of the revolution. By becoming publicly visible, management also becomes publicly vulnerable.

Alfa management philosophy is an interesting blend of socialistic and capitalistic ideology. The group is totally concerned with their employees' social and economic and cultural progress. With all their social programs, they still have the highest profit ratio of any company in Mexico, one we would all be proud of



Our project for this group was to develop a total communication program to introduce Alfa to the world, both in Mexico and in the other well-established industrial nations. Alfa is interested in joint ventures in many of its defined growth areas with other multinational firms.

In these programs we can work with management and identify what publics are important to them and then design targeted programs to communicate management's message to their key audiences. This holding company is not important to a great many people. Alfa determined that at the moment it was important to 500 key financial and government officials, both in Mexico and outside of Mexico, in the major money markets.

Our job was to find the most effective way of reaching those 500 people. First we provide tools to make these personal contacts as meaningful as possible. We supply audiovisual backup presentations, and other aids that will help make high level personal meetings more effective.

The facilities are important, because eventually these contacts will come to Monterrey and want to see what it is that Alfa's management is talking about. We maximize these visits. Guests are impressively met at the airport. They are greeted and programmed so that the meetings that follow will have maximum effect. Offices, facilities, plant tours and entertainment are carefully designed for optimum effect.

Basically, the group has economic, social, and political points of view that they wish to communicate. Stated briefly from an economic standpoint, Alfa wants the government to understand that it is dedicated to providing jobs in Mexico, working on balance of payment problems, and is supportive of government within the concept of private enterprise having an important role to play.

Another key target for Alfa's economic message was other international corporations—they want the multinationals to be aware of investment potential and of Alfa's desirability as a joint venture partner in Mexico.

Stockholders and the financial community are very important to Alfa, because the company seeking funds to help finance expansion activities.

In addition to economic messages, Alfa has social messages. They want the government to know that they care about their employees; in fact, care so much about them that they are creating some problems because their wage scales are 20 percent above national averages. If you go into a new community and build a plant and your employees are living better than their neighbors, this creates special problems. One of Alfa's solutions is to help plant communities to elevate their total population by starting co-ops, by helping people to practice private initiative in their own homes and teaching them how to market, how to manage small companies professionally. This program has been extremely successful. As a result, Alfa's employees have a rare loyalty.

Alfa accepts community leadership roles, and is beginning to communicate its good works to the general public. Alfa deals with real issues that are important to people, rather than running self-serving ads saying, look how great we are.

Politically—you have to get a permit from the government for anything you do in Mexico, so obviously it's vital that Alfa maintains strong relations with the government, and public opinion leaders. There has been a lot of hostile press in Mexico about industrial groups that are plundering the country, and they can no longer sit aside quietly and let these messages be implanted in the mind of the general public.

Next, we selected the *Wall Street Journal's* special issue on Mexico to be the premiere of their promotion. So we used a modest piece of space to say that industrial growth is the other side of the Mexican coin, relating Alfa's growth to the industrial revolution taking place in Mexico—stating the corporate goals and objectives in terms interesting to target audiences.

This year at the annual meeting we will be doing a seven-screen, multimedia presentation exposing Alfa's dramatic growth and diversification. This presentation will also be shown to the government officials and other prominent audiences to build pride in Mexico, to show what Mexicans can do with their own capital, their own inventiveness and initiative.

Management must recognize the importance of a cohesiveness in these kinds of programs. Everything from gift giving to business cards, to a special party for VIP's to formal communication, needs to be coordinated by common goals and objectives.

In my opinion, management can no longer delegate the communication process to people who are not tuned in on their objectives. Communication is a vital tool of management, and it must be used properly. We help to formalize, systematize and regulate and manage the function.

As a closing comment, I challenge you to think of your jobs in a much broader context than the old corporate

structures permitted. All the ways that your company visually and verbally communicates with your publics are part of your image projection and collectively as important as the beautiful ads that help build your image in *Fortune* magazine. Each has a role to play from plant signing to executive contact. Determine your corporate needs, define objectives, supervise all communication channels—maximize your company's identity and the funds you spend to communicate it.

Diefenbach: The final point I'd like to make is related to dealing with identity as part of an overall program of personality, rather than dealing with it as a one-shot. We've learned, through the years, that the concept of doing a corporate identity program and then moving on without proper internal management handling, without proper agency coordination, and most important, without proper top management understanding is a bad investment, indeed.

Corporate identity is a continuing process—not manuals that gather dust.

There's a point to which a consultant is of value, and a point at which he is no longer of value. If he's designing your office calendars for $2,000, he's no longer of value to you. However, he should be kept involved for periodic reviews. After all, you've already made the investment in him.

In closing, I would like to restate four major points:

1. Individualism in business is a marketing necessity.
2. Effective corporate personality is marketable, day-to-day.
3. Corporations must think beyond conventional mass media to meet the overall communication challenge.
4. Corporate identity is a continuing process—not manuals that gather dust.

Thank you for your attention. We have been talking a great deal about business personality, and would like to invite you all to our business personality, the Ferryboat Klamath in San Francisco Harbor. Incidentally, we are the only business in the United States that's been hit by an American submarine.

Question and Answer Period

Q: *I'd like to ask a question. That is, I sense that you feel design, graphic design, is becoming increasingly sterile, that it is lacking a lot of warmth and the humanism that it had generations ago. Would either of you care to expand on that, because I think it might be interesting.*

Diefenbach: Yes, it has to do with a depersonalization, really, and large businesses, and everybody in this room has to face this and counsel management on really communicating with people.

Graphics is no more than a further expression of the problem. As it becomes more depersonalized and more similar, it tends to become more removed from personal experience and therefore is more suspect.

Brubaker: And we also have to broaden our scope. If we try to have all of identity focused on one little symbol, then this is too narrow an area. This is why we're recommending these totally broad kinds of concepts where you're tuning up everything, using color schemes, using interiors, environments, office space, any tool that you have, rolling stock, whatever it may be, to get that image implanted.

Q: *What do you think of corporations trying to capsulize everything? It's manifested in this initialization paranoia that corporations are going through. Somebody was reported to have commented on it the other day, as a way to achieve instant anonymity. Why do you think it persists, despite the fact that everybody says it's the wrong thing to do? Why do corporations continue to do it?*

Diefenbach: The situation, now, I think, is much different. The voguish late sixties conglomeration and all the activity that took place at that time, naturally, had as a result name changes, and not everybody could be, obviously, IBM or GE so there was a good deal of fall-out and a lot of bad counsel between consultants and corporations. And many of those painful experiences were felt by some very good companies. Many of them have either changed back or have adjusted their identification to reality, to a personalization of who they really are.

Report from No Man's Land

Louis L. Banks
Thomas Henry Carroll—Ford Foundation Visiting Professor,
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The Report from No Man's Land title is that kind of imprecision in language that Mr. Dunlop was warning us about this morning. What I'm trying to convey is that I find myself in the middle of a sort of No Man's Land, away from journalism, close to business, and holding guest privileges in the academic world. Believe me, that *is* a kind of No Man's Land—and it offers a perspective that's somewhat unusual, at least in terms of observation of what's going on in those three active fronts, or interactive fronts.

I'm delighted to follow Mr. Diefenbach and Mr. Brubaker, because they used the word "individualism" in an operative sense, and I want to just go to this a little bit, in a philosophical sense, to try to give you a view of one of the basic changes that I think are going on today in corporate relations with the rest of us—a change which may, in some way, alter not only the form but the substance of your communications.

Let me start by telling you about one of my business school students named Tom. Tom's now about 26 years old, and is in his second year at the Harvard Business School, and for good measure he's jointly enrolled in Harvard Law School. In his undergraduate years at Harvard College, he was a firebrand—in those years of 1969 and '70, when trashing and smashing were in, and college presidents were out. After graduation, Tom went off to South America with the Peace Corps. Down there, he put his student idealism to the test and tried to get things done for the poor, backward people in the small agricultural community where he was stationed. At every turn, he found himself confounded by a combination of ignorance, inability to get things done, and bureaucratic government. And at the end of two years of this, he had come to a conclusion that surprised the hell out of *him*. The only way to help these people to improve themselves, he found out, was to somehow, some way, connect them with business enterprise.

Tom decided that his next move was to come back to the United States and try to get into business school—to see how this thing called "business" could be used to move the world a little further in the direction that he wanted to go.

Now, I tell this story about Tom to illustrate the first of two propositions. Despite what you hear and read about those negative public opinion polls about business, there's a large segment of the young who are coming to see American corporate enterprise as the principal dynamic in today's world developments, and despite what they learned from their liberal arts teachers, and what they read in the media, and see on television or in the movies, this oncoming generation believes in business as an effective force.

I'm not trying to tell you that this return to business among the young is a matter of joyous excitement, necessarily, or one that will banish Fred Harris from the electoral process or result in a series of ever increasing Republican victories.

There are two factors that I believe are of basic importance in this. The first point about this youthful interest in business is that it occurs, more or less, by default. My friend Tom is in some ways an exaggerated case, but he dramatizes a fairly prevalent cycle of thought and action and reaction which some of you may have seen among your own children of that vintage. First, a furious and frenzied opposition to established institutions in those undergraduate years of '69 and '70, the darkest years of Vietnam. Then a kind of post-orgiastic retreat into silence and quiet work while he pulls himself together in distant places—either literally or figuratively. Then a painful return to the real world, in a period when government has lost its magic as policy maker and performer, and has even lost our respect as the custodian of the national character. So with a good bit of pragmatic American wisdom, Tom comes to the independent, professionally managed corporation as the most likely arena for effective action, quite literally with the thought that it's the only thing around that really works. And along with this, his generation is perhaps the first, since the depression years, to be persuaded that things go better with a minimum of government interference in business affairs.

> "...there's a large segment of the young who are coming to see American corporate enterprise as the principal dynamic in today's world development..."

But equally important, and this is my second point, they are coming to business on their own terms, as far as personal values are concerned, and here is where the word "individualism" that Mr. Diefenbach used is relevant. These terms have variously been described as youth values or quality of life or rational humanism, but in my view the central word is individualism.

If we can suspect a revival of Calvin Coolidge's dictum that the business of America is business, and I think we can, then we have to be prepared to couple it with another American shibboleth that's even older, "Don't Tread on Me." My proposition is that we're now in the process of seeing the two come together in this younger generation, as my friend Max Ways predicted in *Fortune* several years ago.

Without any conspiracy with Mr. Crowley, who so generously introduced me, the editors of the DuPont corporate magazine, *Context*, recently asked me to speculate on the nature of the turbulent changes that had engulfed industry over the past decade. There are, as I wrote, a thousand ways to measure the history of the decade, from Lyndon Johnson to Gerald Ford, from Vietnam to the Middle East, from Corvette to Chevette, from rising expectations to painful accommodations. But in the framework of business and social values, I concluded that we've moved in ten years from business dominance *in its*

own terms, ("the business of America is business") to a kind of pervading individualism *in its own terms* ("don't tread on me".)

Ten years ago, as we now see things, the strongest developmental force at work in the Western world was the large professionally managed corporation, mapping its growth in all the familiar dimensions of market analysis and unfolding technology and financial planning. Governments were benign and supportive. States vied for new plants. Constituents of the governments were supportive, too, and they were still impressed by the visible increase in real income that came with rising productivity. Lou Harris reported, in 1966, that a comfortable 55 percent of adult Americans felt "a great deal of confidence in the people who were running their corporations."

By the close of 1975, within the same framework, governments were critical, hostile, and sometimes seemed to be downright irresponsible, in economic terms. White collar and blue collar workers alike had a sense of money in the bank—a growing sense of personal economic security that flowed from business growth. And in that perverse way of nature—somewhat as we heard last night when Dean Williams talked of Joseph Schumpeter's prediction—the happy owners of the bank accounts, far from falling down to worship corporate performance, began to get a new sense of their own personal worth. And that sense of worth, according to surveys by Dan Yankelovich, was divorced from the basic fear compulsion of earning a living to survive.

Note this carefully, for this is the first time since the industrial revolution that man, on a mass basis, has been able to divorce his job from his basic fears about survival and shelter. Not surprisingly, such old values as loyalty to the boss and the corporation, and the automatic salute, began to weaken, and not surprisingly, new values rose in importance and they clustered around quality of life and self-expression.

If you'll pardon one more personal allusion, let me say that three times now, I have exposed the students in my second year business school classes to case material that dramatically illustrates the power and influence of executive rank in a highly profitable multinational corporation—private jets, invitations to the White House, good salaries, enormous power, etc. The company under discussion happened to be Phillips Petroleum.

Now, many of these students, you must know, are mortgaged to the hilt in their determination to get to the place where they can be corporate executives themselves. There are very few silver spoons in the Harvard Business School. I asked them to think about the case material and relate this role to their own expectations. The one consistent theme in their responses is the higher premium they put on their individual values than on "making it" in corporate terms that conflict with those values.

I'll grant you that there may be some change of heart when youthful idealism is confronted with reality in the cold business world. But these students aren't children; most of them have confronted experience. There's a sprinkling of ex-nuclear submarine officers, people who have served elsewhere in the armed services, have fought in Vietnam, women who have held jobs, and so on.

Not necessarily typical, but memorable, is the blue book statement of one young man whom I'd come to know as quite literal in method and methodical in thinking. I don't want to offend engineers, but I'd say he's engineering-minded and quite conservative in his general political outlook.

He was reflecting on that conflict of corporate goals and social goals which is evident in the corporate scandals that Dean Williams was talking about last night, and here's what my friend wrote:

"We are what we make of ourselves. When we compromise our code of ethics, our integrity, we steal from society. Each theft results in less worth stealing, as well as a belief that what is left isn't worth saving."

And a companion theme from one of his classmates, another conservative, believe me, in general political outlook: "I feel that a company must be positioned within two dynamic continuums, social demands and corporate operating demands, and there must be a continual re-evaluation of the fit. When the fit has become static and unresponsive, my association with the company will become a personal embarrassment, and my performance and loyalty will start to shake."

Yankelovich has documented the finding that these expressions of individualism, in its own terms, are by no

"The one consistent theme in the responses is the higher premium they put on their individual values than on "making it" in corporate terms that conflict with those values."

means elitist. They pervade the attitudes of young blue collar workers, who may perhaps state them more bluntly in demands for less compulsory overtime or better working conditions, a product worthy of pride, and more leisure or more time with the family.

The first thing to get straight, in conclusion, is that these various manifestations of "don't tread on me" do not, in themselves, prove hostility to the business system. This statement may shock you corporate executives who are fighting to keep solvent and produce goods and services and provide jobs, and are badgered by legislators, regulators, and agitators and even sneered at by your own children for producing a profit.

But just as my friend Tom has come to business as a place to get things done, so all the evidence indicates that the U.S. sees itself as a business society—even a business civilization—and is quite comfortable about having it that way. Dan Yankelovich reported in late 1974 that 93 percent of Americans—in his words "an overwhelming majority would sacrifice, if necessary, to preserve the free enterprise system." Nor do surveys show any appreciable weakening of the work ethic. In other words, most able-bodied individuals still want to make something of their lives through work.

So how to account for the gap between the 93 percent who believe in the system and the meager 20 or 27 percent—which is Lou Harris' last?—who have confidence in the system's managers? Part of the reason must surely lie in the increasing conflict between the needs and values being served by managers in conventional business terms, and the needs perceived and values reflected by individuals as workers, consumers, and citizens, in their own terms.

Certainly, this is a time when corporate communication has a special kind of meaning. My recent MBA students have been coming with remarkable agreement and with no special prompting from me, to the conclusion that the large American corporation of the future will prosper only if it creates a management structure that is as sensitive to social pressures as it is now to sophisticated

analysis of its markets. In this framework, communication would seem to me to be listening, hearing, learning, thinking, and responding along a central strategic line.

Again, Mr. Crowley, no collusion between us, but listen to Irving Shapiro, the chairman of DuPont, who must have some pretty good communication. Mr. Shapiro writes: "Finding the right fit between the goals of organizations and the goals of people working in them, will be one of management's main tasks in the years ahead."

And speaking of employees, he writes: "Give them a chance to learn and contribute as individuals and recognize their contributions, honor them by keeping them informed about the business, by soliciting their views and by respecting them from the day they first report to work."

I think Mr. Shapiro is communicating, not only with his employees, but with a sensitive perception about the future.

In summary, then, this is what I think. There's a new kind of support building for business in this country, as indicated by Yankelovich's 93 percent who would sacrifice to defend the free enterprise system. The American people recognize instinctively the relationship between independently managed corporate enterprise and their personal freedoms, and the possibilities for their development. And don't forget that in our form of government the American people are sovereign in these matters. They know that corporate management has legitimate rights and they know that they, as individuals, have legitimate rights, too. If we communicators can only understand the problem and help in the necessary adaptation and education on this matter of individual legitimate interests, there's no reason why we cannot write a new chapter for Professor Joseph Schumpeter, confound Edward Gibbon, and do right by Adam Smith in his vision of a great society.

Question and Answer Period

Q: *Professor Banks, I'm much encouraged by your remarks. I like to believe that you are correct in your perceptions of the future.*

A: I do a lot of reading in these areas. I have talked to undergraduates a lot, and one would think the Harvard undergraduates might be less inclined to be interested in a business future than those of Northeastern, which is across town in Boston. I have talked to them, too. I think, myself, that it is absolutely and firmly a case of coming to business because they know it can get things done and most other institutions have struck out. I've seen this view increase in succeeding classes, and I'm almost frightened at the anti-government feeling that is developing.

Q: *I wonder if the tremendous downturn in job opportunities is having an effect among the students today? It used to be that an MBA was a ticket to almost any place, a degree. Has the downturn affected the students' attitudes?*

A: Well, I'll give you a sampling of one class. Right now, as you know, is job-hunting time for the graduating classes of the business schools. They are out on an Easter break, they are all around the country, talking on their second interviews. It is true that talk of corporate resistance is having an effect on the students. They're nervous and they're worried. It's also having an effect on the recruiting corporations, and it seems to fall right down the middle. Half of the recruiters have suddenly turned very tough, and they're saying, look, you need us more than we need you. If you're going to come into this corporation, you've got to realize that we're going to move you around as much as necessary to get the job done, and if your wife doesn't like it, that's too bad, and what's more, we want to look at your wife and see if she's going to fit with us. That's one half.

The other half, very interestingly, are responding by being even more sensitive to individual needs. They're likely to say—as one young man was telling me the other day about his interview with Baxter Labs in Chicago—we get you, we hear you when you say that you don't want to be moving all the time. In this company, at some point we're going to want you to go to Europe. If you want to plan your family to have children at the time you're there, you'll find that's a pretty good experience over there. Then we'll get you back here and we'll do the best we can. And meanwhile, in the other office, company people are talking to his wife, who is a professional, and trying to help her find a job in Chicago. And I can only tell you that the best students are going to the places that treat them in that individual manner. It doesn't mean the others won't take their jobs and live with them.

There comes a time, you know, in these 11:30 classes when the gastric juices overpower the brain waves.

Q: *At the end of your talk, you mentioned that the vast public really has the final vote, and don't forget it—that's how you emphasized it. Last night, the Dean said that there's a possibility today that the masses may choose, for the first time, security, as opposed to individualism. That, to me, was one of the more frightening comments he made. Would you comment on that?*

A: I don't think I can. My sense of it is more along the ethical line, where I understood very well what he was saying, which was, okay, we're a business society and we understand what business can and will do for us, but if we're a business society, we damn well don't want to have our society typified by the various assortments of scandals that he chronicled.

But I don't sense the security thing, and I will just have to yield to somebody else on that.

Business and Television

Dan Cordtz
Economics Editor, ABC News

You and I have a problem, and I'm not really very confident we can find a solution, but if we don't, the consequences could be very serious indeed. The problem is the way television covers the economy, or rather, the way television doesn't cover the economy. It's a problem I wrestle with almost every day, and I somehow get the impression it's a problem that aggravates a lot of businessmen, too. So I want to talk about the elements of the problem, as I see them, and how that may differ from the way you see them. Then I'll tell you what you can do and probably can't do to improve the situation from your point of view. And finally, I'll tell you some things I think you ought to do to help me accomplish what I have in mind.

To begin with, let's go over some of the distressing facts of life that Harold Williams mentioned last night. Most of the people in this country are largely ignorant of economics. I can't vouch for the figures, but I've read that three-fourths of all college graduates haven't taken a single course in economics, and it's easy to guess how little knowledge there is among those who haven't even gone to college.

Eight out of ten people in the country can't even give an approximate idea of the difference between micro-economics and macro-economics. You all know how far off people are when they are asked what the average profits of American corporations are, and I know from my mail that a lot of people don't understand what the gross national product is, or what the consumer price index measures, or any of the definitions or details behind the monthly unemployment rate, and they haven't a clue about what productivity is, or its central role in determination of our standard of living.

Now in this vast wasteland of economic illiteracy, what's the medium on which most people rely for their information or misinformation? Why, it's television. Overwhelmingly, they tell the pollsters that they get most of their news from TV and they consider TV much more accurate and reliable than either newspapers or magazines. Even for many of us who earn a living in television, that's appalling, but it's a fact.

And it dramatizes just how important it is to upgrade the quality of television coverage of economic affairs. I see no reason to hope that people are going to end their reliance on television. So if something can't be done to make television more informative, the public will just go on reacting at random to each new bewildering development, a tempting target for every political demagogue who comes up with a plausible notion of how to achieve utopia with no pain and very little strain.

The central difficulty in doing something about television coverage of the economy, in my opinion, is not television's hostility and anti-business bias. There is some of that, I don't doubt it, and in a minute I'll suggest a partial explanation for it. But the major obstacle is indifference. Based on my year and a half at ABC News, on what I hear from my counterparts at the other two networks, I must conclude that the movers and shakers in television just aren't interested in economics, much less business. The producers, and they're the ones who make decisions about what goes on the air, think the whole thing is dull, and they're convinced the viewers think so, too.

Two years ago, when the economy seemed to be going to hell, they all got excited about it, but mainly on the superficial level of reporting higher grocery store prices and showing long lines of laid-off workers at the unemployment office. It wasn't that they love reporting bad news, as a lot of people charged at the time, it was that viewers plainly were worried about such things. So by definition they had to be interested. And if the producers think the viewers want to watch stories about inflation and unemployment, they'll put them on.

Six or eight months ago, when the monthly statistics started pointing up again, the economy was pretty much abandoned as a story. You know and I know that we're not out of the woods. In fact, people like Mike Evans of Chase Econometrics are warning of the possibility of renewed double-digit inflation next year, leading to an even worse recession by 1978. That doesn't mean they're right, but it does mean the debate's not over. Yet I have to battle to get anything on the air nowadays. A year ago, I was on the evening news five nights a week. Now twice a week is doing very well.

That's the underlying problem. When we narrow the field of economic news down to business news, we have to face up to some other difficulties. Television news programs have mind-boggling audiences. More than seven million sets are tuned to the ABC Evening News each night, which must mean upwards of fifteen million people watching, and we're No. 3. So the producers have to think in terms of catching the attention of a huge number of people.

What's more, the audience is remarkably representative of the population as a whole. So only a minority of the viewers have a direct, conscious, personal interest in the details of business management or the prospects of any individual company.

It seems to me that the typical viewer is probably interested in any company only as a supplier of products or services that he uses or knows. Obviously, everybody is interested in the company that employs him, but even General Motors doesn't have that many workers, by television standards. So stories about companies are most likely to be stories related to products—higher prices, consumer complaints, all the things you'd just as soon not see on the tube, which means that if you ever get a call from the local television station or even from a network correspondent, you'll probably try to duck the whole thing. You might very well get by with it, because many producers

will just scrap the story if they can't get any cooperation, but you'd better not count on it. In any case, if you do duck out, how can you then complain that television doesn't care enough about business or that television is unfair to business?

What's more, the reluctance of companies to respond in controversial situations is probably the No. 1 reason for the negative opinion about business held by many television reporters. When people back away from being interviewed or commenting or answering questions, journalists and readers and viewers, quite naturally, think those people have something to hide. In my opinion, for example, Mobil Oil made a mistake when it refused to participate in the recent series on gasoline prices that ran on a local NBC station in New York and stirred up such a ruckus.

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From what I've read, the series included a lot of things that were pretty hard for the station and the correspondent to defend, but when Mobil complained about the series, it also had to confirm the fact that the station had asked to interview Mobil officials and was turned down. And the reasons Mobil gave got right to the heart of corporate fears about television news.

According to the New York *Times*, Mobil said it could not make its case in the time it would have available, and added that its spokesman would be at the mercy of the NBC film editors who could pick and choose whatever they wanted from his responses. Mobil also assumed the station was out to skewer Mobil and the oil industry from the start. In other words, that it could not expect a fair shake or an honest attempt to be balanced and accurate.

My feeling is that's a self-defeating attitude. If you really think television is that hostile and if you believe there's no way for you to overcome or get around that hostility, then the class is over and there's no more to discuss. But you'd also better prepare yourself for a continuing deterioration in the attitude of the American public toward business and businessmen.

Now the problem of time constraints on television news is very real and it's not easy to deal with, but it's not impossible. Each of the three networks has 22 minutes each evening to report that day's news. At ABC, we usually try to put on eight or ten film spots, which is the jargon for the typical TV story, with movies, narration, whatnot. In addition, Harry Reasoner gives a passing mention to another eight or ten news items. They're called readers. The typical full-scale television news spot will run somewhere between 90 seconds and 2 minutes. That's no more than a single page of double-spaced typewritten copy. Sometimes, if a story absolutely demands more time, you can get it, but rarely, at least at ABC. And that means if *you* go before the cameras to give your side of the story, you'll get about 30 seconds maximum.

I make it a point to warn prospective interview subjects of that fact, and more than once it's cost me an interview. But when somebody complains that it's impossible to say anything in 30 seconds, I'm not impressed or sympathetic.

Companies spend millions of dollars on 30 second television commercials. Is all that money wasted? Most of the spots I do on radio run only 35 seconds, and I have to tell a complete story. You can say a lot in half a minute.

When Lou Banks was my boss at *Fortune*, he had a policy that before writers sat down to their typewriters, they had to tell him what the story was in one sentence, or at most two. Since the final product was going to run seven or eight thousand words, that exercise was actually intended to focus the writer's attention and help him avoid wandering down a lot of side roads. But it was also amazing to me how concisely I could tell something if I really set my mind to it.

In my opinion, the real reason businessmen beg off television interviews is not because it's impossible to make a case in 30 seconds, but because it's damn difficult. It takes a lot of thought and effort that people aren't willing to make. And it also puts many executives in an unaccustomed, uncomfortable position. They can't filibuster or ramble. They can't use their rank or authority to win a debate instead of relying on the force of their arguments, and of course they can't count on wearing down the opposition with the sheer tonnage of a long series of arguments.

I had an unhappy experience a few months ago that's a pretty good illustration of the pitfalls. I did a spot about the steel industry and its problems, huge capital requirements needed for expansion, foreign competition, and so on. I tried one major company after another, trying to find someone who would go before the camera to make the industry's case. One company after another turned me down. Finally, at the urging of the American Iron and Steel Institute staff, the chairman of one of the big companies agreed. The interview took up almost half an hour of his time, and a whole morning of my time, and it was a disaster.

Now I know that nobody gets to the top of a major corporation without some forceful powers of persuasion,

"...the real reason businessmen beg off television interviews is not because it's impossible to make a case in 30 seconds, but because it's damn difficult."

but I'll tell you none of it came across in that interview. The man was apparently unnerved by the camera, so he kept his eyes on the floor much of the time, which made him come across as something less than candid. He insisted on replying at interminable length to every question, and he said everything in a pedantic manner and in a monotone.

The result was, when I got to the editing room, I couldn't find anything that was usable, not even 15 seconds. Naturally, after the spot ran, I got an angry letter from the public relations director who had obviously gotten even worse from his boss. The PR director told me that the chairman would certainly not give any more television interviews. So when I wrote back, I couldn't resist saying I thought the chairman was very wise to take that attitude. *(Laughter)*

But it doesn't have to be that way. There are, right now, some corporate executives who know exactly how to handle a television interview. The best I've come across is Don Regan, of Merrill Lynch. He answers questions so concisely that he can literally give you three responses that you can string together and still stay under 30 seconds. Now, Regan was trained as a lawyer and he's had a lot of experience with interviews, and for all I know, he's just brief by instinct. But he's an example of how successfully TV can be used.

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One of the big public relations firms has a course for executives, teaching them how to handle themselves on television. I hear that it's very effective. But without meaning to spoil anybody else's act, I'll give you a few simple tips right now for free. The first one is to get clear understanding from a producer or correspondent before you start about how much he can use. That will usually be about 30 seconds. If you're going to get 30 seconds, tell the correspondent, frankly, that you don't intend to let the camera run for half an hour so that he can pick and choose any odd little snip that he wants.

Zbigniew Brzezinski, on the faculty at Columbia University, who has been around that track many times, will talk for just five minutes, under those circumstances. As he points out, that's ten times as much as will be used, so it gives the correspondent plenty of material, and it gives him some control over what's going out.

"...I believe the best interests of business and of your company will not be served by focusing on how television treats your company. For the most part, television just isn't going to treat your company at all."

Some correspondents will squawk, but it is fair to set some reasonable limits that way.

When the camera starts rolling and the questions are asked, there's absolutely no reason why an interview subject should be intimidated into rushing an answer. Stop and think about it. The TV station is paying for the film. Don't start an answer until you've got it well ordered in your head and then try consciously to condense the answer, to list your points serially and briefly, and to be as vivid and simple and colloquial as possible.

Actually, the correspondent will thank you for it. He wants to use something, otherwise he wouldn't be there.

Finally, and probably most important, if you have really one essential point to make, make it, and don't be trapped into making a lot of other replies that are way off the point, because you might see that extraneous stuff used on the air. And if you don't want to see half an answer chopped out and used, be sure that you keep right on rushing ahead and don't use vocal inflections that make it sound as if you've finished your reply when you haven't.

Well, so much for nuts and bolts. I really don't want to spend a lot of time on them, because I believe the best interests of business and of your company will not be served by focusing on how television treats your company. For the most part, television just isn't going to treat your company at all. My own conviction is that the most important thing that television should be doing is remedial education in the basic facts of economics. The people of this country can be given some better understanding of how the system works and the consequences of the actions of government, companies, and individuals. They aren't necessarily going to love businessmen any more, but at least they'll be able to perceive more accurately where their own best interests lie, and if all of us believe what we say we believe about our economic system, we really can't ask anything more than that.

All right, how can television go about this remedial education? One way, obviously, is to run documentaries or specials, and there has been a little of that, although most of the ones I've seen aren't very good. They were sort of slapdash things put together a year or two back, as the recession got worse.

A better way to go about it would be a continuing series of half-hour programs devoted to individual aspects of the economy. The networks are not convinced there's an audience for programs like that. In fact, quite to the contrary, they're convinced there isn't any audience. They won't do them and they won't run such programs produced by outsiders. So it's Catch-22.

I've been telling people that I think the only practical way around the situation is for independent, established, experienced, and well-financed journalistic organizations like Time Inc. to go into the business of producing such programs and marketing them outside the networks. Now, I hear that Time Inc. is doing exactly that.

But that's not the whole answer either, because the people who need the information the most won't watch those programs. Very few people are interested enough to sit still through half an hour of economics. In fact, except for a rarity like the *National Geographic* show about the human body, "The Incredible Machine," the ratings on almost any documentary are zilch. What's really needed is a regular diet of economic news on the big network evening news shows, which have by far the largest audiences of any public affairs programs.

I've tried to persuade ABC News to do three kinds of spots on the evening news. The first would be explanatory pieces about the economic statistics that the government puts out. And that effort was fairly successful back when those statistics showed an unusual situation. But now, reporting on those monthly figures is a little bit like taking your temperature every afternoon and finding out it's 98.6. It's reassuring, but it's not very interesting. And when we have only 22 minutes, it's almost impossible to sell those stories.

The second type of story I've tried to do is an industry report. Stories about individual companies pose all sorts of difficulties, but it's much easier to interest viewers in a story about a whole industry. The report on the steel industry I mentioned earlier was one of what I hoped would be a continuing series. Unfortunately, I have yet to get the second spot on the air, although on principle my bosses say they're for the idea, and a spot on the housing industry is supposed to run this week. But what I really want to do is a series devoted to specific important economic problems that may not be in the news every day, but are sure to surface from time to time. Social security, for example, or tax reform, and even a series on the fundamentals of economics, the capital formation problem, productivity, inflation, and a long list of others.

These subjects can't be covered in single spots. They take more time than I could ever get and they throw too much information at the viewer at one time. But if we feed people one easily digested bite at a time, five nights in a row, I'm convinced that a certain number of people will pay attention and will end up with a better understanding of the issues. The best way to make the case is to show you what I mean, so I brought along a film of a recent series we ran on the subject of public service jobs. As most of you know, Senator Humphrey is backing a bill that would set up a permanent program of public service jobs, to hold down the official unemployment rate to 3 percent. So it's not an issue that will go away at any time soon.

And assuming that most of you don't see the ABC Evening News regularly, this should show you what I'm trying to do.

(Film shown)

Well, that series wasn't perfect, and as I look at it now, I see some things I'd like to do over. But all in all, it's a fair sample of what I'm trying to do. And I have to tell you now that the business community has not given me a dime's worth of support.

A few days after the series ran, I covered a hearing before the Joint Economic Committee. One of the witnesses was Reginald Jones, chairman of General Electric; at a break in the proceedings, Mr. Jones came over and told me what a good job he thought I'd been doing. As we chatted, he specifically mentioned the public service job series.

Well, I said, thank you, but when I thought about it later, I had to admit that I was a little miffed that he hadn't told somebody with real clout at ABC. As far as I could tell, nobody from General Electric had ever taken the trouble to write a note to somebody at ABC and say, we thought that was a good thing you were doing. Because as generally satisfied as I was with the job series, do you know how much public reaction I got? Practically none. And absolutely none from the kinds of people whose commendation might strengthen my hand at ABC.

I recently got a letter from a graduate student at the University of California, who by the way turned up here today—I don't know if she's still here or not. She's writing a master's thesis on TV coverage of business and economics and she asked me a series of questions. One of them was, how do you think businessmen perceive you? My reply was, on the basis of the evidence, I don't have any reason to believe businessmen perceive me at all.

So to sum up, what I'm saying is, yes, television should, must do better, but if business wants television to do better, business has to change some of its ways, too. You've got to cooperate more, when television occasionally does do a business story. You've got to learn how to handle yourself before the camera, so you can play a more constructive part, and make your own case more effectively. And most important of all, you'd better start judging television news on a broader basis than the immediate interest of your company.

Producers and executives of television news won't do anything unless they believe there's a demand, and they won't keep on doing things unless they see signs of approval from people with more sophistication than the general run of those who write us letters.

It won't help for you to grouse to one another about how bad television news is, although it is, and it certainly won't impress anyone if you restrict yourselves to complaining about individual stories in which your companies have a direct interest. I can't even guarantee that it will help for you to let the networks know the way you feel about coverage generally, but I think it's worth trying, because I can assure you that television coverage of the economy is not going to improve without some outside encouragement.

There's never been a better time than right now.

Question and Answer Period

Q: *I believe, perhaps two and a half years ago, correct me if I'm wrong, ABC did a series on the evening program, one or two hours, on the energy crisis. Mobil wanted to buy time on ABC to respond and they were denied that privilege, as they were also with CBS and NBC.*

A: Okay. As a matter of fact, Jim Hoefer tried—I gather he was thinking about trying when I talked to him the last time—to get Herb Schmertz to come out here and Herb wasn't able to fit it into his schedule, because we thought it would be kind of fun to really do battle here. And I've done that a little bit, or did once with Herb Schmertz in Washington, at a meeting of the Public Affairs Council, or something like that.

It was not just ABC, of course, as you said. It was CBS and NBC also turned them down, and I'm not even sure whether ABC was the main culprit or the only culprit in that show.

I think Schmertz, to begin with, is just a dynamite public relations man. I think the stuff that he's done at Mobil is about as good as one can do. I'm not sure that it convinces anybody much, but those ads are great. But I'm not particularly sympathetic with that notion of buying time, because what that says is, that if you've got the money, the budget, then you can make the case on television. But somebody who has an equally good case or even a better case, and hasn't got the dough, can't get on. So I don't see any particular reason why we ought to sell what amounts to public affairs time to Mobil Oil or anybody else who can afford it. And that's not the solution to all this, because again, if you haven't got the dough, you can't get on. The solution is to make television news, itself, accurate and balanced and fair and comprehensive, and not to say that Mobil Oil can come on and speak its piece, after something has offended them.

Beyond that—they did that this time, as I understand it, after NBC (it was a local show in New York, a series on the oil problems)—they refused to participate in the series and then wanted to come on, under rules that they established themselves, and buy the time and speak their piece. The thing that really disturbs me about that, and a point on which I cannot agree with Schmertz or Mobil or maybe any of the rest of you who feel that way, is that I don't think television should be open to those who can afford it, and therefore *not* open to anybody who can't. The real solution is for the television news time itself to be accurate and balanced and fair, and if you offer somebody a chance to participate and he chooses not to, I think he's got a very weak case in arguing against it.

As I say, I've been through this with Herb Schmertz before and there are people, obviously, who think he's right, but I'm not one of them.

Q: *I understand your point of view, but what makes you think the [illegible]*

A: Well, if I understand what you're asking, I don't think we pretend that we have experts or expertise. I don't pretend to it. I'm not an economist. I'm a journalist. But we have access to them, and if we really want to try to put out a balanced, fair appraisal of anything, we can approach these people. The real problem arises when you go to the experts, whether they are at Mobil Oil or anywhere else, and they say, no, we won't play.

Q: *You do have a problem. Studies [illegible] might be able to handle it. And as you pointed out, most CEO's are not TV performers. Most of them are not. I agree with you, Ronald Reagan, and they're scared of the medium. So they don't perform. You don't want to hear from the PR man because he doesn't run the company. So when they offer to buy time to rebut something, in fairness, the networks ought to tell us*

A: As I indicated earlier, I'm not all that sympathetic to the notion that the poor old CEO can't do this.

Q: *He never had to.*

A: Well, he never had to. I didn't either, until a year and a half ago.

Q: *I wonder if the lack of interest in economic reporting of the*

television audience doesn't stem in great measure from the despair that we all feel about why we can't get two economists to agree on why we can have inflation and unemployment in such large degree at one time. I think that people feel it's almost hopeless. Government will come in with these different plans that don't work, and you have all these viewpoints, and sometimes they all sound like Professor Corey. (Laughter) *It's a difficult subject anyway, and when you can't get any kind of unanimous opinion from people that are educated in it, people that don't have it as a primary interest just give up. I don't think it's a subject that lacks interest, it means people's jobs, but there doesn't seem to be any clear way and I think people give up.*

A: Well, they're not easy questions, they're not. It's a very, very difficult subject, and I don't know that anybody knows why it is that we have had, the last few years, runaway inflation and unemployment. These are new things and they're new problems, and the answers are not easy. As a matter of fact, my reaction to the whole thing is that I don't think it's my role to provide answers. The role is to shed a little light on it, and put out enough information so somebody can at least do a little better job of making up his own mind as to where the weight of the evidence lies.

I'm sure that's one of the things that make it difficult, but it's damned hard stuff to understand.

Q: *This is the paradox of what we're discussing tonight. It's a very difficult problem, a very complicated problem, a problem that has to deal with the economic system. It can't necessarily conform to your format of 30 seconds. Now, how can television do that?*

A: I'm not entirely sure that it can, which is why the whole thrust of what I said was not all that optimistic, but I think we have to start from the fact that television is the medium on which people rely and television has—

Q: *—30 seconds.*

A: Well, 30 seconds for you to make your case in the context of a piece that runs a minute or two minutes, which is not—

Q: *It's an incredibly complex problem.*

A: Yes, it is, and you're not ever going to cover it in detail, but I pose the question, is it better to give people a little information, to make them a little bit smarter, or just to leave them with nothing? I opt for trying to raise the level of understanding by that much, rather than forget all about it.

Q: *The alternative of forgetting all about it or finding another way.*

A: I suppose the alternative is finding another way, and if you can find it, I'm all for it, but I don't see what the other way is. The Evening News is going to be 22 minutes of news, from now on, that's what it's going to be.

Q: *What about newspapers?*

A: Well, I made my living working for newspapers and there are a lot of days when I think I'll be back to it pretty soon. *(Laughter)* But the fact is that's not where people are getting their information, and that's all there is to that.

Q: *We hear that the young people are getting more and more interested in business. This is quite invigorating to us. Are you covering it? Are you following it? We only heard about it in one instance today. You are in a position to look at it in a broader sense.*

A: The short answer to your question is, no, I don't cover it. I had the delightful experience of being one of Lou Banks' guests up at his seminar at Harvard, and it was great, I really enjoyed it very much, and I can see that it's there, where he sees it. He's dealing with a pretty exceptional group of people and I'm not certain that I agree with Lou that the picture is all that favorable. What I have to deal with, and what television generally has to deal with, are not the students of Harvard Graduate School of Business Administration, but they are the people who may not even have gotten out of Public High School 65. They're the people who are watching, and they are also the people who are voting, and I count it some modest success if we can do something to contribute to their understanding of what the system is all about.

I'm not optimistic about it. I'm very pessimistic about it most of the time. But I think that when we start, when we try to do something, and we really don't get any backing or support, then it's sort of distressing. I really found it pretty damned distressing, having spent all the time working on that series that we watched, that nobody responded to it. Nobody responded. I got some letters, sort of semiliterate, but I didn't get any response from anybody whose opinion might count.

Q: *Maybe if some of the people who spend millions of dollars in advertising would make their voice a little stronger to your management, in an educational way, would speak a little more strongly, maybe they would give some of their support in a commercial area.*

A: Well, one thing I would not ever want to suggest at all, the last thing I would want to suggest, is that you, as business people, would use your economic clout as advertisers to suggest to ABC that we do something or not do something. That's the last thing I want. I think as viewers and as intelligent viewers—the fact is, of course, an awful lot of businessmen don't see the evening news, whether it's ours or anybody else's, because it comes at seven o'clock and they are all riding the trains or something. But—and I wouldn't even suggest you say, yes, well, we'd better call in there and say, that's terrific, you hired some guy from *Fortune* to do economic news. But when we do something that's good, you ought to say so and write a letter. If we do something bad, say that, too. As a matter of fact, if you only wrote a letter to me, it would be useful. But to be sort of shouting down the well all the time is a pretty disappointing kind of operation.

Q: *In a sense, you serve as a filter for news. We're engaged now in our every-four-year exercise—the election of a new President. Just look at the Democratic race that's going on. There are a lot of sentiments expressed here, and a lot of sentiments that people in this room are worried about are represented in the various candidates for election, from Jackson on one side to Udall on the other side. I've been very struck by a program I saw recently, a series of programs in which several of the candidates show up to face the issues.*

A: I have been arguing ever since the campaign got under way that ABC ought to send me out to interview candidates on their economic positions, because these guys could not snow me quite as easily as they can somebody else. I haven't gotten anywhere. And I'm not sure that I'd be in a stronger position if I had a stack of letters from occupants of this room, but I certainly wouldn't be in any weaker position.

The evening news, and this I found astounding, when I looked at the audience measurement studies, goes to everybody. It's really very close to a cross-section of the country, in socio-economic groups. So we do have other viewers. I'm saying that the other guys, this lower educational group, really need it, but if we got some reaction from viewers of any stripe, it would make some difference.

Q: *Dan, the chairman of the board or the president of a company, despite the training you may try to give him as a public speaker—that's not his main interest. Would it be possible for the companies, or at least, various industries, to develop spokesmen who are trained economists, who are witty—*(laughter) *Would these people have believability?*

A: Well, all of the witty economists are Democrats.

(Laughter) They really are.

Q: *I would like to ask a question which has been occurring to me through your entire talk. It's been fascinating, and I'm not an expert on this whole issue at all. I know very little about it and maybe it would be obvious to everybody here but me. But could a fundamental problem be that television has an extraordinarily visual audience, and most of what's news—economics doesn't lend itself particularly well to visual presentations*

A: That was spoken like a television producer. *(Laughter)* The first thing I ran into at ABC and I've run into ever since is this argument that economics is not visual, so it's no good. Well, it was a weak argument for them to make at the time, because this came right on the heels of the Watergate trial, and my response was, yes, the Watergate trial wasn't visual either. It didn't even have talking heads. You couldn't even get the camera in the courtroom. You had to rely on sketches all the time. But I didn't notice anybody not devoting five minutes every night to it.

So the question is whether it's important. If it's important, then it's up to television producers to make it interesting, to make it visual, to do whatever they have to, to make people watch it. This nonsense—you know, it's the same sort of thing I was criticizing businessmen for earlier. Most of us don't get paid for doing things that are easy. You get paid, and especially you get paid well, for doing things that are hard. And it's hard to make economics visual all the time. But that's what we're supposed to do, and if you decide, okay, this is an important subject, then you do it that way.

I wish I'd brought along the piece that I talked about earlier, on the steel industry, because I thought that was a dynamite spot, in visual terms. We opened the thing up with a blast furnace and the flames spewing out, natural sound roaring all over the place. It was just great. And then we ran down the steel billets running through the rolling mill and what not, damned visual, and we tied all the rest of it into it. We talked about the cost of a blast furnace, a basic oxygen furnace, and all the rest of it. I think you can do it, but it's not easy, it's very, very hard. But everybody tends to cave in on this very quickly. The real problem is that the people who run television are not interested and they're convinced nobody else is interested, and that's really the problem.

I am now going to ask the question that I planted, that wasn't asked me, and then I'll answer it, and that's it. *(Laughter)*

The question had something to do with the whole business about show business. I wrote a precis of the Bible in 30 seconds, to present here, but I gave up on it. The question was, what is—and I'm surprised it wasn't asked anyway—the criticism of the show biz aspect of television. No doubt about it, it's show biz that ties into this whole visual thing, and that's where you get into your real problems in dealing with stories about companies and why you really ought to be just as happy that television does not bother to do little stories about individual companies.

I hadn't been in television at ABC very long when the then executive producer of the Evening News decided we ought to do a story about Westinghouse, which was having all kinds of problems of one kind or another. It was in the news. And I was not able to figure out why in the world he wanted to do a story about Westinghouse, when we didn't do any stories about individual companies. And I finally concluded it was because this guy, a grand old man of television, was an old pal of Betty Furness, so he wanted to do a story about Westinghouse and all its problems.

Well, the whole thing sort of lent itself to the visual treatment. We went out and got an old Betty Furness commercial, and boy, it was great. The thing opened up with this old black and white grainy commercial, Betty Furness wearing a long skirt and funny hair style, strolling around in front of the refrigerator and speaking her lines, and the narration that went over the film started out saying something about how 20 years ago Westinghouse was a big name in appliances, and Betty Furness was a household word, and one of the most famous slogans in television was—and at that point we hit her coming on—"You can be sure if it's Westinghouse."

Then we moved on to all the troubles of the company and we went down and interviewed the new chairman of the board in Pittsburgh. We got to the end and there was just no way that I could wind up that story, except by being filmed up on the hillside, overlooking the plant, and saying, "Well, nowadays, you can't be sure of much of anything if it's Westinghouse." And I'll tell you the fur flew all over the place for weeks after that. Nobody could point to anything that was wrong with the story. All the facts were correct. We didn't treat them badly in any other way, but just that show biz ending. There just wasn't any way to get around it, and I had the one satisfaction, a few weeks later, of seeing a story in *Barron's* with the headline "You can't be sure if it's Westinghouse."

Accountability in Corporate Communications

Robert P. Zabel
President, N W Ayer ABH International

In doing my homework for this meeting, I found that those of you who had attended earlier seminars had discussed a broad range of problems covering some of the subjects that we have touched on already this week, and that we will touch on in meetings to come. There has been a continuous and deep interest in certain specific aspects of corporate communication.

Questions such as, how do we impress corporate communication's importance on top management? How can we better get across the advantages of the free enterprise system to a host of people who may not hate it, but seem somehow to be turned off about it? What should we do to improve our business relations and our standing with the government, and a number of other questions.

Maybe the reason these subjects keep coming up is that they are problems that most of us have not been able to solve. When one individual or one company or one industry makes some progress, it's rather unusual, and we look to it for example. We're delighted to hear the case history and hope we can apply some of the lessons to our problems and to our company's or clients' needs.

For most of us the problems of corporate communication remain. What a vague and indefinite art we practice! In industry, we can mass-produce a precision product and we know, for sure, just how high a percentage of finished items will pass quality control. We run power plants and switching systems by computer.

In marketing, we can take into account a myriad of intangibles, program them, and predict the success or failure of the new product. We have the mechanics, so that a housewife who puts a bar of soap on the check-out counter sets in motion machinery that not only totes up her bill, but controls inventory and ordering by the supermarket chain, the distributor, and the warehouse, and then starts up the factory equipment that will put that bar of soap right back on the shelf again.

So much we are able to do—so many production miracles, so many inventions, and so many new economies, and so many new conveniences, and so many new cures. Yet still, the same old problems persist when we consider corporate communication. Is it working? What's its worth? Is it worth the effort?

Out here in the West, it's not inappropriate to think of pioneers, and to recognize that we still are in a pioneer period when it comes to corporate communication. I'm reminded of a comment by David Brinkley, about pioneer immigrants of the nineteenth century, who said, when they left the shores of Europe, that they had the hope of finding the streets paved with gold in America. Instead, those immigrants learned quickly that (a) the streets weren't paved with gold, (b) the streets weren't paved at all, and (c) they were the ones who were supposed to do the paving.

I don't pretend that we're going to find golden solutions during the week here. I think the best we can do is to continue to search and grope and think and learn something from the ideas and examples of each other, and then go back and do our jobs and, I hope, pave the streets of communication so they don't develop quite so many pot holes as before.

There is a continuing crisis in corporate communication. In proceedings of earlier *Fortune* seminars, there are interesting case studies, success stories, about companies whose names today, unfortunately, are mud in the minds of millions. There are individuals whose accomplishments were extolled and whose reputations have since been ruined. For us to believe that these disasters occurred solely because of a breakdown in corporate communication is obviously inane. But I am convinced that chicanery and bribes and payoffs and revelations of laundered money, all these terrible developments, can be traced to lack of, or a flouting of, one element that must exist in any compound of corporate communication, and that element is accountability, and it's accountability in corporate communication that I'd like to consider for the next few minutes this morning.

Someone once defined the corporation as an ingenious device for obtaining individual profit without individual accountability. As managers of corporations and as communicators for business, to whom and to what should we be accountable? Certainly, accountability is basic to business. The word is virtually synonymous with the bottom line. And we've long accepted as a truism the idea that top management is accountable to stockholders, but let's reexamine this one. Who else is top management accountable to and for what?

To begin with, top management is accountable to itself, not just in terms of growth and profits, but in terms of searching out the truth about itself, deciding who it really is, who it wants to be and when, and then taking great care to impress that honest image on itself, first, on its employees and stockholders, and then on its external audiences.

What then? Are there larger dimensions of accountability which you try to keep in mind? I think so. I think we have a general responsibility to adhere to the accepted standards of morality. We have got to reaffirm the fact that our responsibility for deeds and words is not only to the bottom line, but also to society and to the Judeo-Christian, or Moslem or Buddhist standard of moral conduct.

This may sound like sermonizing and in a way it is. And like most every other sermon, it's not really saying anything new, but saying something that, because of human frailty, I think, probably needs to be resaid each week. Business has got to be moral, not just in order to be believed, but in order to be. End of sermon.

There is another major responsibility that we have, and that's to the living thing that's the corporation itself and its future. This responsibility is not just to executives and shift workers who will come and go, and to stockhold-

ers, as we've already said, but to that inanimate entity, the corporation itself. The corporation has an ongoing life of its own, and a prime responsibility for those who manage it, and those who communicate on its behalf, is to preserve, protect, and enhance the quality of that corporate life.

A number of the sins of business can be avoided if, before we act and before we speak, we question whether our deeds and words are in the best tradition of our enterprises and how they will affect the future, not just the next quarterly statement, but the long-term future viability and nature of an organism that should continue to flourish long after all of us have left.

So some parameters are established, and enlightened business knows its loyalties, and an enlightened businessman is more than just an individual who thinks and knows. He or she is a person who acts and is accountable for his actions.

I believe there are five actions for which we are especially accountable in corporate communication. We've touched on one or two of these earlier, but let's examine them separately. The first of these actions is to tell the truth. We're the tellers as well as the doers for industry. What we say must be true, and a full story—no half-truths need apply. Unfortunately, we have a long way to go before we catch up to the credibility that we think we deserve, or that we hope we will earn. And the principal reason for lack of business credibility is the traditional attitude of business, one that unfortunately still persists in some places, and that is to say nothing or to stretch the truth.

Maybe you recall the cartoon in an issue of *The New Yorker* last month that showed an executive saying to some subordinates: "Don't tell me the facts, I know the facts, but what are we going to give out for public consumption?"

We have loved the truth when it helps, but we have sometimes hidden the truth when it hurts. No wonder we have spawned a distrust for business, in the press, particularly, and among the public.

As Donald McNaughton, chairman of the Prudential, said recently: "The journalists tell us that business arouses their hackles because so many companies press hard for space or air time when they have good news, but remain underground when their fortunes are receding." He went on to say: "Another thing business must do is to become more open about its affairs, more candid about its plans and problems, and much readier than it has ever been to respond to questions and criticisms."

The truth, the whole truth, nothing but the truth for the corporate ad.

Let me tell you about one that told the truth, but not the whole truth, and so was never published. It was an ad about pollution control, noise pollution, to be specific, at one of the plants of a major industrial firm. The ad was well researched, well written. It was interesting, informative, and by every other objective measure, truthful. But the ad was a lie. The company had solved the noise pollution problem at one of its plants, but not all of them, and the ad implied that the problem had been solved across the board. It didn't say so, but there was a clear implication. By itself, the ad was literally true, but the statement it made to the world was a lie.

Needless to say, the ad never left the agency. I'm sure that if it had, the client would have rejected it, and if he hadn't, many of the readers would have.

We've come a long way in telling the truth about our business since the days of "the public be damned." But we've a long way to go.

An interesting survey was published this month on the credibility of large corporations. It was taken among young doctors, lawyers, engineers, business executives, a rather influential group in our society, successful men and women with an average age of thirty-one. A strong majority of the respondents, 73 percent, agreed with the statement that the existence of large corporations is essential to economic growth. But only 49 percent felt that corporations fairly represent the quality of their goods and services, and only 22 percent believed that large corporations are doing an adequate job of informing the public of their policies and activities.

It doesn't seem to be the business establishment that is being distrusted, as much as the lack of candor of the businesses that make up the establishment.

The second action for which we are especially accountable in corporate communication is to tell it clearly. Whenever I talk about keeping it clear, making yourself understood, I can't help thinking of Knute Rockne who had a habit of giving his players impromptu quizzes. He collared Frank "Curilla," a substitute, in practice one day. "It's our ball on the enemy's two yard line, fourth down, goal to go," Rockne barked at the young unsung quarterback. "What would you do?" The sub responded, "Move over on the bench a little, so I could see the touchdown better." *(Laughter)* So tell it clearly. Nobody has to listen.

"We're the tellers as well as the doers for industry. What we say must be true, and a full story—no half-truths need apply."

With the billions being spent for corporate information, there's a lot of clutter out there. And while more and more companies are adopting and expressing corporate stances that are direct, vivid, easily comprehended, and while others are taking the posture of advocates on public and often controversial issues, there are still many that wallow in the delusion that what interests them is going to interest everyone else.

This is reflected in the kind of corporate advertising that is written to please the president of the company, because he's the only person who will ever want to read it or understand it.

It isn't easy to get a clear, strong statement about a corporate entity of any size. One of my colleagues has a technique that has worked well in the formulation of corporate communication programs for clients. On occasion, he has closeted himself for a day with the top management of a company. The purpose is to define, in a single, simple sentence, just what that company is and what it wants to be. Through most of the morning, the room in which they work, as you can imagine, is a verbal shambles. So many elliptical statements, so many objectives, and such confusion. But in the afternoon, he goes to the blackboard and he lists all the points about which there is some degree of consensus, and asks that each be weighed on a total scale of 100; it's surprising how many of them get under 5 points, and it's usual that one or two elements score very high.

The little ones are recognized for their lack of importance by being discarded, and the strong ones are to be welded into that one sentence that states what the company is and wants to be.

The policy statement is then converted into strategy for a corporate communication campaign, and the budget

is established, depending on when the company wants to get where it wants to go. I'm not saying that this approach is a substitute for opinion and attitude research. But it does clarify what the organization is and right from the top management. And this lucid definition provides a framework on which elements of advertising and public relations can be assembled. The point is, get to the point, don't beat around the bush, and don't complicate it. Don't get lost in semantics and build a Rube Goldberg bridge to your listener's ear.

As Lloyd George once said, "The most dangerous thing in the world is to try to leap a chasm in two jumps." It's a funny picture, isn't it?

So make the message truthful, but make it clear. One way to make it clear is to simplify, and that's what Merrill Lynch does when it reminds us that Merrill Lynch is bullish on America, and AT&T does when it reports One Bell System, It Works. And De Beers means it when it says, A diamond is forever.

I'm pretty sure you will find clarity a common ingredient in any corporate communication campaign that meets the definition Harry Darling of the ANA offers for a truly successful corporate program: "It's that rare beautiful moment when the board of directors thinks it's projecting a favorable company image, and the marketing department considers it hard sell, product sell."

But the words must be true and the notes ring clear.

The third action for which we are accountable in corporate communication is to tell it to the right people. We must see that what we have to say reaches the proper audience, those whom it is in the best interests of an enterprise to inform and influence. Our first audience is an individual, just one man or woman. So often we talk about the need for top management involvement in corporate communication, and express our pride in the ability of the CEO to speak for the corporation. So long, but for how long.

Our friends at *Fortune* note that on an average, the top position in major corporations changes hands about every three years, and with early retirements and second careers and the exhausting demands of the job, the tenure is getting even shorter. So every few years we face a renewed task of immersing this key individual, the chief executive, in the corporate communication process, of molding an individual to become the face and the spokesman of the corporation, and, of course, adapting attitudes and actions within the corporate entity to his personal leadership.

We are accountable to the corporate leader, and we are accountable for him. He can often give our enterprise a human personality, a face, a name to remember. People everywhere look for a human being with whom to identify any enterprise. So that's target No. 1, the man at the top—and, I might add, the second and even the third in command could be at the top in a minute flat.

Target audience No. 2. We are accountable to the individuals of our organization, individuals our organization touches most closely, those people who invest in it, and often the same, those who work for it. We can reach them easily and directly. We have an obligation to reach them with the full story. Again, no half-truths need apply.

I'm reminded, when I think of the attention that needs to be paid to stockholders, of a bruising fight for control one midwestern company went through earlier this year. It was a real bloodbath and it was fully covered in the *Wall Street Journal*. When it was finally over and the CEO had been deposed, all of the information that the stockholders ever received from the company was contained in a curt but coy letter that began: "The sincere differences of opinion that were discussed yesterday by members of the Board, have now been fully and completely resolved. The debate of the past day is behind us. We're confident that out of today's resolution of these differences, will emerge a more united management team."

Someone didn't give the shareholders, or at least their intelligence, high priority in corporate communication.

Compare this action with the completeness with which duPont informs its shareholders about their company in the annual report. Last year's pages reviewed every aspect of the company, positive or negative, including candid coverage of occupational safety, minority employment, and other subjects that more timid or less confident companies would leave out.

We're just as accountable in communication to our employees. If employees are uninformed or misinformed, they find reasons to become hostile and naturally their negativism affects the corporation's external publics.

"We are accountable to the corporate leader, and we are accountable for him. He can often give our enterprise a human personality, a face, a name to remember. People everywhere look for a human being with whom to identify any enterprise."

One organization that is refreshingly candid and open and one, I'm pleased to say, we've been helping since 1908, is AT&T. We had occasion, recently, to look at some of the diverse pieces of information that the Bell Companies have been presenting to their employees. I have with me a random selection.

A feature article in an employee magazine about, of all people, the president of the union. Posters that reflect employee criticism of the business climate in which they work. For example, one such poster showed a sketch of two pachyderms with a caption saying: "Getting anything done around here is like mating two elephants. It's done at a very high level, with a lot of fuss and squealing, and it takes two years before anything comes of it."

Articles that face up the facts about the resentment of white males toward women and blacks in jobs that once were the province of white males.

The promise of AT&T management, in talking with over one million employees, is that you may not agree with us, but we pledge that we will tell it to you like it is, and despite its bigness and its critics, the Bell System is making this corporate communication policy work.

Of course, there are many other audiences besides our own employees, and they are vital, but I do believe that what we say to our own people should set the tone for our communication to outsiders, to the financial community, opinion leaders, government, young people, old people, whoever may touch our lives, and we theirs.

I'd like to show you a corporate communication commercial that tells you something about a company, who it is, what it does and what it thinks and why. That's a lot to get across in one commercial, so it's not thirty seconds. We allowed three minutes. It's a commercial born in adversity, a disastrous fire, but it's pretty positive as a corporate communication message.

(At this point, a film was shown.)



AT&T called this message "A Miracle on Second Avenue," and a miracle it certainly was. Put yourself in the position of any one of AT&T's audiences, owners, workers, users, insiders and outsiders, and I think you'll get the same message.

Clarity, based in truth, and forceful messages aimed at the relevant audiences, but here comes a problem and it's a big one. When we are concerned about reaching customers, prospects, opinion leaders, government, consumer activists, regulators, and the myriad of others who constitute that amorphous being we call the public, we must recognize and surmount the barriers between us and the public. A message isn't worth paper and ink or film or tape until we can place it before the eyes and the minds of the people. Can we get it through? That should be the easy part, provided we have creativity and money. Unfortunately, when it comes to reaching the general public, especially when we take a forceful stand on issues, namely advocacy advertising, it's the hardest part, and it's not all our fault.

Some outside forces are literally blocking the efforts, and I believe the rights, of corporations to channel information to the public. I mentioned the first of these forces, the press. It isn't exactly in bed with business, nor should it be the servant of any advocate, in business or labor or government or politics, but the power that the media say belongs to big business fades into insignificance when compared to the power the media themselves can exercise over business.

We don't want to control the press, but they can make or break us. One mission of the press is to dig up wrongdoing. In recent months, investigative reporters have turned up some startling corporate chicanery. But in the process, many reporters, editors, and broadcasters are making it appear that all business is suspect, and this just isn't so. We are under attack from several sides, from the press itself, from the activists, from government agencies, who know how to get their points of view across to the press apparently more capably than we do. Perhaps because business has been reluctant to talk about itself for so long, it doesn't fare so well with the press, now that it is under such sharp scrutiny.

There are other reasons. For the most part, journalists are generalists. They have limited time and space to report just the cream of the story. Many of them—and please understand, lest I'm sent home without my lunch, that I'm not speaking of the editors of *Fortune* or other business publications—many of them lack any understanding of economics or the complexities of enterprises that may employ hundreds of thousands of people, produce intricate technological products, and operate within the laws and monetary fluctuations of several dozen countries.

Louis Banks, our speaker yesterday, and former managing editor of *Fortune*, cited some business horror stories like this: "At the time of the critical issue of securities, the chief financial officer of AT&T is challenged on his financial policies by a wire service reporter who, it turns out, does not know the difference between a stock and a bond." He continued: "The chairman of Exxon explains his company's policies in the Middle East for forty-five minutes to

network television, only to see it compressed to a meaningless thirty seconds."

What the networks are telling us is that business and its chief executive officers must somehow discuss the most complex far-reaching problems, such as the energy crisis, or our free enterprise system itself, in just thirty seconds, or TV news won't put the business side of the story on the air.

Perhaps you will agree, as I do, with Professor Banks when he says, "We need the competent, informed, honest, independent criticism that is implied in the First Amendment, and we have proved its worth over again and again. But today, we're drowning in criticism, informed or otherwise, and what we need is recognition of achievement, as well."

Of course, the second external force that impedes our communication is the fairness doctrine. We discussed this last evening and there was, perhaps, a misunderstanding of it. This doctrine embraces the concept that since the airways are federally licensed, the radio and television stations using them have a special obligation to present a balanced viewpoint about any issues of controversy.

"We are under attack from several sides, from the press itself, from the activists, from government agencies, who know how to get their points of view across to the press apparently more capably than we do."

Translated, this means that if a station accepts a commercial from an advertiser on such a subject, it must provide time for a responsible group that holds an opposite opinion to air its views.

Now, on the surface, this sounds fair, indeed. The trouble is, the time granted for the group that wants to oppose the advertiser is free. That's a key point. The time granted for the group that wants to oppose the advertiser is free. However, the stations and networks have an interest in selling time, not giving it away. Thus, they have avoided opening themselves up to the possibility of free time by refusing the paid advertising of advertisers seeking to put their views on matters of legitimate controversy in front of the public.

The situation has gotten to the point where one of the oil companies, as was mentioned last night, wanting to get their side of the energy controversy on the air, offered to pay for its attackers to have equal time, and was turned down by the networks.

What can we do about these barriers, besides recognizing that they exist? The question has been answered in part. Provided we stick with a policy of openness to the press, I think much of the antagonism from that quarter will gradually diminish. But there are ways to hurdle the obstacles between business and the public. For instance, let's have more background briefings with the press, even when we don't have a story, so that we can foster some mutual understanding when we do. Let's take the time with the press, to talk about how business and society are complementary, so the reporter can better comprehend the social pulses of our system, as well as the economic complexity of the business he is assigned to cover. Let's welcome, rather than shrug off, opportunities to make public speeches, even when the platform may seem to have only marginal importance. And let's not duck controversy, but seek out speaking appearances before groups of activists, students, government bodies, whose opinions are different from our own. Let's not be shy about meeting them on their own turf, but let's train our speakers well.

Let's marshal our allies to champion our cause, our employees, stockholders, industry associations, community groups, and the unions. They may all share our interests in certain specific issues. Why should we go it alone? These groups often can marshal more muscle and better press relations and lobbying than any individual corporation can command.

And let's advertise our ideas. I'd certainly be out of character if I didn't express my conviction that persuasive, relevant advertising, advertising that dares to shake people up, to move them, is probably the strongest weapon we have in the battle for people's minds, and if we can't get it on the air, let's do more of it in the newspapers and in the idea medium, magazines.

Let's enlist the full resources of our companies and our advertising agencies. We use publicity and sales promotion and research and direct mail to people to market products. These methods can also be used to communicate ideas, to set the record straight, to bring understanding about our institutions, and to respond to our critics.

Truth, clarity, a message properly aimed and through all barriers, which brings me to my fifth and final action for which we are accountable. To measure the effectiveness of our corporate communication—yes, and even in the most cerebral consideration of corporate communication there is room to take the bottom line into account. We are accountable, too, for producing results, changes in attitudes and behavior toward our organizations, and for seeing that these results justify the cost of our efforts. Simply, this means watching the barometers and asking people questions, and compiling and comparing their answers, and finding out if what we're doing is working and is it worth it.

The process of persuasion is often a long one, and it's particularly complicated when we're talking about ideas. It's important that we measure our progress at every stage in the process of persuasion, to see what inroads we have made, to stay with the theme, the approaches, the communication techniques that work, and to discard and modify those that don't. It's particularly tough to measure this progress, a lot tougher than it is to find out if your product advertising is working or can be expected to work.

We simply do not, at this time, have as much statistical information as the product marketers do on which to predict the success or failure of our efforts to communicate ideas and opinions. However, even in this inexact science of the measurement of the impact of corporate communication, there are some elements of accountability that can be applied. We start by defining the problems, the opportunities, and the target audience. Second, we ascertain where we stand right now, through the use of benchmark studies of opinion, among the audiences of our concern. Third, and this is important, I believe, we must set objectives that are measurable. We can't be vague and say we want people to think that we are a fine company, making high quality products. Instead, an objective should be stated more specifically. To give you an example: When asked, 50 percent of college graduates today believe the XYZ Company is more responsive to the needs of society than the average U.S. industrial firm. In five years, we want 89 percent of the same demographic audience to agree. That's a measurable objective.

Fourth, we decide on the program itself, the kind of

weight, media, and message in advertising. We also decide what the involvement of public relations and direct mail and employee and stockholder relations will be. The program has to run constantly and consistently with adequate weight against its carefully targeted audiences.

Years ago, our agency adopted a motto: Keeping everlastingly at it brings success. And to keep everlastingly at it is a requirement for the kind of corporate communication that works. IBM and Mobil don't just jump in and out of corporate advertising. They keep on and on and on. And as we move along, we monitor our progress against our objectives, with continued opinion and attitude surveys, and we monitor the competition, competitive ideas as they rate against our own, as well as social, political, and economic trends that influence our audience. Does this approach work?

Let me mention just a few examples that I'm particularly familiar with. The most public company in America, AT&T, measures public opinion constantly. Studies by Yankelovich and others rank the Bell System as one of the top two best-managed corporations in the country.

In our years with the Pharmaceutical Manufacturers Association, years of negative publicity about the drug industry, a continuing Gallup survey showed that our corporate advertising was helping to swing the pendulum of opinion in their favor.

The advertising for DeBeers is corporate in nature. Its role is to sell the idea of the diamond. Back in the Forties, fewer than half of the women who got engaged sported a diamond ring on third finger left. Today, more than 80

"...we must set objectives that are measurable. We can't be vague and say we want people to think we are a fine company, making high quality products."

percent of the engagements are sealed with a diamond, and this in the face of some radical social changes and a more casual approach to the institution of marriage. We have continuously researched and monitored these changes and adapted our findings to our approach to young people.

In our work for General Motors, we have continuously monitored attitudes on such things as pollution control and equal opportunity employment. In each instance, our "tell it like it is" advertising has brought about positive attitude changes toward GM.

We have done extensive monitoring on the attitudes and behavior of young people in the work we do for the U.S. Army Recruiting Command. Our studies include thousands of enlistees and their influences every year. We have seen the perception of the Army by all important groups change strongly and positively over the years.

The kind of measurement that we obtain from the media is important to all of us. As for many of you, *Fortune* has tested the response to numerous campaigns we run in the magazine. Before a recent campaign for one of our clients, *Fortune* ran a subscriber study of awareness and attitudes toward the company. That was the benchmark. And after we ran six corporate advertisements, a second questionnaire went out to the same sample. We found, to our joint satisfaction, that not only did awareness of the client and the nature of this business increase by nearly 20 percent, but favorable attitudes toward a particular corporate capability measured against that of a competitor went up by 80 percent.

So there are some certitudes that we can discover in this inexact science of measuring the impact of idea messages, and there will be more. Certainly, we're bound to have more examples of programs that work, which will give us more information on which to base predictions for new ones. You may be interested in an approach we're taking.

Today, the Ayer New Product Model, which was developed a number of years ago, is being used with success in the introduction of new consumer products. This mathematical model takes fourteen critical factors, like the weight of advertising, the weight of competitive advertising, product distribution, the consumer's willingness to switch brands in the product category, and so on, and applies them to a new product, to find out what an advertiser needs to spend in order to obtain a specific initial sale.

We are in the very early stages of using this approach to build a model that will help corporate advertisers achieve share of mind, rather than just share of market. That's a long and complex project. There are many more than fourteen critical factors to apply and they are much more difficult to measure, but we're starting to work on it now.

Incidentally, there are a number of universities that are also working in this area. But no matter what technical advances in corporate communication are achieved, those of us who serve as spokesmen for business and industry always will have to remain accountable, to ourselves, to ethics and morality, to the ongoing life and the vitality of the corporation. And I suspect that in future *Fortune* seminars we still may need some reminders, though perhaps less frequently, of our responsibilities to tell the truth, to make it clear, to reach the right people, to overcome all the obstacles, and to do our best to ensure that our efforts bring forth tangible and priceless results, in terms of honestly earned good will toward the companies we serve, results we can measure, that will make us more accountable.

I can't stress how important it is to measure our success, so we know if we've made it or are just going through the motions.

One businessman I know found the road to success no easy matter. "I started at the bottom," he said. "I worked twelve hours a day. I sweated, I fought, I took abuse. I did things I did not approve of, but I kept right on climbing the ladder."

"And now, of course, you're a success?" I asked him.

"No, I wouldn't say that," my friend said with a laugh. "I've just become an expert at climbing ladders."

Climbing the ladder and being successful can be two entirely different things, but they can be one and the same, if you know where you're going and you measure your progress step by step.

"Capability" and Advocacy Advertising

Graham H. Phillips
President, Ogilvy & Mather (Canada) Ltd.

During the past year, several well-known institutions and individuals have remained silent about various accusations of wrongdoing. The passage of time has eventually revealed that the institutions and individuals were, in fact, guilty as charged. It has happened so many times that the media and the general public believe silence is tantamount to guilt, when an issue is raised. To them, a conspiracy of silence exists.

Big business can't afford to continue being part of this conspiracy. Our image is bad enough without giving cause for it to erode further. I'm going to talk to you about three ways in which business can break the silence and further improve communication, and, I hope, improve its relationship with the general public—and I emphasize, general public.

I'm going to talk about capability advertising, advocacy advertising, and how business might help educate the public through advertising. I'm going to concentrate on paid advertising because that is our field of expertise, recognizing, however, that paid advertising should only be a small part of the total communication package. Advertising, by itself, cannot solve your corporate problems, as it cannot sell an inferior product. Advertising is the icing on the cake. Even if it looks good, no one will eat the cake unless it tastes good, too.

Advertising is a waste of money unless you deliver on the claims you make. The principal advantage of paid advertising is that it guarantees that your message will be seen or heard as you intended it to be heard. It enables you to direct your message to a selected audience. It enables you to time your message exactly, so that it ties in with all your other communication programs. It enables you to measure the response to the message, before you even run it, through creative research.

The price of paid advertising should be well worth these guarantees that you receive in return.

Having accepted paid advertising as part of a communication program, what should be said? That depends on the problems and objectives of the company. Both must be clearly defined. Speakers at previous *Fortune* magazine seminars have preached the gospel of being specific, which I do not intend to pursue further today, but with which I fully concur.

Corporate or institutional advertising can be divided into two categories: advertising that is designed to improve the image of a corporation, generally a long-term endeavor, and advertising that is designed for a specific issue, such as excess profits, pollution, or to educate the consumer about how business operates. This type of program tends to be short term in nature.

We believe there is a place for both activities in any corporate program. I would like to tell you what Ogilvy & Mather has learned about writing advertising in these areas.

We have learned that the best approach is to advertise the technological capability of the corporation when the objective is to enhance consumer attitudes toward the company. In fact, we often refer to it as capability advertising, rather than corporate advertising. We believe that the best way to improve the image of a company is to demonstrate the products and services it provides industry and the consumer. There are many advantages to following this approach.

> "A lot of image advertising is dull. It is dull because too many companies write advertising to suit themselves, not the consumer or target audiences."

First, capability advertising appeals to all your target audiences. It is a way of reaching all your prospects with one message. Your advertising budget is not fragmented and, therefore, works harder. Product or service technology appeals to the consumer because it enhances product values. New technological advances are also more interesting. A lot of image advertising is dull. It is dull because too many companies write advertising to suit themselves, not the consumer or target audiences. Technology appeals to the investment and business community because they measure future corporate potential in terms of new product developments, R and D capability to generate future sales and profits. New products and services can appeal to government officials, provided they do not result in harm to the environment or the safety of the consumer.

Capability advertising can be continued regardless of the rapidly changing situation in which a company operates, such as energy or commodity shortages, plant accidents, government or activist assaults on specific issues. It enables you to maintain advertising continuity, an important factor in being successful. It enables the corporation to set and maintain a true course without deviation.

Capability advertising naturally shows the diversification of a company. It shows how a company can be involved in broad aspects of our daily lives. Shell Oil isn't just a gasoline company; it's involved with cosmetics, clothes, food, medicine, aerospace, transportation, communication, etc. Capability earns you the respect of consumers, if not their undying love.

Capability advertising generates sales because it is product and service oriented. It therefore produces revenue at the same time as it enhances the corporate image. Chief executives will feel a lot more comfortable about investing funds for capability advertising, because there can be substantial return in sales. We have examples of diversified manufacturers who have landed huge contracts as a result of this type of corporate program.

Capability advertising supports the salesman and raises the morale of other employees, as they see evidence of corporate progress. They feel they belong. It is also a method of recruiting new people by predisposing them to all the corporation's activities.

Preparing a capability advertising program requires the same care and attention as developing a campaign for a national packaged goods brand. In fact, in my view, it requires more attention. Whereas one can grasp hold of a can of orange juice, even enjoy the taste, how much more difficult it is for a consumer to grasp and retain a corporate image, let alone be convinced of the credibility of that image.

Here are some points we have learned about creating capability advertising. We have learned that the most important decision you will make is how to position your company. The positioning should be decided before any advertising is written or even attempted. Positioning is how you describe your company to the target audience. It pays to ensure that your positioning meets three criteria.

It must be distinctive. A positioning statement should distinguish your company from the great blur of corporate slogans. Your advertising must stand out, otherwise it will pass like a ship in the night.

Here are seven corporate advertising slogans. Can you put slogan to company? Does any one really stand out? And aren't they all a little bit confusing? Apologies to anyone who owns these slogans.

For the business of management, a company of uncommon enterprise. The proud inventors. The company. The growth company. The uncommon company. The automation company.

Here are some slogans that I believe are distinctive and you may recognize the companies immediately. The slogans telegraph the nature of the company, they communicate a distinctive positioning.

Just slightly ahead of our time. Where science gets down to business. We guarantee tomorrow, today. The best ideas are the ideas that help people.

And here is one we are proud of. "Merrill Lynch is bullish on America." I'm going to show you a television commercial with all disclaimers to *Fortune* magazine. Remember, I'm talking to the consumer, about Merrill Lynch and America, and maybe it's a good commercial for us all to look at, because it shows that business is contributing to America and, we hope, will continue to do so. One commercial.

(Commercial shown)

The original campaign, "Merrill Lynch is bullish on America," was introduced in 1971. We do a tracking study every six months, and measure the results of this advertising. It continues to perform very strongly.

Your positioning must be realistic. Before you settle on a corporate positioning statement, conduct an in-depth analysis of the strengths and weaknesses of the organization. Compare them with the competition. Then settle on a platform you can support with facts. Positioning statements cannot be concocted in a typewriter by an agency copywriter.

Your positioning must endure. Advertising is a long-term investment, particularly corporate advertising. We have told several clients to save their money, unless they are prepared to commit funds over the long haul. The same goes for positioning of corporations. Once the positioning is set, it should be able to endure all the ravages of time. It should be a linchpin for the corporation, not a passing fad. Those who switch campaigns and slogans annually are wasting their money. Once you set specific and measurable objectives and establish the proper positioning for the corporation, the battle for the consumer's mind is half won. The next step is to communicate the positioning to your audience via paid advertising, and through every other communication effort.

As with packaged goods marketing, the positioning or product claim must appear on all the merchandising materials. The advertising must be credible. It is not easy to jump over this hurdle. What may seem totally credible to you may be anathema to your audience. You must test your advertising for credibility at the inception stage. Otherwise, you could again be wasting your money.

Research indicates that only 5 percent of Americans associate the word "trust" with the word "business." Too much corporate advertising falls on deaf ears because people do not trust its source.

Here are five executional techniques that can improve credibility in paid advertising. Show your employees' faces

"Research indicates that only 5 percent of Americans associate the word 'trust' with the word 'business.' Too much corporate advertising falls on deaf ears because people do not trust its source."

in your advertisements. In fact, let them serve as spokesmen in your television commercials. We have found that an audience is more likely to trust an employee of a company than a celebrity spokesman or faceless company.

Here is an example of an employee speaking for Shell Oil.

(Commercial shown)

Deal in facts, not generalities. Too much corporate advertising is heaped full of empty phrases and glittering generalities. Be specific. Fill your advertising full of facts, so that your audience can form an opinion.

Keep it simple. One of our copywriters has a placard on his desk. It says, "Kiss." It doesn't invite passion in the office. It means keep it simple, stupid. Too much corporate advertising is written by committee. It is a ragbag of compromise and thereby confusing. Make sure the advertising communicates your intended message to the audience. Use creative research to find out. Don't overclaim. It is unlikely that your company is going to solve all the world's problems. Make sure your advertising doesn't end up claiming that it will.

Use phrases like "another step toward solving," etc. Keep the tone down. Don't be strident. Avoid looking like a high pressure salesman. You aren't selling brushes door to door, you're selling a conservative, reliable, and humane organization that is working in the interest of the audience.

After you've developed and tested a credible platform for the advertising, you must develop an involving and interesting story. Nobody was ever bored into paying attention to an advertisement, yet a great deal of corporate advertising is dull. One of the principal traps you can fall into is to talk to yourself with the advertising. You may find the subject fascinating, the chief executive may feel the television commercial that features his latest automated plant is superb. Unfortunately, the viewers may not, and you will be wasting your money.

There is a research technique that can rank potential corporate subjects in terms of audience interest. We have



used it on several occasions. It helps you ensure that what you advertise will involve the audience you wish to reach. An effective way to involve people is to give them valuable information, which they can use profitably. This (slide) was one of our most effective advertisements for Sears television sets. How to pick the right color television. A lot of facts about how to buy a television.

Shell has had a considerable success with its recent information series. Here is an example. *(Slide)* I'd like to help you squeeze extra mileage out of every tire. A guide to tire life.

The trick is to give out information, but to weave your corporate or product message into the information, so that you can benefit from an image and sales viewpoint. There are great cost advantages to marrying corporate and product advertising under one umbrella. The consumer information approach is an effective way of accomplishing this objective. It can also be done by using similar television or print formats with the same spokesman.

However, the marriage should not be forced. That never works. But by directing all your advertising in one direction, you will reap a bigger harvest than the company that fragments its advertising budget.

In the search for audience involvement, you must search for a big idea within your message. This is as important for corporate advertising as it is for packaged goods advertising.

In Canada, we reject television story boards or print advertisements from our creative people unless they contain a big idea. Here are two superb capability corporate television commercials for International Paper. Both contain a great idea and therefore both are involving commercials.

(Commercials shown)

Generating audience involvement on television is difficult in today's clutter situation. Speakers at previous seminars have recommended program sponsorship to isolate corporate messages and to frame the commercials for the suitable program format. Many companies have gone this route and it's a good one if you can afford to buy a whole program.

Another way to stand out in a crowd is to buy one minute or longer spots. Since about 90 percent of all national television commercial time is accounted for by 30 second announcements, a one minute spot seems like the movie, "Gone With the Wind."

Several years ago, when we were working for IBM, we had the presumption to produce several three minute commercials. The objective of the campaign was specific, to convince the general public that computers were an asset to society and not a threat. We chose to execute the strategy on a capability basis. Here is my favorite, all three minutes of it.

(Commercial shown)

I predict we will see a trend toward longer, rather than shorter, corporate television commercials, despite the increasing cost of television time.

Capability advertising is, of course, particularly suited to the service companies. We handle Houston Lighting & Power from our Houston office. Its problem, like all utilities, is to keep its customers happy, despite substantial increases in the cost of electricity. Faced with this situation, we recommended a combination of both service capability and issue advertising. Here is another example of how to get involvement, which is based on real experiences suffered by those who live in the turbulent climate of Houston. Reality is involving.

(Commercial shown)

Again, through tracking research studies, we are able to measure the effectiveness of this type of advertising, and

research has indicated that the campaign has contributed greatly to customer satisfaction, despite large increases in rates.

The objective of most capability advertising is to demonstrate how business has improved the life and the welfare of the man in the street. To be successful in earning the respect and support of the public, it is essential for business to touch a responsive chord, to recognize the power of love and care and interpersonal relationships. Here are two capability television commercials for Imperial Chemical Industries, a huge and diversified British company. Its problem was being perceived as a monolithic, inhuman, and polluting corporation. Here's how we helped to solve the problem.

(Commercial shown)

A research tracking study shows that the campaign had a dramatic effect on improving attitudes toward ICI. Don't expect immediate shifts, however. It took 18 months of constant advertising pressure before attitudes turned around. The moral of the story is, stay patient.

Product or service innovation is the basis of all capability advertising. We have found that one of the most difficult aspects of producing campaigns is finding interesting product or service stories. In large diversified corporations, no system generally exists for the compilation of such material. It is not a question of a lack of potential subjects, but an inability to concentrate this information. It is necessary to appoint someone to gather materials from all operating departments. Sometimes the most mundane product can be transformed into a brilliant creative idea.

> "It took 18 months of constant advertising pressure before attitudes turned around. The moral of the story is, stay patient."

Here are two examples of this for the British Steel Company, whose principal problem was that the public believed steel was an old-fashioned and unattractive product. The management wanted to demonstrate the versatility of steel and thereby improve attitudes toward the company itself.

(Commercial shown)

After a year of advertising in selected markets, research showed improvements in attitudes toward the company and its products. Research has told us, on many occasions, that the best way to involve the audience is to demonstrate your product or service in action. In fact, we know that demonstrations can increase recall by 10 percent over the standard television commercial.

The capability strategy, fortunately, offers you substantial potential in this regard. If you were to ask me why capability advertising always seems to work, it may be because you were able to demonstrate your claims.

Ogilvy & Mather is committed to the capability strategy as a means of enhancing attitudes toward a corporation. It is an effective way of breaking silence and constructively demonstrating how a company contributes to the welfare and life style of society.

I would now like to turn to a more aggressive method of breaking corporate silence, advocacy advertising, the objective of which is to answer important issues and thereby influence public opinion in favor of the corporation. This is a relatively new field for advertising people. In the past, it was the responsibility of the PR man to advance the cause of the corporation. But now we feel that paid advertising is an important supplement to his activities.

First, I believe advocacy advertising is an important and effective way for business to communicate with an audience. Certainly it is one of the most effective ways to obtain broad coverage of an audience with a corporation's viewpoint.

Second, more advocacy advertising should be done as a means of educating the consumer (more on this in a few minutes).

Third, it is no good running advocacy advertising after the barn has caught fire. Too much advocacy material is defensive in nature and falls on deaf ears. You must get out there first so that your point of view can be weighed against your adversaries'. Anticipation is the order of the day, early investment in your opinions and viewpoint is critical.

Fourth, advocacy advertising is very hard to write, and although I urge more of this material, I'm also sympathetic to those who have to prepare the copy and to those who have to approve it.

Fifth, advocacy advertising should be part of your total communication package. How many times have I read excerpts from a superb speech by a chief executive, to, say, the Kalamazoo Chamber of Commerce, which clearly and succinctly spells out the corporate viewpoint, yet nothing else is done with the material. Surely it should be considered as the basis of an advertisement, so that the chief executive's position can be communicated on a much broader basis.

I have a feeling that in many corporations the right hand hasn't a clue to what the left hand is doing, which is a shame, because many opportunities are lost under these circumstances.

Here's what we know about how to write advocacy advertising. Write to suit the interests of your audience. You cannot expect high readership levels if the advertisement doesn't interest and involve the reader. Your need for profits will probably turn off the average reader unless he's a banker, an executive type, or an investment adviser. Instead, you should explain how profits will help the corporation provide better service, better products at lower cost. Now you will have the attention of the general public. Be candid and honest. If you are unloved, admit it quickly, and then spell out the facts.

We did some research for Shell several years ago at the height of the energy crisis, when the oil companies were under extreme pressure. Certainly they were unloved. We tested 11 headlines for issue advertisements that dealt with increased prices and profits. The winning headline stated: "There's nothing we can say to make you like us, but we feel a responsibility to explain the increased cost of gasoline, who's getting what, and how much."

The worst headlines reflected the private interests of Shell, "The oil companies can't absorb these costs and stay in business." "Debunking the myth that increased gasoline prices are pure profit for the oil companies."

The research went on to indicate that issue advertisement headlines should not be oversimplified. They should be informative and thereby lengthy. They must be credible. They must present a balanced case.

People, today, have a built-in resistance to forced feeding. We believe it pays to give them the facts on both sides of the argument. If you are right, the audience will recognize it. If you are wrong, take a very hard look at your corporate policies. I repeat, keep it simple. When writing the advertisement, keep in mind who the primary audience

will be. If you are trying to reach the general public, write as you would explain the issue to them orally. Eliminate business language and the words we use every day, like cash flow, liquidity, invested capital, return on equity, earnings per share. The purpose of advocacy advertising is to influence public opinion. If you write in words the audience does not understand, your efforts and your money will again be wasted.

Do not be afraid to use long copy. Long copy can be particularly effective in attracting attention and readership. Research shows that although readership falls off rapidly up to 50 words, it drops very little between 50 and 500 words, but you must involve your reader, you must give him a reason to read on.

"People, today, have a built-in resistance to forced feeding. We believe it pays to give them the facts on both sides of the argument."

Use photographs or charts with captions to tell your story. Research tells us that twice as many people read captions on the photographs or art work as read the body copy. It is therefore important to get the guts of the advertisement handled by the headlines, subhead, and captions.

Don't bite the hand that feeds you. I won't go into this obvious caveat, but in moments of high emotion it is tempting to lash out at our perceived enemies with a point of view. Here is a Canadian example of, perhaps, biting the hand that feeds, Mr. Trudeau's hand. "Mr. Trudeau, you are a national catastrophe." *(Laughter)*

At the time, I think every businessman, including myself, in Canada secretly admired this advertisement, but it is, indeed, risky.

Do not threaten your audience, woo them. It is a mistake to tell your audience that unless they support you, something dreadful will happen. Instead, explain how your activities can benefit them in terms of their interests, jobs, income, education, health, and security.

I will close on the subject of consumer education being a responsibility of big business. We did research for ourselves just last week to find out how much the average consumer knew about Canadian business. We used open-ended questions to eliminate guessed answers. Here are the results:

34 percent of the sample didn't know what percent of sales by the average company was profit.

45 percent thought it was higher than 20 percent.

68 percent of the sample did not know how much tax corporations pay as a percent of gross profit.

Only 9 percent put taxes in the range of 40 to 50 percent.

25 percent of the sample did not think that large corporations contributed to their life style.

24 percent did not believe there was any relationship between profits and creating jobs in the future.

27 percent could not relate profits to improvements in product quality.

50 percent could not relate the size of profits to future salary or wage increases.

We were surprised at how many of the sample understood that profits were reinvested in the business to expand or develop the corporation, but 30 percent thought the profits were all divided up among the management and shareholders. How I wish they were!

This small excerpt from our own research, plus data from other studies, indicated how uninformed the general public is about business. I wonder how many people can really understand the newspapers today, and fully comprehend such phrases as budget deficit, balance of trade deficit, money supply, and how these factors affect their daily lives.

With the increasing trend toward self-improvement, it is time for some of our largest corporations to tackle consumer education in the form of paid print advertising. If a large proportion of consumers do not understand basic economics, then how can we expect to get their support? Giving them some help in understanding economics might create a substantial amount of good will toward business.

In a recent article on economic education, Mr. Christoff from New York University pours cold water on institutional advertising and educational advertising. But I have seen research—and I showed you some examples today—which clearly demonstrates that institutional advertising does, indeed, shift consumer attitudes, and I also believe there is a real place for educational advertising and it is our responsibility to get into it.

Mr. Christoff did, however, warm to correctional advertising, which I believe is an interesting concept—one that was mentioned last night. Here is an excellent example *(slide)* of a Mobil advertisement which seeks to correct errors in a WNBC television evening news report. Many of you will have seen it. "Whatever happened to fair play?" and a series of checks against WNBC.

I believe this serves to educate, as well as to serve notice on the press to be more accurate and tell the whole story. It is time for the news media to be more accurate in their stories and, in my view, it is time for our news editors to publicize the beneficial works of our institutions and private enterprise, as well as the bad and the ugly. In this imperfect world, we cannot live on bad news and despondency all the time.

One thing is for sure, there are those who believe a conspiracy of silence exists and that business is part of it. Unless we break that silence, the verdict will be guilty as charged, without even so much as a trial.

Communications and the Cartoonist

Charles M. Schulz
Cartoonist and Creator of "Peanuts"

(Drawing a picture of Snoopy reading Fortune *on his kennel. Applause)* That's just to show you I'm not a fake. *(Laughter)* I'm always afraid, when I go someplace, people will think they just sent in some Hollywood star or something.

Several years ago, I drew a Sunday page where the kids were playing croquet, and Lucy had finally hit Charlie Brown's ball, which gave her the right, according to the rules, as you remember, to place her foot on her own ball and whack it hard enough, sending his ball flying, not only clear out of the game but across the yard, underneath the fence, through the hedge, out into the street, where it rolled down the curb and it rolled about six or seven blocks on down into the next street, with Charlie Brown chasing it all the way.

He finally found the ball stopped, and fortunately there was a telephone booth right next door to where the ball had stopped. So he went into the telephone booth and he called back to where the kids were playing. One of them answered the phone and he said, I'm down here, about seven blocks away. The number is 343-9718. Call me when it's my turn. *(Laughter)*

When you do a strip like that, of course, you can make up a number, or if you have a television producer like Lee Mendelsohn, who is obsessed with calling people on the phone and calls you so much, you think, I'll get even with old Lee, I'll put his phone number in there. *(Laughter)* So I put Lee's telephone number in that Sunday page. These things are drawn at least ten weeks ahead of time, and I'd forgotten all about that Sunday to come. About six o'clock in the morning, as I recall, the telephone rang for the first time at Lee's house and his wife rolled over very sleepily and picked up the phone and said, hello, and she heard this little voice say, it's your turn, Charlie Brown. *(Laughter, Applause)*

I suppose that's communicating. It is one indication, obviously, that people do become very concerned about the characters, they learn to care about them. Comic characters, I think, have a unique way of attracting attention. Oh, pretty girls' faces and things like that in magazine ads will always stop the eyes when you're thumbing through a magazine. But if you're thumbing through an ordinary magazine you subscribe to, and suddenly there's a Popeye there or a Steve Canyon or something like that, it's an old friend, it's like seeing the photograph of an old friend. If Snoopy is there in that magazine, you stop, you have to find out what he's doing there. An ordinary cartoon won't quite do it—and there are a lot of great cartoonists drawing for some of these great magazines—it's the face of this friend that you've known all of your life, characters that we've grown up with, like Little Orphan Annie who's been around for 45 years—I think Little Orphan Annie is about ready to die.

But when you see that character out of place, then you know you've seen a friend and it really is an eye stopper. People care about these characters, and I suppose it's the caring. With me, I'm afraid I'm beginning to live a little too much in the past. A lot of the ideas I've had lately come from things which I remember happening to me when I was a little kid. I remember losing a baseball game once, 40 to nothing. That's where I got the idea for Charlie Brown suffering all those losses.

It's not true, you know, that Charlie Brown's team never won a game. They won once when he was home in bed sick. *(Laughter)* Snoopy has not always been the little dog that just trotted around the neighborhood. Snoopy finally got up on top of that doghouse and, you know, for the life of me, I don't know how in the world he ever got up there. I can't remember how he got up. All I know is, the first day he was up there, he rolled off, fell flat on his stomach and he said, well, life is full of rude awakenings. I don't know how I happened to think of putting him up there, but that was the one idea that I think made the strip take off. From there, it became unique and Snoopy became more than an ordinary dog. Later on, he began to fight on top of the doghouse, pretending that he was a World War I flying ace.

I received a letter from the Richthofen family recently, about all that. I think they're offended because of all this notoriety. I also received a letter one day from General Pershing's son because Snoopy always says, I curse this stupid war. He says, I don't know what General Pershing has got us all out here for anyway. *(Laughter)*

> "The one book which Snoopy never quite got out was the one that I thought had tremendous possibilities and that was the one that was to be called 'The Sensuous Dog by S.'"

Snoopy has published a book, the collection of his writing, now. The one book which Snoopy never quite got out was the one that I thought had tremendous possibilities and that was the one that was to be called "The Sensuous Dog, by S." *(Laughter)* But no one published that one. He got a letter from one of his publishers one day. He submitted a manuscript and the editor sent back a little note saying we're enclosing two rejection slips, one for the story you just sent us, and one for the next story you send us. *(Laughter)*

One of my favorite short stories of Snoopy's is the one about the two mice who lived in the museum. One night, one of the mice crawled into a suit of armor and he got lost in the suit of armor, and he said, help, help me make it through the knight. *(Laughter)* Snoopy was delighted with this. He said, once you've written something, you know when it's good. *(Laughter)*

Snoopy has a brother who appeared on the scene sometime, I think it was last summer. It turns out that his

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brother lives in Needles. Do you know why he lives in Needles? Because when I was six years old, for one year in my life, I lived in Needles. I don't know who in the world lives in Needles, but we lived in Needles when I was six. So now I had to do some research. I called up the chamber of commerce down there at Needles, to discover what it was all about. Is there still a Harvey House in Needles? Can I mention the Harvey House in the strip? And things like that. I always try to draw about things that I understand to a fair amount.

Anyway, Snoopy has this brother. Now, his brother's name is Spike and he lives with the coyotes. Apparently, he hasn't been very successful since the Harvey House closed down, and he's out there in the desert living with the coyotes. Snoopy was invited for Thanksgiving dinner, but he hated it. He said, those people eat bunnies. *(Laughter)* He was horrified to discover that.

Soon, he is going off to Wimbledon. Snoopy loves to play tennis. He practices against the garage all the time, and he and the garage entered a mixed doubles tournament once, several years ago. *(Laughter)* Somebody asked him, how did you do in the mixed doubles tournament, and he said, well,.we lost. He said, I played great, but the garage choked. *(Laughter)*

So he's decided he's going off to Wimbledon, and of course, he doesn't know where Wimbledon is. But he says, there's somebody I want to see in Kansas City, and perhaps while I'm passing through Kansas City I can see this friend. Well, he's got another relative who's going to appear in Kansas City, and so that is kind of a secret, but that's something that's coming up, too. What I'm going to try to do is build this cast of characters around Snoopy, the relatives that he has living around the country, and then I hope someday to bring them all together for a grand reunion. He tried it once, they all got together, but he said it wasn't the same. You get back together again, you've drifted apart, things aren't the same as they were back when they all lived at the Daisy Hill Puppy Farm. Those were the real days. They used to sit around and sing a lot. *(Laughter)* But he went back one day to try to find his birthplace and where he was raised, only to discover with horror that the Daisy Hill Puppy Farm is gone. It has been replaced by a six story parking garage.

He had looked forward to it, because he has so many memories, and he stood there on this hill, looking out over the six story parking garage, and he said, you stupid people, stop parking on my memories. *(Laughter)*

Of all the things that I've thought of, I think I was luckiest when I thought of Linus and his blanket. I say lucky, because I know if I hadn't thought of it, Mort Walker would have thought of it within a very short time. I think this is the one thing which has captured the reader's imagination most of all, and every time I go someplace I get backed into a corner by some woman who has to tell me all about her grandchild who drags his blanket around. After 10,000 stories about grandchildren and their blankets, I don't care to hear about those blankets anymore. *(Laughter)*

And every time the phone rings—it hasn't happened in a long time, but it used to be that people would call and say I have a great idea for a special product and I'd like to present it to you. I say, what's your idea? Well, I can't tell you over the phone. Why not? Well, it's kind of a secret, but I think it's a good idea, and I know it's going to be a blanket. I finally get them to tell me what it is. Well, I had the idea to market this blanket.

And so, of all the things we have out in the market, the only thing we can never put out is a security blanket.

One of the things I'm most proud of is the fact that if you look up "security blanket" in the dictionary now, there it is, and I can't get over the fact that I thought of something that's in the dictionary. The same way as: Happiness is a warm puppy.

I've been ripped off on that an awful lot. Everyplace I go, I see happiness is this or happiness is that, and I've been criticized for that, too. I've been criticized by some profound philosophers who say, you know, there's more to happiness than that. Life is more complicated than that. But I still defy anybody, if you really have to talk about life and really have to define what happiness is, I defy anyone to give me an example of what is more happy than a little boy or a little girl holding a warm puppy. That's what it's all about to me, and I'll stand on that. I don't care what they think.

Linus has a problem, of course, with this blanket, but I suspect all the time that it could be the mother and it could

"...if you really have to talk about life and really have to define what happiness is, I defy anyone to give me an example of what is more happy than a little boy or a little girl holding a warm puppy."

be the father. When he goes to school, he has these notes in his lunch—he opens his lunch and there's a note from his mother saying, your father and I have worked very hard to give you this education, so make sure you study hard. Charlie Brown says, now I know why you drag that blanket around.

He has a grandmother who hates blankets. The odd part about this blanket business is that the mothers really tolerate them quite well. It's the grandmothers who can't stand the blankets because it's a reflection on their own bringing up of children, and Linus' blanket-hating grandmother is the worst of all. But Linus has worked out a system. He knows that when his grandmother is coming over to visit she's going to bug him about this blanket. Can't you get rid of that blanket? Why do you have to drag that thing around? So if he knows she's coming over, he mails it out in a self-addressed envelope and it comes back in about four days, if he's lucky, and she's gone and everything is all right. *(Laughter)*

Lucy, of course, is the one that pulls away the football from Charlie Brown every year. Boy, it gets hard to keep thinking of those football ideas. I've done that for 19 straight years, now, and I think my favorite of all is the time when she says, I'll shake hands with you, Charlie Brown, I'll shake hands and I'll guarantee that I'll hold the ball and you can come running up and kick it. He says, well, when you shake hands with somebody, I guess that means she's going to hold it. So he comes running up, she pulls the ball away, and he lands flat on his back. She leans over and she says, a woman's handshake is not legally binding. *(Laughter)*

One year, he says, how long do you think I can put up with this? We got a little bit of biblical reference in there—you know—how long, oh Lord, how long—she pulled away the ball, she leaned over him, and she said, how long, Charlie Brown? All your life. *(Laughter)*

I like Peppermint Patty and the little girl who is now involved in trying to make hats for her baseball team, little Marcy. I don't know why Marcy calls her sir. That's beyond me, but somehow she likes Peppermint Patty, and Pepper-

mint Patty is the one who is kind of mystified by love. She says, love, what is love, Chuck? And again, I was thinking back to something that happened a long time ago. She said, Charlie Brown, explain love to me. He said, well—I remember, in one of the other strips, he said, you not only can't explain love, you can't even talk about it. He said, my dad said once that he owned a 1934 Ford and there was a little girl that he liked a lot and he used to take her for rides. One day he went to pick up this girl in his 1934 Ford. He knocked on her door, she answered, and they walked down the front walk. He held the door open for her—I guess kids don't hold the door open for girls anymore, but they did in those days— he held the door open for her, she got in, he closed the door. When he walked around the back of the car, she leaned over and flipped the little button that locked him out. And then he jiggled the handle and she just sat there and kind of grinned at him. And Charlie Brown said, I think that's what love is. Peppermint Patty said, I don't know about you, Chuck. That's it. *(Laughter)*

Sometimes I'm asked, what is your most favorite strip. I really don't have any favorite strips, but of all of the strips the one that got the most attention was the one when the kids were looking at the clouds. We used this in a movie, and it's in a play which is running in San Francisco now, called "Snoopy." Lucy, Linus, and Charlie Brown are lying on this little knoll and they're looking up at the clouds, and Lucy says, it's kind of fun to look up and imagine what you see in those clouds. You look at the shapes and they remind you of things. Linus, what is it that you think you see? And he said, well, that little group of clouds over there looks a little bit like the map of British Honduras, and he says, up there, that small cloud reminds me a little bit of Thomas Eakins, the famous portrait painter, and over there, that large group of clouds reminds me very much of the stoning of St. Stephen. And he said, I can actually see, in my mind, I can see the Apostle Paul standing to one side with garments folded at his feet. That's what I see.

"My only job is to entertain and to try to say something funny, and if you give me credit for being some kind of communicator, it's something that I'm really not even thinking about."

Lucy says, you have a fine imagination, Linus, that's very good, I'm proud of you.

Charlie Brown, what is it that you think you see? He says, well, I was going to say that I saw a ducky and a horsie, but I changed my mind. *(Laughter)*

You know, the odd part about all of this is that I've had people say, why don't you do this with the strip, why don't you introduce some religious teaching into it? Actually, I'm the first cartoonist ever to use Old Testament scripture and New Testament verses and things, but actually, to teach, you know, would be a terrible mistake. People say this would be a great tool to use for education. Well, Wilson Rowles has agreed to some kind of educational films which we're going to be doing in the future, but to introduce them into the strip, I think, would be fatal, because we have to remember that my No. 1 job is to help that editor sell his newspaper. My only job is to entertain and try to say something funny, and if you give me credit for being some kind of communicator, it's something that I'm really not even thinking about.

I frequently say—and people think I'm just kidding—



all I'm trying to do is get something in the mail for next week. Most of the time, I'm not kidding. That's all I'm trying to do, just get something in the mail. But basically, it's something I do because I have no choice. It's not a great ambition. I'm not one of those that say comic strips are art. I don't think comic strips are art. I don't think illustrating for magazines is art. In fact, I doubt very much even if we can say what art is. We have to let a few generations go by.

I think it was Charlie Brown's sister, Sally, who was horrified one day when she came home with her little piece of sculpture. It was a coat hanger which she had made into a piece of modern sculpture and she got a C on it. She said, a C? She took it back to school the next day and she raised her hand and she said, I have a question. This C that you gave me on this sculpture that I did, how did you arrive at this C? Was I judged upon this as being a work of art? Is it not true that art can only be judged by future generations? Was I judged—*(Laughter)* And she says, perhaps I was judged upon what I learned in this project. If this is so, then should not you, the teacher, who imparted this knowledge about art to me, also be willing to share this C with me?

(Laughter) Was I judged upon my effort? I tried as hard as I could. Was I judged upon the quality of the material out of which my piece of sculpture was made? If so, should not my parents share my C, for are they not the ones who get the coat hanger from the dry cleaners down the street?

She finally ended up by saying, I think, something like the squeaky wheel gets the grease, or something like that.

What I'm getting at is that I don't pretend what I'm doing is art. It's not a tremendous ambition, but it is something that I always wanted to do, ever since I was about six years old. I knew I wanted to draw a comic strip, and I don't think I could ever stop drawing. I don't think I could ever stop if I wanted to. It's one of those things that I am obsessed by, the same way as Willie Mays, I think, was obsessed by playing center field, or Hank Aaron was by hitting home runs. He couldn't stop doing it.

So if I'm communicating, I'm communicating only because it's the one thing I know how to do. I feel that I understand it reasonably well. I have a knack for being able to draw fairly well. I can write fairly well. And you put the whole thing together and you've got a comic strip artist, and this is what I do, and this is how, I guess, I communicate.

Question and Answer Period

Q: *How much do you rely on your own childhood memories?*
A: I would say about, oh, 49 percent. I've gotten six ideas from my own children in 25 years, which will get you no place. *(Laughter)* So it's observation and living. I would say most of the ideas come from little key phrases that pop into your mind every now and then. Jeannie and I were playing tennis the other day and I heard somebody say, oh, the reason we lost is the tennis gods weren't smiling upon us. Well, suddenly, I had an idea right away. Snoopy comes back and he says, I lost today. I guess the tennis gods were not smiling upon me. Woodstock chatters away with these little funny marks of his, and Snoopy says, that stupid Woodstock, he doesn't believe there are such things as tennis gods. I like Woodstock because he's kind of naive. *(Laughter)*

Q: *Will Lucy ever get sweeter?*
A: I have a feeling, now and then, that she hasn't been quite as mean as she used to be in the old days. I don't know why. Maybe I just drift away from certain ideas, that's all. Of course, she's greatly enamored of Schroeder, and she says, wouldn't it be great, someday, Schroeder, if you and I were to get married, and we toured the country, and then we would tour Europe, and you would play all of these marvelous concerts, and all of a sudden, one day, you took a day off and you went skiing and you broke both of your arms. *(Laughter)* And she says, you broke both your arms, and you wouldn't be able to play the piano again, and I'd have to get a job in a laundry to support us. Wouldn't that be romantic? *(Laughter)*

Q: *What's inside of the doghouse?*
A: Well, inside the doghouse is a fabulous place. The only thing you have to be careful of about the doghouse is when you enter, there's a very sharp turn, they say, as you go down the stairway. *(Laughter)*

Q: *Is Lucy going to fly in the Powder Puff Derby?*
A: I think I've already missed it. I've gotten too far ahead. I'm not sure. I did it last year. That's a very difficult thing to do because the doghouse can't move and I think I used up about all of my ideas on the Powder Puff Derby last year. The same way as with wrist wrestling. Now and then, you write yourself out of something. Snoopy went to Petaluma once, to take part in the world wrist wrestling championship. For those of you who are from out of town, you do not know, I suppose, that not very far from here is a community called Petaluma which is actually the home of the world wrist wrestling championship, and Snoopy went there to enter it, and in the rules, the contestants place their hands like this, and grasp each other's thumbs. Snoopy was eliminated because he doesn't have a thumb. *(Laughter)* So I wrote myself out of that. He can never go back again.

Q: *For a sobering moment, all of us are involved in the creative world. Either we depend on people who are creative or we try to be, ourselves. Do you ever reach periods when you wonder where the next series of ideas is going to come from? Second, do these ideas come in a whole pattern where you might have a whole series, or are there times when you are worried about ideas?*
A: I run out of ideas all the time. The most maddening thing is when you approach, say, a Monday and the following days and you think, I've got this whole week now, I can really get something done. And you go in there Monday morning, you can't think of a thing. You sit there. Some magazines have come in the mail, so you read a magazine. You put it back and you start trying to think. Nothing comes. The whole day goes by and instead of catching up, actually you've fallen a day behind. You've blown the whole day. You might as well have stayed home and gone off and done something. That happens all the time.

I find that working in the same place is very important. If I had to go off and work in a different room, or even to work at home, to sit in the bedroom or the library or something, thinking, well, I've got nothing else to do tonight, maybe I'll just sit here and think of a bunch of ideas. My mind simply will not work unless it's in that very same room that I'm used to being in.

But then, all of a sudden, I'll get going on some ideas, and one of the things I think you have to do is just kind of shut out the whole world. I would say a cartoonist is like a composer or a writer. You just crouch over that piano or that typewriter, close out the world and just sit there by yourself and try to draw something funny. We also have to remember that cartooning is still, basically, drawing funny pictures. Cartooning is not writing. Cartooning is part writing, but basically it's still drawing funny pictures, and there's nobody that can compete with you. If you simply illustrate some ideas, then the writers can compete with you. And if you draw an adventure strip where your drawings are nothing but illustrations, then you're competing with the television screen, and even worse, you're competing with the movie screen, and the cartoonist cannot compete with the television screen nor can he compete with the movie screen. He has to do something that can be done only in his own medium, and this is why, I think, Milt Caniff has always been so good with Terry and the Pirates and Steve Canyon. He knew. Although he was illustrating, he always kept it slightly toward the cartoon style. The same way with Roy Crane, who used to draw Washtubs and Captain Easy and then Buzz Sawyer. It was still a rollicking style of drawing. It was something the photographer could not compete with. So you have to stay on your own ground. I think this is very important.

But I do get running on ideas. Like the New Year's Eve afternoon when I tripped and broke the bone in my foot. I went back to work four days later and boy, I was grinding out ideas with Snoopy being in a cast so fast I could hardly draw them. I was mailing them in and mailing them in, and I got further ahead than I've ever been in my life.

But again, it was because I had experienced it.

Q: *For whom do you cartoon? Do you have any particular audience in mind?*

A: Just myself. Never, I never cartoon for little kids. I'm never thinking about little kids when I'm drawing them. If I admit that I slant it for any audience, I suppose it would have to be for the college age audience and slightly above that. But even that is not necessarily true. Basically, I just cartoon for myself. I draw what I think is funny and hope that everybody else does.

Q: *Does politics ever enter into it?*

A: Politics never enters into my humor for several reasons. One, it doesn't interest me that much, and I think there are such things as targets which are simply too easy. *(Laughter)* Also, I'm too wishy-washy. I'd make a terrible political cartoonist, because if the governor took me out to lunch I would not be able to draw a bad cartoon about the governor. *(Laughter)*

So I always say I think I'm really drawing about things which are more important than politics. You know, love and friendship and things like that.

Q: *Which one of your characters do you most readily identify with?*

A: Oh, none of them, really. I like all the ten that appear most, and the reason they appear is not only because I like them, but because they provide ideas, and I think this is the secret of a good cartoon character. It's not only the ideas that they act out for you, but the very nature of the personalities you have given them that eventually provides you with ideas. Peppermint Patty provides me with ideas, and Charlie Brown, with his wishy-washy personality, provides me with ideas, and Snoopy provides me with ideas. So whenever you get stuck, you go back to your little white pad of paper and you start drawing Snoopy on top of the doghouse, and suddenly you draw his ears sticking up. Nothing happens from that, so you draw Charlie Brown, do a little bit on a piece of paper. He's standing on the pitcher's mound. Lucy comes walking up and says something to him. What does she say? I don't know. I can't think of anything. So then you go back to these characters, and this is the way you think of ideas.

Q: *Do you ever dream about the characters?*

A: Almost never.

Q: *You have your first full length film opening on Friday night. Do you think there will be more?*

A: Oh, yes. The film that's on TV Friday night is called "A Boy Named Charlie Brown." How many have ever seen it? It's a full length animated feature, I think it ran 83 minutes. Now, for television we've trimmed the thing down to about 75, which I think is going to make it a much better movie. This is the first one that we've had on television. After that, we'll probably have "Snoopy Come Home," which is the second feature. We're now working on a third feature, called "Race For Your Life, Charlie Brown," where all the kids go to camp. And they're riding off on this camp bus, and Sally says, what do I want to go to camp for? She says, I hate going places. I don't like to go on trips. The only kind of trips I like to go on are the kind where you can be home by noon. *(Laughter)*

So that will be running in the theaters some time next year. Now, you may be interested in knowing that all of the animated films are done down in Hollywood by Bill Melendes, who used to work for Disney, and then for UPA. He was the one, also, who did all of the Ford commercials when we were doing those about ten years ago. So when we got the opportunity to do television work, I asked that Bill Melendes be the one to do these things.

Each television show runs, I think, 27 minutes. Television animated costs right now are a minimum, the way we do them, of $5,000 a minute, which is why you don't have very many prime time television shows. And each half-hour television show requires 30,000 drawings, which means it takes us about six months, or takes poor Bill about six months to do them. I just write the stories and think up all the gags, and all of Bill's people then do the drawings.

Q: *How do you feel about the animation, the characters coming alive?*

A: I was very proud of, "You're a Good Man, Charlie Brown." Do you know that that's the most produced musical in the history of the American theater? Every high school in the country and every college has put the thing on, and now the Snoopy one is starting, and I hope the same thing happens with Snoopy, because it's fun. And it's very gratifying for me to sit in that theater and to hear an actor speak a line which I thought of, oh, 30 years ago. I can remember standing in a building in Minneapolis, looking down in the street, at a fire hydrant, and thinking of a line, and now 30 years later I hear an actor speak it on the stage and everybody laughs, and it's a great feeling.

A cartoonist doesn't get to hear the people laugh because he draws the thing, mails it in, and that's the end of it. But it's fun to sit in the theater.

Does Corporate Advertising Affect Stock Prices?

Eugene P. Schonfeld
Assistant Professor of Advertising, Northwestern University

John H. Boyd, Jr.
Assistant Professor of Finance, Northwestern University

Boyd: I would like to make a brief prefatory statement; perhaps disclaimer is a better term: "This research did not receive financial support from any firm, foundation, or agency, except for partial deferment of data processing and computer costs by Northwestern University. Like most scholarly research, our study is not productive of any absolutely definitive answers. However, it does allow us to draw a number of important inferences, some with a greater degree of confidence than others."

Schonfeld: The research we are presenting is not really new; in fact, we've been doing this work for two years. We have written a paper for the *Journal of Finance*, which is now being reviewed for publication. Nevertheless, you're the first large audience ever to see the results. I might also mention that this is work in progress, not necessarily the end result.

A thorough search of publications in marketing, advertising, finance, and public opinion research shows that there is no hard research on corporate advertising and stock market prices. John and I spent a number of hours in the library and we were quite amazed that this subject had never been given a full empirical treatment. So we set out to do it.

Moreover, if you're familiar with financial studies, the most widely accepted stock market theory implies that corporate advertising probably has zero effect on equity prices. In Chicago, our home town, there is a minor university located in Hyde Park—the University of Chicago. And that particular university has something called the Merrill Lynch Institute for Security Analysis, or some such name. Over the last fifteen years or so, researchers at the U. of C. have published a vast number of papers, all claiming that the stock market is a perfect, or at least near-perfect, market.

If the stock market is a perfect market, at any point in time the price of a company's shares reflects perfect information. All buyers and sellers know about the company. They know its history, they know its goals, etc., etc. In addition, there is zero search cost for information. That is, if you're a potential investor, information is freely available to you, on which to make buying and selling decisions.

John and I don't believe in "perfection," so what we're doing here comes close to challenging the *ex cathedra* theory. A lot of you may take it for granted that corporate advertising has an impact, but there are some hard-nosed guys at Chicago who would say you're probably wrong.

Traditionally, corporations have certain publics that they try to communicate with. They talk to investors, to shareholders, employees, legislators, regulators, and so on. The logic or rationale for this is that firms want to stimulate awareness, build good will, influence attitudes, and affect legislative decisions. Many of you here have mentioned Daniel Yankelovich and his attitude research, which helps you justify what you do. Basically, this is very much in the traditional framework. *(Slide # 1)* In fact, there is a "traditional indirect influence hypothesis," as John and I think of it. That is, what corporate advertising does is influence the



corporate environment. It influences potential investors, legislators, employees, and so on. They, in turn, may yield benefits to corporate shareholders. Improved operations may result in higher earnings per share, and higher earnings per share should produce higher stock prices.

There's an alternative view which we call the direct impact hypothesis. *(Slide # 2)* That is, corporate advertising in its own right may affect stock prices. It could lower investors' search costs for information and enable them to



make better decisions. Because of this, they may be willing to trade at higher (or lower) stock prices.

Our purpose in doing this study was very simple: to determine if, and I underline the word *if*, corporate advertising has direct impact on stock market prices. And if so, what is the nature of this impact? Now, John will tell you specifically what we did to test the direct impact hypothesis.

Boyd: Our basic study design involved four basic steps: (1) select firms for analysis; (2) gather financial data; (3) gather advertising data; and (4) test for advertising effects.

To begin, we selected a large sample of firms, more or less at random, without knowing whether or not they were advertisers. The only non-random element about the sample is that they were big firms. Next we gathered financial data, because there's a body of theory and common sense which indicates that stock prices are largely determined by financial variables. Therefore, if we were to isolate the impact of advertising, if indeed there was any impact, we had to control for the financial variables that everybody knows are important.

Now, a bit about the firms in the sample. They were large companies, those with over $200 million in sales in the year 1972-73. We took them from something called the Compustat financial tapes, a computerized data source of

10-K type information across a large number of industries. Our final sample of 721 firms is similar in composition to the Fortune 500.

Having obtained the financial data, we next gathered advertising data for eleven print vehicles using the audited information from the Rome Reports over three years, 1971, '72, and '73. In some cases, we were not able to get the information from the Rome Reports, and actually had to audit magazines ourselves. That was, to say the least, a tedious job!

I should mention that *Fortune* magazine did one very nice thing for us. The provided us with some information on advertising expenditures—not for *Fortune*—but for *The Wall Street Journal*. I wouldn't want to make an invidious comparison, but Dow Jones and company was not willing to give us any data at all. And as you can well imagine, this kind of study, with *The Wall Street Journal* left out, would have been no study at all. Fortunately for us, *Fortune* spends large amounts of money auditing every edition of *The Wall Street Journal*. Unfortunately, no one audits *Barron's*, and *Barron's* is absent from our study. But you can see the thrust from looking at the list of included publications. *(Slide # 3)* These are all print vehicles that would be expected to reach investors.

Slide # 3

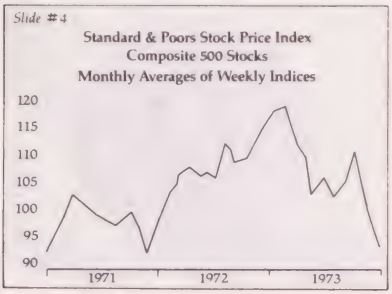
Media Vehicles Studied

Banking	Fortune
Banker's Monthly	Harvard Business Review
Business Week	Institutional Investor
Dun's Review	Nation's Business
Financial World	The Wall Street Journal
Forbes	

The three sample years, 1971, '72, '73, were not chosen at random. We chose them specifically because we wanted contiguous periods. We also wanted some different stock market conditions because we thought that if, perchance, there was an advertising impact of the kind we were trying to isolate, it might depend on conditions in the market. *(Slide # 4)* And you'll see, in fact, that over this period we had very different sorts of stock market moves.

The dependent variable, academic-ese for what we're trying to explain or predict, is stock price. To be very specific about it, however, the dependent variable that we actually used in statistical tests was closing stock price per share, adjusted for any splits or stock dividends that might have occurred during the year.

Slide # 4



As I mentioned earlier, we knew that if we were going to attempt to isolate any advertising impact, there was a set of financial factors that had to be taken into account. In one respect, we were very fortunate because there already existed a large research literature on this subject, some of it in the financial community, a lot of it in the academic community. Therefore we were able to verify our results with financial variables against other research. *(Slide # 5)*

Slide # 5

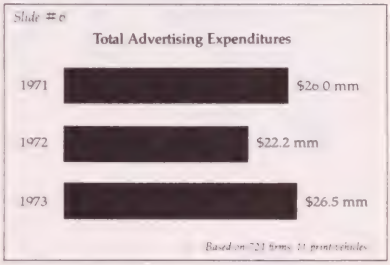
Possible Financial Determinants of Stock Price

Earnings Per Share	Continuity of Earnings Growth
Dividends Per Share	Continuity of Dividend Growth
Growth in EPS	Gross Profit Margin
Fluctuations in Earnings	Net Sales
Leverage	R and D Expenditures
Stock Price Stability	Etc.
Size of Firm (Total Assets)	

These are some but not all of the financial variables tested. I think you'd find it difficult to take issue with most of these variables: earnings per share, dividends per share, growth in earnings per share, fluctuations in earnings, leverage (the book value of debt to equity), stability of stock price, the size of the total organization, etc. In fact, we tested other variables as well, but the list is too long to include here. Eventually a reduced set of explanatory variables was chosen for the final analysis.

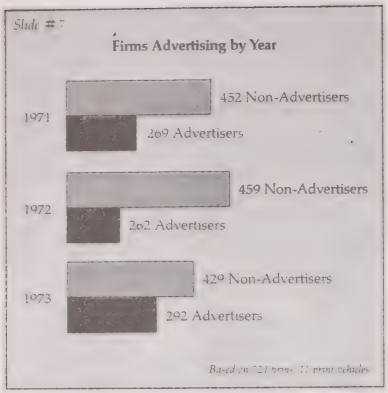
What about the advertising by firms in the sample? We see, very briefly, that total ad expenditures were quite stable through the three-year period. *(Slide # 6)* On an

Slide # 6

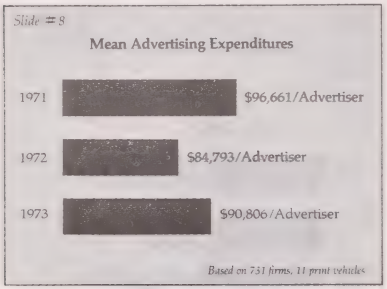


average, it was about $24 million to $26 million. *(Slide # 7)* That's based on a sample of 721 firms and the eleven print vehicles that I just mentioned.

As you look at the three years, you'll see that companies that didn't advertise in the media studied outnumber the advertisers. One might ask why, at this point, we didn't throw out the non-advertisers. The answer is, first of all, that we wanted to be able to make comparisons across the two groups: what did the performance look like for advertisers versus non-advertisers? Second, we wanted to make sure not to bias the results through the process of sample selection. As explained previously, the only criterion for selection was firms with sales over $200 million that happened to be on the Compustat tapes.



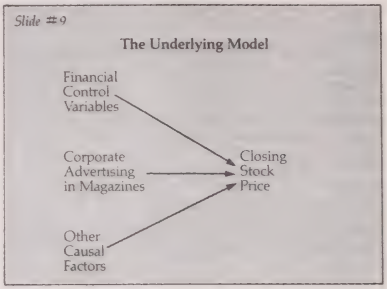
A final point on advertising expenditures. *(Slide #8)* I was surprised when we calculated average expenditure. The subsample of firms that advertised in these same eleven vehicles were only spending roughly $90,000 a year, on average.



The underlying model hypothesized that there are three sets of influences which combine to determine stock prices. *(Slide #9)* The first set is composed of financial control variables. The second set of hypothesized influences is the test set—i.e., financial press advertising measures. And the third set of influences contains everything else, all those things that we're unable to capture statistically. Economists sometimes call this a portmanteau variable—unexplained error is probably a more descriptive term.

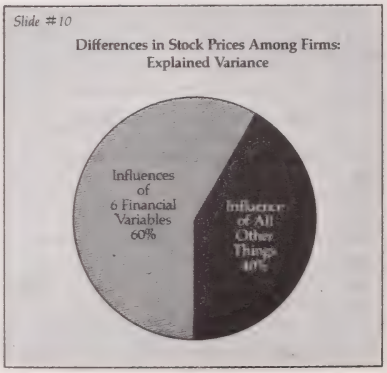
Gene, do you want to go ahead now?

Schonfeld: We started our analysis by taking a look at the financial control variables in their own right to see if our study matched previous studies. In the final analysis we used six financial control variables: earnings per share, a measure of the consistency of growth in earnings per share, a measure of continuity in dividend payments, leverage, total assets, and profit margin on net sales. The financial literature says that these variables ought to have a certain kind of relationship with stock prices. Earnings per share should be positive, consistency of earnings and of dividends should be positive, leverage should be negative, assets and profit margin should be positively related to prices. Our results with these variables were always consistent with expectations.



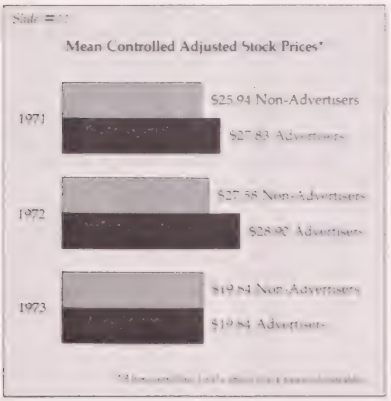
We tried other variables. (Slide #*10*) For example, we tried the absolute level of dividends per share, price volatility, several measures of earnings volatility, R and D expenditures, net sales, and some other measures. Basically, these six explanatory variables capture almost all the explanatory power that we can attribute to financial measures. Adding other variables didn't produce much improvement, and overall we were able to explain about 60 percent of the variance in stock prices. The results indicated that these six financial variables were statistically significant, in accord with the theory and with existing studies. When I say "statistically significant," we're talking well above the 95 percent confidence level.

Next, we took advertising spending in the eleven audited media, and introduced that into the analysis, to see if adding this one variable would make any difference. The results, I think, are not surprising to most of you—a little bit



surprising to John, as a hard-nosed economist. Advertising had a positive statistically significant effect in 1971 and 1972, the up-market years, but not in the 1973 bear market.

In the third year—I fear some of you may remember 1973 with a little regret—advertising had no measurable effect. We are going to talk about that third year a little bit later. It's a very interesting period in our study. *(Slide # 11)*



What is the dollar impact of advertising? Well, we have a variable which we call mean controlled adjusted stock prices; that is, average stock price after you've taken account of earnings per share and the other financial variables. In other words, if a company spent zero dollars on advertising in the eleven media and was typical in all other respects, it would have had a stock price of $25.94 in 1971. An advertiser, if it had spent the average amount on advertising, would have had a share price of $27.83.

Thus, for non-advertisers, mean controlled adjusted stock prices were a bit less than for advertisers, about two dollars less in 1971. Two dollars per share may not seem like a lot, but actually this is quite significant when you're talking about 721 companies with millions of shares outstanding. You can see that in the next year, advertisers again outperformed non-advertisers, and that in 1973 there was virtually no difference.

The gut issue here is that we found a positive and significant impact for advertising in two of the three years. Given that this conclusion is correct, a lot of other questions are immediately raised. We'd like to go through a series of these questions with you.

Question (1): Based on stock prices only, is it worthwhile to advertise, and if so, what is the optimal budget? (When we say "optimal," we mean the budget that will maximize the price of your stock.) We estimated a corporate ad budget that would have maximized stock price for the average firm in our study over the three year period. This budget was the point at which the cost of advertising, and of course that's a reduction in earnings per share, is just equal to the benefit. This point was positive—meaning that it does indeed pay to advertise. The optimal budget, as we estimated it, was .0079 times total earnings before taxes.

What does this mean in terms of budgeting? *(Slide # 12)* Or theoretically, how much should the typical firm have spent per year, for the years that we studied? It turns out the average optimal advertising expenditure should have been $851,547. On average, the actual results were $90,753. In other words, companies spent about one-ninth what we estimate they should have. Of course this conclusion is based on statistical estimates and should be interpreted cautiously. There is much variability among firms, and no firm conforms precisely to the average. However, the results do suggest that many firms could have benefited by spending substantially more on corporate advertising, if their objective was to maximize stock price. In fact, John and I have done a little analysis on individual firms, and it is possible to estimate the optimal budget for a given firm, if you want to apply similar kinds of analytical methods.

Now, John will go to some other questions.

Boyd: Question (2): Does the impact of financial press advertising vary systematically across industries? We spent some time looking at this, for it wasn't particularly hard to do once we had the large sample. We simply split the sample up into various industries and replicated the tests that we've already described.



Surprisingly, the tests that we've carried out to date don't show large differences across industries. It may be that if we used alternative industry definitions or looked at them differently, we might find varying impacts. But the evidence that we have so far indicates that if there are differences, they're not very large.

Question (3): Does the effect of corporate advertising vary through time? Well, the answer to that is based on only three years of data. It would have to be yes, however, because in 1973, the down market year, we found virtually

no effect. (Even in '73, however, *some* firms were apparently able to demonstrate a positive advertising impact. We'll discuss these additional findings shortly.)

Question (4): Does the effectiveness of corporate advertising vary systematically across print media? For example, do you get more bang for the buck advertising in *Fortune* or in *The Wall Street Journal* or *Forbes*, or wherever? I see a few of the *Fortune* people out there getting a little nervous right now. Apparently, yes, the effectiveness does vary. We were able to make comparisons across media, and begin to answer that question. However, there are two reasons we don't want to talk about those results today. One is because I think it would be highly discourteous to stand up here and make invidious comparisons—although I would do that anyway! *(Laughter)* The second reason is that these tests are exceedingly difficult. The statistical problems involved in sorting out the separate impacts are vexing, and therefore our results are tentative.

Question (5): Are there specific financial attributes or characteristics that constitute a "good story" which may amplify the effects of advertising? We looked at some obvious candidates, things you might want to advertise in reaching the investment community, such as growth in earnings per share, or a stable dividend record. There was no consistent significant interaction with advertising that we could measure.

Another thing we looked at is that perhaps you're a company that's been having a few problems, earnings have been depressed and so on. Recently you've had a turnaround in performance and earnings are taking off again. Perhaps this is a message that could be advertised and brought to the attention of the investing public. Again, surprisingly, we found no significant advantage to corporate advertising for such firms.

We did find a significant effect with one variable, a measure of the stability of growth in earnings per share through time. For some reason, this variable did seem to amplify the impact of advertising significantly. This is conjecture on my part; but I think the result may have something to do with what investors, perhaps insitutional investors, were looking for in companies during the period 1971 through 1973.

Question (6): Are there systematic differences in the effectiveness of ad campaigns carried out by different firms? We looked at this issue and spent a good deal of time devising a statistical technique to isolate "effectiveness." We used an approach that controls the influence of financial variables and size of the ad budget, and then estimates the impact of corporate advertising for indivdual firms. Subsequent testing showed that, on the basis of this measure, there *are* significant differences in the effectiveness of ad campaigns carried out by individual companies.

In particular, we ran split sample tests comparing the "high-effectiveness" half of the sample with the "low-effectiveness" half. The impact and statistical significance of advertising were consistently much greater for the high group. Actually the "high-effectiveness" subsample had a significant advertising effect even in the 1973 down market year.

Given that financial performance and size of ad budget were controlled for, why do some firms seem to have greater impact than others? We don't know for sure, but it seems to us that a possible explanation will be the kind of variable that financial people don't understand very well; things like choice of media, creative content, ad placement, and so on.

Schonfeld: We have some conclusions. These conclusions have been touched on already so I'll be brief. (1) Corporate advertising seems to have a positive statistically significant effect on stock prices. We're very confident of this, as we've mentioned already. (2) Based on three years of data, the impact of corporate advertising seems greatest in an up market. Perhaps the market is in a speculative mood, and if you draw attention to yourself, a broader range of investors will consider you. We really don't know. But there is some evidence that in an up market, ad impact is greater.

(3) Many firms can probably benefit from spending significantly more on corporate advertising than they now do, if their intention is to affect the price of their stock.

(4) There is some evidence that over the 1971-73 period, firms that could report stable earnings growth had more favorable results from their corporate advertising. Surprisingly, most other message effects tested, such as growth in earnings per share, were not consistently significant.

(5) There appear to be significant differences in the effectiveness of ad campaigns carried out by different firms. Incidentally, among the companies represented in this room there is quite a variation, according to our results. As you know, most of your firms are included in the sample! *(Slide #13)*

Slide #13

Future Research Issues

Optimal Ad Budgeting for Individual Firms

Measurement of Individual Campaigns Over Time

Inclusion of Other Media Such as Television

Inclusion of News, Analyst Meetings, etc.

Analysis of Effectiveness of Individual Media Vehicles

Finally, it's time for the commercial. We have several future research issues, some of which may have already occurred to you. For example, the optimal ad budgeting process for individual firms; we have not really gotten into this issue in any great detail as yet. The tracking of individual campaigns over time is another interesting subject. Our current research has looked at advertising over a three-year period, not over a long time spectrum, the way a single advertiser would normally view his corporate advertising budget. We would also like to include some other media, such as television, in the analysis. We have seen some research on the subject of corporate television advertising, and frankly we don't think it's very good research. John and I would like to look at the inclusion of news, publicity, public relations, analyst meetings, etc. Just like financial press advertising, these represent information flows that are, or at least should be, important to the investment community. And finally, there is the issue of the effectiveness of individual media vehicles. As mentioned previously, we're still working on that problem.

Obviously, John and I do not have the necessary resources—especially financial resources—to tackle all of these issues. But perhaps some of you would like to make a contribution to the effort. I'll just let it go at that. Without further verbiage, why don't we go to some questions.

Question and Answer Period

Voice: Didn't you have to adjust dollar spending for size of audience for the different publications?
Schonfeld: We just looked at total spending in those eleven vehicles. We experimented with another variable, however, which is probably familiar to all of you, a measure of adjusted gross reach. We calculated the audience size of these publications, the number of insertions that were run, and calculated the gross reach, adjusting for the number of pages used. We discovered that our estimated adjusted gross reach figure correlated .95 with actual dollars spent. Dollar spending is a cleaner measure, so we put aside the issue of audience measurement.
Voice: Did you, by definition, take every ad that was in these books, like every corporate ad?
Boyd: That's a very good question. We did *not* go through and look at the content of the ads, and that's been pointed out as a potential problem in our study. We don't feel that it's serious, if, indeed, it's a problem at all.

There was an interesting study done by *Barron's*, surveying institutional investors. They concluded that product advertising was one of the most effective ways of influencing institutional investors. And if product advertising reaches investors, we wouldn't want to exclude these effects.

There is product advertising in our data—companies like IBM run a lot of product advertising in these vehicles. But if product advertising is working via the traditional indirect route, it would increase sales and stimulate earnings, which might then affect stock prices. But remember, we already have earnings per share in the analysis; that's a variable that we've controlled for.
Voice: Wouldn't a corporation agree that the prime objective of advertising is to increase stock price?
Schonfeld: I think that's a question we ought to ask you. We don't know. I will mention that one person we've talked to here sort of pulled me aside and said, "Don't quote me, but...this is something we have tried to do." I don't know. My own particular belief is that manipulating your stock price through advertising is really almost a moral or legal issue, rather than a social science issue.
Voice: You said you selected the year-end stock price as your indicator. Did you test that against average of the year or weighted averages?
Schonfeld: No. The reason for that is, our advertising expenditures were annual figures, and we wanted to get a correspondence between the independent variables and the dependent variables. If we had had a little more resources, we would have gathered the advertising expenditures on a quarterly basis, and used quarterly financial data.
Voice: One of your qualifiers said that even in a down climate, effective advertisers made out pretty well. What does that mean?
Boyd: Let me tell you about the precise test that led us to that conclusion. We took the effectiveness measure that was computed for individual firms, and on the basis of that measure, split the sample in half. Then we redid our tests for the high impact group and for the low impact group separately. For the high impact half of the sample, the effect of advertising was much, much larger. In statistical terms, the coefficient of advertising for that equation was considerably larger than it was for the low group. Also, it was much more statistically significant.

The other interesting thing that happened was that when we split the sample up in this way, the high impact group had an advertising coefficient that was positive and significant—even in '73.
Voice: Could you explain your measure of earnings growth stability?
Schonfeld: Okay, you really want me to? All right, we ran a regression equation where we regressed earnings—
Boyd: All right! What we did was fit a time trend to earnings; a statistical fit like plotting earnings per share through time, and drawing a line through the observations. If you plotted earnings per share this way, there's a statistical measure that tells how widely those observations are scattered around the line. If they were nice and close to the line, smooth and very consistently along it, our stability measure would be high. If, on the other hand, they were scattered all over the graph, our stability measure would be low. That's how we did it.
Voice: Are you surprised at the $90,000 figure?
Boyd: I was, yes.
Voice: That was $90,000 per advertiser?
Boyd: Yes. That's per advertiser, per year, in those eleven print vehicles.
Voice: Are you telling me that I'm wasting my money advertising in newsweeklies? How can you leave out [illegible] and [illegible]?
Voice: How, in this kind of thing, do you screen out the "heard in the street" comment, which knocks our stock price down 18 percent over a period of four weeks? This might have happened at the end of the year.
Schonfeld: Okay. Let's take your question first. If you look at the reach of *Time* magazine, for example, the percentage of the audience that is institutional investors or large private investors is very small. A lot of the people reached are not even potential investors. Now take *The Wall Street Journal* or *Institutional Investor*. What percentage of the readers of *Institutional Investor* are potential investors? What we tried to do was concentrate on those magazines where we had no doubt that the advertising messages were primarily geared toward investors.

In addition, if what you say is true, and we didn't take something into account, we have an error in our analysis, a random kind of statistical noise. If anything, that would tend to make the analysis less statistically significant, not more so.
Voice: Don't you have to have a readership factor in there to indicate something of the quality of the ad?
Schonfeld: We tried that. I did my Ph.D. dissertation on mathematical models that predict readership and inquiry response to print advertising. I took part of that analysis and included it here, calculating a measure called adjusted gross impressions. If we substitute adjusted gross impressions for dollars in this analysis, the results are exactly the same. In fact, adjusted gross impressions and dollar expenditures correlated at the .95 level.
Boyd: His answer is, it doesn't make any difference if we use the kind of measure you're talking about.

Narrowing the Gap with Dividend Reinvestment

W. L. Mobraaten
Vice President and Treasurer, AT&T

In the past year there has been a ground swell of concern about the capital shortage in the U.S. As seen in *Chart 1* a potential shortfall of $471 billion is in prospect. This chart is based on a well-documented study conducted by Dr. William Freund of the New York Stock Exchange using inputs from Data Resources, Inc. and other highly regarded sources. This study looks at each sector of the

Chart # 1

Capital Shortage 1974-1985

Total Demand for Funds	$ 3,471*
Total Supply from Savings	3,000
Capital Shortage	$ 471

*Billions 1974 Dollars

U.S. economy: industry, transportation, housing, schools, hospitals, etc. and compares the total demand with the supply of savings in prospect. Like all important issues, this one involves some controversy. But there is *no* disagreement on one key point: the demand for capital in the next ten years will be almost three times as great as in the past decade. Consequently, unless Americans celebrate the Bicentennial with a *savings* revolution, the capital availability outlook is dim, indeed.

Most suggestions for resolution of the problem center around changes in tax policy. *Chart 2* suggests that this area indeed needs the attention of Congress.

Chart #2

Taxes on Capital (Maximum Rates)

	*Corporate Income**	*Individual Dividends*	*Individual Capital Gains*
U.S.	50%	70%	35%
W. Germany	49	56	0
Japan	53	25	0

*Includes State and Municipal Income taxes.

Here we see a major reason *why* the U.S. lags so far behind West Germany and Japan in capital formation: *we discourage investors!*

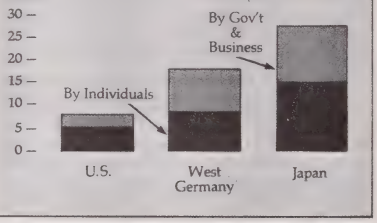
You will note that the U.S. corporate income tax policy is roughly the same as in West Germany and Japan. However, U.S. taxes on dividends and capital gains are far higher. The maximum U.S. tax on dividends is almost three times as much as Japan's. The U.S. taxes capital gains up to 35 percent. This compares with no tax at all in both West Germany and Japan.

Let's take a closer look at what's really being taxed in the U.S. The consumer price index rose almost 86 percent from 1960 to 1975. Thus, a stock purchased at $100 in 1960 and sold for $186 in 1975 has no real capital gain in all—you are merely "getting your bait back." But in the U.S., you are obliged to surrender up to $30 in taxes for phantom capital gains. In these circumstances, it is obvious that *capital gains taxes place a severe penalty on investment.*

The impact of a more realistic tax policy on the saving rate is illustrated in *Chart 3*. The U.S. saves and invests only 8 percent of its gross national product. West Germany saves about 18 percent of its GNP while Japan saves an amazing 27 percent.

Chart #3

Average Percent of GNP Saved and Invested



Without minimizing the importance of tax reform as a fundamental step toward resolution of the capital shortage, I would like to focus on one important source of capital which business people can tap without help from Uncle Sam: dividend reinvestment.

At the outset let me say that while dividend reinvestment can help narrow the capital gap, at best it can provide only one quarter of the amount of capital needed to close the gap.

The National Picture

Chart 4 indicates the rapid growth of dividend reinvestment plans in the past few years.

In 1968 there were only two plans. Growth accelerated in 1969 when AT&T started its plan and has continued each year since then.

At the present time it is estimated that some 665 companies offer some form of dividend reinvestment and savings plan. Dividend reinvestment, therefore, is one of the most exciting growth industries on the horizon these days. As such, it is a credit to corporate managers and their

public relations people. On the other hand, there is still much work to be done.

Chart #4

Companies with Dividend Reinvestment Plans

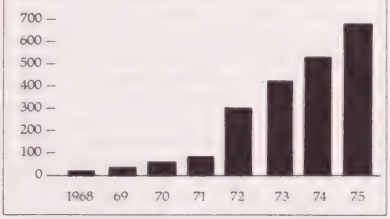


Chart 5 indicates some measure of the opportunity for greater participation: of the $32.8 billion in dividends paid by U.S. corporations in 1975, only $1.3 billion was reinvested. The potential of this market has hardly been scratched!

Chart #5

Total Corporate Dividends Paid Vs. Amount Reinvested (1975)

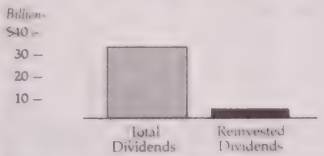


Chart 6 points up three specific advantages of a dividend reinvestment plan:

1. *Gain goodwill and additional share owners*—share owners tell us they appreciate the "painless" and convenient opportunity of accumulating shares without paying brokerage commission.
2. *Promote share owner loyalty*—with dividend reinvestment, small share owners gradually become large owners as their stake in the company grows.
3. *Encourage capital formation*—the plan provides incentive for share owners to divert dollars from consumption to savings and investment.

Chart #6

Advantages of Dividend Reinvestment Plans

1. Respond to Share Owner Need
2. Promote Share Owner Loyalty
3. Encourage Capital Formation—*Automatically*

The plan also facilitates the quarterly issuance of new shares—if needed. Thus it removes the threat of issuing a large block of new stock and the resultant pressure on earnings and market price.

Evolution of AT&T's Plan

The AT&T plan was initially developed in response to share-owner investment needs. Participation in the plan has grown with each change, and as you will see, DRISPP is now a significant source of new capital for the Bell System.

A. Original Plan—1969

Features. The original plan was administered by a bank. Participants were charged a flat 75-cent service fee plus their proportionate share of the brokerage commission. The purchase price was the average of prices paid in the open market over the two to three week purchase period.

Problems. If the stock price rose during the purchase period, some share owners objected to paying more than the price on the dividend payment date.

In addition, the program was not advantageous to those with less than fifteen shares. Nevertheless, some signed up despite our efforts to discourage their participation.

Participation. *Chart 7* shows the extent of participation in the first AT&T dividend reinvestment plan: 5 percent of our share owners participated. They reinvested dividends from 3 percent of the outstanding shares at an annual going rate of $42 million.

Chart #7

Participation in AT&T Dividend Reinvestment Plan

	1969 Plan
Share Owners Enrolled (Thousands)	143
Percentage	5%
Shares Enrolled (Millions)	16
Percentage	3%
Amount Reinvested (Millions)	$42

B. Second Plan—1972

Features. The plan continued to be administered by the bank. The fee was reduced to 5 percent with a $2.50 maximum per quarter. For the first time we incorporated a "cash added" feature to supplement dividend payments. This permitted up to $1,500 cash per quarter to be invested by each share owner.

Problems. As with the first plan, the problem stemming from purchasing shares over several days in the open market continued.

Participation. *Chart 8* indicates the increase in share-owner participation—8 percent of our share owners invested some 4 percent of the total dividend at an annual going rate of $66 million.

C. Third Plan—1973

Features. Under the third plan, AT&T assumed total responsibility for administration of the plan. Share owners cheered when AT&T Chairman John deButts announced the change at the 1973 annual meeting because it eliminated all commissions and service fees. But the most

Chart # 8

Participation in AT&T Dividend Reinvestment Plan

	1969 Plan	*1972 Plan*
Share Owners Enrolled (Thousands)	143	232
Percentage	5%	8%
Shares Enrolled (Millions)	16	22
Percentage	3%	4%
Amount Reinvested (Millions) *(Annual Basis)*	$42	$66

important feature was that new shares of stock were issued. We thereby created a significant source of new equity capital—and eliminated the purchase of shares in the market. This plan also expanded the investors' options: dividends and interest from other AT&T securities—such as bonds or preferred shares—could now be "automatically" invested in the plan.

The stock purchase price was determined by averaging the high and low price of AT&T's common stock on the quarterly dividend payment date. The cash-added feature was also increased to permit shareholders to invest up to $3,000 cash per quarter. And quarterly "reminders" were sent to participants upon request.

Problems. The problem associated with rising prices during the market purchase period was effectively eliminated, but there still remained the risk of sharp price swings on the dividend payment date. A potential problem of competition with brokerage houses was reduced, if not eliminated, with the $3,000 limit on optional cash payments. In point of fact, brokers said they really weren't interested in purchases of such small denomination as were typical under the plan. (The average investment per account was approximately $118 each quarter.)

Participation. *Chart 9* reflects a significant jump in participation: some 455,000 share owners (16 percent of all AT&T owners) reinvested dividends on 8 percent of the shares at an annual rate of $215 million.

D. Fourth Plan—1975

Features. The prime innovation of the plan in 1975 was the discount of 5 percent below market price allowed on all common stock purchased with reinvested dividends. I understand that five other utilities have since followed our lead. This discount does *not* apply to cash added, or to dividends or interest from other securities. The purchase price is based on the average of the five days ending with the dividend payment date. This method stabilizes the price paid and avoids the risk of a sudden, one-day market price swing.

Chart # 9

Participation in AT&T Dividend Reinvestment Plan

	1969 Plan	*1972 Plan*	*1973 Plan*
Share Owners Enrolled (Thousands)	143	232	455
Percentage	5%	8%	16%
Shares Enrolled (Millions)	16	22	46
Percentage	3%	4%	8%
Amount Reinvested (Millions) *(Annual Basis)*	$42	$66	$215

The IRS has ruled that the 5 percent discount should be treated as dividend income. Needless to say, some share owners were not pleased, but only a few withdrew as a result of the ruling. After all, you're still ahead with a 5 percent discount, even if you have to pay some tax.

Why 5 percent? The 5 percent discount is about the barebones minimum cost a company would incur if it were to sell new shares through an underwriting syndicate. In effect, share owners are reducing company expenses through this "Do it yourself" feature. Importantly, the 5 percent discount is attracting institutional investors who are most anxious to improve their investment performance. Institutions are currently reinvesting dividends at a $93 million annual rate and they account for 25 percent of the total amount being reinvested. Overall, they can improve their return on new shares purchased by up to 6 percent—i.e., the 5 percent discount plus perhaps 1 percent broker's commission. Many institutional investors say it would be imprudent not to take advantage of the 6 percent saving. Additional savings are effected by eliminating market pressure which would occur if institutional investors purchased substantial blocks of shares in the market.

Problems. Share owners who could not afford to reinvest their dividends felt that they were being discriminated against. Also, we occasionally receive complaints from brokers.

Chart # 10

Participation in AT&T Dividend Reinvestment Plan

	1969 Plan	*1972 Plan*	*1973 Plan*	*1975 Plan*
Share Owners Enrolled (Thousands)	143	232	455	601
Percentage	5%	8%	16%	21%
Shares Enrolled (Millions)	16	22	46	85
Percentage	3%	4%	8%	15%
Amount Reinvested (Millions) *(Annual Basis)*	$42	$66	$215	$362

Participation. *Chart 10* shows that a substantial surge in participants has occurred: some 146,000 additional share owners enrolled in the plan by the end of 1975. Thus 21 percent of our share owners are now reinvesting 15 percent of total dividends—plus cash added—at an annual rate of $362 million. The cash option has also been enhanced by our acceptance of post-dated checks.

The impact of this new plan has not been fully realized to date. Many institutions are not yet aware of the features and advantages of the plan to them. This is a challenge to us.

We are confident, however, that share-owner participation will increase. If we increase total participation to $500 million annually, this will provide about 20 percent of Bell's total external financing requirement.

While dividend reinvestment is an important source of equity capital in itself, it can also be used to augment public equity offerings. In August of 1975 we announced a change applicable to the October 1 dividend: Reinvested dividends purchased shares at 95 percent of the *lower* of (1) the average price for the five trading days prior to October 1, 1975, or (2) the public offering price of the underwritten issue scheduled to be sold on October 1.

This change removed the uncertainty that owners would have faced and provided a convenient way for them to participate effectively in one of the largest equity offerings to date. Cash added to dividends increased 175 percent for the October dividend and the total investment

reached $125 million (a $500 million annual rate). I might add that the subsequent decline in total investment to $90.6 million in January was the *only* time we have ever experienced a decline in dollars invested—despite the wide up and down swings in the economy and in the stock market.

Communication Vehicles

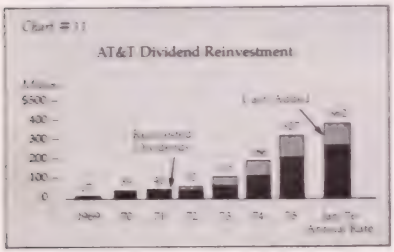
Since 1969, we have solicited our share owners six times relative to dividend reinvestment. These solicitations have generally included a letter and full prospectus to participants; other owners have received a letter, a summary prospectus, and an enrollment card.

Perhaps some might describe this approach as "dull." I prefer to say "low-key." The reason is twofold:

1. At the beginning of 1974 we conducted an experiment to see if an eye-catching brochure and prospectus would elicit greater participation in our reinvestment plan. The results were somewhat surprising—the mailing to the control group (which received the same package as 2.7 million nonparticipating share owners) outsold the test group (which received the eye-catching package) by almost two to one.
2. The second reason for our low-key approach is the obvious SEC legal restrictions placed on companies that are in registration. Because reinvestment involves issue of new equity, we are in continuous registration and must be absolutely certain that we avoid even the appearance of touting our stock.

Nonetheless, we have successfully designed a prospectus which is less portentous, less forbidding, and less dull than the usual prospectus. As you will note, we use a question-and-answer format to explain the plan in plain English. While this approach is now fairly standard for reinvestment plans, I understand that we were among the first, if not *the* first,to use the technique.

We also pioneered the use of an S-7 summary prospectus. Working with the SEC staff we developed standards for the content of a summary prospectus which were subsequently adopted by the SEC.



We have also taken the opportunity to remind owners about dividend reinvestment in our normal correspondence with them. Since AT&T assumed complete responsibility for the plan in 1969, *every* annual report and share owner quarterly newsletter has mentioned the program. Articles have described plan changes and regularly report on participation.

In short, advertising in the traditional sense has not played a role in selling our plan to owners. Instead we have used existing media—prospectuses, quarterly and annual reports—to bring the plan to our share owners' attention. To the extent possible, we've avoided "legalese." Most important, we've been ready to listen to our share owners and make changes.

Furthermore, we've backed the plan with good service, so that we won't lose customers we've worked so hard to get. *Chart 11* summarizes the success of this approach to date. As you can see, we are currently receiving new equity at an annual rate of $362 million. Not shown on the chart is the April 1 dividend reinvestment, which was in the range of $400 million on an annual basis. Each change in the plan has increased the level of owner participation, so that dividend reinvestment has become for the Bell System a significant source of capital with potential for expansion in the years ahead.

Question and Answer Period

Q: *What would be the behavior of institutions versus the individual?*

Mobraaten: Institutions, as they learn about the 5 percent discount for shares purchased with dividends, have generally signed up. There have been mechanical difficulties for people who manage trusts, in terms of trust agreements and nominee accounts. Basically, the institutions that have signed up have stayed in so long as they have maintained their position in AT&T. A few appear to be selling shares acquired through reinvestment. Individuals, by and large, are staying in the plan, although there's always some turnover. But total participation keeps growing.

Q: *A related question. Do institutions start turning out depending upon their cash flow and do they get back in for a quarter?*

Mobraaten: Bear in mind that a single institution may be dealing through six or seven different nominees so it's very, very hard, in many instances, to deal in the concept as an institution. But it would appear from what they tell us that if they have decided to buy on the reinvestment plan, they'll continue to buy. But sometimes they take the shares bought through dividend reinvestment, and sell them. You might think this is a bad thing, but if you think of the caution institutions use in selling stock, you'll realize that they feather it out into the market to minimize the impact on the market.

On the other hand, if we had to sell that amount of stock at one time, we would have a significant negative impact on the market.

Q: *Do you have a feel for the split—the percentage of the $360 million—between dividend reinvestment and 5 percent discount on cash purchases?*

Mobraaten: First of all, there isn't a 5 percent discount on cash purchases. The cash is bought at 100 percent of the market. I may not have made that clear initially. Only the dividends are at 95 percent of the market.

As shown in the last chart, cash added is about a quarter of the total invested each quarter. And the rest is dividends.

Q: *What about the decline in cash participation?* [See Chart II]

Mobraaten: The decline in cash participation for the first quarter of 1976 was caused by an unusual situation. The 1975 amount was augmented by the new offering we had in October. As I mentioned before, the one-time change in the plan to provide owners with a convenient way to participate in the offering resulted in a 175 percent increase in cash for the October reinvestment. With the exception of that unusually high quarter, I think you'll find that

cash-added has generally increased slightly. So we don't see any significant decline in the cash added.

Q: *How many employees are participating?*

Mobraaten: I don't know exactly how many employees are participating. About 10 percent of our share owners are employees. So I'd presume the same percentage would hold here.

Q: *About three million shareholders, I gather you have. Am I right?*

Mobraaten: Yes, 2.9 million.

Q: *Do you have any method for distributing your literature other than the Post Office?*

Mobraaten: The only way of distributing literature to the share owners, other than the Post Office, is news reports about us, and advertising.

Q: *Can you get the prospectuses out any other way?*

Mobraaten: Oh, no. If we can, I'd like to know. When that mail rate went up, you can imagine that it had a significant impact on our costs. The volumes that we have are almost inconceivable.

Just to digress a minute, when we issue a dividend, the Post Office literally moves its office to our building, and there's a continuous stream of mail trucks—the trucks get loaded and drive away again for about a week.

Q: *Maybe there's a suggestion that you ought to put a prospectus in all your bills.*

Mobraaten: That would be very costly. We are very conscious about the weight of the prospectus. You notice the paper that it's on. We watch where the paper stock is stored to make sure it retains normal humidity and doesn't get wet, because then it will weigh more. We want to stay well within that 13-cent limit to avoid doubling our cost. So we watch the weight of that prospectus very, very carefully.

Q: *Given the costs we're talking about, are you looking at what the Social Security Administration is doing about electronic funds transfer, and do you think that might be a way you'll be distributing dividends someday?*

Mobraaten: Yes. There are a number of share owners now who have told us they want their dividends deposited directly in banks. I clearly foresee the day when that will be done electronically.

With dividend reinvestment, by the way, there is no dividend sent. It is electronic fund transfer in its simplest form. We just make a bookkeeping entry for the share owner. We do not issue certificates unless they want them. We keep all records for them. So I think in the future we'll see a lot of electronic fund transfer.

Q: *You started out with a bank and you changed to a self-administered program. Why didn't you go into the self-administered program first? What were your cost differentials?*

Mobraaten: Dividend reinvestment was fairly new. There were only two companies, I think, that had done it, and shares were purchased on the open market. We cannot purchase our stock on the market. There were lots of questions that were then unanswered. Would it be worth the while? Would the share owners really want to reinvest?

Cost difference—I don't know the cost at the time of the initial plan. Probably, minimal cost to us. The bank handled the whole transaction, bought shares on the market, and charged to share owners their proportionate fees. Today, we estimate that the additional annual cost of reinvesting dividends is about $3.50 per account. The cost to us is very competitive with any other form of raising equity.

Q: *I was wondering about one thing. In a sense, this is an inefficient way of doing this, because, unfortunately, given the current tax laws, an investor has to pay taxes on his dividends. In a theoretical sense, it would be better if you could just cut your pay-out ratio a little bit and avoid having double taxation. I understand you're very constrained, it's not well received when public utilities cut the dividend pay-out ratio, to put it mildly, but would you make a comment on that?*

Mobraaten: Yes. First of all, 20 percent of our share owners are in the plan. So 80 percent are choosing not to reinvest their dividend. Now, if we took action to reinvest their dividend for them, we would obviously incur their displeasure. So if you just want to look at it that way, it's not very practical for us to force the reduced dividend on the 80 percent.

As to double taxation, I agree that the tax law should be changed. We've made that point before Congress, as have most other utilities. Specifically, we support the proposal to postpone taxes on reinvested dividends until the stock purchased with the dividends is actually sold. The subject has received a lot of attention lately and is not a dead issue as far as we know.

Communicating with the Financial Community

Carl Tiedemann
President, Donaldson, Lufkin & Jenrette, Inc.

Before going into my opinions of how corporate America should communicate with the financial community, I felt it would be helpful to try to point out to you some of the significant trends which are emerging or currently in place in the securities industry. These trends should importantly affect how you ladies and gentlemen communicate with the investing public.

A persistent trend which began several decades ago and is still very strong is the trend toward institutionalization of capital. Clearly, pension fund growth remains one of the truly most attractive growth areas in the financial community. At the same time that pension fund growth has continued, the relative importance in the marketplace of the small investor has been declining. When you combine this trend toward institutionalization of capital with the introduction of ERISA last year, you have a whole new set of dimensions, problems, and opportunities relating to communication that corporate America has to start considering.

The pension fund manager, in my judgment, is now demonstrating a greater degree of prudence, almost to the point of caution, in his investment selection. The corporation executive responding to this phenomenon should be very sensitive to this point, and should try to direct his remarks and his image creation, if you will, to that point

A second trend which is a rather recent phenomenon is the propensity of institutions to create their own investment research departments. These departments, at this particular stage, are still relatively small. I would say, on an average, they have four to eight people, and typically will screen the information that comes from Wall Street for their own portfolio managers.

The economics of the money management business do not permit a significant expansion of this trend. In my judgment, the money management fees that are currently charged are too low to permit the individual institution to build a large department to do self-contained research.

The third most significant new trend is the emergence of an oligopoly in the securities industry, mainly as a result of profitability problems resulting from the future shock structural changes forced upon our industry by Washington. We have experienced a large number of liquidations, acquisitions, and mergers, reducing the total number of Wall Street firms—firms that are members of the New York Stock Exchange—from something over 700 in the middle Sixties to approximately 475 firms today, and there are still more to go. In our industry, you are seeing the development of a two-tier structure. The strong are clearly getting stronger and the weak are getting weaker, which should force further concentration in the securities industry to the point of making it an oligopoly. Roughly 20 firms are emerging as the clear leaders and there are certain people in Wall Street who feel that that number will probably be down to 10 or 15 dominating firms by 1980.

The various functions of Wall Street that used to be performed by many independent firms are currently being combined under one roof. Such functions as research, underwriting, acting as broker-dealer, block positioning, equity and debt trading, institutional and retail sales, are all being folded in under one roof. Examples are Morgan Stanley building into the research and trading business, where it had no presence four or five years ago, and Merrill Lynch aggressively trying to go into the institutional research and banking business, where it had limited visibility five years ago.

Now, what should your message be? In the simplest terms, I feel your message should be whatever turns on the investor, the institution, and the brokerage firm analyst. In the high-flying silly Sixties, the key corporate buzz words were growth, synergy, flexibility, opportunistic, young, aggressive. In today's toned-down environment, the key words are strong, dominant, conservative, solid, stable, quality. If you are to attract the investor's favor, be sure you are sensitive to the investment climate and that you create the right image for your company by describing it in terms that are attractive to the investment community.

A second message management should get across to its investment audience is that it is maintaining business candor. In this age of skepticism, with highly sophisticated securities analysts carefully studying every corporate release, the firm that tells it like it is, brings out the problems and articulates what management is doing about those problems, is the one that gains credibility. The company that buries its problems in footnotes at the back of the annual report and talks only about its successes of the past year is probably going to lose credibility.

The corporation should also clearly discuss its business philosophy, what its strengths are, where it hopes to go, and its overall long-term objectives. In my judgment, it is very important to leave the analyst and the investor with a relatively simply conceptual picture of your company. There are any number of companies, from Disney to Polaroid to Xerox and many others, that besides being very fine companies have also projected a clear conceptual framework to the investor, enabling him to get a good handle on the company.

I'm amused to think back over the years on what has happened to the stock of a company such as Gulf & Western. If you look only at the bottom line performance of Gulf & Western over the last decade, I submit that 95 percent of corporate America would like to have its earnings record. We were fairly close to that company in the early Sixties when it was only an auto parts company, and we helped Charlie Bluhdorn in the Paramount, Consolidated Cigar, and other acquisitions. It's interesting to note that G.&W., when it was a pure auto parts company, when its single mission was to approach the privately held "mom and pop" auto parts companies and buy them up,

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and it had only one business, it was clearly understood by the investment community. The multiple at that time was significantly higher than it is today, when no one knows exactly what Gulf & Western really is. Most investment firms have great difficulty in deciding which analyst should follow that company. Should it be a movie analyst, should it be a zinc analyst, should it be an auto parts analyst? Since there are no conglomerate analysts on Wall Street, the G. & W. story doesn't get told very well and the investment community cannot get a handle on the company. The result is a lower price-earnings multiple than is justified by the record created by the company.

Of growing importance to the investor is a company's dividend policy, a subject that is usually totally overlooked by management in its communication with shareholders. I think that over the next five or ten years, particularly in this post-ERISA environment, some real tangible form of return to the investor is going to be increasingly important. I think corporations should address that subject more vigorously and spell out the policies more clearly to their shareholders.

Furthermore, the corporate message should emphasize the relevant businesses and opportunities rather than the irrelevant. Often, I've seen corporations discuss in their annual reports some obscure business which will never have a meaningful impact on the company, but which management apparently believes will attract the investor. In my judgment, the analyst and investor see through this and are turned off by it.

Finally, in communicating with the investing public, management should emphasize the key growth characteristics of the company. I think a classic example of an industry that has failed to do this is the rail industry, where today roughly 20 percent of the revenues come from carrying coal to the public utilities, a business that is growing at a 15 percent compounded rate. I would question whether any significant percentage of the stock-buying public is aware of that factor.

How to get your message across? The oligopoly trends in the securities industry, which I mentioned earlier, greatly facilitate the communication process. As probably most of you know, *Institutional Investor Magazine* has done a survey of the institutions, to identify the best analysts in each industry area. They dubbed these experts the All-American Analysts Team. Whether you are enthusiastic about that program or not, it has great significance for the corporation that is trying to communicate with the institutional marketplace. *Institutional Investor* identifies in each industry three or four major analysts who are, in its judgment, the best and who have the most impact on their respective institutional clients. This All-American Analyst list is a handy tool for any corporation that wants to gain exposure in the institutional marketplace. If the corporation can get its story across to two or three analysts on this All-American Analyst list, chances are that roughly 80 percent of the institutional marketplace will be contacted, and the company story will be well presented to that large marketplace.

In taking advantage of this trend, though, you've got to remember that whereas the quantity of analysts on Wall Street may have declined significantly, the quality has clearly improved. The current Wall Street analyst, in my judgment, is highly sophisticated and has frequently come out of the industry in which he is doing research. The corporation had better be prepared for a very bright, creative individual when it approaches one of these analysts.

It is important to supplement your efforts with All-American key research analysts by going directly to the institutional portfolio managers and other institutional analysts, by giving clear messages in financial periodicals, direct mailings of annual reports, and occasionally making management available for institutional research dinners, investment seminars, and conferences.

During the capital raising process, the underwriting syndicate can be very effective in calling attention to your corporation and getting your story across to the financial community. Contrary to popular belief, the public equity offering can often increase interest in your company. A well-written prospectus distributed to the investment community can create interest from an entirely new group of investors. This is particularly true if your company is small and prior exposure has been very limited.

On the underwriting itself, multiple managers should be considered, perhaps one in a major institutional firm and the other in a major retail firm. Try to structure the syndicate so that there is a good representation of institutional, retail, and regional firms, and above all, make sure you support the broker or brokers who have supported you during the period when there wasn't a financing, by ensuring that they are invited to participate in the underwriting. The syndicate should reflect your needs, not solely the needs of the underwriter.

One comment on the annual report. I think corporate America has really missed the boat by putting out inferior annual reports. I think a well-written annual report is an important vehicle, a great way to express the philosophy of the corporation, where it's going, and what it is all about. There is nothing worse than an annual report that goes out to shareholders showing two or three guys sitting behind an oak desk with a half smile on their faces, giving a very bland rundown, for two pages, of what happened in the previous year, followed by income statements and a few charts—with the only interesting part of the report in the footnotes.

I call your attention to two annual reports that I personally think were very well done. One was General Electric's. What G.E. did—the part that particularly appealed to me—was to give a record of each of the businesses it was in, and then talk about the business climate, giving opinions on such matters as what public policy should be, what the government should do, giving some strong opinions on what was really happening in that business. It was a very interesting annual report, very creative and exciting to read.

From an analyst's standpoint, another one worthy of your attention is United Telecommunications' annual report. In that, our analyst found everything statistically that he would want from any company report. I think it was a great selling document, primarily for the research analyst.

By handling communication within the financial community well, management will not only broaden public ownership of the company, but should be able to significantly reduce the cost of capital by increasing its earnings ratio. This requires patience, hard work, and creativity, but the rewards are great.

Communicating with Money Managers

Stanford Calderwood
Director, Endowment Management and Research Corporation

Before I sat down to make my outline of what I wanted to talk about today, I asked one of my assistants to get one of those black boxes you have when you're a money manager, when you run a money factory. I said, "Look up all these guys I'm going to be talking to, let's find out about them."

Well, let's examine a profile of the companies on the list that *Fortune* had submitted to me a couple of weeks ago of companies that would be represented at this meeting. There were forty-eight of them, and it turns out that these companies represented about $102 billion in market capitalization. If we were to pull out AT&T and General Motors, it's still $49 billion. The average daily trading of these forty-eight companies was $57 million. The market capitalization ran from $18 million for California Computer to $32 billion for AT&T. And the daily trading ran from $27,000 for California Computer to $7.6 million for AT&T. So the companies represented in this room obviously are a very representative group. You represent maybe 20 or 25 percent of the S&P, and about 30 percent of the daily trading.

The next thing I asked the black box was how you were performing in the market. The time period I used was the first five full quarters of the bull market. The market bottomed in December 1974, and we started the clock ticking as of January 1, 1975, and we went for five full quarters.

During that period, the stock market, as measured by the S&P 500 with yield, was up 57 percent. Companies in the room that did as well as the S&P, plus 25 percent more on a relative basis, totaled twenty-nine or 60 percent of the total. Companies whose stock prices were up 100 percent or more when the market was up only 57 percent totaled twenty-four, or half the firms in this room. For companies represented in this room the average return was 98.3 percent in a period when the market was up only 57 percent. Any money manager who had gone out fifteen months ago and bought a 2.08 percent position in each of these forty-eight firms would have wound up fifteen months later by far the best money manager in the country. Is there some conspiracy going on in this room? Does *Fortune* invite only outstanding performers to these seminars? Or is there a correlation between companies that accept *Fortune's* invitation and stock market performance?

I think the University of Chicago Center for the Study of Security Prices better look into you guys. Something mysterious has occurred here.

Obviously, on balance, the people in this room had a story to communicate about their companies to the financial community. Let me confess, and I hate to do this, you didn't get through to me or to my firm, and we manage about a billion dollars. At the end of March we owned shares in only ten of the forty-eight companies represented on the list. Thirty-eight of you we'd overlooked and you had all this good news to tell not only us, but other money managers. Dammit, if you knew and you didn't tell us, or other money managers, that the outlook for your companies was so bright, I wonder why. It may be that you don't understand the needs of money managers and money managers don't understand how to listen to you. How do we get the information out of you and how do you get it to us?

In talking to money managers, the first problem you must consider is what are the best channels. This breaks down into two parts: First, you must catch their attention. The truth of the matter is, there's a lot of static between you and money managers, and somehow you've got to bore through that static and get their attention.

Second, after you have the attention of the money managers and they do put their skilled analysts to work, you must be able to service those analysts properly.

Now, let's talk about getting the money manager's attention just a little. Keep in mind what he faces. He's got a mixed-up, crazy world out there, because industry groups

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are all over the lot. The S&P 500 had ninety odd groups in it, ranging all the way from Aerospace to Vending Machines. Moody uses fifty-two categories. Value Line has eighty-one. What is an industry?

Once the money manager gets through the industry breakdown, he faces a universe with a lot of companies. You've already heard that the New York Stock Exchange has over 2,000, the American Stock Exchange has 1,200. There are 3,000 listed issues that sell for more than $5 a share. The information flowing from these three or four thousand companies is overwhelming when you run a money management firm.

On an average day in our firm, the pile of mail is about this high, both from companies and from people like Donaldson, Lufkin. We get well over a hundred separate reports every day. Now, some of these reports cover only a single company, but some will cover, say, the paper industry and will go into great detail about half a dozen or more companies.

In addition to all of the voluminous material coming in the mail, we do all the normal things. We subscribe to *Fortune* and *Business Week* and perhaps forty or fifty others. These include broadly based publications that cover all industries, such as *Advertising Age*. Each of our specialists narrows down the trade journals within his particular area. That means we get *Chemical Week*, *Electrical World*, etc. And out of this high level of static, the money management firm, trying to take care of the billion dollars that it may have, must be triggered to focus on some segment of the

economy in a relatively few companies to build the firm's portfolios. At EM&R the average portfolio, which has more companies than most, runs between forty and fifty separate issues.

I suspect that the best run money management firms derive most of their focus from the basic study of where the economy is going. Studies a year ago or eighteen months ago certainly pointed very clearly at why General Motors has done so well. It was clear that the average car on the road was so old it had to be wearing out. It just had to come to pass that people were going to start to buy new cars. And so the better money managers went out and started to buy General Motors and Ford and Chrysler. And as the handout shows, these stocks made some money.

But there are tougher industries to spot. Coal is beginning to be extremely important in our economy. But when a money manager goes to look up coal among the S&P industry groups, he finds only about 1 percent of the S&P is represented in what are pure coal "plays"—Eastern Gas & Fuel, Pittston. The rest of the action in coal is hidden away someplace. It's hidden away in Continental Oil. It's hidden away in Union Pacific, in Joy Manufacturing. But in addition to these companies, there are all kinds of corporations, and a good many in this room, that are going to be beneficiaries of this tremendous industry surge in coal over the next decade. The economic input tells the money manager that coal is the place to be. So money managers decide to put a lot of money into coal, and the scramble is on. Where do you find coal? It turns out not to be an easy thing to find, because there is a communication gap.

Incidentally, Carl (Tiedemann) spoke of railroads a moment ago, and those of you who are our clients know that in that area we have found not only the railroads that haul coal, but the railroads that own a lot of it.

Now, the media used during this early formation of an investment thrust will be varied, and much of the use will depend on circumstances. The trigger to start the thrust might be almost anything. A cover story in *Business Week*, a few paragraphs in *Fortune's* Business Roundup, or an especially articulate ad from one of the companies. But once you begin to dig into an investment direction, once you take that $50,000 analyst and put him on the airplane and say, "Bill, look into it," there are a lot of places where the gap between corporations and the investment community can be a little hazy.

Most of these points you know, but just let me go over them very briefly. To begin with, of course, the thing money managers rely most heavily on is what Carl has already mentioned, a corporation's own published reports. Money managers would never start from an ad or a story in *Business Week* and go out and buy. An ad might trigger a closer look, but what really counts are the corporate reports published under SEC and NYSE scrutiny.

The thing you may be interested in is that good money managers keep corporate reports on hand for many years, and track what you say this year, next year, next year, next year, checking consistency down through the years.

Money managers pay a great deal of attention to the 10-K's, the 8-Q's, and all the others. The analysts go over all such reports with great attention to detail.

Another thing that money managers pay a great deal of attention to and get tremendous help from—and not nearly enough companies issue them—are the statistical booklets. There are some companies in the country that publish ten, twelve, fourteen pages of every conceivable ratio you can think of. Now, we can go to the black box and get those ratios, but the black boxes are sometimes inaccurate, because of restated earnings and other accounting changes. For a corporation to put everything on the table, the good news and the bad news, makes a very good impression on an analyst. Most analysts, most money managers are smart enough to know that not every company is going to have a good year every year. Money managers know you're going to have bad years, and they want to know if you are facing up to it, so they can judge how bad the year is going to be.

One of the things that hurt performance for money managers is trading. This will break Carl's heart, but good money managers do not like transaction costs. There is usually little reward for trading casually. Money managers would much rather ride through with you if they think the company is going to come out of the valley at the other end. And this depends greatly on open contact between you, as the corporate communicator, and the money management community.

Carl has just talked about Wall Street research. On one side of the sheet I passed out, I indicated to you that for these nineteen corporations with outstanding performance during the last five quarters very little was in our files from Wall Street research. We had a file on absolutely everyone of you. We had your news releases and we had your annual reports, but as you will see on that list, a good many of the companies that had really superior performance in the first fifteen months of the bear market had nothing in our files from the leading Wall Street research firms. Now, EM&R manages about a billion dollars and is probably the fiftieth largest investment advisory company in the country, and so you can bet that we are damn well covered by Wall Street. If it wasn't in our files, it probably didn't exist.

> "...money managers are human and thus subject to all of the communication techniques you use on other people. Money managers are not a group apart."

If money managers are so busy and so swamped with information, how do you reach them? I'd like to spend just a few more minutes breaking that matter down into two parts. First, as somebody has already said, money managers are human and thus subject to all of the communication techniques you use on other people. Money managers are not a group apart.

Second, we should remind you that this particular group of people is more sophisticated than most, as Carl has indicated, and that substance is much more important to money managers than form. A lot of beautiful pictures in an annual report is essentially meaningless to us. A great deal of substance means everything.

Let me remind you that money managers are humans. I don't care whether we're talking about Carl Hathaway down at Morgan Guaranty who wakes up every morning worrying about $30 billion, or Roland Grimm of EM&R driving down on the Massachusetts Turnpike Extension, who only has about a billion to worry about, or my friend Ed Crocker over at Cambridge Trust, who only has $165 million. All of us have the normal drives that you have. We all want to win, especially in our highly competitive business. We would have given our eyeteeth to have had the insight to know that the forty-eight listed companies on that sheet that I passed out would outperform the market in such a way. We also have our prejudices, just like

everyone else. I know a lot of money managers who, not too long ago, would sit around and swear that they would never own a share of steel stock, never, never, never. But the smell of performance has a way of drowning out prejudices in our business. Since the word got out—all too slowly, I'm afraid—that it was getting to be as costly to make a ton of steel in Japan as it is in the United States, that a steel shortage at the end of the decade was looming, and all of the rest of the news that would make steel a bullish buy, there has been a shift. I noticed on the sheet that in nine months the banks have gone from only 3.3 percent of U. S. Steel's float to 7.1.

In the corporate world, I don't know what goes on, but there are two kinds of people. The middle management man assigned to keeping contact with money managers frequently deals out information that is quite sterile and devoid of any real insights, and often devoid of enthusiasm.

Within the same corporation, other corporate managers are terribly enthusiastic when they are not in the presence of investors. They don't give inside information, but they do discuss their company, their industry, with

> "He reads the business press, he absorbs what he hears from other analysts, what he hears in speeches, yes, what he sees in ads. He listens to the tone of your voice."

both enthusiasm and insights that can be especially helpful. Wise money managers will seek out the people who are not the Wall Street contacts because they often get a picture that is filled with many insights the normal contact feels constrained to keep to himself.

Just let me tick off a few other points quickly. Money managers prefer managements that are credible. If you mislead them because you don't tell everything, and they put their hand on that hot stove once, and get burned, there are some who will go back and try a second time, but there are damned few people who will go back and try it a third time. You may be off some money manager's list forever. So be extremely careful when you hand over the information. Do not be afraid to tell the whole story. They would much rather have the whole story than have part of it held back, because if you mislead them, if you lie, you'll pay the penalty for a long, long time to come. It takes a whole new generation of analysts, sometimes, to come in and forget the burning.

Keep in mind that money managers read, watch TV, sleep through speeches just like all the rest of you out there are sleeping through this one. I suspect some of you doubt that they're that human. I suspect that when some guy goes out and dumps 500,000 shares of your stock over four days and blows the price out of the water, you think he's some kind of monster, but he really is not. He reads the business press, he absorbs what he hears from other analysts, what he hears in speeches, yes, what he sees in ads. He listens to the tone of your voice.

If we accept that the channels of communication to money managers are wide and varied, how should they be used? That is your expertise and I don't think I will go into it in detail. Let me just give you a few observations, not as an expert, but as a man constantly on the prowl for ideas. The first thing, of course, is that money managers want a lot of facts. So many ads, I must tell you, remind me of that marvelous book—*When in Doubt, Mumble*, by James Borne. A good many ads do convey that feeling.

I think you should use the language of money managers. The editors of *Fortune* do. Your ad agencies aren't so skilled. If you will go through the issue of *Fortune* they have passed out to you, you will find 148 advertisements in that issue. Only three or four of these ads use graphs, charts, diagrams, or tables. If you go through only eighteen articles and columns in the very same issue, you will find sixteen graphs, charts, diagrams, and tables. That's about 44 to 1 that the editors are using. Now, the reason *Fortune's* editors do this is they know that we're all busy and we're zipping through that literature, that pile of mail, those magazines that come across our desk every day. We are looking for ideas. If a good idea is buried in one of those "when in doubt, mumble" ads, we're not likely to pick it up. At the same time, if you will go through a year's issues of *Fortune* or *Business Week*, you will find a good many ads that are much more effective.

Try to bring money managers fresh, important, basic news. The coal story is one of the most exciting stories in this country today. Many corporations in this room are beneficiaries of this shift to coal for energy. But too often your ads are not telling the story.

I was going to go through half a dozen ads to show you some that people in my shop liked and didn't like or said might be helpful to them, but we're running so late that I think I'll just stop now.

Some Thoughts on Financial Communication

Ray Garrett, Jr.
Gardner, Carton & Douglas

I have not actually checked up on this, but I would venture a guess that all of the companies represented in this group are so-called reporting companies under the Federal Securities Exchange Act. They file with the Securities and Exchange Commission annual reports on Form 10-K, quarterly reports on Form 10-Q, and, from time to time, current reports on Form 8-K. And at least annually they file proxy material. If this isn't true of every company—making appropriate technical allowances for banks and insurance companies—it is surely true of most. A company does not have to be very large or have many stockholders to come under these requirements.

This being the case, I propose to begin our discussion of corporate financial communication by reference to this underlying statutory and regulatory apparatus, the prescriptions and prohibitions of which shape so much of what must and can be done.

The federal securities laws, including the Exchange Act, are commonly described as essentially disclosure laws, as they relate to the issuance and trading of corporate securities, as well as the soliciting of proxies for the votes of holders of voting securities. Among legal scholars the characterization of these laws as *disclosure* laws usually is intended to emphasize not so much what the laws *are* as what they are *not*. They are not laws that give the SEC substantive control over access to the public capital markets, either by application of a "fair, just and equitable" standard such as one finds in the blue-sky laws of California and many other states, or by imposition of economic standards or notions of national economic planning relating to the allocation of capital.

In this sense, the federal laws are *merely* disclosure laws. They embody the conscious policy decision by the Congress that investors are entitled to be fully informed, and to have a fair marketplace, but not otherwise to be controlled by the federal government in their market decisions nor, indeed, protected from their own folly. This fundamental policy approach also reflects the proposition that, on the whole, the aggregate of the decisions of investors, being fully informed, will probably do as good a job in allocating capital in the public interest as would any conceivable group of economic planners.

Consistent with this philosophy, the traditional SEC view has been that mandatory disclosures under the acts are those material facts appropriate to enable an investor to decide whether to buy, sell, or hold or to decide how to vote.

Of course, what most investors would like most to know—future earnings and future market prices—they are *not* told. The commission has never been tempted to permit guesses as to future stock prices in filed material but, as most of you know, the commission has had a brief and stormy romance with the projection of future earnings. Like many affairs, it all started out with the best of intentions. Everybody, including the SEC, knows that the most commonly employed method of investment analysis begins with an estimate or projection of future earnings. Securities analysts and salesmen are always making projections. Many CEO's make them regularly in talking to the news media. Why shouldn't companies be permitted and even encouraged to make earnings projections in prospectuses and annual reports? After all, the British *require* projections plus auditors' opinions thereon.

After extensive and lively public hearings followed by a published statement of commission policy conclusions, the commission released a proposed rule with conditions and safeguards against abuse so tightly woven that it caused widespread terror. Finally, rather than try to modify the rule to meet valid objections and calm fears, the commission has recently decided to stop trying to be helpful and just drop the whole project. So today, and for the foreseeable future, if a company wants to put earnings forecasts in its prospectus or 10-K, it's on its own. So is it if its CEO wishes to engage in the making of projections to analysts and others.

"...the development of financial statements that have meaning for investors, including securities analysts, has been difficult and occasionally tempestuous."

In the total disclosure process it has always been recognized that the financial statements and related financial information are the heart of the disclosures. But the development of financial statements that have meaning for investors, including securities analysts, has been difficult and occasionally tempestuous. Why should this be so? Why not just make all companies tell the truth? This simplistic approach to financial reporting, which one encounters in some noisy commentators and, what's more, in some suspicious and impatient members of Congress, seems to assume that the whole difficulty arises from corporate management's penchant for self-serving deception, the mercenary character of the public accounting profession, and the gutlessness—if not worse—of the SEC. While I will not say that this is total nonsense, it is largely so. The problems are far more complex. While it would be a better world if all corporate executives were guided solely by a passion to tell the public the whole truth, and if all auditors were wholly free of any selfish instincts, and if the SEC were always fearless in the pursuit of what is right and good, this would *still* not solve all of the problems in this area, or even most of them. And yet the adequacy of accounting principles employed in providing financial information is the key to whether there is meaningful communication.

It is true that, almost from the very beginning, the SEC

has assumed and maintained a rather uncharacteristic posture of restraint with regard to accounting principles. Although the Exchange Act gives the SEC the authority to establish accounting principles by rule, the commission decided almost forty years ago that it would defer to and rely on the accounting profession. The commission stated that it would enforce, so to speak, generally accepted accounting principles as established by the profession by insisting upon the application of those principles in financial statements filed with the commission. This policy is still followed. The treaty is still being honored, although it has its critics, including some in high places.

The accounting profession has never found it easy to achieve a consensus on accounting principles. For years the formal effort was in the hands of the Accounting Principles Board of the American Institute of Certified Public Accountants. The APB had a hard time getting agreement on anything at all contentious. Even when it achieved verbal agreement on the statement of a principle, if the business pressures were strong enough the erosion in practical application could be rapid and devastating—as with pooling of interest accounting for acquisitions in the Sixties.

The development of accounting principles for the profession has now been vested in the Financial Accounting Standards Board, made up of persons from the profession and from industry who have given up their former careers and serve full time as board members. The best hope for improved financial communication, at least to the extent that it is embodied in, or based upon, formal financial reporting, lies with FASB.

Every important decision that the board makes—every principle that it adopts—means at least intellectual defeat for someone and, for affected companies, possibly some more tangible detriment. And since the board cannot handle everything first, it is always frustrating someone's perception of proper priorities. So one cannot expect the board to lead a tranquil life, free from criticism. But it needs and deserves more public support and less suspicion and criticism than it has been getting. It also needs understanding interaction with SEC's efforts to attack pressing problems.

Accounting for inflation demonstrates the difficulties of the process with regard to one of the most fundamental problems facing financial reporting.

While it may be true, as has been observed, that the American people will never again be happy without a little bit of inflation, the ravages of excessive inflation are becoming well known. One of these ravages, perhaps not so well understood by everyone as some of the others, is the effect of inflation on our conventional accounting model—based upon the historical cost of assets—and its tax consequences.

It is probably enough with this group merely to state the proposition to have it understood. But just in case you have missed or forgotten the order of magnitude, I would like to read some portions of an address by Robert M. Bleiberg, editor of *Barron's*, reprinted in this week's issue. Mr. Bleiberg refers to a study prepared under the auspices of the Academy of Political Science in which a group of scholars analyzed the effects of inflation on selected areas of the economy.

> As to the financial damage wreaked on corporate enterprise, Professor Bach of Stanford observed... during rapid inflation...the overstatement of profits can be enormous. To illustrate, in 1973, out of $73 billion of total corporate after-tax profits, $18 billion were illusory inventory profits and another $3-$9 billion were illusory profits from inadequate depreciation. Thus, "genuine corporate profits" in 1973 were only $52 billion, rather than the reported $73 billion.
>
> What appeared to be a spectacular 26 percent rise in corporate after—tax profits over 1972 was in fact only 3 percent in real terms. As inflation accelerated in 1974, the overstatement was even more dramatic; illusory inventory profits alone were running at a $37 billion annual rate by mid-1974.
>
> As for taxes, Professor Harris of Columbia University stated: A 10 percent inflation would increase the burden of taxation (and, of course, the U.S. Treasury's take) by nearly 15 percent..
>
> The process of inflation automatically enlarges the size of government. Progressive rates, inadequate depreciation, inventory profits taxed as earnings, illusory capital gains taxed as income (while real losses are incompletely deducted), combine to enlarge tax revenues faster than the true earnings of labor and capital. More resources shift to government. Political processes can thus determine the use of more and more of our effort and capital.

The conventional model to which I refer is basically that accounting principle which requires that an asset be entered on a company's books at its cost to the company and that depreciation be recorded by the amortization of that cost over the estimated useful life of the asset. Under certain circumstances the asset must be written down below amortized cost, but it may never be written up. The establishment of this principle resulted from a hard-won battle over the stock-watering practices of the past, and one who, like me, was brought up to regard the writing up of assets to reflect unrealized appreciation as pretty close to original sin, must shudder a little at the prospect of recommending that very thing. Nevertheless, something must be done, unless one has more faith than I do in our ability or even desire to keep inflation under control.

There are two basic methods of adjusting for inflation, each with many variations and supporters. One is usually referred to as general price level adjustment, a form of indexing. The other is current or replacement cost adjustment, requiring estimates of the current cost of replacing existing capacity. As with most important matters, neither method is perfect and obviously right to the exclusion of the other. The FASB has published for comment a proposal to change the accounting principles to provide for general price level adjustments. The SEC, much more recently, has adopted a rule requiring that larger reporting companies include in their financial statements, beginning next year, footnote information on the effects of replacement cost adjustments. There is some conflict of approach here for the time being but nothing that is irreconcilable in the course of time. There has been considerable griping among business spokesmen at the SEC's move.

Now, to my dismay, again in this week's issue of *Barron's*, I encountered an interview with Professor Abraham Briloff of the City University of New York. Professor Briloff's views are important, and I say this without expressing any judgment, one way or the other, on the quality of his scholarship or the soundness of his views. His anti-establishment posture and the extremeness of his positions—usually extremely anti-management—force-

fully expressed, give him influence on molders of public opinion as well as legislation, persons without the time or resources and, one suspects, often without the inclination to counterbalance his bold assertions by further study.

With this in mind, listen to the following:

> **Q:** Abe,...what do you think about the trend towards replacement value depreciation?
>
> **A:** For me, this is nothing more than a prelude to a rip-off of the federal tax revenues. As a matter of fact, its proponents have made no secret about it. We lose track of the fact that the SEC has indicated the reason that it's trying to relate depreciation to price levels and the like is that there are various studies and tax proposals to permit this added deduction....

I dearly hope that this utter nonsense does not somehow derail this most significant progress in communicating financial information to investors. Obviously there has been a failure of communication between the SEC and Professor Briloff. Of course, effective communication requires a willing receiver as well as a transmitter. Perhaps that is part of the difficulty.

Mandated corporate disclosures can also be a weapon for purposes other than, or in addition to, enabling investors to make investment decisions and exercise their franchise. A long time ago, in support of more public disclosure of corporate affairs, Brandeis observed that "Sunshine is the best disinfectant; electric light the most effective policeman." Ignoring the scientific inaccuracy, the intended meaning is obviously true. The knowledge that transactions will become publicly disclosed does much to prevent improper transactions from occurring. In the legislative history of the securities laws, this was one of the stated considerations in favor of a disclosure policy. With possible minor exceptions, however, this deterrent effect, while recognized and certainly not regretted as a byproduct, has not been used by the commission as a sole or even primary justification in framing a disclosure requirement.

> "...there is reason to expect new disclosure requirements aimed frankly at exposing violations of other laws and policies and, by so doing, deterring their future occurrence."

This effect, and therefore possible use, of disclosure has recently been discovered by others, and there is reason to expect new disclosure requirements aimed frankly at exposing violations of other laws and policies and, by so doing, deterring their future occurrence. This may come by judicial action, by legislation, or by commission action, but if by the last of these, it will be accompanied by some other rationale.

We have seen pressure in this direction in the efforts of public interest groups to persuade the commission to require the reporting in the 10-K of the most insignificant deviations from national environmental policy, equal employment opportunity, and other laws and policies. Here the commission has tried stubbornly to hold the line at the standard of economic materiality.

On the other hand, in the area of illegal or improper payments—sometimes inaccurately called the "foreign bribe cases"—the SEC has been on the verge, at least, of taking positions on detailed disclosures that seem explainable only on the ground that the conduct, however trivial, is wicked and should be rooted out through forced disclosures. This has been true in the foreign area and in the area of illegal corporate political contributions. There are indications that before long the commission will be bringing cases demanding disclosure of domestic political and commercial bribery, kickbacks, and violations of various domestic laws.

And if the commission does not go all the way, Congress might, since it is already considering legislation that would seek to control foreign behavior of U.S. companies through mandatory disclosures. On the whole I deplore this trend. Not because I like bad behavior, but because of its threat to the traditional financial disclosure for investor purposes and what it will do to the relations of the commission and its staff with American business and auditors and lawyers.

So far I have been talking about disclosure and not about communication. They are not necessarily the same thing. One of the persistent criticisms of the whole disclosure apparatus under the federal securities laws is that it does not actually result in the communication of much useful information, financial or otherwise, to anyone who could use it. Everybody knows that few investors read prospectuses. Even fewer read 10-Ks. What's worse, even if they read them, they usually cannot understand them. Assuming these observations to be generally correct—and I am sure they are—does this mean that the whole business is an expensive irrelevance, of benefit mainly to auditors, lawyers, and financial printers?

The fact that SEC disclosure documents are typically not very readable by the ordinary person of reasonable intelligence has periodically been deplored by the commission. SEC chairmen have been fond of lecturing the members of the bar and others on the excessive use of legalisms, turgid boilerplate so dear to the heart of a certain school of legal draftsmen and so impenetrable by most everyone else.

I never delivered such a lecture, in part because I am not sure just what to do about a major aspect of the problem. Disclosure documents filed with the SEC are what lawyers call *liability documents*. If you make a mistake, you can be sued.

Consider Walter Guzzardi's article in the current (April 1976) issue of *Fortune* entitled "The Casualties Were Staggering in the Battle for Piper Aircraft." In that case, unless the Supreme Court, which has agreed to review the case, reverses or modifies, the defendants are stuck with damages aggregating $36 million. First Boston Corporation, which acted as dealer-manager on Bangor Punta's exchange offer for Piper stock, for which it earned a fee of $50,000, may be stuck with half of this, or $18 million.

The fear of this sort of thing is what leads securities lawyers to advise their clients that legal defense considerations must prevail over effective communication. As company counsel, you know that not many investors are going to read it anyway, but the *one* person in the world who you know will read it, with *exquisite care*, is the plaintiff's lawyer if the investment goes sour. Of course, legal defensibility and comprehensibility are not necessarily incompatible. But major efforts to get lawyers to write more simply and clearly have had only marginal success. And since I see little likelihood of removing the potential liability for these writings, we may see only marginal improvement in prose style.

The criticism of Professor George Benston, which also appears in this issue of *Fortune* as the Personal Investing feature, under the heading "There's No Real News in

Earnings Reports," is of a different nature. His specific point in this piece is that by the time a company mails its annual report to stockholders, any information in it that might be expected to have market effect is somehow already known to the market and its significance already fully reflected in the market price.

His studies come out with some other findings that are rather reassuring. He writes:

> In addition to getting at the facts early, the market seems able to analyze them with considerable sophistication. It is not fooled by accounting changes, for example...
>
> The research shows that, on average, earnings changes produced by accounting are not associated with changes in stock prices except when the new methods result in lower taxes. In short, the market appears to be able to see through accounting gimmickry.
>
> [Based on the recent British experience] there is also some evidence to suggest that the market is not fooled by all the distortions of financial data resulting from inflation.

Professor Benston concludes:

> In short, the market is extraordinarily intelligent. It gets the news before the financial statements are out and it interprets the news in a far more sophisticated manner than many financial executives believe it does.

It is really no surprise to learn, if true, that few annual reports contain fresh news of immediate and measurable market impact. There are other vehicles for the quicker dissemination of that kind of news, such as a preliminary earnings report given to news media. But Benston says even such preliminary releases are already discounted before they are released. I can think of some that were not. But suppose most of them are. Does this mean that all of this stuff is leaking out prior to the release date?

Benston does not suggest that. He suggests that analysts and others do a remarkably good job of developing expectations, and it is only when the actual news is significantly contrary to what the market generally expected that there is measurable market effect. So, he says, "No profits can be made from trading on the data in financial statements."

Professor Benston and others of his school of thought tend to conclude from these studies that all of the information generated by the SEC disclosure process is essentially useless to investors. And this leads to random walk, or dart board, theories of investment and indexed portfolio management—seeking only to keep up with the S&P 500, for example, by buying the stocks composing the index.

I will leave it to others to defend the fundamentalist theory of investing, and pursue another line of thought. All of these disclosures are good for management and for our corporate system of economic ownership and control. They provide an essential discipline for management. In the minds of both management and security holders they serve the cause of accountability that is essential to sustain the legitimacy of corporate economic power.

Let me try to clarify this by reference to the writings of a legal historian, Professor Willard Hurst of the Wisconsin Law School. He writes that:

> There are broad currents of opinion in the society [our society today] which are not certain that the corporation is a legitimate agency for capital mobilization.
>
> Its legitimacy has to turn to a considerable degree upon maintaining some sort of vitality in the investor and in the legal protection of the investor. He may, in the large, be an unreliable source of the necessary impetus for maintaining this role, because most investors don't give a damn, or they express their give-a-damns only by opting out via the stock market, but still the presence of the investor body and the presence of declared legal rights and duties of investors provide...an indispensable leverage for creating some means of external check on management power holders.
>
> We want management power holders, but our tradition stubbornly insists that we can't tolerate any group of power holders who are accountable only to themselves.

"Management *must* regard itself as accountable to its stockholders—and this means full and truthful reporting of its stewardship on a regular basis—in order to sustain the ligitimacy of its own power."

Management *must* regard itself as accountable to its stockholders—and this means full and truthful reporting of its stewardship on a regular basis—in order to sustain the legitimacy of its own power. If this is not taken seriously and done effectively on the whole, then the only institution to fill the void must be the government.

A View of the Securities Market

Richard E. Cheney
Executive Vice President, Hill and Knowlton, Inc.

Mark Twain supposedly once said that a lie will travel around the world while the truth is putting on its shirt. Thanks, in part, to my co-panelist, the truth may very well catch up, as the present epidemic of confessions of corporate bribery suggests.

Never short of a Salvation Army prayer meeting have so many sinners come forward to detail their sins. I'm reminded of the story of the tumbler in the confessional, who, when asked about his profession by the priest, demonstrated with a few flipflops and half-gainers in the aisle of the church, to the consternation of two old Irish ladies who entered at that moment. One turned to the other and said, "Look what Father Sporkin's making him do for penance this morning. And me with no pants on."

Never before in the United States have our reporting requirements been so stringent. Never before has there been such an unequivocal obligation to provide a continuous flow of timely business information to all investors, share and share alike. Practically everybody connected with this business, including those of us charged with the communication function, is now liable for, often even a guarantor of, the timely dissemination and the adequacy and reliability of investment information. The broadened 10-K and 8-K requirements that Mr. Garrett talked about, the new expanded 10-Q's, have had a dramatic impact, not only on business reporting, but, as he says, on the conduct of business as well.

I would hope that a useful purpose would be served if we stepped back today and asked the question: What is this all about? What are we trying to accomplish? I'd like to suggest that one attractive answer to this question is that we're trying to maintain the economic well-being of this country by facilitating the raising of capital through a fair market.

A securities market that promises "no springs, honest weight," is bound to be the busiest market in town. The securities sold there are going to command a premium for honesty, whereas the securities sold in the gypsy market across town are going to sell at a chiseler's discount. The company that comes to the fairest market to raise capital is going to find the most receptive buyers and get the best price for its securities. Measured against this aim, I think we all have to agree that most of the commission's efforts over the years have been constructive indeed.

Having said this, let me add a disquieting second thought. The New York Stock Exchange released a census of stockholders at the end of last year which showed an 18.3 percent decline in the number of U.S. shareowners over the preceding five and a half years, down nearly 31 million in 1970 to 25 million on December 31, 1975.

At the same time, the institutional stockholders were narrowing the number of companies they actively followed. The most recent figures available to me—obtained in a survey by Technimetrics, a research firm—are now over a year old, but they still offer, I think, a disturbing picture of the securities market. The pension managers in the Technimetrics study actively researched an average of only 200 stocks, down from 226 in 1973. While affiliates of mutual fund management companies increased their stock coverage in 1974 from 240 to 315, the number of companies actively researched by bank trust departments dropped 17½ percent and by investment subsidiaries of banks 20.8 percent.

Think of this in relation to the 2,118 stocks listed on the New York Stock Exchange plus the 1,261 stocks on the AMEX, not to mention approximately 2,600 NASDAQ stocks.

Who is following all the other companies? What are those companies going to do if they want to go to market to raise capital?

Though I have no way of proving this, I think the new option markets may be draining money out of the market

"A securities market that promises "no springs, honest weight," is bound to be the busiest market in town."

for stocks of smaller companies, the very companies which are most apt to have to go outside to raise capital. People who used to buy over-the-counter stocks for speculative rise want to play the option market.

Perhaps I'm unnecessarily alarming. Two weeks ago, the "Heard on the Street" column of *The Wall Street Journal* pointed out that about three-fourths of the stocks listed on the New York Stock Exchange reported upward price movements in the first three months of this year. Only 95 stocks were below their 1975 closing prices. The rest were up, some as much as 100 to 200 percent. The gains on the AMEX were even more lopsided. Only 33 AMEX stocks dropped in price, while 1,013 advanced, and the gains ranged as high as 272 percent.

Moreover, in the past month or so, eight companies have announced initial offerings of securities. That's as many as went public in all of 1975.

It does seem likely that more discretionary income is going to find its way into the stock market as the recovery continues and inflation remains under control. Also, in all probability, the very fact that the market is rising is going to bring broadened interest in stocks, with success breeding renewed interest. Who's to say that the capital markets aren't alive and well and on the threshold of their greatest era?

Confronted with this kind of question, I feel a little bit like the resident physician in the Bellevue emergency ward being asked whether the people of New York City aren't some of the healthiest people on earth. I see a fair number of U.S. companies from a very special perspective. That perspective is when they are threatened with being taken

over against the wishes of their management.

If you ask the chief executive officer of Microdot or Garlock (incidentally, that's one I lost), two recent targets of raids, whether he thinks a healthy market sets an adequate price on his company, I'm sure he'll give you an earful. If you ask him whether his 10-K or 10-Q or 8-K was of any value to him, getting his stockholders the best price for their stock before or during the raid, I'm sure he's going to have some strong reservations about the amount of help they were. Despite all our stringent reporting requirements, there are plenty of other managements afraid of finding themselves in the same fix, because their stock prices don't reflect, really, the underlying value of the company. You can witness the number of state laws being booted through legislatures to slow down tender offers, and companies are stimulating that kind of legislation.

So what? So what if a few companies with good earnings records and a lot of promise are selling at bargain basement prices? Aren't tender offers part of the corrective mechanism of the free market?

The trouble with looking at takeovers as a corrective mechanism is that they add, unfortunately in my opinion, to the concentration of economic power—although I can overlook that if I'm hired by a firm that wants to take somebody over. As Rudy Eberstadt, the president of Microdot, put it, "Where are future Xeroxes and IBM's going to come from when smaller companies are gobbled up because the market passes them by?"

"Is it enough for the 10-K to talk about the steak and leave nobody to talk about the sizzle?"

Now, is it possible that the SEC, in mandating reforms in the brokerage commission structure, has overlooked the need to strengthen the marketing capability of brokerage firms? Is it enough for the 10-K to talk about the steak and leave nobody to talk about the sizzle?

Let me draw what I hope is a legitimate distinction between selling a security and puffing. A number of companies have been getting a letter from a competitor of ours soliciting their financial public relations business. After drawing the management's attention to its company's low stock price in relation to book value, the letter goes on to make such claims as the following:

"In July 1973, we were hired by 'X' Corporation. On an adjusted basis the stock was selling then at about $2 per share. It is currently selling at $16, adjusting for a three-for-two stock split in 1973 and a three-for-one stock split in 1974. It reached a high of $23½ after adjusting for the split. In a matter of a few months, we were able to successfully turn over the entire floating supply of stock. The average daily trading volume in the stock went from about 4,000 shares to over 40,000. The stock was recently listed on the New York Stock Exchange. We were able to place several stories on the company in financial magazines and *The Wall Street Journal*. In addition, we generated brokerage reports by such firms as Baker Weeks & Co.; Shields Model Roland, Inc.; and Eberstadt & Co., Inc.; etc.; and hosted brokerage and institutional meetings throughout the country. 'X' Corporation is now known coast-to-coast and has an excellent institutional and brokerage following."

The letter goes on:

"We have enclosed a backgrounder, which we prepared on 'B' Corporation. We obtained considerable sponsorship for this company throughout the United States, developed a number of prominent news stories and generally made the management and company well known throughout investment circles. Within one year's time, we helped the stock price move from $13.75 per share to $21. The company was subsequently purchased at $25 cash by 'C' Corporation on the basis of only a little over $1 in annual earnings. You will find in our backgrounder how we played up the asset value of this company."

Despite all the efforts of the SEC liaison committee of the Public Relations Society of America, which I chaired for a number of years, and despite lawsuits against PR men like the Pig 'n Whistle case, there are still "flaks" such as this around offering to "flog the multiple."

In talking about the need to promote a responsible selling effort in the securities markets, I am not asking for this kind of overreaching—for a return to the go-go years when investors were bilked with "concept" stocks. I am talking about fostering a concerned marketing effort to promote the material well-being of more customers through the purchase and sale of securities.

I think the SEC really should do more to encourage companies to take their story to the investor. Too often, whether it intends to be or not, the SEC is thought of as an inhibiting force. We still find some law firms fearful of SEC reaction to an effort to get companies better known in the investment community. Just how farfetched their caution can become was illustrated recently by one client who was told by his lawyer he couldn't hold meetings with security analysts because he had convertible stock outstanding. Because the price of the underlying common stock was such that conversion looked imminent, the lawyer said our client was in the midst of a security offering, during which talking to security analysts would be a so-called "selling effort" and hence would violate the securities acts.

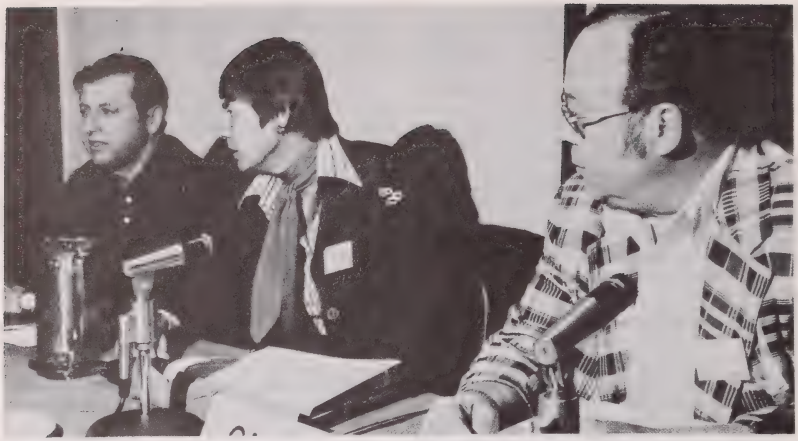
Why is this silly? Because communications are constructive if they're responsible, whether a company is about to sell securities or not. In my view, the commission can't emphasize too often—and it's tried to do this in the past—the importance of a company maintaining its communication effort during a registration period. In fact, with the 10-K today, it might be said to be in registration all the time.

There's another point which can't be made too often. The commission should make sure that in its zeal for full disclosure, it doesn't cause companies to swamp investors with so much information that they turn away in disgust to real estate or the racetrack. In past talks, I've occasionally mentioned what I call the cigar stand theory of financial public relations. Let's say you and a friend are partners in a cigar stand, and you go to Europe on doctor's orders for a month with strict instructions not to think about business. When you get home, you hurry down to the cigar stand and say, "How's business?" You don't want him to give you a 10-K, at least not right away.

Walter Olsen, president of the American Institute of Certified Public Accountants, recently made the same point. He said:

"It is not very satisfactory to give users of financial reports a lot of financial data and tell them to make their own analysis and interpretation. They need to be told what the financial data mean in terms of the operations, financial condition, and future prospects of the business.

"It seems to me that management is in the best position to do this and should be charged with providing such information in new formats that would include sections



dealing with the key aspects of the business such as production facilities, sales order backlogs, marketing programs and product development, work force and labor relations, and working capital.

"We have already started in this direction," he continued, "as a result of the Securities and Exchange Commission's requirement for a management analysis of the summary of operations. What I am suggesting is that this approach be expanded and refined to take the place of many of the disclosures which are currently included in financial statements and footnotes."

Some measures to stimulate the securities markets I would question. Should the SEC attempt to attract more and better salesmen and analysts to the securities business

"...communications are constructive if they're responsible, whether a company is about to sell securities or not."

by restoring fixed commissions? In addition to restoring fixed commissions should we skew them to subsidize the small investor who is now paying higher commissions than he did prior to a competitive rate structure? Since the smaller investor might be apt to buy a wider range of stocks than the institutions, wouldn't subsidizing him help to make for a broader and healthier market, assuring that the Microdots and Garlocks got more attention?

I don't think we need to turn back the clock to a fixed commission structure in order to assure a broader and healthier security market. Despite competitive commissions, brokerage firms will use some of their larger revenues to strengthen their research and marketing capabilities without any commission umbrella. Who knows? If the industry thrives sufficiently, we may even see new firms starting up.

But I do believe that the problem of creating a healthier market for a broader list of securities can be tackled in another way. Since business pays so much of the tax burden that keeps government going, why not stimulate business by giving investors a tax break on security transactions? Stimulating capital formation could cause business to expand sufficiently to make up much of government's initial loss in tax revenues.

Why shouldn't the SEC show its concern for a broader and healthier market by taking the lead in getting such a tax break for the investor?

But, you may ask, is tax reform the province of the SEC?

Let me answer that question with another.

Are foreign bribes?

The furor in the SEC over bribes highlights my basic question. What is the SEC trying to accomplish? Is the SEC's role to set guidelines on how big a bribe should be reported, as Al Sommer suggested in his final salvo a few days ago? He was trying to get at this economic materiality criterion that Mr. Garrett talked about. But bearing in mind Pascal's observation that three degrees of latitude can make murder a crime, should the SEC tell us whether a crime in a banana republic is a crime in Washington? Or vice versa?

There's a continuing danger, it seems to me, in the commission's going too far over into an adversary role in its relationship with business. We must continue to ask what it is trying to achieve and to suggest ways that can help it accomplish its proper objectives.

Question and Answer Period

Q: *I have in mind a class action suit against the SEC. It seems to me that the information disclosure policy of the SEC tremendously favors our large investors who can process information, and that what you're really doing is giving the institutions a tremendous advantage over the individual person.*

Garrett: The suggestion is that by requiring so much detailed information in filed material, the commission is giving an unfair advantage to the institutional investors who have the facilities to process and use all of this data, whereas the individual investor does not.

It has never seemed a very persuasive argument for withholding information to somebody that can use it, that someone else possibly would not be able to use it. I think the commission has relied upon the ability of small investors to take advantage of what in the trade is called street research. That is, the analytical reports that are done by the

research people in broker-dealer firms, or access to some more sophisticated investment counsel if he wants it.

The general effect of all of that, particularly if you could believe any of Professor Benston's stuff, does get widely reflected in the market. In any event, the commission has never deterred people—at least not as a matter of policy, maybe some specific examiners have—from restating complex material in simpler form, or summarizing highlights, or using the famous pie charts or the Mother Goose stuff, as it came to be known, that would make it easier for the investor who's in a hurry or who lacks resources to do more, to get a quick picture.

I really can't agree with you that we should cut back on what professional analysts could use, simply because ordinarily people can't use it directly in their personal thinking.

Q: *Is there any indication, in terms of a measurable trend, Mr Cheney, in terms of takeovers, that would point toward acceleration corresponding to the late Sixties? What are the trends for takeover?*

Cheney: Well, if you had asked that question a few weeks ago, I'd say it looked like they were coming at about a one-a-day rate. For some reason or another, they've tapered off.

Now, you know, in the Microdot fight, there was a question—I'll have to be careful how I talk about this, because it is in litigation now—there was a question about whether one of the banks had acted with propriety in lending the General Cable people money—when General Cable officers were on the bank board, incidentally—to finance a takeover. Microdot, you will recall, was a bank customer and had a $2.5 million line of credit.

The bank in question defended its action on the ground that it would be a patsy for everybody that came in and put a little money in the bank. They could then not legitimately make money financing takeovers, so they defended their action.

I understand since then there's been a lot of calling on banks by corporate customers for assurance that they wouldn't be taken over by raiders financed by the bank's money. The bank's involvement was quite well publicized; we did our best anyway. Corporate customers of the banks don't want reassurance on the phone. They want to come into the bank and they want to find out from the bank what its policy is going to be.

I don't want to place undue emphasis on public relations activity in takeovers, but I think, though it's hard to prove, this pressure on the banks has slowed down the tender offer business to some degree.

The second thing that slowed it down, which is probably more important, is that there are an increasing number of state laws that call for hearings and delay and so on in takeovers, and the delay makes possible a slip in the offer, something going amiss, or whatever. But I think another reason raids have tapered off is that the rising market has tended to discourage people—the kinds of bargains that were around in January were just incredible. There are still a lot of bargains around, and I can tell you, based on the number of people who have come to see us, who are breathing hard, I would look to see some more raids through the year.

Q: *Is the tender offer still a favorite approach?*

Cheney: By whom?

Q: *The raid—takeover.*

Cheney: Well, it beats a proxy fight, if the alternative is a proxy fight. If you really want to know where I got my head kicked in, I'll tell you about a couple of proxy fights.

Q: *I'm talking about a tender offer as opposed to negotiated—*

Cheney: Usually you do the negotiated, if you can. But if you think the people are going to be reluctant or difficult, if you decide you want them, you go the other way. You've got a problem, though, of enlisting their cooperation. If it's a situation where you've got a marketing force or skilled professional people, you can't afford to antagonize them and lose the whole ballgame.

But a natural resource company, for example, where there are a lot of assets and you can manage them, maybe, as well as the management, then you might decide that the management is stubborn and intransigent, and you're going to go for a surprise offer, hostile offer, so-called. You suit your method to your situation, to what you're looking at.

Q: *You read us a letter, something about soliciting an account. Obviously, you're not approving of that technique. Now, there's that account out there and he may get it or your firm may get it. Once he gets it or you get it, how does your firm do the job differently than his firm?*

Cheney: In this case, we had it.

Q: *Would you do anything differently once you got the firm?*

Cheney: I don't know. I don't know how he works. But you know, one thing that's happened, in my opinion, since the market decline—the quality of analytical research has come up enormously, because the guys who weren't so hot got fired and the people who are left are careful, they work very carefully. Hell, they could see through a four-flusher at five miles. They're not going to be taken in by somebody who twists their lapel. There are very, very shrewd people on the street today.

So you level with them, you try to establish a climate where you level with them. I don't know what he does.

Q: *It seems to me that one of the prime areas of your talk was to try to, somehow or other, encourage the small investor to get back into the market. If that's the case, what do you do to encourage your clients to write a clear and more concise 10-K and all the rest of the requirements that are necessary under the SEC regulations, so the small investor can get this material and try to make his own determination?*

Cheney: Well, the 10-K itself, we've done some surveys and found that when they're offered, there's very little interest from stockholders in getting those things.

Q: *Is it that they don't want it or can't understand it once they get it?*

Cheney: I can't answer that. They don't get that far. You know, you can't say that they don't understand it, because they just don't want it. Maybe that's just a sign that they didn't even like the annual report which offered it.

We're hard pressed—we try not to do boilerplate programs for each client. I can tell you some things we've tried which I think are kind of interesting. We had one client, recently, who had a guy call on him who said he was going to own 10, 15 percent of the stock by February or so and he wanted it on the board.

Now, my client, who is a tough cookie and has a nice sense of humor, referred to him as the anteater, because that's what he looked like and we were determined to resist the anteater. In that instance, my client had a good record, a wonderful record. He was in a turnaround situation and he quite legitimately split the stock three for two and maintained the dividend. And then, at my urging, he called all the stockholders and said, "Did you get the news about the dividend? I want to make sure that our reports to you are informative and that you're getting what you want from us in the way of information about your investment." And he was dumbfounded. These stockholders couldn't believe

that a management cared enough about them to call and ask that kind of question.

And afterward he wrote a thank you note. He said, "I appreciate your taking the time to talk to me about our company. Thanks for your help. I'm sending a very modestly priced company product as a token of appreciation."

I can tell you we're a lot better off now when the anteater puts his nose in the tent. The anteater has never gotten his 5 percent, incidentally. He hasn't filed a 13-D, which is the form you file when you get that much stock. And I think he's got the message, because he's just up against it if he comes in there.

If you call stockholders after a raider shows up, they still like it, believe it or not. But there are probably a few of them who say, "Oh, *now* he calls me"—if you see the difference.

Another instance—we have a steel company client. Readership studies on the back part of the annual reports—not the financials, but the operating sections—show that they really are dullsville. They send everybody face forward into the report with a great belching snore.

Now, we said, "What the hell can we do to get that read?" Our steel company client talked to a security analyst, a stockholder, a shop steward, Abel, steelworkers, Father Hogan (a great steel economist and a customer), and they all talked about the company very forthrightly and candidly. They complained about aspects of it. One guy complained about getting his dividend cut, and so forth. And the chief executive officer answered their comments in the report in a very straightforward way. That got a lot of readership and a lot of interest, I can tell you. Everybody here should rethink his communication program to see if he's really getting through.

Q: *For several years, now, I've continued to lose battles with my company concerning lines of business. We have three lines of business, and we had a fourth called "other." Very frankly, I don't know what makes up the other. I keep asking the question, "What is the future of lines of business within the SEC and particularly, where should I go and what should I do in order to turn over a better battle?"*

Garrett: There isn't at the moment, so far as I know, any live project to change the very fuzzy and unsatisfactory rules and instructions that apply on line of business reporting, as far as the SEC is concerned. The Trade Commission, you know, got involved in wanting reporting, at least, from major companies, based on standard industrial classification business. The SEC accountants and commissioners never thought that kind of detail was either necessary or particularly helpful to investors. We've never gone that far. Frankly, I don't know what you can do.

It is a most unsatisfactory area, I agree. I think there's been some voluntary improvement. I see more detail that some companies are putting in, at any rate, without necessarily being compelled to do so. It is a definitional problem, and definitional problems are quite serious. It isn't easy to say what's a line of business for all companies for all time, but the general response in many companies has been to be as uncooperative as possible and still get their filed material done. You run into such well-publicized examples as 3M being simply in the tape business, and Motorola in the electronics business, and some other situations like that. I'm talking of several years ago; I'm not up to date on the reporting at the moment.

But I would not look for improvement through the SEC. There are other things that are further up on their list.

Cheney: You might use the argument that what investors don't know about represents risk. And also, when you get that kind of catch-all framework, sometimes they think two things are wrong when, in reality, only one is wrong. And the more you give the investor, the easier you are for them to follow. If, in today's marketplace, they can't understand it, forget it. No security analyst wants to run the risk of getting canned because he didn't foresee a corporate surprise. And your "other" as a line of business category represents a potential surprise.

Workshop Session: Group A

Moderator: Ray Gaulke
President, Marsteller, Inc.

Presenter: Al Campbell
Director of Advertising, FMC Corporation

Gaulke: When I was asked to do this, I said, "What are we going to do at this session?" and somebody said, "Well, you really don't have to worry. This has been the most successful session in the last few years, because it's a give-and-take session." That still made me a little nervous. So we had some talk, and I said, how about having a good friend of mine, Al Campbell, who is director of advertising for FMC, talk a little bit about his program, which we are familiar with, because we work on part of it.

What I suggested at first, was that Al was moving from—how many agencies, Al?

Campbell: Thirty-five.

Gaulke: He's starting with thirty-five agencies, and he's moving that number down to eight, and then it's going—

Campbell: Four, five.

Gaulke: Okay, I'm close. Fortunately, I'm one of the five. And I thought that might be something that you'd all be interested in. There's really a lot to the FMC program that you might be interested in, and Al has agreed to put together an overview of the program. We're going to go through it, and we can stop at any point and answer questions or discuss some of the key areas. So Al, I'm going to let you start.

Campbell: Thank you, Ray. I thought if we had to have a title for this session, it would be called, "There's more than one way to skin a cat." And after listening to all these presentations about corporate advertising, corporate communication, I can see why there is so much confusion in this area. We're all trying to do the same things. We all have the same kinds of objectives, and we're all in there pitching for attention. I guess this is why a lot of corporate programs begin to look alike.

First, we're going to talk about FMC. Then in about thirty seconds we're going to talk about advertising. We have a corporate management committee. *(Slide)* Our management people review our program and give it final approval. Our corporation is structured in two parts. *(Slide)* When I talk to our chemical people (42 percent) they're the front part. If I'm talking to our machinery people (58 percent) they're the front part.

We have a lot of divisions, *(Slide)* thirty-two of them in the United States, and that's the end of my thirty second FMC promotion.

Now, I would like to take a few minutes to explain our complicated but highly structured program. It's called *(Slide)* "Corporate Advertising, 1976." And just so that we understand each other, all of the subjects you see on the screen are going to be open for discussion later, either from me or among yourselves, or back and forth, or whatever. *(Slide: FMC objectives)* Objectives and strategy is a subject that we can all talk about at any time. *(Slide: FMC audiences)*

Target audiences are another subject that is wide open. I'm sure that most of yours are the same as ours.

Media recommendations. *(Slide: FMC media)* The reason I put this *(Slide: increased frequency and reach of pages vs. spreads at same budget level)* up is that we did something a little different at FMC this year. We went from spreads to pages, and what I was trying to show my management was the amount of coverage we got when we bought spreads and the amount of coverage we could get when we bought pages.

This was the kind of campaign we were running when we were running spreads *(Six slides: spread ads)* and this is 1975.

We ran a series of ads that talked generally about our company. They talked about areas that cut across divisional lines. Although they were industry oriented, they weren't necessarily product oriented, and this series did quite well. I'll show you the last three here.

We did, over last year, increase our awareness 30 percent and you must realize that we've only been doing business as FMC for about three years. We changed our name to FMC in '61, but up until three years ago we did business as about twenty-eight different divisions, under twenty-eight different company names. It was only three years ago that we decided to sign everything with an FMC.

We took three of last year's ads and converted them to a one-page format for this year, and tried to create something a little distinctive. Our ads tied to energy, food, and other important subjects.

I'm going to leave this slide on for just a second. We're talking about air and what we do in air pollution control and water pollution control. I would like you to know that we got a letter after we ran this ad from a man who had bought a hundred shares of stock. He was very excited about this ad. He happened to see it in one of the weekly news magazines. I felt very gratified about that. That's one of the few letters we got this year. We probably don't get as many letters as the television advertisers, but I imagine a lot of you don't get a lot of letters on your print ads either, so we're probably all in the same ball park.

If you opened your new issue of *Fortune*, which they very generously left in our rooms, you saw this ad *(Slide)* there. And we run our ads—

Voice: —Who did the photography on that ad—

Campbell: This was done by Dancer, Fitzgerald, Sample, our corporate agency, and it was done out of their San Francisco office. I don't have the name of the specific photographer.

These *(Slide)* are some of the domestic media that we use, and *Fortune* is right in the foreground here, as you can see.

In our international program, we took a little different tack. We're trying to talk about different parts of the world that we're doing business in, and we run these ads *(Slide)* in seven languages.

We do a little bit in the plant community. You know, when you're talking to a consumer advertising type, a lot of

the time he is just responsible for one brand or something like that. And as most of the corporate advertising types find out, you not only do your domestic advertising or your corporate advertising, you probably help on your product advertising, and then you do some international advertising, and when you get into the area of plant communities, you've got to do something there too.

We're going to try radio this year. We set some different objectives, *(Slide)* and so we'll be glad to talk about objectives or plant community programs.

Voice: Al, what's the message that you're putting into the local market?

Campbell: Oh, we're going to do something a little different this year. We tried last year to get our plant communities interested in using radio as a means of communicating with their own employees and with the community in which the plant is located. We had a couple of divisions that were doing this quite successfully. Once a year, I hold a seminar and bring fifty-two of my communicators in, and we have a two and a half day session. We played tapes for them, told them what a great reaction they were getting in those communities using radio, and waited for a year but nothing happened.

So this year, we made a presentation to our corporate management. We wrote three one minute commercials. We took 50 percent of the commercial time to talk about the corporation. We took 50 percent to talk about the local plant. We did the three just as a demonstration. We put some background music on them. We planned to have the commercials written locally and taped by local announcers. We'll provide the background music and we're going to split the cost on a fifty-fifty basis with the local plants. We're going into about fifteen of our forty-two plant communities with this on a test basis.

We're starting in new communities where we built new plants during the last year.

Then we're going into some small communities, where we have fairly large plants. We looked at a few major metropolitan communities where we have more than one plant and will use Houston as one of those.

Voice: And the total cost is only $16,000?

Campbell: Our half of that is $16,000. It will run about $32,000 and we budgeted about $75,000 for this area, so we're going to double the frequency. We're going to run it for thirteen weeks and get some plant reactions and then we're going to run it for another thirteen. So we'll spend about $70,000 in that area.

We also do some special advertising for special areas. *(Slide)* We did some in Poland, some in the Middle East. I'm sure you all do that kind of thing, too. So any kind of specialty advertising you want to talk about is wide open.

Occasionally, we have to run a customer relations ad. *(Slide)* In this particular instance, one of the big soap companies is a good customer of ours and they sponsor the Dinah Shore golf tournament. They asked if we would put an ad in the souvenir program. I borrowed the art work from our chemical group—this used to be a chemical ad, talking about agricultural chemicals. We changed the copy, and made it a golf program ad.

We have corporate policy standards, *(Slide)* as all of you do, I'm sure. If you don't, this is a super place to make it very clear to your divisions, if you're a multidivision operation, where the corporation stands, the kinds of things it does, and what the divisions are to do.

We're one of the few companies that have an advertising policy and guideline manual. *(Slide)* I brought copies with me and I'm going to make you all take one, because I don't want to carry them back to Chicago. These were written primarily for our division ad managers.

You know, occasionally, we get a division, and I'm sure you do, too, where a product manager is running the advertising and you don't really have a skilled ad manager. So we have a manual that gives them some of our graphic standards and things like that.

Our law department, trademark, and patent people put out a manual which we published for them, called "FMC Trademarks, a Guide to Correct Usage." *(Slide.)* This is a confusing area for sales people, and sometimes even for advertising agencies. They often use trademarks as read-through copy and things like that. We have rules on usage, as you all do, and we've published a manual on them. I'm going to give you all a copy of this manual, too, because I don't want to take these back to Chicago either. You're free to plagiarize any of this material that you think is worth while, or you might send it on to your own law department.

We have a big identification standards program. *(Slide)* We were one of the Lippincott & Margulies identity programs about three years ago. I was involved in the program to redesign our trademark, and then in the publishing of the standards and guidelines that we follow. They cover things like stationery and business cards and forms and all the usual: truck identification, railcar identification, divisional identification. We even have a separate manual *(Slide)*—I didn't bring you one of these, but you are all welcome to it—it's a little thing called "Program Design to Help Dealers and Distributors," and it tells how our program works for them.

We also, in our department, get into the trade show area, *(Slide)* as I'm sure a lot of you do. So we have certain standards that apply to trade shows—color schemes and graphics and things like that. This was the big packaging show last year. *(Slide)* We go to about 200 trade shows, seven or eight of which are major. This one had about five divisions participating. It's just in the last two years that we've been participating as a single company, rather than as five different divisions, hidden in different parts of the hall.

Sometimes you produce special promotion pieces. *(Slide)* We produce a product index, which is a fold-out piece that lists five or six hundred products. We have a little book *(Slide)* called "The Company We Keep," which a salesman can carry in his pocket. It's done in Chinese, English, French, German, Italian, and Spanish.

We reproduce our print ads. These folders *(Slide)* on the right, "A World in Need of Positive Answers," are a sample of that. We produced a Bicentennial calendar for secretaries or desk use *(Slide)* and put "1976-1776" on it in some fancy graphics. We get into graphics on packaging *(Slide)* with all of our divisions, so that they're done in certain styles. We are in the plant sign business *(Slide)* and we carried out that program fairly well throughout the world.

Product identification *(Slide)* is another area that's going through a lot of changes right now because we're just implementing this program.

In our department, we also produce an advertising media report, *(Slide)* to give all of our divisions the total media list costs. We use about 360 trade publications and produce about 2,000 ads a year. We consolidate all the media information, so we know everybody is getting the lowest earned rates for everything.

We distribute materials like guides for compliance

with federal antitrust laws and advertising substantiation and advertising and women. We've got an audiovisual program started *(Slide)*. We're going to set standards in this area. We found out we're buying equipment all over the company that's all different. When we tried to get cassettes from one part of the company and put them on another, we found we couldn't. We have to go through an expensive process of changing them so they'll work on different kinds of playback equipment. So we're going to standardize equipment. We're going to standardize on openings and closings for films and things like this, and try to give our people more help in the whole audiovisual area.

This is becoming a very important area for sales and training films and all kinds of foreign language films.

We also get into the business gift program *(Slide)*. We publish a little book on that. We don't keep any of the inventories. We buy the gifts and put them into a gift house and they handle all the orders for us. So gift items, or anything like that, is a subject if anybody wants to talk about gifts.

Literature is put out by the corporation, and all of the divisions, so we try to maintain a standard format for brochures with regard to quality and graphics. *(Slide)* I know all of you do this.

Our divisional advertising *(Slide)* is a little bit different from some of the previous programs discussed. Yesterday,

"Communication with our own communicators. You have to provide the opportunity to let those people talk of what they're doing, and talk with us about what we're doing."

Mr. Boomer (of United Technologies) was talking about how they use their signature, and they play up their individual company names along with their corporate mark. We did away with all our old company names, and we only have what we call competence areas. We talk about environmental equipment, construction equipment, or food equipment, and so forth. At least our ads are all being signed FMC now, and they do start to look as if they're coming from one company.

We had, as Ray Gaulke said, thirty-five advertising agencies when we started this program about three years ago when I took over as corporate advertising director. One of our problems was to communicate with all those agencies, and it was rather difficult. We had even appointed five agencies in the same city, where one division didn't want to use the same agency another division was using, just because the other division was using it. And so we've taken a lot of little $200,000 and under accounts and put them together. We now have five agencies, some of them doing several million dollars worth of business. Marsteller and Dancer, Fitzgerald, Sample are the largest.

That's the end of the FMC program. *(Slide)* All of the subjects covered are now wide open for discussion.

Ray, why don't you start off by telling them how easy it was when FMC changed agencies in Pittsburgh, Chicago, and New York since we don't do this with directives, just "persuasion." Tell them what happened, Ray.

Gaulke: Sometimes you go to a division and talk to them and they're very friendly, and you have a really unique meeting and you say, well, when can we get started, and they say, well, get started doing what? And we say, well, sort of get started being your agency. And they say, that isn't what we had in mind at all. And so sometimes we go back several times and talk to them, but eventually, it works out.

It's a little better than when, all of a sudden, we're really shoved down somebody's throat. That is really difficult. The way that Al has been introducing us, letting us get acquainted, and then leaving it up to us to approach them like a new business prospect is much better—in other words, do our capabilities presentation. We might do a little research on the market. That has been a very effective tool for us in taking over some of these divisions, because most of them, you see, are really being served by agencies that are just around the corner. Most of the agencies will do pretty much whatever they want without question. That sometimes represents a problem.

But we've been successful, I think, in every take-over. It's also been good, since we work with some big divisions, to show them the work we're doing for those divisions. It helps a little bit in the transition.

But you see, when you tell them the advantage of having an agency with a lot of resources working for them where normally that agency would not be interested in working for that division, that's the real sell.

Voice: Al, how many people work for you?

Campbell: We have a very lean corporate staff. We have five. I'm director of advertising. I have a marketing communications manager, audiovisual manager, exhibit manager, and identification manager. I have half use of a PR man I just hired for our Brussels office to coordinate our European activities. So we have five and a half people. Then five secretaries who all have extra duties such as exhibits assistant, audiovisual assistant, media and budgets assistant, special services and so forth.

We have a separate corporate PR department, but at the divisional level all the ad managers handle product publicity. Corporate PR really handles financial relations, government relations, employee communications, etc.

Voice: So in effect you have thirty or forty people performing these functions?

Campbell: About fifty.

Voice: You say you bring all your people together once a year.

Campbell: We have a seminar.

Voice: Could you give us an idea of what the objective is?

Campbell: Communication with our own communicators. You have to provide the opportunity to let those people talk of what they're doing, and talk with us about what we're doing. We sometimes have a policy that we think is super, and then find out it doesn't work very well for the divisions. By the end of the session, they tell us why it doesn't work. Sometimes it's an excuse when they say that won't work. Usually when they understand the policy it works very well.

Voice: Do you invite the agencies to these meetings?

Campbell: We have not in the past because we have had too many. We are still not certain whether to invite them to some sessions this year.

Voice: Your advertising policies, the advertising and promotion activities for your line of products are the responsibility of each division. And having said that in your policy, how do you legislate the divisions into placing their business with the agencies?

Campbell: Corporate policy staff divisions can't change their advertising agency unless they tell the corporate office.

Voice: You're making the change, not them.

Campbell: Originally, yes. We selected the best agencies to

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be our agencies of record. Then we convince one division that they will get better advertising using one of these agencies.

Voice: Actually, what you're doing is you're setting marketing and advertising plans at the corporate level.

Campbell: No. Marketing plans and advertising plans are a responsibility of the individual divisions. How they carry them out with their agency is not just their responsibility. We review advertising objectives and strategy but they can't change agencies just because they feel like it.

Voice: In other words, and this is a problem I'm sure every corporation faces, you are giving them the responsibility, but you are taking some of the authority away from them.

Campbell: The authority of selecting outside consultants, yes.

Voice: Doesn't this give them a cop-out? If they are responsible for their own advertising programs, and for whatever reason, their advertising programs are not effective, can't they turn around and say, you're the one who made us change agencies? How do you face up to that?

Campbell: So far, in every instance that we changed agencies, the divisions have come back and said there has been an improvement. We've been doing this by upgrading our agency service. But we are making the decision at the corporate level as to which agency or agencies will be used. I've had marketing directors who were hostile about changes, then later, we'd sit down at a luncheon and the vice president in charge of that group would come back to me and say, I didn't realize the kinds of services we could get from an advertising agency.

Voice: Are you able to do this at the same cost to the division as you had before?

Gaulke: Al has convinced us that there will be good times and bad times. I think we're fortunate and I assume that the other five agencies are, too. We have some large accounts in this mix. We have the agricultural-chemical division, for example, which is very large, and Al's point of view, and we've accepted it, is that we have to look at the account as a single account, although it's in twenty-five pieces around the country. As long as it's in one office, that's okay.

I think the guys in Chicago, who may be handling three unprofitable pieces of business when I have a large profitable piece of business, may not feel that way. But we've had a discussion about that, and we do now view it as one account.

I think it's going to work out okay. But we have a little piece of business, for example, in Horsham, Pennsylvania, which is the FMC packaging machinery division, and I doubt if they're going to spend $100,000 this year, but we're going to serve them as if they were spending, you know, three-quarters of a million.

Voice: We have an exhibit house of record that we try to use in our affiliates around the country, and we try to keep that part of the business out of the advertising agency. The house of record has good designers, who understand our program, and are able to work with affiliates and carry that kind of thing out.

Voice: Is that a corporate budget, or do you charge that back to the divisions?

Voice: Corporate.

Voice: Did you say you have separate compensation arrangements—

Campbell: With different agencies.

Voice: Could you describe them?

Campbell: Sure. We go from straight commission to where we pay a fee, and they kick back all the commissions and apply it toward the fee. We have some agencies that handle space only, and the divisions are working with art services, PR firms, or boutiques, on separate contracts with separate arrangements.

Voice: What determines the arrangement?

Campbell: The needs of the division, really. You have to kind of look at their program, how much money they're spending, where they're located, where the agency is that's going to serve them, which agency can serve them best, and go from there.

Voice: I'm going to raise this subject to the people around the table. How do they feel about the problem of an agency on a fee basis. Say corporate advertising, the agency is happy, you are happy; would you significantly increase the media expenditures. We really don't need any more creative effort. We use about the same number of print ads and commercials. Say you propose some innovative incentives, and they say, look, you're doing a good job, business is (inaudible), but there is no reward here. The incentives they proposed had been too innovative for me.

But it seems to me it is a real problem. You want to motivate your agency. You've increased their expenditures but not their efforts, and it's a classic dilemma. Does anybody have any suggestions?

Voice: We used the BBD&O plan in several of our agencies, to guarantee them 1½ percent net profit on billings and over 2½ percent we split fifty-fifty. Actually, most of the operation falls between the 1½ and 2½ and everybody seems to be happy. It seems to bother line managers, operating managers. They don't like the guaranteed profit.

Voice: We made that part of our calculation of the hourly fee.

Voice: I guess the answer to that is the other side of the coin. Does anybody guarantee your profit?

Voice: Well, on the other hand, your law firm would not take any business if they thought they were going to lose money on it. I don't think any agency would take on your business if they thought they would lose money. You are in control of the two vital ingredients—the amount of work involved and the amount of income involved. The client is in charge of that, usually, and as a result, it's quite fair. The agency puts its work in at the front end, and then halfway through the year there's a budget cut or something, and they're left there. I don't see why they should carry that risk.

Voice: If you compare the relationship of your advertising agency with your relationship with your doctor—the doctor sends you a bill for $35 for ten minutes. You don't question it, you send him a check. The client-agency relationship, in so many instances, is not that way, and I think it's a damned shame, though I'm now a client.

Gaulke: Let me comment a little bit on that. One of the trends I have noticed is the trend of clients coming to us early on, when we start to work with them, and saying, hey, we'd like to offer you compensation that guarantees you a profit. We've had the last four new clients put us on essentially the BBD&O system or something like it, where they know we're going to make a profit and that guarantees them continued interest.

I'm very surprised at that trend, but I can see it happening.

Voice: That's why, Ray, I don't know how in the world you worked on a straight commission basis, with Mr. Campbell and all of those twenty-five divisions.

Gaulke: Well, I don't have twenty-five but the reason I do is because there is a cash cow in there, and without that cash



cow I'd be in real trouble. And Al knows that.

Voice: One day the guy in that division is going to say, I'm not going to support this plan.

Gaulke: Right.

Voice: It's going to come to a breaking point especially when they're profit centers. The profit center principle leads to two things. A, I have a bottom line and you expect me to make it. B, Therefore, I should manage the whole process. That's always the argument that makes that principle very difficult.

Gaulke: Right. And we think they're getting good work. They're getting value. I don't think we're making excess profits, but it's a good profit.

Campbell: We have a chief executive who is very marketing oriented, and he also recognizes what's happening here. He's aware of some of this, so that at his discussions, at his level, he can sway others or explain some of his thinking. He wants more corporate involvement in divisional programs, even though the division's responsible for the profit. At the same time, he recognizes that to establish a better marketing program for all of our divisions, we've got to upgrade our agency service. He's pleased with what's going on in that program at the present time.

Now, I'm in a fortunate situation, where I've been able to put one major account in each of the five agencies. The corporate account is in one. The only consumer line of products we have, that's in one. Petroleum equipment is in one. And so each of those, even though they are carrying some small accounts, does have a major account.

It's gotten to the point where I think the smallest agency has a billing of about a million or two, where we used to have some accounts that ran $50,000.

Voice: How do you staff the agency to handle the service required by several divisions?

Gaulke: Well, what we try to do is not have too much overlap, so that when somebody calls, he doesn't hear that the guys are out with another division, and therefore they can't come and see him. We staffed the account under one group head, all parts of it, but we have separate account teams for each major piece of business, and we try to group it. It just happens that parts of it are in Philadelphia—a lot of it is in Philadelphia now—but we do have separate account teams handling each of the major pieces, and we try to group it—not have just one account team.

Voice: Does each of those five agencies handle international?

Campbell: Yes. Our divisions are responsible for product sales throughout the world.

Voice: How much control do you exercise domestically?

Campbell: We see all of the advertising after the fact. If we tried to look at everything beforehand, it would be the biggest bottleneck in the world. So we look at everything after the fact.

Voice: Do you get a lot of surprises?

Campbell: We do, from time to time, yes.

Voice: At what stage do you see the plan?

Campbell: At the beginning of the year, I get everybody's advertising objectives, and we spend a lot of time reading their objectives, their programs, making notes to ourselves in the margins, and unless we see something that's just really weird, we don't write back on these. But the next time I visit a division, their plan is in my portfolio as one of the things we go over and discuss. I can't begin to understand the sales of all the businesses we are in. Take the marine and rail business, for instance. Their customers are changing. They used to sell to Southern Pacific, Western Pacific, from up in Portland, Oregon. Their customers were the big railroads on the West Coast. Now they're selling eastern companies as well. They've got all these leasing situations, and they buy cars and lease them back to the railroads. So that whole market has changed.

Unless you're involved in that constantly, you don't keep up with it, so you see things coming through in marketing objectives and advertising objectives that are

quite different. We question those when we visit that division. We'll talk about the strategies, why they change and what changes have been happening. But generally, they're running those programs on their own. We can't possibly say send your plans in, we'll okay them, and we'll send them back to you.

Voice: Are you writing your corporate or other kinds of financial advertising overseas?

Campbell: No. It is written here.

Voice: But is that your corporate campaign translated?

Campbell: Yes. In Western Europe we're doing a lot of direct mail and quite a bit of newspaper advertising—very little in the trade magazines, no television, some radio.

Voice: That's being created in Europe?

Campbell: That's being created in Europe.

Gaulke: Are there some more general questions that people want to ask here, not necessarily about FMC?

Voice: We run about a thousand print and broadcast ads, and we set up a system where we ask the division for five days of clearance time, to the corporate office, but if we ask them to, they turn it around in twenty-four hours. We have a two-level review system, so if I come to Silverado, my advertising man is actually reviewing those ads and keeping them in the system.

Gaulke: In what form, Jack?

Voice: He sees them in proof form before going into the final publication.

Voice: Do you turn some down every now and then?

Voice: Well, what we do is to review them from a corporate identity viewpoint and from a corporate policy viewpoint. We don't get into the marketing, we don't get into media. But it's too late for us if it's on the air or if it's in print.

Voice: Some divisions are reviewed by legal counsel, in the heavy construction industry and in the consumer product area. Those get a legal review. But we try to give them the guidelines. These are some of the things we talk about in our seminars, and we even had an ad critique and gave out our own awards to the best ad of the year, and so forth, using our own people to judge. It's not a corporate decision, but the ad the guys all voted on. We find that by giving them guidelines, and reviewing later, we catch the errors going through, type sizes, type faces, position of signature, and so on. Generally, we call the errors to their attention once or twice; that's about it.

Gaulke: Let me just comment on international advertising, a trend I see. One of the trends we have been observing is that many companies that advertise internationally are taking back the responsibility for advertising, wherever it was. If it was in Europe or somewhere, it's coming back here. Marketing guys are taking it over back here, and the ads are being produced over here, maybe translated over there and approved. So we see a big trend in communications coming back to the United States. I don't know if any of the rest of you see that.

Voice: I see a great centralization back to the States, with translation services in the country usually.

Voice: We do all typography—(inaudible). We try to centralize, we do it once and then we have it translated, and it's working out very well. (Inaudible)

Voice: With a centralized agency approach—is there some reason you don't have the division advertising managers reporting directly to you?

Campbell: Well, we're so diversified, we have so many marketing objectives, marketing programs going on, and advertising is just part of that marketing function. It has to be done at the division level. There's no way I could approve objectives or budgets. On the quality of the advertising, we can make a judgment, and say, that's not a very good ad or the typography is terrible, or the art work's bad or something like that. But it's pretty difficult for us to understand all these markets as intimately as the divisional ad man. He's got to have that responsibility right on the line.

Gaulke: Let me just comment on another trend. Maybe it's wishful thinking, but we were talking to some of the agency account guys recently, and they said that one of the things they perceived last year, as selling costs have gone up and things have gotten tough, and everything, is a greater understanding on the part of profit center managers that advertising can, in fact, make a greater contribution. They thought it could. I bet you it's wishful thinking, but it seems to us like the profit center managers are now seeing communication as something that could be more helpful to them than they thought before.

You know, in the old days, it was give me the money and I'll add three more salesmen. Now he can't do that as easily. I think that's an interesting trend if it is, in fact, true.

Voice: I think it's true when you do good advertising, when you recognize that it's better than what was done before. They think, maybe this isn't a bad idea.

Voice: We centralize our advertising, we don't have it in divisions. Particularly overseas, they fight you, they don't want to cooperate. When we show them we can do better advertising, they say, this is not a bad idea. They go along with it.

> "If it's lousy advertising, they say, who needs you? I can do better. I control my own fate, and I'm responsible for the bottom line. The larger a company gets, the more diversified, the tougher a fight it is."

Voice: If it's lousy advertising, they say, who needs you? I can do better. I control my own fate, and I'm responsible for the bottom line. The larger a company gets, the more diversified, the tougher a fight it is.

Campbell: I have an interesting opportunity, each year. Our division managers, the fellows running the operating divisions, have meetings, and they invite me to participate. Next week, I am going to a chemical group meeting, not only to present my corporate program, but to explain it, answer questions, and talk to them about how they can improve their programs.

One of the things that came up in a recent machinery session was that some marketing managers seem to think their objectives and their five-year plans are secret and shouldn't even be shown to the advertising manager. And even if they show them to their advertising man, they certainly should never show them to the advertising agency.

We had quite a discussion about this, and we talked about sharing the information with the agency, having the agency assist them in the development of their objectives, having the agency assist them in the development of their budget. And as we started to get into the discussion, we had a division manager sitting there and saying, do you guys do that in your division? The answer was, hell, yes, we do that. How do you expect them to operate? Well, we've never done it. Then you see him make a note.

You know, we're just now starting to get that kind of communication at the division management level. Never

thought about it before, never thought that was very important.

Voice: We operate on a contract fee basis, we have a contract plan, a marketing man, and so on. We make a presentation to the divisions and say, this is what we're going to do for you next. Then I call in the principals of the four major advertising agencies—(inaudible). We say, this is what we are going to be doing for the divisions for the year, and everybody's in the room and—

(Inaudible conversation.)

Voice: Does the agency interface with your department or with the divisions?

Voice: With my department. They don't go to the divisions, except the ad manager.

Voice: I suspect you centralized for somewhat the same reasons I did, that is, the profit center manager or the division is generally ignorant about the professionalism of communication. Apparently, you and I have seen problems. I'm curious, is that the reason you've done this?

Voice: Yes

Voice: My company has been in business 118 years and you don't change everything overnight. I think, by good example, as we go along, we've done the same thing as you. The reasons we went into it were greater control, lack of duplication, and frankly, with a company like mine—we haven't started our corporate advertising for this June—we have found that in order to centralize in one location, we have to have more professional people. If you leave it to the marketing divisions, they have someone who normally is a salesman come over and, all of a sudden, he's the advertising manager, with no professional expertise.

Gaulke: You know, one of the things I was thinking about was the fact that we are, you know, very concerned about honesty and straightforwardness in corporate advertising, but I'm afraid that when it gets into product advertising, sometimes we lose control of that when we talk to sales managers who are more enthusiastic about their product than perhaps they should be. That's the next level that we're going to have to all look at and straighten out, because if you look at a lot of advertising in some of the vertical publications, boy, there are a lot of claims that one of these days are going to be looked at.

Voice: We have legal review for an ad, and we have to have a signature. With the proliferation of liability law and interpretations every year, an ad has to have legal and research approval.

Voice: Many companies have their own legal staff, as would be true of your company, and that clearance is made. Now, if the ad comes in and some question is raised, the corporate head may go beyond the lawyer for his division, but for the most part, in my experience, that's the way most companies operate.

Voice: That's all consumer advertising. It has to be approved, to have legal approval, both at the divisional and at the corporate level, but I don't think that applies to industrial.

Voice: You mentioned in your book about the head-on type of advertising. Are you doing anything about it?

Campbell: We don't go so far as the automobile companies, put in competitor's products and then do comparisons. What we try to encourage ad managers to do is to look for our product differences and promote them. To do that, they've got to understand the competition. So we try to watch our competition's advertising, press releases, or whatever, in each marketing area, and then in our own programs try to talk about our pluses and our selling points.

Voice: Does your president approve every one of your corporate ads, or do you have power of attorney?

Campbell: No, I have power of attorney, but he wants to see them. I always send him an advance proof of every ad. We present the whole program to what we call a management committee, about eight people. About three on there are really concerned—our president, our executive vice president for marketing and our vice president for international business. They are the most concerned. They are more concerned than the secretary-treasurer or controller. And so they see the entire program. Then we have to prepare specific ads, and we have to rely on division recommendations, division approval, or approval of any divisions that are in that market. When we get our first proof back from the agency, I usually send it to the executive vice president for marketing and the president, and say, "Here is our next ad in the series. Its first appearance will be in *Fortune* on May 2nd," or something like that.

They like to know what is happening, and occasionally they'll get a phone call from somebody, I just saw your new ad on such and such, and they don't like to be surprised.

Voice: I don't think I caught the full strength of the international corporate program. You mentioned Western Europe. Surely, it's broader than that.

Campbell: Yes, Western Europe, Mideast, Latin America, Canada, and Brazil. We were doing some in the Far East, but we're not doing it this year.

Voice: And the seven languages—

Campbell: We run in English, French, Portuguese, German, Italian, Spanish, Arabic, and Parsi.

Voice: How many companies translate their annual reports?

Voice: We do, but in digest form, because when you send a digest report, you don't have to include everything required in your official report.

Voice: Anybody else?

Voice: Yes, we do. We did Japanese a couple of years. We gave it up because we couldn't afford it. It looked as though we weren't going to list on the Japanese Exchange. We do German, French, and Italian, but we're getting out of Italy.

Voice: We keep hearing that English is becoming the international language of business, but I guess sometimes we have to question it. But it does seem, no matter where you go, wherever you travel, you are able to get by with English.

Voice: Yes, but with journalists and so on, you will often be surprised. You really have to watch.

Voice: I noticed in a little clip the other day that in France, now, Frenchmen misusing Anglo-French words are fined $35 per person, per use.

Voice: We had a rather interesting situation where all the people in Shell International met and discussed with our agencies, from an international standpoint, advertising generally. Very few people at the meeting didn't use English. There was very little translation involved.

We had another meeting where we talked about the international scope, and again used the universal language. The conclusion I drew from that is that really translation isn't that much of a necessity.

Voice: On the other hand, I got an ad back from Japan, a pilot campaign, one ad—and the local gentleman over there had it translated, put it through a process, and there were forty-one errors in the copy. I suspect that agency is right. So it's awfully hard to have any foolproof system.

Voice: When people ask for directions, they always use French, even though English was spoken at the conference.
Voice: Is it a practice to have something translated into a foreign language and then retranslated back to English?
Voice: You would sure get some surprises.
Campbell: I spoke about a little book we called "The Company We Keep." It's just a little folder a salesman can carry in his pocket, telling about our company and our product line and divisions. But the chairman was going to China. He was invited, not as a part of a group, by the Chinese government. Just he and his wife and our vice president for international business and his wife were going.

He said, what can I take with me? You know, he was going to leave like in twenty days. So we got a couple of films we had, and we had Chinese sound tracks put on them. They were in cassette form. We bought a Fairchild projector, 50 cycle current, the whole bit, and then he decided that this little thing would be kind of good. Marsteller's Chicago office has a guy in Hong Kong, and he said, send me the English, we can do the translation, we'll get it to you in Hong Kong and have it ready for you. When they come to Tokyo, we'll hand it to them and they can carry it in. This will be a great thing to hand out.

So we did that, it was all done in Chinese, and of course nobody could proof it, I sure couldn't. They had made the trip, and they used it, and it was very successful.

One day, I got a letter with one of these attached to it. It came from supposedly a Chinese employee of ours, who said there were some very anti-Mao statements in the text of this, and he hoped we didn't use it as a company. He was surprised that our chairman would be handing out things in China that were anti-Mao.
Gaulke: You can imagine Al's panic.
Campbell: I called Marsteller and you can imagine—
Gaulke: Calmly, you know, he calmly called.
Campbell: When they sent it back, it was retranslated, and the only thing they could conclude was that there were some pro-business statements in there which I guess could have been conceived by someone to be against the Chinese philosophy of the people. And we talked about industry doing certain things. But that was the only thing we could find. We went through one heck of a lot of trouble to check and recheck. We sent it to Washington, had the Chinese Embassy go over it, retranslate it for us. We never could find the trouble.

We never could find the employee, and yet it was written on our company stationery, and had initials down at the bottom, as if like a secretary had typed it. We went back to the division and there were no secretaries with those initials. No one knew what happened.
Voice: It wasn't the old style Chinese, was it?
Campbell: No, no, this was modern. This happened last year.
Voice: When did they make the trip to China?
Campbell: Last year.
Voice: I'm trying to be specific because we did this in June. We had Marsteller do the translation. *(Laughter)* I didn't have any problems, but the Chinese told us that for a twenty minute film, this was the first time an American company had taken the time to translate a film into their language, and they said, very enthusiastically, we want to study your film. Our people took it as a compliment. They really wanted to screen it, and screen it to death.

I was just wondering if they're pulling our leg by saying it was the first time—
Campbell: The trip was in July of last year.
Gaulke: They're going to have a U.S. film festival over there. They're collecting entries.
Voice: —1974, this was late in 1974.
Voice: Maybe we're talking to different groups. It's a big country. There are not many parts that are dealing with American companies.
Voice: That's true.
Voice: I'd appreciate some more discussion on translation. Do you centralize it, generally? Did you centralize that year? Have you found out about the various countries? What do you do about Russia?
Voice: We have done some brochures in Russian that we have had translated here.
Voice: There's a company in New York—I'll send you the name, if you'd like—that purports to specialize in any language.
Voice: I want to be even more specific, because there are a lot of them that claim to be specialists and what you get back is terrible.
Gaulke: The only foolproof way to do it—let me tell you the way we do it. We send the copy to our office over there, in whatever country, and it is translated, read by the executive representive of the company there, to make sure, and then it's brought back here, and then it goes back out again. That's the only foolproof way, we've found.

You still get into arguments, but you see, one of the problems about Russian, for example, is there aren't many Russians moving back and forth, in and out of Russia,

> "...I think more and more advertisers are buying companies and not products, and that's the way to go, that's the next logical step, now, to do the competency campaign and only let the divisions do the product advertising when there's something new or unique."

fairly regularly, and languages do change. So that's why you run into problems like that.
Voice: Reference was made here to translation into Arabic. There are so many different forms of Arabic. We were sending many of our ads to Beirut to get Arabic translations. When we were dealing with Saudi Arabians, they were enraged at the translations that came out of Beirut.
Voice: Our problem is technical language, which is a great problem anyplace.
Voice: As advertisers, we know phraseology can be interpreted in different ways. We ran an ad in that special Arabic edition of *Forbes* last year, and we didn't get very much—(Inaudible)
Gaulke: Apparently, neither did the magazine. The editorial translation was not very good, I heard.
Campbell: We had a meeting in New York about a year ago, at AMA. Several of you were there. These were both international advertising managers and corporate advertising managers who had international responsibility. There were about as many as there are around this table, and we all sat and talked about our programs, and media and agencies and whatever else we wanted to talk about. The one subject that kept coming up over and over, the biggest hassle everybody had, was translation. No matter what system they've used, sooner or later the translations come back to haunt you, and nobody had any real fix on

the thing.

Voice: Al, now that you're three years into what you call areas of competence, what's your evaluation of that, and Ray, what do you feel in terms of it being sort of a trend? Do you find that this is a better way to go? It's certainly more simplistic in your advertising work. Everybody here felt, seeing those ads, that the FMC identity was really in the right juxtaposition, but the copy points have had a lot of other problems. Do you feel that that's worked well for you?

Campbell: Yes. We have several things going against us. We have initials for a name. Thy don't make a word. They can be confused with Ford Motor Company or anybody else.

The only thing we have that's distinctive is the shape of our mark. The name is FMC Corporation, and if a person wants to know what it stands for, we have to go back to Food Machinery and Food Machinery and Chemical Corporation and so forth.

Ever since the company was founded, we have had diversified operations. They were all profit centers and they operated as separate companies. We had as many as twenty-eight of those doing business as John Bean, Niagara Chemical, and so forth. They promoted those names and promoted them heavily, but we didn't have the impact of doing everything as FMC.

When we did our study, we debated whether to keep names like "Link-Belt" which was a well-known corporation in the Middle West, and it was decided that as long as those were old company names, historical names, they would continue to run head-on into FMC. So if we were going to use FMC, if we wanted to establish FMC, we had to relegate those to brand names for products and then phase them out. We're in that process now, and believe me, it's not been easy. If they tell you how easy all these name change things are, that's a lot of bull.

Voice: Did you set a time limit for making these changes?

Campbell: Yes. Originally, we set a five year time limit on it, and only recently our management has agreed to extend that for a short period, which has not been defined. We review these names every six months, and the historical brand names are the ones we are going to phase out. Now, it may be that "Link-Belt" will end up as a brand for chain, which is originaly what it was. It was a type of chain, and we still make chain, and we still make "Link-Belt" chain.

When you try to talk about "Link-Belt" engineering, there isn't any such thing. It's FMC engineering. When you try to talk about "Link-Belt" research, there isn't any, anymore. Any yet the people—that's the hardest—the people who worked for that company for fifty years or thirty years or twenty years feel that those names are so well known they can't be changed. We feel they can.

Voice: Do you put FMC on your products?

Campbell: Most of them. We're changing over to FMC. In the case of "Link-Belt," on the chain, it still says, "Link-Belt."

We have taken all of the fancy styles of lettering out of all of our brand names, and we've put them in Helvetica type so that FMC becomes the mark and "Link-Belt" becomes just a word. The word has to be followed by the generic description of the product in print, and used as a true brand name. They have to say FMC engineering or FMC, the company, but they can say "Link-Belt" chain. We are changing others over, and I expect most of it will be done by 1980.

Gaulke: In terms of communication, I think it's a very helpful thing, except we have to take one more step. The competency philosophy helps you put together small divisions, like FMC packaging, for example, where one group makes cellophane and another one makes machinery, and another one makes this and that. What it permits you to do, but what we haven't done yet, is to do competency campaigns, where you can put some of this together. I think you're starting in mining, aren't you?

Campbell: Yes

Gaulke: And that would be terrific, because I think more and more advertisers are buying companies and not products, and that's the way to go, that's the next logical step, now, to do the competency campaigns and only let the divisions do the product advertising when there's something new or unique.

Workshop Session: Group B

Moderator: Robert P. Zabel
President, N W Ayer ABH International

Presenter: Dan Provost
Director of Corporate Communications, Liggett Group

Provost: I wish I had known about Bob Zabel's talk before I came. I would have brought a copy of the new code of ethics that we've published at our company. It covers just about everything from kickbacks to EEO procedures, to political contributions, to timely disclosure, etc. And every employee is required to have one in his possession, and to read it and understand it, and to sign a card once a year indicating that he has read it. And of course, when he signs that card, he's putting himself on record that he has read it, and if he deviates from the norm after that, he's in serious trouble with the management of the company.

Another thing we did this year, which is somewhat related to your talk: We put our company philosophy on our annual report cover. It hasn't been out very long, but so far the remarks have been good, and of course I'm anxious to see how it lives through the year.

I'm just going to ramble about what's happened to my company and myself in the last six years or so, in the whole area of corporate communication.

Starting back in 1969, a group of executives from a company that was slightly bigger than ours approached us, and we interpreted their visit as a raid. It turned out to be a real starting point for us, because many of the things that we had talked about and planned and even budgeted for years were always left on the shelf; they never got off the ground. These included a better general PR program, with a program for security analysts, a corporate advertising program, a corporate identification program, and eventually the writing of a "defense" manual.

Prior to that time, we were very product oriented and promotion of the company was unimportant. We had a very heavy product advertising program and a heavy product publicity program.

As a result of this situation, we immediately started to do a lot of things. We retained Friedlich, Fearon & Strohmeier and asked them to come over and talk, and we started to plan an advertising program. Much of the plan was already on paper, because we discussed it prior to this. Friedlich came up with a unique creative approach which got us off the ground, and it did very well by all measurements. We started a long-term research study with the *Wall Street Journal*, mailing questionnaires to 2,000 subscribers, and we've made that study every year since, measuring a number of corporate characteristics, to see if we were on target. We did very well the first two years with this program. We received a lot of attention from the press.

We had arguments about what was humorous and what wasn't, and you hoped that something would be humorous to everybody. I thought before that time, during that time, and since that time, that the use of humor is dangerous. It's a difficult thing to do, because what's funny to one person is not very funny to another, and of course our audience was very special. We were going after the financial audience in the financial publications.

We had arguments as to whether or not we should have three, four, or five vignettes in each one of these ads. The headline, "Myers and Liggett?," was a good device because it attracted attention immediately. It distorted the company name, and you couldn't avoid looking at it, and it was memorable. It was easy to remember, and all we were doing was turning the company name around with a question, and then answering the question. Of course, the whole point was that Liggett & Myers was not Liggett & Myers anymore.

This was a year later, the end of the year, with the same approach, only this time we're talking about end-of-year results.

Voice: What year was that?

Provost: That was 1971.

Voice: Where was it running?

Provost: This was running in *Forbes, Fortune,* the *Wall Street Journal, Barron's, The New York Times,* and others.

This is some of the good press we got on this program. We received a lot of attention from the press. Winning awards is not the end-all of any advertising, but this was fun, it made us feel good, and we received a number of accolades based on this. This was the summary of our advertising, which was discussed at length at the first *Fortune* meeting five years ago. I was scheduled to be there, but I wasn't. If I had known about this, I would have been there!

As I said earlier, one of the things we decided to do was to do something about the security analysts. We formed a team which consisted of the president of the tobacco company, the corporate vice president of marketing, the chief financial officer, and myself, and we designed a program to inform the analysts. We traveled around the United States and appeared before important analyst groups to make our presentation.

A year later, we had a financial setback which severely damaged our credibility, and it took a long time to rebuild it after that.

Management agreed to continue our analyst program. And we continued our corporate advertising, but obviously we did not continue what you just saw because it was humorous, and now we had a more serious problem.

So, what we did was to take the one thing we had that was working, and that was the fact that sales were higher. In other words, we had good brands in growth industries that were doing quite well. So, we concentrated our efforts in that area, and we came up with a new campaign that was a bridge from the original one. We said: "What's up at Myers and Liggett?," and talked in each case about what was happening to the sales of our leading brands, the home cleaning products, J&B Scotch, Alpo, and so forth. This was the introductory ad, two pages, in color, in the major books we mentioned a minute ago. And then we continued through the year with single pages in black and white.

There were a lot of other ads which I don't have here, but these are some of the experimental ones that were never used. The idea was always to dramatize the word "up."

Voice: Were there any research results on whether the financial community finally understood this diversification; was there some reaction?

Provost: Yes. I'm going to get into that a little later. I'm going to interrupt myself now to explain that one of the things we decided on in our original program, was to do something about our company name. We had changed the company name from Liggett & Myers Tobacco Company to Liggett & Myers Incorporated, which didn't mean much to the public or even to our own people, except that we took tobacco out of the name.

We went through a tremendous exercise in company names. First, we used Friedlich to do it for us. We spent a modest amount of money, and we did not come up with a solution. We had a tremendous hang-up, and that was that Liggett & Myers was referred to by the press, by our trade, by our stockholders, by our employees, as L&M, although L&M, the company, was not generally known by the public at large.

So we had many exercises in futility, trying to figure out how to use L&M, but make it different from the cigarette. No matter what we did, there was no way to get away from the L&M cigarette. The cigarette had millions and millions of dollars invested in it for more than twenty years, and it is still a major brand.

The eventual program that the agency recommended was a good-looking program. It was very similar to IBM, maybe because the man who supervised it at the agency did likewise at IBM, before he went to the agency. It was too industrial for us. We're not an industrial company. It was a beautiful program, but it was shelved.

"In 1973, our new management wanted a new approach to corporate identification. So we gave it very high priority, and we did a great deal of work and research, and came up with hundreds of versions of what we might do with Liggett. We did it all in-house. We didn't go outside. And eventually we came up with Liggett Group,..."

In 1973, our new management wanted a new approach to corporate identification. So we gave it very high priority, and we did a great deal of work and research, and came up with hundreds of versions of what we might do with Liggett. We did it all in-house. We didn't go outside. And eventually we came up with Liggett Group, which worked very nicely graphically and phonically, and I think the main thing we liked about it was that it was unique.

One of the things that helped tip the scales: we looked at everybody else's name, and we found that words like corporation and company and international and limited, etc., etc., were like Smith and Jones and Brown in the telephone directory, and if we were going to have one word or two words or three words, whatever, we wanted those words to be functional, to be working for us. And, on a tabulation of these words, "group" was on the bottom of the scale. There were fewer "group's" in the United States than anything else, so "group" became a pretty good word, because it was unique and it fit nicely with Liggett. Also it gave us a group of companies, which fit nicely with our slogan, "The companies of your pleasure."

Next, we put together a manual and told everybody from the start that we didn't expect them to go out and spend major money, like some other companies, to change our name overnight, but that we were going to do it gradually over a period of time, without spending a lot of money. In terms of stationery, business forms, etc., we were going to use inventories until they were depleted, and then order new ones. In terms of signage and more expensive things, we would plan changes ahead of time, and do it over a period of a year or two. We have made good progress but are still a long way from our goals. We have certain companies that are difficult to move and negative for different reasons.

One of the things we decided was that we would concentrate on this new name and nothing else in our corporate advertising for one year. We developed one ad and ran that ad for the entire year.

We built a model of the new logo to get a three-dimensional effect. At the same time, we built a real neon sign of "Liggett Group" about five feet wide and two feet high. The model was built as an alternative in the event that the neon sign did not work. We did have a lot of problems with it. It was difficult trying to get the engraver's plates right. There was more dot etching on that ad than any other I was involved with prior to that time. At one point, the engraver said, "If you dot etch some more tonight, there will be no ad there tomorrow."

Again, we got good press on our program. This happens to be one of my favorites. If I'd written it myself, it couldn't be stated any better. This is from *Forbes*. 'More often than not, the upshot of lengthy, elaborate, costly studies for companies to arrive at new names and/or trademarks, is a giant step backward. Sometimes a near total loss of identity, a long held place in the sight and the mind, of a new no place, nowhere, in any marketplace, in anyone's mind. Like Esmark, whose Swift and Company had a great name and reputation, even if for too long, too small a bottom line. Instead of just refurbishing a great name like turning earnings around and adding viable new products, which present management has done to a degree, they mistakenly drop a great name. I hope they'll Swiftly reverse that foolishness.

"Far and away the best new logo I've seen is Liggett & Myers emerging as Liggett Group, with the lettering set so that the two words make the point twice. Seeing this, one wonders why so few major multifaceted companies use that great descriptive but noncommittal word 'group.' The British have used it for years. It has not only untarnished connotations but, in all its simplicity, glamor as well."

A year later, after this ad had run for the better part of a year, *Advertising Age* did a roundup on corporate advertising and corporate identification and criticized just about everybody but ourselves. There's one paragraph I'll indulge in.

"A really innovative introduction of a new identification system was pulled off by the Liggett Group. The graphic trick of using the letter 'G' in a contrasting color for both words is not only effective and memorable, but the announcement campaign presented the new mark—and the corporation—in an original and special way. In our opinion, the very freshness of Liggett's approach has helped increase awareness of the company's scope, and as a result reinforced its own over-all communications effort."

This is the *Fortune* Adverbatim Study remarks, as a result of the full color announcement ad on the new company name that ran for a year. These people are pretty much saying what we wanted them to say, that the company is progressive and that it's not just tobacco anymore.

Voice: Was it all done in full color?

Provost: No, it was not. It had to be black and white in the *Wall Street Journal* and the *New York Times*. I think this ad was fairly effective. The idea was to make it something a little unusual, a little bit different than just putting a logo in an ad. We put it up in the proverbial lights, so to speak.

And that brings me up to our present campaign. We had run the new company name ad for a year, but we had not finished our job of gaining awareness of the name change. We decided to get back to our original problem of selling diversification, and we decided this time not to do what we had done before. We weren't going to show multi-brands in every ad, and have everybody remember none of them. We had made good progress in terms of research, which I'll go into later, but there was still plenty of room for improvement.

Also, as you might imagine, the research showed that we suffered quite a bit for a year or two after we had our financial problem in 1972. We decided that we would now use only one brand in an ad, instead of many, and this, of course, presented a problem, because we don't have that kind of budget. We didn't have enough money to use one brand at a time and really make an impression, and furthermore, we figured if we kept it simple, we didn't have to use large space, and that we could make something visible and memorable in small space.

To make a long story short, we came up with small units which we put in the financial sections of the *Wall Street Journal* and the *New York Times*, where you don't have too much competition in terms of attractive advertising. If you put something there that looks pretty good, it turns out to be about the only thing there.

And meanwhile, we would take the same ad and make it a third of a page in the magazines, and run on three consecutive spreads. We ran these all last year, and again, we had good "Starches," and we had good *Fortune* research, and we had good results with our *Wall Street Journal* research, which now has been conducted every year for six years.

We've had arguments from some of our people, and we listen to them, and we talk to them, and we explain to them what we're doing. We're not selling products. There's not a single word of copy in these ads—the entire copy in the ad is the headline, "Liggett is"; there's nothing else.The copy block you see down below is nothing but a listing of our most prominent brands. We've done fourteen of these ads, and we have a frequency table to determine how often they run. In other words, J&B runs more often than the Verdicchio wine ad, for example. We put the products in an A class, a B class, and a C class, and the A runs very often, the B pretty often, and the C not so often.

In other words, the brands that have the big names are the ones that are going to help the corporation and, hence, they get more attention.

This Wedding Veil ad will run eight times, whereas the Wild Turkey will run eighteen times, and J&B will run thirty-six times during the year, and likewise with Alpo.

The philosophy is that the brands enhance the image of the corporation through their success and then, eventually, the enhanced image of the corporation will contribute to the further success of the brands.

If you don't do this, you never achieve the better image that we're talking about.

Now we're about to interrupt our program for one ad, which will run in May. This is going to be a full-color page, with an adjacent black and white one-third page. The reason we're doing this is that this is a one-time opportunity to make an important announcement because on April 27 the stockholders will vote to legally change the company name. We have used Liggett Group as a trade name for two years, and now we're actually going to change the name from "Liggett & Myers Incorporated" to "Liggett Group Inc." We don't want the Inc. in the new name, but that is a legal requirement. It will not affect our new logo.

In this case, we decided to put our president in the proverbial lights. We wanted to make it dramatic, so we went to a portrait painter. We went to the same portrait painter that had done four presidents of Liggett prior to this, and we had him do a portrait about two-thirds life size. It wasn't necessary to do a full portrait, and it was less expensive to do it two-thirds. It looked as good, and it served our purpose.

We're changing our stock symbol from LM to LGT, and again we have very simple copy. On the adjacent black and white column, we're doing something that's contrary to our regular advertising, and that is to list every company and a good many of the brands, but not all of them. The little image, the black and white image of the portrait of our president, ties the extra column to the full color page.

"The philosophy is that the brands enhance the image of the corporation through their success and then, eventually, the enhanced image of the corporation will contribute to the further success of the brands."

The copy reads: "Liggett and Myers was once totally a tobacco company...which grew to a company widely diversified into spirits, wines, pet foods, home care products, people foods and fashion accessories...which became known as Liggett Group...which has now become the corporate name, Liggett Group Inc....so that the Liggett & Myers name can once again hold its traditional place as the name of the cigarette company in the Liggett Group of companies."

And the caption on the portrait says: "Raymond J. Mulligan, President of Liggett Group Inc., views new symbol, LGT, on the New York Stock Exchange."

This is our merchandising brochure. We tell our story on the first page, and when you turn that page, you see the black and white column adjacent to the color ad, and then we show three, six, nine of the fourteen single column images that are running regularly, three at a time, in the various publications.

That's all I have to say, except if anybody is interested, I'll go into detail on all the research.

Voice: Dan, will you trademark that name, Liggett Group?

Provost: Yes, we have. We did originally, two years ago.

Of course, we didn't throw our whole name away. We kept the Liggett. One of the reasons I like the "Liggett is" headline is, because it's like a bridge. In other words, "Liggett is" is about as short a headline as you can get. "Liggett" is like a nickname, both for the old Liggett &

Myers Tobacco Company and Liggett & Myers Incorporated, and now it's still a nickname for Liggett Group. "Liggett is" appears all the way through our annual report. We say "Liggett is" on the cover and give our corporate philosophy.

We say "Liggett is" on page one and give a description of our company, and so forth, all the way through the book.

Voice: The code of ethics that you say you get employees to sign, is that a condition of employment?

Provost: Yes, it is.

Allen Carroll, AT&T: We've had the same thing in AT&T for quite a few years. We started many years ago—with a statement that all employees have to sign, involving secrecy, privacy of communication—so this is for all those employees who see records, etc. Now we've expanded that statement to include morals, ethics, and so forth. About a month ago, all management people were required to sign it. I don't believe we have any requirements to renew it every time an employee changes his job, because it's one statement, one signature.

Voice: General Motors did an interesting thing, on this same theme. There was a corporate report that top management gave to their management people about equal opportunity climate and it was quite a frank, gutsy report. They weren't living up to everything, at that point, that they might have been living up to. After much discussion, it was finally decided that they would put that entire report into a four page ad, and they ran it as a four page ad. The last paragraph said that there's no room for prejudice at General Motors, and we mean just that. If any person at management level at any GM facility cannot function within this policy or has not given it full attention, he simply will no longer be able to work for General Motors. They've run this four page ad in a number of magazines. That's really gutsy.

"I can't see profit centers or presidents of companies opting for corporate advertising, unless somebody gives them a hell of a push."

Victor Fisher, Pfizer: I probably need more help than anybody in this room right now, to try to solve a corporate campaign for Pfizer. One of the problems is—I've heard different formulas, and so forth—it's fine to say we don't charge this to divisions for corporate advertising, but somehow the people that make the money have to pay for it one way or another.

Dan, we're all really corporate advertisers, not consumer advertisers at all. What I'm trying to develop for my management is some way of—it's becoming increasingly clear to me that unless the chief executive officer says, we're going to do this, and here's the way we think it's equitable, it's not going to be done. I can't see profit centers or presidents of companies opting for corporate advertising, unless somebody gives them a hell of a push. I wonder if you could comment on how your various divisions pay for corporate advertising....

Provost: We are not allocating corporate advertising expenses. We talk about this problem regularly, and we are charging the divisions for certain services now, but we're not allocating items like interest charges or corporate advertising.

I've got all kinds of research, but I'm not convinced that the research is good, and if I'm not convinced, it's hard as hell to convince somebody who doesn't believe in it at all.

Voice: One of the things we're really talking about here is more definitive research, to sell the companies that are not necessarily willing, on the fact that there are advantages to this. It's very difficult if you don't have research, to convince somebody he's going to get something out of the bottom line, from some kind of fuzzy, very fuzzy corporate program.

Tim H. Henney, Deere & Company: I can understand Dan's confusion, or perhaps distrust of research, though, because I don't have advertising at Deere & Company. I have been with it, in the past, at AT&T, but I have most of the other activities there, and I get involved in such things as writing and giving speeches, and what not, on the credibility of business, so I relate perhaps to more of the things that preceded us in this meeting, perhaps more than this particular discussion.

When you look at the polls, for instance, that show the public attitude toward business, Yankelovich is saying one thing and Lou Harris is saying something else, and Gallup out at Princeton is saying something else. You don't know whose to use. I've been giving talks to university groups around the Midwest lately, on the credibility of business, and one in Washington, and I used Lou Harris' findings. They differ considerably from those that Williams was using from UCLA the other night, and that Louis Banks was using. It's just amazing. So I don't know whose—

Provost: Tim, I loved the one I heard at breakfast this morning. I was eating with Allen Carroll and he told me how Dichter chased him, trying to sell him fifty or sixty thousand dollars worth of research, for several years. In order to convince Allen, he showed him how he had increased the sales of the cigar industry, which I'm pretty sure is not true, because they've been down every year that I've been in business, except one. And what he told him was that they did a fantastic research job on cigar smoking and found out that the reason men smoke cigars is that they like to put it in their mouths. And Allen said, well, I didn't know that they ever considered putting it anywhere else.

We have used a liberal amount of Starch studies, and that's not my problem at all. I think it's easy to find out whether you're getting readership and attention, but whether or not you're changing anybody's minds about your company, whether it's diversification type advertising like ours, or issue advertising, or whatever, that's something a hell of a lot more difficult and complicated. We've used the *Wall Street Journal* mail studies for six years, and we do have indications—I'm very happy about the indications—they were very good in the first two years. We were starting with very little, and then we built up some sort of image. Then all of a sudden we had a problem, and the image indexes fell off dramatically. They've been gradually coming back, but we're not back to the level we were at in the middle of 1972, at our peak, in terms of what our target audience thinks about our company.

Workshop Session: Group C

Moderator: Graham H. Phillips
President, Ogilvy & Mather (Canada) Ltd.

Presenter: Bill Stewart
Director, Public Relations & Communications, Dravo Corporation

Stewart: The Dravo Corporation is based in Pittsburgh, and rather than try to explain all the things we do—we are rather diversified—I'll just hand out copies of the annual report. You might notice here that Dravo is a company of uncommon enterprise.

I thought another useful piece of information would be our ad budget for the past five years; this is corporate. Dravo is composed of eighteen profit centers, very autonomous. It's something of a contradiction, perhaps, to talk of a corporate campaign or a corporate entity in a company as diversified and with as many autonomous profit centers as Dravo. I think, in the past two or three years, there has been a much greater effort and much greater intent to present the company as a whole unit in the markets that we serve.

Every profit center has its own marketing and sales promotion budget. They handle their own advertising; exclusively print, there's no radio, no TV. There is a corporate advertising department, which we have no relationship with. They handle the placement of the ads and distribute them for profit center advertising. My title is director of public relations and communications, and I have responsibility for the corporate campaign.

Prior to 1974, we really didn't have a corporate campaign at all. What we had was a series of ads that would highlight a particular job we had or tout a successful year.

Voice: Could you talk a little bit about your public relations, what you've been doing in the last year or two?

Stewart: Okay. We have a new senior vice president/finance and he's working very intensively with the financial community.

Victor Head, Commercial Union Assurance: Bill, let me ask you a question. I liked your annual report very much. I think it's a very handsome document, and I envy the reproduction. Can you give us an idea of how much it costs you, and also whether you do an abridged version for your staff?

Stewart: No, we don't. We thought this year about establishing an annual report that could be used as a teaching vehicle, perhaps in high schools in the Pittsburgh area. We thought about it, we planned to do it, but because of some budget constraints moving into 1976, we decided not to do it this year.

We think another Pittsburgh company has preempted us. A local company, not large, by the way, prepared an annual report that served as a teaching tool.

Voice: That's Cyclops. They included comments from stockholders, people that received the annual report the year before.

Head: As Graham Phillips mentioned earlier, when you are talking to a wider public, obviously, you mustn't use the expressions that are familiar only to businessmen, and presumably a simplified annual report would be written with that in mind.

Stewart: The cost of the annual report? In '74, it cost approximately $1.05 a copy, we think. It has consistently run at about the dollar level for maybe the last five years. Not including postage.

Voice: What are the objectives of your advertising?

Stewart: Prior to '74, as I say, there were three characteristics of Dravo's corporate advertising campaign: not enough money; no concept stayed with long enough to achieve any measurable improvement in people's awareness of Dravo; and any time there was an attempt to measure the effectiveness of Dravo's corporate campaign, we found we were doing very, very poorly.

In 1974, you'll notice (from chart), the bucks almost doubled. This objective was established: to increase the business community's awareness of Dravo's engineering competence to solve a wide range of major problems facing the world today. There's a little arm waving there, but in a sense, like United Technologies yesterday, we wanted to position ourselves as a company that, with its engineering and technology, could participate in growth markets, meeting worldwide needs in metal processing, energy, food supply, and transportation. At the same time, we established a target audience for the campaign: managers and officials of industry with salaries of $25,000, employed in plants of 100 or more people. That audience, when handed over to our agency, turned out to be a demographic picture that I thought was much too narrow for the audience we were really talking about. I believe that the reason for making this campaign so commercially (inaudible) in that way was to win acceptance of it in the autonomous profit centers that had previously been so reluctant to participate in corporate ways.

Our corporate advertising costs are prorated against the profit centers. I believe the audience and the commercial nature of the campaign were primarily a political vehicle to win approval, to get the show on the road.

Voice: Were you in agreement with that?

Stewart: I joined Dravo in June of '73, when most of this was being ironed out. In October of '74, I was made director of public relations and communications and, coming from a PR background, that was my first brush with advertising at all. I had no previous experience in advertising, either agency or corporate.

Voice: If I could persist. In your present position, for what areas of corporate communication are you responsible?

Stewart: In a supportive way, nutsy-boltsy way, with financial communication. My predecessor moved on and has the title of vice president, assistant to the president, and in his remaining years with Dravo he is responsible for shareholder relations and relations with the financial community. He has no staff, so we do the annual report, we arrange the analysts meetings. We handle most of the speech writing, but we don't have policy responsibility at this point. I imagine that in two years or so, that will be



changed. One way we might go would be to establish a vice president for shareholder relations. A good bit of the financial communication would be located there—while we would still do all the writing, for the annual report

Voice: Who does your annual report? Do you actually write it?

Stewart: We write it internally, yes.

Voice: How much of a role does top management play? Does top management check the copy?

Stewart: I would say that our president is pretty active. This year, he was out of the country for four or five weeks, so he had a look at it in, perhaps, the latter part of January and then didn't look at it again until the middle of March. So this year he may have been involved less than in the past. He's very interested in the communication function.

Voice: Do you coordinate your product and corporate advertising?

Stewart: Not as much as we should.

Voice: Do you get involved with product advertising?

Stewart: Perhaps only in an advisory way.

Voice: It's presented to you as a fait accompli?

Stewart: Yes.

Voice: I was just thinking that, for someone with a small budget, it would be wise to get those together. Do you have the same agency?

Stewart: Yes. Ketchum, McCloud & Grove.

Mickey Biondo, St. Regis Paper: I wonder if I might just move from some of the basics that we were talking about to some of the bigger problems that certainly are confronting all of us in terms of senior management attitudes, and to a number of other problems we face. We've been listening for two days now to what's been wrong, and if any of us are worth anything in terms of what our salaries are all about, I think we could have written most of the dialogue we've heard in the past two days. What I'm struggling with is the solution of the whole attitudinal problems that we're facing as businessmen; the senior management interface regarding an appreciation and an understanding as to the investment it should take. We need to address those problems, and there may be a deeper-seated situation. Should the corporation be pouring out dollars in defense of what the private enterprise system is all about? How much of the total corporation budget should be allocated to the bigger problem, the problem that's more intangible, versus the day to day marketing problems and liabilities in terms of financial aspects of the corporation.

I think we're all kind of struggling with it now.

Voice: What should we be telling our respective management? Should we be fighting for more and more investment? Or is it the kind of problem that's so big that it's beyond anything any one company can do? Is it a sign of the times and we just struggle and live with it and let it go? As we heard last night, don't count on the networks to tell the story. And I'm not so sure the print media are as dedicated as they might be to this educational process. So who's left?

Voice: We are, the private sector.

Biondo: Really, how far do you go? Where do you put your money? Do you put it where your mouth is, or do you back off and concern yourself with the facts of your business, how it exists today? With the brainpower around this table, I'd be interested in some dialogue on this.

Jim Pyle, Calcomp: I think we have the same problem with every decision we make in this world in which we live. It depends on where you are and what you are in your industry, and what your real position in the industry is, how concerned you can get. There are several different problems. If you're a small or medium sized company, $50 million and $150 million gross volume, you have one problem, struggling to survive. One of your problems is with your competitors, particularly if you have large competitors. But how can anybody ignore the whole business problem? You have to decide—nobody is going to carry a business story to the world, except business. And you can't ignore it, because public opinion and political opinion are kind of tough and they pressure business from every aspect. So you're stuck with a new dimension in what you're going to do in your PR and budget, and you're going to have to worry more about real public opinion. Sure, you want to win public approval for St. Regis Paper, but you're going to have to worry about public opinion concerning business.

It's part of the problem that everybody faces. How much money you can put into it is a tough question, and

how you sell it to management is even tougher. Management generally, in any PR program or in any type of relations program, they say, oh, we can't measure what it's going to do to the stock price, what it will do for us, and couldn't we really spend the money on product advertising or something of the sort?

We subscribe to the philosophy—he made my speech for me this morning—we're small enough or well organized enough, or by accident have one dollar to spend on advertising promotion, public relations. It's centralized in one budget. So one dollar is trying to do all these things, which is impossible, create a good feeling in the public, get people interested in investing in our company, keep the salesmen happy—all these kinds of things. We have one integrated program. We don't split it up because we don't have enough money, we feel, to divide it up in all these pots.

With a larger company, you may have enough money to do all these things, but then you wonder is it as effective, if you do control it centrally?

Biondo: Jim, you have an impact on priorities, as so do most of us around the table. I guess what I'm asking is, how do we, as communicators, put the priorities on this budget? Say you only had a million-dollar budget or a half-a-million dollar budget, or a hundred thousand dollar budget, do you put something in to be spent in this area? Or do you say, forget it.

Pyle: You have to say something. The question is how much. I really don't think you can say forget it. Then you've got the tough problem.You have to come up with a number, 1 percent, 2 percent, 5 percent, 10 percent. That's really tough.

> "What I'm struggling with is the solution of the whole attitudinal problems that we're facing as businessmen, the senior management interface regarding an appreciation and an understanding as to the investment it should take."

You have to come to the yes and no stage. If you really feel as I do, you have to go to management and say, we've got to do something about this. Here's how much money I think we ought to spend on this. They may throw you out and you may get no money, but you've got to do it every quarter, every year, until they do something.

Biondo: My experience has been there is one key guy, and that's the CEO. If he shares the concern and is committed he's probably going to be sending some money in.

Pyle: Fortunately, we've got an operations guy as a CEO and that's who I work for. This makes you very popular in a company, when you work with the CEO and you have all the PR money, and all the advertising money, and marketing doesn't have a dime, they all love you. They all know you're spending our money on some other guy's problems. But it's a corporate problem. It's not a marketing problem, it's not a sales problem, it's not a manufacturing problem, but it's a corporate problem. The only way you can solve it is to get all that money in one pot, and if you don't have it there, it's hell to get it there, particularly if it's a diversified company. You're not dealing with division vice presidents, you're dealing with P and L guys who are presidents. Each one of them has his image of what the company is, which may not fit in with the boss' image, but if he's doing well on the bottom line, as a P and L guy, he's going to be tough to deal with. If you're not careful, he'll wind up with his own ad agency, his own damn program, which drives you crazy.

Stewart: Jim, in our case, we're diversified and in some industries we think we can make some impact. In some industries, we might be a supplier, and obviously, we can be supportive through associations and the like. But the one industry in which Dravo is something of a force is water transportation, and in that area, while we do not do any advocacy advertising we do an awful lot of work in Washington; we do an awful lot of work with WA, the Waterways Association, and the like. That's a very good area for us, because we have the area of user taxes—who maintains the river channels, who builds the locks and dams—and in an area like that we can be out front. In other areas, we realize that we can't be. Our budget is not staggering.

Ray Cox, Combined Communications Corporation: I'd like to respond to Mickey's question, but first I'd like to ask a question of my own, and it comes back to the question I asked Bill. Where are you in the decision-making process, as far as your advertising budget is concerned, how many people have control over setting that budget, or have a very strong voice?

Biondo: Ultimate control?

Cox: Yes.

Biondo: The final number?

Cox: Yes

Voice: That's a good question.

Biondo: Do you mean control or do you mean—

Cox: Setting the budget, setting the directions of your company—I'm curious about that.

Voice: If you get five million, you have control. If you have two and a half, you don't have. Is that what you—?

Cox: That's what I'm asking.

Voice: I ask for five million every year, and I never get it, but I get control of all I do get.

Cox: The reason I ask this is that I find myself in a unique and enviable position, because all of our advertising, public relations, financial relations, stockholder relations, and such things as that are controlled at our company through one point.

Voice: What's that?

Cox: Me. And I may be in an enviable position. I am with Combined Comunications. The people who are here have much larger companies than we do. We are rather young, we have a rather small corporate staff. We have a management committee of five people from that corporate staff who have a voice in what happens, as far as the allocation of budgets are concerned.

The problem that you mentioned, and this is why I'm coming to this, is that those things all appear under one umbrella. I, at the beginning of each budget year, set a number that I want as far as the advertising budget is concerned, as far as shareholder relations are concerned, and other items down the line in the budget. Among those, I set a budget, an advertising budget of $250,000 a year for our company on gross sales of $150 million.

In addition to that $250,000, I have set aside $65,000 for just such purposes as you're discussing, and that is—

Biondo: Why is that? That's because you are personally committed.

Cox: That's because the company is committed.

Biondo: Are you the president of your company?

Cox: No. I'm one of the founding officers of the company.

Biondo: You're essentially saying what I'm saying. It takes somebody in a position of power, who is committed, and



then it gets done. If they're not committed, it probably doesn't. My point is, as communicators, how do we feel personally, fighting for the priorities of this kind of thing? Are we the kind of people that are listening and saying, yes, I understand the problem, but I'll be damned if I'm going to go in and argue with my CEO or my executive committee or whatever, to help fund this kind of a communication effort.

Phillips: It might be interesting if you'd discuss what sort of arguments you use, in the first place. One of the first things we should do is some form of research, to identify the strengths and weaknesses of your company versus your customers and versus your competition.

Biondo: That's easy. It's not too difficult to get that perspective. But when you're talking about defending the private enterprise system, you're really reaching for this outer fringe, and that's a little different kind of cat.

Cox: Are you really?

Biondo: I don't think so, because I happen to be very dedicated and concerned. I don't think there's going to be the next hundred years unless a major change takes place.

Cox: I'll tell you one piece of wood you can throw on that fire, and that is—and it's been thrown on many a fire—the "Powell Memorandum," in which he said everybody should appoint a Vice President of Survival, and that's just damn near where we are.

I have given up, as far as college students are concerned. I have given up as far as high school students are concerned. But I would much rather reach the teachers and teach them free enterprise.

We're also going to attempt to reach the other media, and try to get to the business reporter, and talk to them in terms of what free enterprise really is, because these are the places where the problems occur.

Biondo: It's refreshing to hear that. You have a relatively small business. You don't have millions to work with....

Voice: It's a small business.

Biondo: Every dollar you spend on corporate communication is very carefully thought out. I wonder what would happen if the family of the Fortune 500 was thinking this way, and then could something happen out there to create an appreciation and an understanding, I think so.

Cox: The impact, I think, would be of turnaround proportions.

Jim Hoefer, Fortune: Have you seen the Phillips offer? A collection of television and print advertising that has to do with a system that's already done. It's free to everyone that wants to use it.

Voice: Hal, would you like to talk about your setup?

Harold Drosethes, U.S. Steel: I'd be glad to. We're organized on the basis that we have an advertising and sales promotion group, which I'm associated with. We have separate public relations and public affairs. However, all of the paid space advertising is done by the advertising division, even though it might be to the financial community or to Washington, or to whatever one of our many publics we want to reach.

We take the attitude that at least it's been successful from a budgeting point of view, that advertising in U.S. Steel is the voice of management, and that through advertising they can tell a consistent uniform story to the publics and it can be the story that they want to have told. So when we go after a budget, we have first done some pretty significant conversing with our major executives, about

what it is that's on their mind and what it is they want to talk about and what it is that's bothering them.

Fortunately, the current trend of opinion against business and industry, in general, is very much on their minds, and they have therefore approved, with great enthusiasm, advocacy advertising. I didn't come prepared with props, but I did borrow a newspaper and here's one of our ads. If you haven't seen it, I'm distressed, and if you have, you're familiar with it. It's "What Makes America Work" and we've asked important leaders in industry, business, and education to speak on this subject.

This happens to be Jerry Wiesner of MIT. We run this in the *Wall Street Journal*, in *Fortune*, certainly, in *Time, U.S. News, Newsweek, Sports Illustrated*, and then in some of the vertical books like *Scientific American* and others. We've had one spokesman, Harry Parks, who is a sausage maker in Baltimore, who talked about the freedom to succeed and it was a very compelling statement. He happens to be a black man.

We just did one on George Meany, who talked about collective bargaining. It was a very good statement, that kept it simple and talked strictly to the people.

Walter Wriston of Citibank did one on capital formation and tax reform.

Sidney Marland has done one on education, and why it helps make America work.

We have one upcoming from Esther Peterson on consumerism.

We think that this is borrowed interest advertising, and we did it this way because we don't believe that U.S. Steel necessarily has credibility on the right to succeed with the American people, but Harry Parks certainly does.

We don't know that our credibility would come even close to Citibank on tax reform, and so forth, so we used what in the business we call, I guess, borrowed interest. We use a spokesman, and then we append to that a statement of our view.

We got a great reaction to it, mostly positive, some negative from the unbelievers, from the Philistines, but we all expect that.

Voice: Is that the reaction from businessmen, or from the people you're trying to reach, or are you looking at yourself in a mirror?

Drosethes: No, we're not looking at ourselves. We're also in the *Reader's Digest*, I didn't mention that. No, we get a reaction from businessmen. And from our point of view, and very cynically from the standpoint of continuation of the budget, we're very happy that our chairman's peers talk to him favorably about what they see, because that impresses him. But from a communication point of view, we get letters from all segments of society, and we think that it's an important thing to do. The whole point of this, Mr. Biondo, is what makes America work—we think we ought to tell people that this doesn't just happen, that there are problems, but also there are solutions.

For instance, with the no-growth syndrome that was abroad in the land for a while, we think that the MIT guy, talking about technology and how it's going to help us in the future, is a very useful device.

Voice: What's your budget for this program?

Drosethes: $7,700,000.

Voice: As a percentage of total expenditures, is that a sizable percentage?

Drosethes: It's about 40 percent.

Voice: A little more about the philosophy here, and how it related to the Westinghouse situation, where they were trying to promote nuclear energy which is in their best interest. They understand that the people, the great unwashed public, knows little about nuclear energy and might be frightened because of the price. So they made the decision to step back one pace and promote within the "idea media"—I like that phrase—to people who could understand all of the aspects of nuclear energy, and then do something about it in their local situations, any civic group, get the people who can distribute the word. That's why communication is important. This is exactly what you're doing.

I think the education of the people—since the press, the daily press, doesn't seem to have intentions of doing it—is really up to us, performing as citizens, and Eaton's program is set up on that basis also. When everyone gets together and it's really a face-to-face contact with workers in the company, unions, everybody who might not have the education to understand the complexities of the things you're talking about, then you can get it done.

Drosethes: I'd like to add one more thing, then I'll be quiet.

One of the things you talked about this morning was the idea of bringing together all your communications against an objective for maximum impact, and without belaboring it, we are unable to use this series on television, because it's considered controversial. Therefore we really have under this program, a dichotomy where our television ads use our own employees, who talk about what they do and try to create a good impression of the company. We really, honest to God, use our employees. We're talking about guys off the line, in the mill, and not management people. That's worked very, very well also.

> "And from our point of view, and very cynically from the standpoint of continuation of the budget, we're very happy that our chairman's peers talk to him favorably about what they see, because that impresses him."

One more thing. When we changed agencies about six years ago, we brought in the new agency, Compton. For about ninety days of very intensive indoctrination in all aspects of the company, we actually paid them for their time, although during that time, BBD&O continued to do our advertising. And we came up with the "We're Involved" slogan, because when they got through with the indoctrination, and they had looked at shipping and raw materials and plastics and steel and God knows what else, they said in their wrap-up report, my God, you guys are involved in damn near everything. And that seemed like a pretty good thing to tell the American people, that we are involved in their lives. We've stuck with it. We think it's more true now than it was when they started.

Voice: Is it your intent to do some research?

Voice: Yes, we do continuing research, and that's always a part of our budget presentation.

Phillips: Did somebody sell your management on this idea or did management convince themselves that it should be done?

Drosethes: To answer your question, the idea is certainly a management idea. As a matter of fact, it was our chief executive officer, Ed Speer. The how to do it, of course, is ours.

Phillips: I was wondering whether there is a question of how you persuade management, what techniques you use, or is it a question of whether management is going to do it,

depending very much on their own psychology, their own background.

Drosethes: I would be inclined to believe that.

Phillips: Are there any techniques that can be used?

Voice: I would like to ask a question. A company like yours, steel, can embark on a program like this, and you're already so well-established, it enhances your identity. It builds on a very solid foundation. Companies like ours are relatively small. I wonder if any people around this table have a problem of getting involved—if not in advocacy advertising, at least in diverting some corporate bucks to something other than the corporate mission.

Head: If it's a question of putting over the message of free enterprise, I'm rather surprised to detect a morbid fear of the press. It reminds me of a conference at Stockholm I was at very recently, a businessmen's conference. This was very real there. I'm surprised to find it among a meeting of communicators. The message I was trying to emphasize was that the press is not anti-establishment. The press is the establishment, and the press is not anti-business. It is business and it's very big business, indeed.

One of my jobs is to improve relations at top management level with the leading business journalists in London. There are various ways you can do this, from having a drink with somebody in a bar in Fleet Street to having a reception, a small dinner, a small lunch. I don't know how much of this is done over here, or in Sweden. Do you do that much in Sweden, Klas?

Klas Helsing, Kockums: Yes, of course, and I also believe that what you're trying to do is really to grasp the whole world. I mean, what can you do? You're a small company and you have to face the fact that you don't have the resources. You must hit the publics most important to you and be satisfied with that.

We're a small company, about the size of your company, even smaller. Our problem is that we operate all over the world. We have companies in the United States and Canada and Great Britain and Australia, South America, everywhere. And I work with a small budget, but I'm satisfied, because what I try to do is address the publics that are important to us.

I have a kind of theory—I don't know if it works here—that the major reason for the hostility of the general publics and the community toward business and industry is that we have all this money to spend. They hate us because we are too—we have too much power. It's the old story about the weak one who never wants to be impressed by the strong one. We've too long been bosses in all markets where we operate, and it's come to the surface now. And they've suddenly been supported by the media to an extent which probably surprises all these publics themselves.

To me, this situation is quite clear. What we have to do is not really talk about how much money we can spend, but what techniques we can use, because it's a matter of using the right techniques, rather than spending a lot of money.

Biondo: You're right, because there aren't many around who can do U.S. Steel's seven-million-dollar thing. Thank God the U.S. Steels are doing that sort of thing.

I'll give you a vignette of one thing we did that was not an expensive thing. It was a revelation to me. This goes back four or five years.

We had been sponsoring in St. Regis a packaging design contest, which had been going on for ten years. Design obviously was a marketing communication technique. We'd go to design schools and colleges all over the country seeing the students—this was in all fifty states, including Alaska and Hawaii—and we'd say to these design people, look here's a thing: design a package for it and do the graphics, and we'll put together a group of judges, and we'll give out an award for the finest design.

We are a maker of folding cartons and packages of all types, and I thought this would enhance our prestige as a packaging company. Then of course, about four or five years ago, when the tumult reached its peak, on the campuses, particularly, they were burning the administration buildings, and what have you. And the students were saying to us, look, we don't want to create a package for this contest because we don't even think you need the thing let alone the package.

As far as any contests are concerned—we used to say to these people, you win a weekend in New York, and you know, plaques and all that. And they said you know what you can do with your plaques. And furthermore, who cares about New York? It had reached a low ebb. We said, okay, time to regroup.

We tried to relate to what was a real kind of perspective that these young people were telling us about. They were saying, give us something that means something about a problem that's real. We said, okay, if you believe that starvation throughout the world is real—yes, that's a real problem. We reduced the universe from fifty states down to six universities. We spent time with deans at these six universities and we said, look, we would love to create a senior problem—this could be a graduate school problem, or at the senior level—and tell these students we'd give them access to all of St. Regis' technology. We put hot lines in. We gave them access to customers of ours who were in the food business, who had had products, for example, in the R and D levels. One particular product that they worked on was a corn and soya and milk product, which was high in protein. In that stage of development, it was simply a pile of gunk. We said, okay, here is a high protein substance that could really solve the problem of starving people, if we could induce them even to eat it. Package it and get it there. You want a problem? That's a real problem. You work on the problem.

> "I find, very frankly, that my biggest difficulty in presenting what I conceive as the rationale of a company, in any of the areas we've been discussing, is to communicate that to a hard professional manager,..."

For one year, these students worked on the problem. It was a fascinating experience. At the end of the whole situation, what they got to win was no award. It was the opportunity for six teams from six universities to present their solution to this problem. And we saw some of the most exciting designs; we saw some of the most innovative marketing techniques and applications of human psychology to a problem we've ever seen, because I think these young people are that way. They're tremendously innovative and fresh in terms of their solutions to problems.

We said, we will put the real world into the room, listening to your solutions. We gathered maybe twenty key people, from government, industry, the world of design, and what took place was simply a dialogue, the real world relating to their solution of this problem.

The whole point is this. When it was all over, I had practically every one from every team from every college

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come up to me and say, you know, I never understood how business worked until I worked on this exercise. If I had known then—when I started college—you know, the whole mechanism, it might have affected my whole attitude as I was going through college or as I was going through graduate school.

That little exercise cost us about $35,000. It's not a lot of money. All right, our universe was maybe fifty young people. I think we made an impact on fifty young people. But there are different techniques. It's not always advertising, it's not always a mass of communications. There are little ways to get to these people in some shape or form. There's a way to get to the press.

We haven't spent the time to figure out how, because that's a function of education and understanding. If there's real understanding and perception of what it all means, I think we'll get the favorable attitude we're looking for and will have no problem.

That's really perfect communication. There's a Chinese proverb, if I remember it, that says, I read and I forget, I listen and I remember, I do and I understand.

Head: Mike, what kind of publicity did you get on any of that, if any?

Biondo: Oh, the press picked it up. We were on ABC's seven o'clock news in the Washington area. Thirty seconds. It was a fascinating kind of commentary. We made a film and showed it to all our packaging customers, who were very intrigued. They asked for prints to show their management. There was a burst, if you will, of enthusiasm and then it quieted down again. We call this our interaction series, and we're thinking now of trying to do the same thing with the problem of housing; we are a producer of lumber and construction products and we're thinking of an interaction on solving the housing problem, how to make a house for a young married couple that they can afford, instead of a $70,000 thing.

We haven't given up on that technique.

Hoefer: Can I have Pete Orser talk about this last couple of years, in developing a corporate communication program?

Pete Orser, Libbey-Owens-Ford Company: Well, quickly, to my friend down at the end who asked a question early in the game, which is to me crucial—how do you talk to your "senior management?" How do you get across to them all the things that should be done? Our company tends to be more humanistic, I hope, more personal, more generalist, with whatever degree of expertise we may hold. My basic problem—I happen to be with Libbey-Owens-Ford and we make some glass, molds, plastics, mostly glass—is that this is the world of professional managers. I think we're starting to see the so-called hard professional manager moving out or changing, but we still haven't. I am of course, a great believer in the generalist, in making use of all these so-called specific resources, including professional managers.

I find, very frankly, that my biggest difficulty in presenting what I conceive as the rationale of a company, in any of the areas we've been discussing, is to communicate that to a hard professional manager, i.e., the CEO who plays

tennis with me and has a terrible backhand, with whom I am all the time. I have great rapport with him. The other day, to give you an example—and I'd say it if he were sitting right here—we were knocking around growth and no-growth. For some reason, I popped up as being the espouser of no-growth within Libbey-Owens-Ford because I challenged him on the compromise that must be found. And he is the—I guess the antithesis is the full-growth thing. But he said your only problem is that you didn't come along as a technical man, so to speak, as an engineer or some other professional. You came up through your schooling, and so forth. He said, you know, going back to the whale oil bit, Yankee ingenuity, sooner or later, is going to save the situation. He was an engineer, from Rockwell, and now he's CEO for Libby-Owens-Ford and a good man. And he means it sincerely.

The great hope for 200 years for America has been that Yankee ingenuity will solve these various problems. I have now said the opposite to him just to make the ballgame go around. My only point is, and I'm trying to create, to develop a corporate advertising for Libby-Owens-Ford, the professional manager attitude, Panel L, whatever you want to call it, has been the main and total stumbling block, because it comes up in the last analysis, no matter all the homework and all the research and what your customers do and how much budget they have and how good the product is and so forth. It comes down to people, right there, on that last given day.

I envy you, Mr. Cox, in the extent of your control in that respect. It has to be done finally by us, who are sitting there and saying, this is what the real world today may be, not what we're looking at at the end of a P and L. It has to be all warped and woofed inside of it. You can either win or lose on the basis of professional managers. Then, during the rest of the year, I take on my CEO in tennis or in any other area, to move him and others within the company to be more humanistic and more in touch with the things that go on outside, particularly as they relate to our own people within the company.

Of course, I now end up at the far extreme, being called a straw man, but sooner or later, inside, between the hard line at the end and the naiveté that I espouse all the time, there are going to be some answers, if we can move the hard professional manager back—or get him out, one of the two—toward a more generalistic attitude about everything, including his own ideas of making a piece of steel or a piece of glass. I think Jim's point is that you used to run the corporate advertising much along the lines that you spoke of this morning, and I've been desperately trying to get more of it back in.

We're going to run a campaign in *Fortune*. The main and simple reason is it's a hell of a good book.

We put a little glass in the John Hancock Building, and a couple of windows fell out. The press got ahold of it, and all of a sudden 10,000 of them fell out. That's really not true, but somebody felt a little sprinkling of glass coming down. Our main project right now is to reinvent the wheel, from the days of the Phoenicians, and that is glass in buildings and automobiles, etc., is a marvelous, viable, excellent product. But we're also going to use it to present the personality of Libby-Owens-Ford. But sincerely, I'm trying desperately to get it back in. I haven't any idea whether I have answered your question, but I did want to compliment you, in the beginning, on what I thought was a main and simple point. All of the pieces are relatively easy to kick around, and yes, we should have market research, or benchmarks, and all that junk. The point is to convince the group you're with. That in there someplace is a commitment that relates to the personality of the corporation, which is people, a whole bunch of people. That's what I think it's all about.

One last point. We must all get back into our grass roots system, where we set the example of going out and being on a PTA or helping at the school level or on the political scene. We've got to get it back out there to the communities, where a guy who works for a company can be a whole man and can bring it back into his company and do a hell of a lot better job.

This hard corporate lack of individualism that was spoken of earlier has been almost our death knell, and that's why we have some of these problems right now, and why the populace looks at us so horridly. But I think that is the secret of final success. We are individuals. We're not just glass and steel buildings in Pittsburgh or Toledo or Mexico. We are lots of people doing lots of things and it goes back out into the community.

> "...get those people who make the decisions into the community, get them into the world of reality. Let them take some of the heat from people, let them find out, get them out to the colleges, universities, and let them stand up there before 250 students and take some of the flack."

I almost got on you when you were talking about this big campaign. I was going to say to you, Hal, what are you telling us for? Why not tell somebody like 18 million families, through the *Reader's Digest*?

Drosethes: We do.

Orser: I'm very embarrassed by challenging you on that. I wish I had half of that seven million. My friends from *Reader's Digest* have been down time and time again. I've had it all the way to the final color print, sitting on the damn thing, and too many dollars.

My compliments to you and to you for really hitting them. I apologize for carrying on.

Hoefer: You've been in agony for two years, but you found the hook.

Orser: Yes, the hook is we're making millions in the first quarter. (*Laughter.*)

Voice: I think the most important thing you said was to get back into the community, get those people who make the decisions into the community, get them into the world of reality. Let them take some of the heat from people, let them find out, get them out to the colleges, universities, and let them stand up there before 250 students and take some of the flack. Let them recognize it. They'll know then what the attitude is.

Voice: You've got to make sure that that secondary management man that's been held in check for provincialism all these years does that job; that he doesn't bite off the young guy coming along and say to him, you sit right there and do your work, no fair taking time off. I don't know how lots of companies operate, but I think many of them have this stance that says, stick to the business that you're in. Your weekends are your own, etc. This is the area that really has to be challenged, to open up involvement within a company and without, and give them a lot better chance to be involved.

Voice: This, I think, has been one of the keys to our success in this area, because we encourage our people to get out and get involved in the community, on company time, representing the company, but also representing themselves. We encourage them to enter politics.

Voice: My congratulations. In some corporations, money is going to have to go with this. People have got to get out and hustle and the corporation can turn you down, too. You can be involved in a swim meet or something, and you want 200 bucks, and the guys sitting around—deciding on contributions, you know—won't get behind the guy who is out there hustling. Now, that's got to change, too.

Helsing: I would like to ask a question, both ask a question and make a suggestion. The question is, when you're talking about involvement from the head of your company and the top people, are you talking about involvement in the course that will make business better liked in this country and better understood, or are you talking about making them understand the idea of corporate communication?

Orser: There isn't any CEO in the country that can't sit down and talk on capital formation, depreciation, taxes, dividends, and the whole cotton-picking thing—although it was most interesting to me, at any rate, how many of them take the other side on the energy crisis. I would assume there were a hell of a lot of them who thought it was a real ripoff for a long, long period of time. Then all of a sudden, somebody turned their gas off—which happened to us, by the way—and pointed out that the barn door was open or closed, I don't know which way the expression goes.

The new manager has got to come along in a much more involved way, in the total sense. We can't teach old dogs new tricks. We're old dogs now, too.

Helsing: I suggest you can, and that's my suggestion. I believe that what we're asking from our superiors is that they should be specialists in all fields, and they can't. They are—as you say, what they are. They're accountants, they know finance, they know technology, whatever, they're engineers,and they have diverse backgrounds. We're supposed to be the specialists in communication. We have been through exactly the same thing with our corporation. Our chief executive is a finance man, and many of the people in the other companies are also finance people or technicians or whatever. You've really got to start from the bottom, teaching them what public relations and communication are about. It's pure education from the ground and all the way up, and when you get to the point where they know our language and understand what we're talking about, then you can talk about corporate identity. And corporate identity, to me, and to the people in our corporation, is something that we can all agree on.

What we're trying to do, very often, is to impose something that we sit at our desks and write up—this is our corporate identity, this is what we stand for, that's what I work for, and so forth and so on.





And then we send out this paper, multiplied, to everybody concerned, and say, listen, you adhere to this now, because this is what we tell you to do. And they won't give a damn because it's not *their* corporate identity.

So what we have to do is build it up from the inside out. Then you have the most important tool, as I see it, to convey your message to whatever publics, or to your employees. And the bigger the organization, the bigger the impact.

That's what we've done, and I think we've done it very successfully.

Dale Brubaker, Landor Associates: I think the greatest problem we find in dealing with the specifics is getting involved with the chief executive officer. We refuse to work with the company unless we can have that involvement. And the other major problem is you may have a change of management along the line. The new man coming in doesn't get personally involved, and if he doesn't feel personally involved, he's not going to push it.

One thing we all recognize is that any CEO has a leadership syndrome and he also has an ego, and we've got to get to that ego and make him understand. That's his role, to be able to communicate. We have to teach the CEO to function effectively in this area. There are places you can send him to school to learn how to speak, there are places you can send him to learn how to respond to television questions, if he's specializing in these elements these days, and we recommend that, in this area.

Once he feels comfortable with the subject, even though his expertise may be purely financial, or whatever, his own ego and his own leadership characteristics will take over. We found it works, too, to get to this man with those ideas and make him feel a leadership quality in a field that maybe he wasn't originally trained in. It takes a lot of time and a lot of effort.

Helsing: Does a CEO, a chief executive officer, does he have an absolute power in most of the corporations in this country?

Voice: Not absolute. There is the board of directors and then there are the stockholders.

Helsing: I like to look at every chief executive officer as a human being, too. He has his God, and what you have to do is find who are his Gods, and then make them work for you. If you can do that, you'll—

Drosethes: I think every profession has a certain amount of arrogance. I guess it's necessary for self-esteem. But I would find it difficult to believe that a chief executive officer of a major enterprise isn't much more aware of the pressures and the problems that exist, that will have impact on his company. He has to be much more aware of them than I am.

For instance, government—certainly, government is a bigger and bigger and bigger factor every day in the conduct of business and certainly the chief executive officer is well aware of it, and I mean really aware of the details.

Consumerism—he's certainly aware of that because it affects his company and his product and its performance.

I don't really think, speaking just as one person, that it's so much our job to tell him what he should say, as much

as to tell him how it can be best said. That's cost effective and does the job for him. I think he fully understands what needs to be said, in most cases.

Voice: He has to develop his own language.

Voice: I'd like to argue that point with you, because I think—not only the CEO I work with, but others I know fairly well—I think they aren't quite aware of it. I think the communicators, most of us, spend most of our time trying to do the traditional thing, to tell how we perceive our corporate management to whatever audiences we think or the CEO thinks we should be addressing. But I think the toughest sell that you have is the same one you have with the budget, the inside sell to the CEO, and not only to the CEO, but to the senior management, that our company, the specific company, should really take part in these activities.

Now, how are you going to tell your CEO what clubs to join, which groups he should be with, what he should do with the legislature. You can't tell him all those things, but you can sure continue to kind of nudge him to do things like that, and to allow the company to spend some money.

U. S. Steel does it, and there's a twofold reason. One is that the people at Steel obviously know that steel really pervades everybody's life in the country so really everybody is your customer, and everybody either loves you or hates you or has some feeling about you. There are many other products that are not quite that pervasive.

Voice: That's perfectly valid.

Voice: So that's true. So it's tougher with most people I know. I know many CEO's who talk about the oil crisis. Many guys who weren't in the oil business said, what the hell, we don't get depletion allowance. Those guys make too much money, it's all a fake. Even when they were lined up at the gas pumps they said, they're hiding the gas, we've got a lot of gas. That's our problem, because they're not in the energy business. It isn't that they're dumb or stupid, it's just that they hadn't thought about it. It's not my problem, my problem is to make glass. My problem is to make paper. My problem is to make computer products. And those oil guys, gee, they don't pay any taxes anyway. I pay a tax of 52 percent. What do they pay? Nothing. You know, hurray, they spend all this money on political selection. They don't quite get into the thing.

Biondo: Don't you think that most CEO's are truly concerned with the longer range vitality and perpetuation of business?

Voice: I think they are, but they concentrate more on what I do in my marketplace about it, rather than worry about the business environment.

Voice: I think the populace are doing us a favor. I think the populace are forcing us to do this, and they're forcing the communicators to spend more time trying to sell management on some of these programs, and everything you do costs money. The discretionary buck—you know, the first one you get in trouble and you lose 12 or 15 or 20 or 30 or 50 million dollars a year. You're spending 7½ million on advertising or 10 million. The guy says, we've got to cut overhead and that's one thing we can do, that's one thing we can turn off. We don't have to fire anybody, I won't get involved with equal opportunities people. I don't have to go through a head count. Let's knock 3 mil out of this ad budget.

Voice: I want to ask you a question. Have you ever kicked around egalitarianism with the boss, or Irv Kristol's new class group, or the no-growth proposition?

Voice: I do that all the time.

Voice: Just kind of personal, when everybody is sitting around at lunch, and get some reaction. In-house guru is what you have to be.

Voice: But the point is, when you really get down to it, it gets tight and you're beginning to win the argument. He can always turn on you and say, look, after all, you're the communicator. What you're supposed to do is tell people what I want you to tell them. Who in the hell asked you to tell me how to run the company? After all, you didn't run the manufacturing department. You're not the engineering guy who invented all our products. What do you know about the glass business? You know.

If you really get him in a corner where he's going to have to give in to you, unless you've got him in private, don't try to do that with two witnesses—he's not going to give up. He's your boss. You go back to the beach where you started. (*Laughter*)

Voice: I heard the term "populace" booted about here a couple of times today. How did they make out in the primaries so far?

Voice: Not very well, but they do very well in the news media. That scares people. I don't think they do too well in the primaries.

(*Several voices at once.*)

Voice: Look at our state of California. Never mind whether we love or hate our governor. Twenty-nine percent of the people voted. Sixteen percent of them voted for him—16 percent of the people who voted. The rest of them didn't give a damn, they didn't go to the polls. So who does our governor represent? Sixteen percent of the people who voted, not even 16 percent of the population. Because people think politicians are all crooks anyway, why vote in the election? Why get involved? They're all a bunch of connivers, they're all crooked. It doesn't make any difference who runs the government. The government is lousy anyway. That's ridiculous. That's what's wrong with the government, because nobody cares.

Voice: That wasn't my point.

Voice: You can't solve that problem.

Voice: My point is we seem to be trying to direct our attention to the concepts of the populace.

Voice: I think you can't ignore it. I think you use it as a tool to get your boss—if that's one of the jobs, if that's what's used to scare him a little bit, to move him over a little bit, one way or another, use it. You do that on the press, you do it to everybody else, why not do it to your boss?

Voice: You know, Graham, the word "communicator" always comes up at a conference like this, and I think that sometimes we forget that communicator really has two thrusts to it. Many times we think of it as communicator, which means an outgoing type thing, from me to someone else. But the true sense of the word communicator, the other important part of it, probably the most important part, is the part that comes from someone else to me. And what I mean is that as communicators, we had all better well understand, as a financial officer understands, we should also understand as a tax man understands, we should all understand as a CEO understands. Then you're prepared to talk to them in such terms that they will understand your philosophy.

This is something that we have to keep clearly in focus, that communication is two ways.

Voice: I'm lucky enough to have had a chief executive for eight years and to have reported directly to him all these years, good times and bad. I happen to believe there's a move abroad throughout the community somewhat along the lines that Louis Banks mentioned, that there is an

opportunity. I think, if nothing else comes out of this session here, it will be the corporate communicators that don't get to their chief executive officers who are really the ones directly responsible. I have never seen yet, in two companies I'm very close to, a reasonable program, properly prepared—a long term thing, like the discussions you're talking about—that was not accepted, particularly now in the free enterprise fight, if you want to call it that. So somehow, there is an opportunity, and I think the mood is there for us to do some good.

I happen to believe, also, that maybe the climate is right for us to do it, to really marshal our forces and take advantage of it. In our case, we have every external activity coming in through one person, and it makes a big difference. All budgets go through there. You do have that opportunity to shift funds. This year, we're doing two things, Bicentennial, which will finish July 4th, Free Enterprise, which will start September 1st. But it's not necessarily all advertising. It is a balanced program, and I think the communicators have the responsibility to take advantage of it.

Voice: What are you doing with "Free Enterprise?"

Voice: We're starting a program in September, a balanced program, following through on our Bicentennial. We've involved all twenty-five plants in the Bicentennial on local projects. They, in turn, will now follow through with their own Free Enterprise projects, on their own. It's a simple little program.

Hoefer: Could you talk a little more about corporate communication in Europe?

Helsing: In Europe? Well, I don't really know about Europe. I know a little bit about Scandinavia, and I'd say, generally, it's picking up. We've been underdeveloped countries in Scandinavia, in terms of corporate communication, especially if you look at it from an advertising point of view. Our concern has mostly been the local markets, although we depend very much on international business. Most of the stuff that we produce in Sweden is exported to foreign markets. As you know, we have some natural resources, which the whole economy has been dependent on; mining, for instance, forest products. Now, we're diversifying into other fields quickly, and the more complicated the market's become, the more complicated the communication aspects have become, too. You'll find an increasing number of Swedish organizations now start working on what we call corporate advertising in different markets, though not so much in this country as in the European marketplace.

The reason is that we believe many of the subsidiary companies of Swedish enterprises in the United States and Canada probably fair better and do better from being identified as local organizations or local companies, rather being Swedish companies. So we don't make a point of that, unless we feel there is a great advantage in being considered Swedish.

Quite a few companies like SKF and the others are very low key. You see them but you don't really know if they're Electrolux, American refrigerators, you don't really know that they're Swedish, and they are.

Our company has mainly been in shipbuilding. We're the fifth largest shipyard in the world. Not many people know that, outside the shipping community, the oil companies, and others. But we have, during the last five years, diversified into a number of other activities, ranging from logging equipment to biochemicals. This is a new experience for us, and we've mostly worked inside the organization to do what I tried to explain before, establish a corporate identity within the organization, to make people understand what's happening in the diversification process. And I guess, within the next two, three years, we'll be prepared to go out and tell our publics, though I don't believe we will be doing things many of you are doing, because we're a very small company. We want to reach very select target groups, and as far as I can see, today, we'll never be a public company in the terms that U. S. Steel and many of the other companies represented at this conference are.

Hoefer: I think you're going to see more American multinationals engaging in corporate communication country by country.

Voice: Graham, I'd like to make one point on social responsibility. I don't think we can forget that the prime social responsibility is making that profit, performing the job, and then passing on to the other things.

Voice: Absolutely.

Exhibit 53: "Crosscurrents, 1977"



Introduction

Fortune's Sixth Annual Corporate Communications Seminar at Sandpiper Bay in Florida provided a platform for a variety of important and informative speakers. Among them: Robert E. Kirby, chairman of Westinghouse; Royal Little, the founder of Textron; Robert Malott, chairman of FMC; and William T. Ylvisaker, chairman of Gould Inc.

Their views, combined with the insights of speakers who explored such subjects as communications research, developing objectives for corporate communications, employee communications, financial communications, and business and the press, provided a lively environment for discussion.

As participants in these seminars tell us each year, the greatest value they receive is the opportunity to exchange ideas with their peers from companies in the U.S. and around the world. No other meeting brings an audience of this kind together and focuses on subjects so closely related to their corporate functions.

In the six years since the first Fortune seminar it has become clear that the communications objectives of major corporations have become more diverse and complex, both in formulation and execution. Business operates today in an environment where information about its activities is more widely reported and generates more interest than ever before. The pace and flow of this information has increased dramatically, too. Our hope is that the seminar opens up new avenues of thought and action for responsible and effective response by corporate communicators to the assignments they face.

Another important goal of the seminar is to bring the information developed at the meeting to a much larger audience of people at companies and agencies who are involved in corporate communications planning. This report, Commitment in Corporate Communications No. 6, will receive wide distribution. We thank the speakers and participants who made this report — and a most productive seminar — possible.

Jim Hoefer

James B. Hoefer
Advertising Director
Fortune

Photographs by Guy Gillette

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Royal Little, *Founder, Textron (Retired); Member, Business Hall of Fame*

The founder of the country's first major conglomerate would like us to believe that it all came about because he cashed in on some lucky breaks that followed on the heels of some not so lucky ones. But clearly, anyone who could talk three Harvard professors into giving him passing marks without attending a single class was destined to do great things. And he did. Little shares some of his secrets with us for building a supremely successful conglomerate (and for having a good time while doing it).

Adversity, Hostility and Corporate Communications 17

Robert E. Kirby, *Chairman, Westinghouse Electric Corporation*

The job of chief executive officer is not unlike that of mayor in a major U.S. city—without benefit of the clout that a big-city mayor has. C.e.o.'s have no political chips to cash in, says Kirby. Also, they face a very real hostility from special interest groups, the media, and the general public. To that Kirby adds the negative attitudes toward business that he finds in certain areas of government. He says the solution to the problem will take more than great media buys, or zingy commercials, or moving speeches, or favorable stories in a newspaper. The job requires a clear understanding of the techniques of communication and of the specific overriding issues that companies face every day.

"Mirror, Mirror on the Wall . . ." 23

Edward F. Kelly, *Director of Advertising, Manufacturers Hanover Trust Company*

Delano W. Ladd, Jr., *President, Edwin Bird Wilson, Inc.*

What corporate advertising shouldn't be is an ego trip, according to Messrs. Kelly and Ladd—for management or employees. To avoid that pitfall—and the others that lie in wait for the corporate advertiser—a company must start by defining its objectives and making sure that all concerned understand and accept the objectives from the beginning. Another step toward success is for the company to stop talking to itself in the mirror à la Snow White and to apply the tough self-discipline of sound, proven marketing techniques to its corporate advertising.

Custer's Latest Stand 31

William A. Latshaw, *Manager of Advertising, Bethlehem Steel Corp.*

Francis E. Cronin, *Production and Media Director, Bethlehem Steel Corp.*

Bethlehem's corporate advertising program in magazines has concentrated on six issues vitally important to the company's future health: capital formation, environment, energy supply, overregulation of business, foreign trade, business concentration. To make certain the media used would enhance Bethlehem's message, a survey was devised to measure attitudes of magazine audiences toward the six target issues. The survey helped prove that even though a given publication reaches people with similar demographics, their attitudes and opinions will differ because of such things as background, education, personal interests. Bolstered by the research findings, Bethlehem was able to concentrate its efforts in media whose readers they felt would be sympathetic to Bethlehem's stance, and to avoid media with audiences that held firmly entrenched attitudes in opposition.

Developing Objectives for Corporate Communications 39

Brian McBain, *President, McBain and Small, Inc.*

Richard Morris, *Vice President, Corporate Relations, Carrier Corporation*

McBain's contention is that without qualitative research, a communications program runs the risk of bringing the wrong message to the wrong people. To demonstrate the technique and value of qualitative research to Seminar participants, McBain, working with Dick Morris surveyed a group of financial analysts whose opinions of Carrier were considered extremely important. The results confirmed the findings of earlier Carrier research: analysts still thought of Carrier as a company involved only in producing air-conditioning equipment. The Carrier campaign was proved to be on the right track because it was attempting to change that limited image among the analysts.

International Trade: What's Ahead for Multinational Corporations 45

William N. Walker, *Ambassador, U.S. Delegation to the Multilateral Trade Negotiations*

U.S. businessmen should become more familiar with the direction and force of international economic policy, according

to Walker, because those issues are increasingly overshadowing traditional geopolitical and national security issues. One of the results of the Geneva talks could be the lowering, or the removal, of tariffs on goods imported into the U.S. In that event, Walker urges businessmen to understand the overall picture and to remember that the U.S. has a substantial competitive edge in dealing overseas. As for the European Community specifically, the U.S. has had a whopping trade surplus every year since its founding in 1958 ($6 billion in 1976). Understandably, this has led some Europeans to feel they're being taken advantage of by the U.S. and to look for relief.

The Ups and Downs of Corporate Advertising **51**

Robert S. Marker, *Chairman, Executive Committee, Needham, Harper & Steers, Inc.*

Barron Biederman, *Senior Vice President, Needham, Harper & Steers, Inc.*

Before even the best corporate advertising program can be launched publicly, say Biederman and Marker, the company's chief executive officer must be convinced that corporate advertising is in the company's own interest. The role of the director of corporate advertising is to convince his c.e.o. of the need for a program and define its role, policy, strategy, and budget. If a campaign already exists, the director must be able to demonstrate that it is indeed working. Not to be overlooked is still another responsibility of the director of corporate advertising: he must inspire his staff and guide his agency in the planning, creation, and implementation of corporate communications.

The I Imperative **59**

Stuart B. Upson, *Chairman and Chief Executive Officer, Dancer-Fitzgerald-Sample, Inc.*

Philip S. Boone, *Senior Vice President, General Manager/Western Operations, Dancer-Fitzgerald-Sample, Inc.*

Upson and Boone rightly observe that the goal of most companies is to stay in business for a long time and to make a profit. Achieving that goal may not be so simple. In fact, say the two, it calls for sophisticated strategy as well as strong, honest advocacy advertising. A successful program demands that three groups of people function as one throughout every stage of planning, execution and administration: the chief executive and his immediate management team; the corporation point man; the agency team. Without trilateral cooperation, no program can achieve the clarity, luster, and conviction that the corporation deserves.

What Are You Trying to Do to Whom? **65**

James B. Orthwein, *Chairman of the Board and Chief Executive Officer, D'Arcy-MacManus & Masius, Inc.*

Walter Armbruster, *Executive Vice President, Director, Creative Planning, D'Arcy-MacManus & Masius, Inc.*

Many firms approach corporate communications by deciding what they want to say. But Orthwein and Armbruster contend that this should be one of the last steps. People have certain beliefs about corporations, they tell us, just as they have beliefs about products. And their behavior toward those products or corporations is based on their beliefs. If a corporate advertiser is not satisfied with that behavior, he can change it by creating new beliefs. This is where the concept of "Belief Dynamics" comes in. It helps determine which beliefs a corporation's audience currently holds so it can decide if and how those beliefs/behavior should be changed. Furthermore, say its two advocates, "Belief Dynamics" helps keep companies from disseminating information no one cares about.

Expanded Horizons for Corporate Communications **71**

William T. Ylvisaker, *Chairman of the Board, Gould Inc.*

Excellent technology is at the heart of Gould Inc.'s success and the company's future rests on it. But technology per se is held in low esteem these days by many people; it's even blamed for many of society's problems. Countering that negative attitude became a corporate goal. The result is a campaign that boldly identifies Gould as a technology company and demonstrates that Gould has unique ideas on topics of national importance as well as in areas that are related to its own business interests.

Turning Corporate Communications Failures into Success **77**

Eberhard Faber, *Chairman of the Board and Chief Executive Officer, Eberhard Faber, Inc.*

The man who bills himself as an expert in communications failures tells us how, time and again, he turned disaster into magnificent success. For example: how he lost a Rhodes scholarship (a politically "hot" editorial in the undergraduate *Daily Princetonian* did it) but gained a Fulbright; and how he retired from the family business at 32 (more or less in defeat), after serving "in various innocuous positions" for five or six years, but was welcomed back several years later as its president. Even without the incentive of failure, Faber proved at

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•the Seminar that he is more than an expert in career flops; he is also a master in the art of entertaining a roomful of success-minded communications experts.

Corporate Growth and Communications Challenges **83**

Robert H. Malott, *Chairman of the Board and President, FMC*

Malott briefly outlines the various phases of growth that his company passed through en route to becoming a giant diversified corporation. He suggests that other business leaders might recognize the sequence and thus be in a better position to anticipate problems, particularly communications problems, associated with growth. Malott also tells us why, for the sake of better communications, certain divisions of the company were renamed, why trademarks and brand names were eliminated—and why the corporate name was retained against the advice of a consulting firm.

Change and Opportunity: The Present and Future on Wall Street **91**

Donald E. Weeden, *Chairman, Weeden Holding Corporation*

Weeden has some advice for companies anxious to communicate effectively with the financial community. Be accessible, he suggests, but not overly aggressive. Avoid puffery; focus on the long-term view. And never mislead the people on Wall Street. They don't like to look foolish, and they have long memories. Weeden's own interest in Wall Street is from another perspective. He supports a national market system, which means he would like to see more competition in the buying and selling of securities. The result, Weeden says, would be a more efficient system, one that would encourage more small investors to participate while costing all investors less in transactions fees.

Simple Is Smart—Changing Lingo to Language **95**

Alan M. Siegel, *President, Siegel & Gale, Inc.*

American business has put some formidable language barriers between itself and its customers, often without realizing it. Siegel's mission is to simplify that language, and thus improve lines of communication. Since his entry into this field three years ago, his firm has put its mark on such documents as bank forms, real estate contracts, and insurance policies. The consumer movement has brought increased pressures on business to use language that is clear and understandable—and that communicates. Siegel notes that the company that responds to the pressure could be at an advantage: a survey of bank customers shows that 80 percent of those polled had positive attitudes about borrowing from an institution that used the new style of easy-to-read contracts.

Business and the Press **103**

Joseph Angotti, *Executive Producer, NBC Nightly News*

Jack Egan, *New York Business and Financial Correspondent, Washington Post*

Raymond L. Scherer, *Vice President, Washington, RCA Corp.*

Paul Weaver, *Associate Editor, Fortune*

Moderator: Robert Lubar, *Managing Editor, Fortune*

There seems no argument with Lubar's thesis that "Business distrusts the press. The press distrusts business. And the public ends up mistrusting both of them." But what to do about it? Egan finds the antagonism perfectly understandable and sees it as part of the public's loss of confidence in most of society's institutions. Weaver notes that Americans have never been pro-business. On top of that, he says, business has lost a strong ally with the decline of the Republican Party in the U.S. To the charge that TV at best ignores business, and at worst misrepresents it, Scherer contends that TV coverage is getting better because newscasters are becoming more skilled in business and economic areas. Angotti says corporations must learn to adapt to the quick pace of television so that, when given the opportunity to respond to an anti-business charge, they can do so in time for that evening's newscast; tomorrow is too late.

Workshop Session **115**

Presenter: John R. Purser, *Vice President, Public Relations & Advertising, Jones & Laughlin Steel Corp.*

Moderators: Robert S. Marker, *Chairman, Executive Committee;* Barron Biederman, *Senior Vice President and Management Representative, Needham Harper & Steers, Inc.*

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How to Lose $100 Million and Other Valuable Advice

Royal Little
Founder, Textron (Retired)
Member, Business Hall of Fame

I've had a chance to talk with business groups quite often and they expect me to tell them what a wonderful job I did building up Textron. But I fool them by talking about my mistakes.

I even decided that perhaps the thing to do is to write a book about the mistakes because in my opinion it would be of some value to the free enterprise system, if I could tell about mistakes—fifty mistakes I've made and how you might avoid them.

So that's why I decided to write a book. I think I've thought up a hell of a title: "How to Lose $100 Million and Other Valuable Advice."

Now the book may be lousy but that title is going to sell.

I grew up as a kid on a ranch in California and went to one of those one room, one teacher schoolhouses. I used to ride bareback on a mule several miles to school. The mule was blind in the left eye so anytime anything crossed the road from left to right, the mule would shy and throw me off. I was always late to school when that happened.

So then my uncle, Arthur D. Little, made a deal with my mother. If I could come east, he'd try to make a chemical engineer out of me. So I came east and went to school in Boston, Noble and Greenough School. . . . I changed schools seventeen times before I got to Harvard. I was there for a year and a half and in the middle of sophomore year, the war came along. I went in the service and I had a very distinguished career in the Army. I was in the Rainbow Division and served in France, later in the Army of Occupation in Germany, and I was the only officer in the entire American Expeditionary Force that never got promoted.

Then when I came back about a month before the class was to graduate, I told my uncle, "I'm sorry, I just can't go back and complete the five years of postgraduate work and college that you want me to do to be a chemical engineer. I'd much rather go into business."

But I thought it would be nice to have a degree when I went to apply for a job. At Harvard in those days they had what was called a war degree. You got a war degree if you completed three quarters of the courses necessary for a regular degree. Since I'd been on an accelerated course, I had anticipated three courses before I went to college and I'd been taking more courses than normal while I was there. I got credit for everything I'd taken up until the war and I needed only two and a half courses to get my war degree.

I found a course in conversational French and went around to see the professor. He was a Frenchman who'd come over to the U.S. and I explained to him how I'd helped save his country and told him that I'd been stationed over there and I'd learned a little French. And he said, "Parlez vous français?" And I said, "Mais oui, mon Professeur, je parle très bien." He gave me one whole course in French conversation.

Then I went to the head of the German department. He was a German who had come over here so I couldn't use the same line on him. But I explained that I had been in the Army of Occupation in Germany for six months and learned a little German. He said, "Sprechen sie Deutsch?" And I said, "Jawohl, Herr Professor. Ich bin in Deutschland gewesen und ich kann ein wenig Deutsch sprechen." And he said, "Sehr gut," and gave me one whole course in conversational German.

Then he said, "What's that blue area out east of New England?" I said, "That's the Atlantic Ocean, sir." Whereupon he said, "Young man, you've just graduated from Harvard!"

I had about a week to go before graduation and I was half a course short. I went through the Harvard catalogue. Finally, oh boy, I found half a course in map reading. Boy, could I read maps! I went around to the head of the engineering department and explained my problem. I said, "Professor, if you'll give me this half course in map reading, I'll get my degree with my class. I hope you'll be willing to do it because obviously I can read maps. I've led troops all over France, Germany, and Belgium."

He said, "Well that's a serious matter, I'll have to give you a test." So he brought out a geodetic survey map of the eastern coast of the United States and said, "What are these brown lines on the map that never intersect each other?" I said, "Those are contour lines, sir." Then he said, "What's this black line that runs between Boston and New York?" I said, "That's the New Haven Railroad, sir."

Then he said, "What's that blue area out east of New England?" I said, "That's the Atlantic Ocean, sir." Whereupon he said, "Young man, you've just graduated from Harvard!"

The reason I told you all this about my educational background is because I want you to realize that it isn't necessary to have an MBA from Harvard to lose $100 million!

In 1923 I had the idea of starting a synthetic yarn processing business in New England to take care of the New England textile trade. That work had all been done in Pennsylvania and New Jersey in silk processing plants. But I didn't have any money. A good friend of mine, Eliot Farley, whom I'd worked

for in a company called Lustron, endorsed a $10,000 loan at the First National Bank in Boston. That's how Textron started without one cent of equity capital.

About 1928 we were having a terrible time, always short of money. There was a company in Providence called Franklin Rayon Dyeing that had done very badly. We hadn't made any money. All the earnings were going to pay the factors. The other company wanted to get my management. I don't know why. But anyway, we merged with that company and part of the deal was that they were going to raise a quarter of a million dollars by selling a prior preferred stock and I had to do the same.

He looked over the figures and said, "Sorry, Roy, this looks too much like two drunks helping each other home."

I had a good friend in Boston who was an investment banker. I showed him all the financial figures. Remember, this was 1928. You could have sold anything to the public.

He looked over the figures and said, "Sorry, Roy, this looks too much like two drunks helping each other home."

Then in the middle thirties there was a fellow down in Texas in the oil business who came to New England with an absolutely perfect idea. No way you could lose money. He said, "For every $50,000 that you give me to drill a well, if I get a dry hole, I'll use my own capital to drill wells until we get you a producing well."

So we got together with a lawyer and drew up very carefully the definition of what a producing well was. And then I put up a quarter of a million dollars. And this guy got $20 million out of New England with this idea. And, of course, it was a complete Ponzi scheme. Nobody can afford to agree to drill wells until they get you a producing well. All that $20 million was lost. So I always tell people that if you live in New England and a wonderful idea comes along from Texas, and it has gotten by all the capital in St. Louis, in Chicago, in Pittsburgh, in Philadelphia, in New York, and they finally have to come to New England to raise the money, look out! That will be a lousy deal.

One thing that happened to me was quite a shocker. I bought 10,000 shares of Industrial Rayon back in the thirties. I was able to tell pretty well when the rayon companies would earn money because we were buying rayon. When our customers started buying yarns I knew producers' earnings would go up. So I bought 10,000 shares at 50. In a short time, the price was up to 65. Then I got a little worried about the marketing conditions. I thought I ought to protect this profit.

So I put in a stop-loss order at 60 when the price was 65. What happened? Had a big shakeout in the market. My stop-loss order became a market order. The specialist had to put that on his book. He didn't have enough buying orders. They stopped trading in Industrial Rayon securities. One of the governors of the Stock Exchange came around a couple of hours later and said "Why the hell haven't you opened Industrial Rayon?" He showed him the book. So this governor called up the treasurer of Industrial Rayon and said, "The specialist has about 30,000 shares for sale, would you like to buy it?"

So the treasurer of Industrial said, "Yeah, we'll buy it all at $40 a share." So I got closed out at 40. The next morning it opened up at 62.

Now in some of the Textron acquisitions we had some trouble because we were buying a lot of family controlled businesses. One of the companies, Camcar, was a very good little business, privately owned. They showed me their figures including their net worth and earnings. So I made a deal with them that we'd pay their net worth in cash plus a contingent payout based on future earnings.

Since I'd seen their balance sheet, I thought I knew what the down payment would be. Then at the closing, our auditors and their auditors agreed that they should have capitalized a million dollars of tools and dies that had been expensed. That cost us an extra million dollars. The next time, when I was buying the Benada Aluminum Co., I had the lawyers put in the agreement that the net worth would be determined exactly the way the company had figured the net worth in the past. This time I wasn't going to be fooled.

Well, when we closed the deal that time, our auditors discovered that this guy had a half a million dollars of accounts payable in his top righthand drawer that weren't on the balance sheet. I said to him, "This is ridiculous. You've got to reduce your net worth by a half million dollars." And he said, "The hell I have. I've always kept the books this way. Remember how you wrote the contract?" That cost us another half million dollars.

But we did make the headline of the year in the *Willimantic Chronicle Bowl* and the *Wall Street Journal* which said, "Textron Makes Offer to Screw Company Shareholders."

Then an old conservative company in Providence, called the American Screw Company, was approached by an outfit in New York. They made a tender offer right over the heads of the directors and, of course, this was the first time that anything like that had ever happened in Rhode Island. This was a conservative company that had been in business over a hundred years.

So they came to us and said, "We just don't want to do business with that outfit. They're not our type. Will Textron make an offer to buy the company?" I looked the figures over and we made an offer of $50 per share. The only trouble was that the other bidder had a 20 percent headstart and we were unsuccessful.

But we did make the headline of the year in the *Willimantic Chronicle Bowl* and the *Wall Street Journal* which said, "Textron Makes Offer to Screw Company Shareholders."

I go down to Nassau in the Bahamas, and when my son was young, he and I did a lot of scuba diving. When he was about eight years old, I got him all the equipment, the tank, the snorkel, and everything else. I thought this was a wonderful sport. I was sure that this was going to be a great sporting equipment business for Textron to get involved in.

I found a company out in Los Angeles called U.S. Divers which was the principal manufacturer. I went out to see the fellow who ran it. He was a Frenchman and I said, "Are you willing to consider selling the business?" He said, "Sure, at a price." I said, "Well let's see your figures." So he showed me that they were making a quarter of a million dollars, pre-tax. So I told him

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what we could afford to pay for those earnings. He said, "When you buy the company the earnings will be much greater." I said, "How come?" He said, "Well in the first place, my sister lives in Paris. She's our European agent. I pay her $50,000. She just puts that money in my bank account in Paris. You won't have to pay her."

Then he said, "I've got a Swiss bank account over in Zurich. I've got some patents in that bank and I pay $50,000 and charge that off to expenses for the royalties on those patents, which really aren't worth it. You won't have to pay that."

I said, "Okay, that raises the price another few hundred thousand dollars. What else?" He said, "Well, as a matter of fact, the thing that is really important, that'll bring these earnings up to way over $600,000 a year is that we run this factory on a five-day basis. Every Saturday morning I bring up a truck, take out $5,000 worth of this stuff, and sell it for my own account."

I said, "Don't you realize that there are informers in this country who'll turn you in to Internal Revenue? You'll not only have to pay back taxes, you'll end up in jail." He said, "Why that's outrageous. In France, everybody does this."

Then there was a very interesting company out in Minneapolis, called the Brown & Bigelow Company, which was the leading producer of calendars and gifts for corporate executives. It looked like a perfect fit. It was a leader in that industry and I'd always thought that the ideal thing for Textron was to buy only leading companies in small industries. Here was a perfect setup.

The president of that company was Charlie Ward. Ward had been in Leavenworth, where he'd gotten to know one of the family who'd ended up in jail because of some tax problem. So Ward got to know the Brown & Bigelow family pretty well. They both got out of jail about the same time and Ward was hired by Brown & Bigelow. At that time they were doing about a million dollars a year. He did a fantastic job. He built that company up. By the time we were talking to him, it was over $50 million in sales and a very good profit. But the thing that impressed me was that here was a guy who'd been in jail who spent a great deal of time going all over the country helping rehabilitate people who'd also been in jail.

He worked with the wardens. He gave talks. He'd done a fantastic job. He built a great reputation all over the country for this work. So he and I made a deal as to how we'd merge. Then he said, "Roy, I think before you take this to your board for approval, I ought to tell you that there are quite a few other people in Brown & Bigelow who've been in jail besides me. But they're all straightened out. They're doing a great job. You've got nothing to worry about."

When I went to my board I had a little trouble but I finally got it approved. But when Ward took it to his board, he got turned down. They didn't want to be associated with me.

Question and Answer Period

Q: *How'd you get involved with a very good aircraft company in Fort Worth, Texas, that makes helicopters?*
A: That's an interesting question. We had a very good Textron director, Jack Bierwirth, who was the head of National Distillers. One of our divisions used to buy products from his chemical company.

One day I was in his office and he said, "Roy, you'll be interested to hear that the Bell Aircraft Company is going to sell all its aviation operations to Lockheed." And I said, "Too bad we couldn't have bought it. Textron has so little defense work, we really ought to get into more government business. We don't have enough of it."

So he said, "Well, if anything happens to that deal I'll let you know." A couple of months later, I saw him again and asked, "Jack, how's that Lockheed merger going? I haven't seen any publicity on it." And he said, "Gosh, Roy, I forgot to tell you—it blew up. Bobby Gross wasn't willing to take on the huge plant up in Buffalo that has no work. All he wants is the helicopter plant down at Fort Worth."

I said, "Let's get going." And that is how we had a chance to buy, in 1960, the whole Bell Aircraft operation. I went up to look at the Buffalo plant, about a million square feet. I saw one worker every hundred yards. I thought to myself, what the hell am I doing buying this headache? But I realized it was the only way we could buy it all. So we did work out an interesting transaction there, which probably was very close to what they'd offered Lockheed. We'd only buy its working capital. All of the plants were to be on a thirteen year net lease with very low renewal options.

Q: *Tell us about Textron.*
A: What's discouraging is that after proving the validity of the unrelated diversification, Textron stock sells at only eight times earnings. The thing that distinguishes Textron from other diversified companies is that Textron acquired many leading companies, in small industries, rather than getting in competition with Westinghouse, General Motors, and the giants.

As a result of that policy, take a look at what Textron is today. You've got Gorham, a leader in silverware; Bostitch in staplers; Homelite in chainsaws; Fafner in bearings, Talon in zippers. Leaders right down the line. They've got one hell of a bunch of really top companies in fairly small industries. So they're doing all right.

I always wondered what was going to happen when we had a real tough recession. So when the company came through 1975 in good shape I realized that my basic dream had really come true.

Q: *Textron was going to buy into Lockheed. What did you think of that idea?*
A: Now that's an interesting question. Because, of course, not being on the board, I had no idea that Bill Miller was thinking of it and when I read about it in the paper, I didn't sleep that whole night.

Q: *What's your economic forecast for the next five years?*
A: I'm afraid you don't have time enough to hear that. If you buy a copy of my book, the last chapter is going to be called "Whither America?"

Q: *How do you spell that?*
A: With an "h"!

Adversity, Hostility and Corporate Communications

Robert E. Kirby
Chairman, Westinghouse Electric Corporation

Before I came here, I read through all the talks that have been made at the five previous Fortune communications seminars. And I began to feel a bit like William Everett, who ran the U.S. Patent Office in the early part of this century and wanted to close up shop because everything worthwhile had already been invented. After looking over the proceedings from the previous Fortune seminars, I have the uneasy feeling that maybe everything worth saying on the subject has already been said. Of course, I may be relieved that I'm at podium right now. But you'll notice that I still have a stranglehold on this microphone.

I might mention that this is the second gathering of communicators I have spoken to in less than a month. In late February, I spoke to a group of Westinghouse communications managers in Pittsburgh. Of course, I could talk a bit more Dutch-uncle to them than I can to you. I told that group a story—a true one, by the way—that might be worth repeating here. Last December, on the night before the Pittsburgh Steelers were to play the Oakland Raiders for a spot in the Superbowl, one of the Oakland television reporters asked if he could interview Lynn Swann. Swann is a wide receiver for the Steelers and was a center of interest because he had suffered a concussion at the hands of Oakland defensive back George Atkinson in a controversial play earlier in the season.

The Steelers communications director abruptly ended the interview and ordered the reporter out of the room.

During the interview, the Oakland reporter asked a number of innocuous questions and then began getting a bit nasty. Finally he asked Swann if he thought he might "hear footsteps" when he ran out for a pass the next day.

Well, that did it.

The Steelers communications director abruptly ended the interview and ordered the reporter out of the room. In fact, he chased him out of the room, out of the building, and out on to a parking lot where he proceeded to get into a wild fistfight with the reporter. The Steeler players were so delighted with the communications man's performance—which, incidentally, had been filmed and was televised later that night by another station—that after the season they gave him a special award, a pair of boxing gloves.

After recounting that story to our communications people in Pittsburgh, I demanded to know just one thing:

"How come we don't have hard-hitting communicators like that?"

I was kidding, of course. Still, I do think that in the days and weeks and months ahead, your company no doubt will be called on to do a great deal more aggressive communicating. I know *mine* will. Maybe not bare-knuckled. But aggressive nonetheless.

If I may, I'd like to give you my personal views of how communications fit in with the total activities of a corporation.

But I have another responsibility—to help all these audiences understand what we are doing and why. And to do that I need some very sophisticated communications counsel.

Of course I recognize that I'm talking to a group of knowledgeable specialists whose accumulated experience in the field of corporate communications would fill a good-sized library. I know many of you have walked far down this road and by comparison I'm a tenderfoot on the subject. But maybe my own experience, philosophy, and approach will give you a slightly different slant on some familiar problems. Best of all, maybe they will inspire some dialogue a bit later that will produce useful ideas for all of us. I know I'd welcome that.

Running a big corporation is a complex task. Obviously, the chief executive has a lot of help. Experienced operating people. Great research scientists. Financial experts. Marketing specialists. Planners. Engineers. And so on.

But in just the past few years we seem to have moved into a period in which the chief executive finds an increasing need for a new kind of specialist—a multifaceted communications professional.

You people think a lot about audiences. Consider those that a chief executive has to be concerned with.

In my case, there is the financial community, maybe 50,000 people. Then there are customers and potential customers—about 500,000 of them. And there is the universe of our employees—160,000 strong. And our stockholders—205,000 of *them*.

There are the government officials—local, state, federal, foreign. Legislators, administrators, regulators. All over us. All of the time. Thousands of them.

And then, of course, there is the general public.

I may look on it as my prime responsibility to build good products, deliver them on time, and make a profit for my corporation.

But I have another responsibility—to help all these audiences understand what we are doing and why. And to do that I need some very sophisticated communications counsel.

In a sense, corporate chief executives have a job like that of six or eight city mayors. And yet they don't have the same kind of clout that a Beame has. Or a Rizzo. Or a Flaherty. Or a Bradley. They can't legislate like a mayor. They can't cash in any political chips to get their way as a politician can.

Another way of saying it is that they have audiences but not constituencies. And yet they still have to meet the expectations of these groups, try to get them on their side, and even try to get them to act.

Other factors compound the problem of reaching these audiences. One is a widespread hostility toward business in general, a hostility that we all recognize, wring our hands over, and wish we could dispel with some sort of magic wand.

This hostility is real. College professors don't love us. The news media don't trust us. The government doesn't help us. Some special-interest groups wish we weren't even around.

And each one of these creates an ever expanding ripple of hostility—professors to their students, citizens' groups to the government, government to the news media, and media to the general public. Suddenly we look around and wonder why it is so lonesome out here in businessland.

Unfortunately, this kind of hostility is encountered by all companies, including those that are regarded as model corporate citizens. In other words, it's a pervasive phenomenon, this antibusiness feeling.

This hostility is real. College professors don't love us. The news media don't trust us. The government doesn't help us. Some special-interest groups wish we weren't even around.

Now let's take the case of a chief executive who has to contend not only with this generic problem of antibusiness sentiment, but some specific problems of his own. There'll be a special door prize to the first person who recognizes whom we are talking about. Westinghouse people in the audience are not eligible.

Our case history:

- Take a company that after a decade of steady and profitable growth suddenly finds it has a number of financial sourballs in the corporate sweetshop.
- Take a company that reluctantly but firmly decides the time has come to end a serious drain on profits by shedding one of its mainstay lines of business, major appliances.
- Take a company whose unique scientific and engineering skills have put it in the forefront of a technology—nuclear power—that is at once heralded as the salvation of mankind and damned as a potential threat to humanity.
- Take a company with contracts to supply millions of pounds of uranium under terms which, because of unforeseeable circumstances, are in the words of legal counsel now "commercially impracticable" to meet.
- But also, and this is important, take a company whose steady financial progress and overall financial comeback have been hailed by at least one financial analyst as nothing short of "miraculous."

Our assignment was to figure out how, or even whether, to cope with this compendium of vicissitudes in a communications sense.

By way of historical perspective, I might add, Westinghouse in the past has been somewhat cyclical in its communications efforts. A front-line advertiser—remember Studio One and Betty Furness every Monday night?—during the good years of the late fifties. A very quiet corporation in the financially troubled times of the early sixties. Again a visible and well-publicized corporation in the go-go years of the late sixties and early seventies.

And we think that we are getting out clear signals to all those publics I talked about that Westinghouse is alive and well and living high on the Fortune 500 list.

We are now building communications into our longer-range strategic plans, not as an afterthought or as a peripheral aspect, but as an integral element in our total planning. These efforts are not just at the corporate level; they are being carried on at the company, business unit, and division level—in other words, from top to bottom.

Our goal is to be known as, and to be, a communicating company. We know that for various reasons, including some compelling ones, we have not had that reputation in the past. The job of changing isn't finished. But we have let it be known internally that top management wants this increased level of communication to come about. We are making progress.

There was a relatively brief period in 1974, in the wake of another profit drop, when we paused to regroup our communications efforts. Once the uranium problem cropped up in late 1975, we were confronted with the temptation to head for the trenches again. I'm happy to say we didn't do that.

When I became chairman a little more than two years ago, one of the first requests I made was that we begin doing a lot more communicating. I said four times more, although I know you can't measure communications by the pound. The next step was to develop comprehensive communications plans that would put us in the mode of acting rather than reacting.

And we think that we are getting out clear signals to all those publics I talked about that Westinghouse is alive and well and living high on the Fortune 500 list.

On the company and corporate levels, we've kept a selective schedule of print ads in the publications read by our mainstream customer executives.

We've maintained a regular schedule of meetings with financial analysts in New York, buttressed by a series of print ads highlighting solid product and market achievements of our various divisions.

All our top executives have followed what amounts to an open-door policy with the editorial side of the news media. Our one deviation from this policy—dictated partly by legal restraints imposed by our uranium problem—led to one major article earlier this year that can most charitably be described as an abomination. Our policy remains more than ever one of candor and accessibility to the media.

We have developed new and very successful ways of coping with the strident opposition to nuclear power orchestrated by a numerically small band of opponents. One effective approach has been the use of a group of young, bright, articulate

nuclear engineers—men and women—who periodically and voluntarily take time off from their regular assignments to carry the facts about nuclear power to civic groups, talk shows, newspapers, and college campuses in states where the matter is a particular issue. Last year the score in seven antinuclear initiatives in seven states was nuclear power, seven; nuclear opponents, zero.

This month we began a series of prime time network television commercials that we believe will help reconfirm to our target audiences that we are a company very much on the move.

We've also stepped up our internal communications from top management, concentrating first on our upper management ranks and more recently on middle management.

These, of course, are just a few of our communications efforts, but I think they do reflect our concern with reaching not just those unlistening adversaries who may not hear us anyway, but the other audiences who are either eager or at least willing to lend us their ears.

A few minutes ago I likened myself to the mayors of six or eight cities, but lacking in some of those special implements that real mayors have at their disposal. As a chief executive, I said, I felt that I needed some special kinds of assistance in the field of communications.

Let me be a bit more specific about what I feel I do and don't need.

First, I need something more than just someone who can make a great media buy or create a zingy commercial or write a great speech or plant a favorable story in the hometown newspaper.

I need someone who is acutely aware of the crosscurrents of public opinion—financial publics, customer publics, stockholder publics, employee publics, government publics, and general publics—and what problems or opportunities they may present to me.

I need someone with a clear understanding not just of the techniques of communicating, but of the overriding issues that I have to live with every day—nuclear acceptance, capital formation, job creation, tax structures, technological advances, doing business as a multinational corporation, and on and on.

I need the kind of communications counsel that takes into account not only the short-range objectives but the longer-range strategies that will make or break my company in the future.

I need the wide-vision thinkers who understand the corporation, the nation, society—and how they all can work together.

Lest I leave this audience with the impression that I'm depressed or defeated by the hostility and adversity a chief executive has to contend with, let me assure you that I'm not. These problems add a whole new set of challenges, but we can cope—if we have the kind of high-level counsel I've been describing.

We have some other factors in our favor.

With perhaps some exceptions, I think there is an earnest concern on the part of the news media to serve as a constructive, objective observer of business, rather than as a destructive opponent.

A top executive of another big Pittsburgh-based corporation was pleasantly surprised the other day when he returned from the West Coast, where he had talked to a stockholder group. He found a letter from one of the major newspapers in that city enclosing a clipping of an article that had been published reporting on his talk there. The letter asked for his comments on the accuracy, completeness, and objectivity of the article. A newspaper checking up on itself? Revolutionary? Perhaps, but a welcome idea—one that other papers might want to emulate.

With perhaps some exceptions, I think there is an earnest concern on the part of the news media to serve as a constructive, objective observer of business, rather than as a destructive opponent.

I think there is a growing willingness among corporations to assert themselves when it comes to dealing with the media. Our friends at Mobil are the pacesetters here, but other corporations have also made it clear that they want not favored treatment, just fair treatment. Sometimes you run the risk of a few bruises when you take on the media—witness that fighting communicator for the Pittsburgh Steelers out there on that California parking lot—but sometimes it's worth it.

A third factor—whether we recognize it or not—is the growing importance of communications in developing and executing public policy on issues that touch the lives of all Americans. Take energy. Is it conceivable that President Carter would be able to outline a workable national energy policy without a great deal of public dialogue on the various questions involved? Hardly.

A case in point. Last January 17, during that bitter cold wave, the entire eastern United States came perilously close to suffering a widespread electric power failure that literally could have had catastrophic consequences to the population. At first there were only sporadic news reports about the problem, which was overcome only because enough nuclear power plants were operating despite the deep freeze. How important this incident was, and its significance to the nation's energy policies, is indicated by a subsequent article published in the Chicago *Tribune*, which concluded:

"In short, it probably can be said with only slight exaggeration that nuclear power bailed the country out of an emergency on the morning of January 17. The antinuclear lobby won't be pleased about that, but it did happen."

An incident of this magnitude has tremendous implications for an important matter of public policy, and yet for several days—until there were specific efforts made to communicate it via the news media—it nearly escaped public notice.

I said earlier that I was afraid that everything worth saying had been said by previous speakers at these Fortune seminars. But in looking over last year's talks, I came across one surprising fact: One of the speakers was Charles Schulz, the man who gave us Linus, Snoopy, Lucy, and their pals. And yet in his profound remarks last year, he didn't share with you what I believe to be some of the wisest counsel of the twentieth century. It is included in a list of soft-sell commandments called Charlie

Brown's Rules for a Happy Life. They go like this:

Keep the ball low.

Don't leave your crayons in the sun.

Use dental floss every day.

Always knock before entering.

Never volunteer to be program chairman.

Feed your dog whenever he is hungry.

Charlie said these rules will not only make you happy, but give you a fat dog.

Let me add one more rule:

Keep your communications lines open.

Ladies and gentlemen, circumstances have increasingly elevated your role in the affairs of your corporations to one of new prominence and importance. How well you acquit yourselves can have a profound effect on the success of your own company and on the business environment in which it operates. I hope you appreciate that fact. I know I do.

Question and Answer Period

Q: *Could you expand a little bit on what happened on January 17? As a West Coaster I heard something about some near power failures.*

A: If you recall, a week before January 17 the temperature got very low. There is a power interconnection which ties all of the utility companies from the Midwest through to the east coast together. And they move power back and forth to one with demand overloads from one that has extra capacity to help out.

The highest power transfer ever accomplished before was 44,000 megawatts. That was in a summer peak of a year ago. Most peaks in electric utilities occur in the summertime. However, on the morning of January 17, the temperature was generally −15° or colder throughout the area and the intertie hit 56,000 megawatts. They were 8,000 megawatts overloaded and had to go off automatic operation. They had to put everything on manual to keep the network running and the frequency dropped to 59.84 cycles per second. If it had gone to 59.80, the whole system would have had to be shut down. And what you probably don't realize is that they would have had to start it back up by a little block area in each one of the utilities. So it probably would have taken as much as a week before they got the system back up again. This, of course, scared everybody to death. What had happened? General maintenance is taken care of in the wintertime when the peaks are not so high. So some plants, including one nuclear plant, were down for scheduled maintenance. But when the coal piles froze, the Ohio River froze, and they couldn't get the oil they needed, they lost some coal and oil plants.

North East Utilities was operating at 54 percent nuclear. It and Con Edison were holding the East together. Commonwealth Edison in Chicago was at 49 percent nuclear. It has seven nuclear plants; one of them was down but the other six were running full blast.

TVA had all of its plants going and that's what pulled us through. It's just a case of something happening this year that will probably happen more often three or four years from now. The use of electricity must go up as we move away from other fuels.

Q: *In your company, you mentioned your internal communications program that first included your management team—top management and middle management. Could you explain what your overall employee communications plans are?*

A: In discussing that subject, I may have omitted quite a bit because we have a very extensive employee communications plan. I was talking more about management strategy and our ability to communicate this to upper and middle management people. This has to be restricted to the degree that it is not disseminated to the general public.

We're trying to make all of the key managers throughout the corporation, of which there are 10,000 or 12,000, aware of the strategies of top management. We have a regular communications program that we work at a great deal—the normal type of corporate communications throughout the organization. For somewhat more special information, we found that we could get a response from all of the managers faster if they had a better picture of what was going on totally, corporately. To help accomplish this we send a report quarterly to the upper levels of management. Still other information is distributed to managers on a for-your-information basis. These are above and beyond our normal communications.

Q: *What is your personal opinion of the future of nuclear energy in the United States? And, more to the point of our being here, is the advertising program you referred to an attempt to overcome some of the hostility you think you feel at Westinghouse and what are the methods?*

A: Well, let me take your latter question first. Our advertising program is based on a new slogan. "You can be sure if it's Westinghouse" is fairly old, and it's not even the last one. The new one—"Westinghouse, a powerful part of your life"—will be aimed at the efficient generation, distribution, transmission, distribution, and use of electricity, which is the base business that Westinghouse is in.

That's our new program. It is not aimed just at nuclear power. We work on attitudes toward nuclear power in other ways.

As for your question about nuclear power, every day I become more concerned that we're not going to get from here to there, no matter what we do. We have botched the coal situation beyond belief; the oil situation was wrecked three or four years ago and nobody did anything about it. It's not just my opinion. It's a fact that we have to supply enough energy, electric energy, to keep the economy of the United States growing as it must, as more and more people come into the work force.

I think the energy policy that will be enunciated is not going to de-emphasize nuclear power. If you recall, President Carter said nuclear power would be used only as a last resort. Well, if you've listened to Schlesinger very closely, recently he has mentioned something close to the last resort because that literally is where we are. So we do have to go ahead or else we're going to suffer a shrinking economy, an economy that will not grow properly.

Now, the record of the nuclear power plants is really outstanding. We've never had a fatality. Compare that to coal-fired plants, for example, and coal mines and all their problems. Even with these vast coal reserves, we don't have enough miners trained. We don't have the transportation facilities to get the coal where it has to go. There are a whole lot of other things that we haven't done and we're still not doing. Therefore, we're going to have to use everything we can. Part of the President's program will be conservation of energy. This is an abso-

lute must. We just can't keep throwing it away the way we have been.

The problem is that back when the oil embargo first came, if you recall, there was a lot of discussion by the politicians about taking a hard line on energy—raising the price of gasoline 50 cents a gallon, taxing it 50 cents or a dollar. But nothing was really ever done because this is such a political hot potato. Everyone has a love affair with his automobile. How are you going to stop people from getting into the car and driving somewhere, which is what they all do? But they're going to have to face up to the facts.

We're going to have to look at the total energy problem to solve these oncoming shortages. There's a very interesting point. If we keep doing what we're doing today, by 1985 there will be an oil tanker every—well, Frank Zarb and I used to disagree. He said the tankers would be fourteen miles apart coming across the Atlantic. I said they'd be seven miles apart. But it doesn't really make too much difference, because either way it's a magnificent bridge. The only trouble is, if I were a Russian strategic planner, I'd forget about ICBM's and so forth. I'd just interdict that oil line every time I wanted to throw the United States into total panic, economically and mentally as well.

Q: *Mr. Kirby, do you favor or oppose a national energy policy?*

A: I think we must have one. Ten to one they'll come out with just about half of one, but that's going to be a big political step. It's going to take a lot of courage because it'll be unpopular. There's just no question about it. I don't see any other way to do it except as a matter of national policy.

Q: *President Carter has suggested that his new energy policy will perhaps prove to be fairly unpopular with the general public. Do you have some inkling as to what that policy will be and how we're all going to react to it?*

A: It's going to start with conservation. That will be the first and most important element. And that will be politically very unpopular. Precisely how they're going to do it, they haven't even decided yet.

That's my point. They will probably go half as far as they should, and even that will be politically difficult. Still, that's better than the way they've been going. Conservation will be part of it. Lord help us all, though, if they go to energy apportionment. We're dead. You know, we've got to let the marketplace decide where the energy is used. Because there's no way they can assign energy individually.

I think they're smart enough to do that. I think they'll let the marketplace decide.

Q: *How would you assess the attitude on the campuses toward business these days.*

A: I've spent quite a little time on campuses and it's getting much better. Over the last three or four years, attitudes toward business really have gotten quite good, with the exception of a small, very vocal core group that is very convincing. But I think attitudes generally have swung back now toward the side of business.

Any time there's a high unemployment rate, it's amazing how young people can change their views on things.

Q: *Where do you position solar energy in relation to nuclear energy?*

A: This is solely a matter of quantity. As you know, if we went all out between now and 1985 or 1988, we might be able to derive as much as 2 or 3 percent of the total energy requirement of the United States from solar power. Our problem is that we need two breakthroughs. Two complete technological breakthroughs. Two orders of magnitude. We haven't learned how to store the energy, and the process of converting it to electricity is still too inefficient—takes too much space, too much money. The cost per kilowatt is ten times, twenty times, any other way of generating electricity.

On the storage problem, I really would hate to look at a 100-acre field of batteries sitting out there, which is what we would have to do right now if we tried to store it. Now, there's a great amount of energy there but we need these two complete technological breakthroughs, so don't put too much dependence on solar energy until probably the year 2000. We're guessing at that point, but it normally takes twelve years or so to take a major technological step. And we need two of them.

Q: *The majority of workers in this country are still in the private sector though the proportion is declining dramatically. Yet the general impression of business, attitudes toward business, emanates from our own employees. How do you know that your employees' attitudes toward business, toward business problems in relation to the issues we're discussing, are positive? And how do you propose to find that out?*

A: Well, you're right. Most employees are in the private sector. Of course, in the manufacturing sector, we're using only about 36 percent of the work force. Most of the work force these days is either in government or in the service sector. An interesting point is that as we look ahead, we see that figure going down instead of up. We see a smaller percentage of the work force involved in manufacturing, more in service. You notice I didn't say more in government, but probably more there too.

It's sort of like agriculture. One hundred twenty years ago, 48 percent of the people were feeding 100 percent. Now less than 4 percent are doing this job. That's one of the reasons, I think—one of the important reasons—that our economy, our standard of living, is so high. Manufacturing will probably do the same thing. Not down to 4 percent, but it's not going to grow. I think one of the things that have changed employees' attitudes and will continue to change their attitudes is the graduated income tax. Another is inflation.

These factors have an impact that I believe the politicians haven't fully appreciated. Stop and think about it. Workers are going to become more and more concerned about the success of the company they work for as a matter of their own job stability. I believe that is going to begin to stir them into more action and into paying more attention to whom they elect. And they are the mass of the voters.

Obviously, we go out and try to survey attitudes of our employees. We try to communicate with them very, very closely. I agree we really haven't done as good a job as we should because they're one of the key constituencies that business must reach in order to make government change its attitudes toward business. Between employees and the stockholders, we've got a large segment of the voting public which we can put our arms around and really communicate with. And I don't think we've done as good a job as we should.

"Mirror, Mirror on the Wall . . ."

Edward F. Kelly
Director of Advertising, Manufacturers Hanover Trust Company
Delano W. Ladd, Jr.
President, Edwin Bird Wilson, Inc.

Ladd: As a businessman who spent eighteen years on the client side of the table, I think I can safely say that corporate advertising is the least understood sector of our industry.

Kelly: And, as a practitioner with some twenty years of agency experience, I'll go along with Del on that count. Both of us have seen corporate advertising used, misused, and abused to a fare-thee-well. So if we can clear up some of the confusion and misunderstanding that seem to persist, then our appearance here will have been worthwhile. The problem, as we see it, is that there really is no set definition as to just what corporate advertising is. For some it is "advertising that doesn't sell anything." For others, it is a quasi-political effort, aimed at wooing the good will and favor of legislators and assorted government officials.

Ladd: Some corporations treat it as a kind of safety valve for the chief executive, where he can let off steam about his own pet peeves and opinions.

And there have been—and still are—cases where corporate advertising is nothing more than an ego trip for management and employees.

Kelly: Still others view corporate advertising as a way to jack up the market price of the company's stock. Or as a means of improving community relations or of opening doors for a company's salesmen.

And there have been—and still are—cases where corporate advertising is nothing more than an ego trip for management and employees.

Kelly: The truth of the matter is that corporate advertising is none of these—and it is all of these. And if that sounds like a contradiction, let me put it another way: corporate advertising is what you mean it to be. It begins with an objective—a long-range corporate objective, if you will—separate and distinct from, but essentially related to, the marketing of a product or service.

Ladd: I believe that a good deal of the misunderstanding about corporate advertising enters right there—in the lack of a clear-cut understanding of objectives. On the one hand you have the company's product—a physically real, tangible thing—a toothpaste or a soft drink or whatever. And on the other hand you have the corporation that makes and markets that product. And a corporation is an intangible thing—a legal entity, as it were. In marketing the product, the successful corporation sets definite sales objectives, in terms of units sold, dollars, and share of market. But in marketing the corporation, the intangible entity, too many corporations abandon all marketing disciplines because of the intangibility of what they are marketing.

Kelly: As you know, at Manufacturers Hanover we've had several stops and starts on corporate advertising over the past ten years. And our current campaign, which is going into its third year, has been successful precisely because we launched it from a platform built on solid marketing techniques and research. Many of you are aware that banking is a late arrival on the marketing and market research scene. It wasn't so very long ago, for instance, that the chairman of a large New York City bank absolutely refused to allow the bank's address to be put anywhere in the advertising. He said: "The kind of people we want to do business with *know* where we are."

Ten years ago in my own bank one person was engaged in market research—the director. Today we have upwards of two dozen. Marketing plans for our several divisions were nonexistent. Today, each of our banking divisions, plus our nonbanking subsidiaries and affiliates, has a carefully articulated marketing plan. And each of those plans stems from an over-all five-year marketing plan for the entire corporation. In fact, it was the five-year corporate plan that prompted our current corporate advertising campaign. A major goal of the five-year plan was to increase the number of corporate banking relationships in which Manufacturers Hanover was considered the primary bank. In short, to move Manufacturers Hanover out of the second tier of major New York City banks into the first tier of "superbanks."

The first step, of course, was to find out just what kind of position we occupied in the mind of the corporate audience. We commissioned Greenwich Associates to conduct a ten major market study among a representative sample of the Fortune 1,000 chief executive officers and chief financial officers. This was for us a period of "agonizing self-appraisal."

We had to overcome our own subjective prejudices and misconceptions about our bank. We were a lot like the comic strip character who quipped: "We have met the enemy and he is us."

Ladd: I'll have to interrupt here and say that Ed—and the

agency — Ayer — set forth its plan for developing the kind of corporate communications program that would win the support of Manufacturers Hanover management right from the start. Surprising as some of the Greenwich research was, it received the full endorsement of bank management. More important, management made a *commitment* to a corporate communications program born out of the five-year plan and the Greenwich study.

We had to overcome our own subjective prejudices and misconceptions about our bank. We were like the comic strip character who quipped: "We have met the enemy and he is us."

Kelly: And our entire marketing plan — the advertising, the [illegible] was analyzed by our market research staff and by the senior officers of each of our eight divisions. The result was a statement of the objectives of a proposed corporate campaign. "To inform corporate officers of concerns doing business of over $10 million, on the size, competence, and breadth of services offered by our bank relative to other financial institutions."

Ladd: At this juncture, the agency went to work. The first thing we did *not* do, surprisingly, was to go off on a creative binge and dummy up a hundred pounds of ads. We disciplined ourselves, just as our client had, and analyzed what the audience wanted to know about a first-tier money center bank; what it knew and did not know about our bank, and what we could tell them. We enlisted the aid of the several business and general news publications that made up our media list. The publications gave us insight into the reading habits of our target audience — how much time, for example, we could expect the serious reader to spend on an ad in Fortune. We learned that we had to boil our message down to the bare essentials, to talk to the businessman with a minimum of verbiage and copy clutter.

On the graphic side, we knew our ads would be competing for reader attention with the best in corporate advertising as it appears in Fortune; and we wanted our ads to drive home, visually, the key concept of bigness. An essential part of our creative strategy was to position Manufacturers Hanover as contributing in a major way to the solution of current worldwide problems — energy, food, productivity, shareholder relations, international trade.

Kelly: The agency came back with several approaches. We chose one which we believed was "right on." But, rather than trust to our own gut reaction, we had our research people pretest the ads among a representative sampling of the national target audience. The results were positive. Our ads elicited such comments as: "I didn't know Manufacturers Hanover was that big." "I didn't know they were that strong in international banking and finance." "I didn't know MHT was so involved in so many key industries." In short, our ads seemed to fill those information gaps that our initial market research told us existed among the corporate financial audience. And in terms of readership, our pretesting indicated that our ads would be at least 50 percent more effective than comparable ads already run by two major competitors.

Our kick-off ad, which ran in the fall of 1974, zeroed in on the bank's role in helping to ease the worldwide energy crisis. At that time, you may recall, the supertanker business was at its peak. And, while Manufacturers Hanover was not the largest financier of VLCC's, our research showed we were leading innovators in structuring financing plans for supertankers.

Ladd: Our creative strategy was to translate into more meaningful terms just how much oil the bank-financed ships carried in a single year. We also coined the word "energists" to position Manufacturers Hanover in this vital industry.

Kelly: And our copy sign-off — "Consider the source" — was a direct payoff of our marketing objective, to position the bank as a primary source of financing. The readership scores for this initial ad were nothing short of phenomenal. The ad pulled the highest percentage of readership in every publication in which it ran.

Our second ad attacked head-on the misconception about the bank's international involvement . . . As did the third ad in our series, which gave the scope of the bank's activities in export-import trade financing. When the national economy went into a tight money period, we skewed our ads to non-credit services and to domestic financing that was characterized by loans that bore a high degree of productivity. We coined another word — "productivists" — that said in a nutshell what our criterion was for corporate lending during a credit crunch.

Ladd: I think we should point out at this stage that our campaign was highly flexible from the outset. We had to keep our basic marketing objectives in mind, while remaining flexible enough to respond smoothly and quickly to changes in the national and international economic scenes.

We coined another word — "productivists" — that said in a nutshell what our criterion was for corporate lending during a credit crunch.

Kelly: The ads we ran in 1975 are good examples of this flexibility and responsiveness. They were in response to President Ford's stressing domestic priorities, and his asking the nation's banking industry to give special attention to such things as the exploration of new energy sources for America, plant expansion for basic industries, financial fuel for the nation's utilities, agriculture, and employee benefit plans for America's growing population of retirees. We continued to track our campaign, measuring response and effectiveness with several yardsticks, some formal, some informal. We received consistently positive feedback from our staff, local, national, and international as well. Customers wrote letters commending us for the ads; many requested reprints and framed proofs. Starch Readership scores were exceptionally high on every count. *Business Week* informed us that five consecutive ads in our campaign captured the "Read Most" Starch category in their respective issues. We were told by McGraw-Hill that this was "unheard of and unachieved by anyone else." In Fortune, the Adverbatim Reports on the Manufacturers Hanover campaign showed that we were, in the words of Fortune ". . . doing a record-setting job." And, of course, we began what has since become a sizable collection of statuettes and certificates from a host of art directors' clubs, marketing groups, and financial associations.

We could have rested on our Starches and our statuettes, but we realized that our corporate marketing effort was just beginning to gather momentum. We asked ourselves: "Where

do we go from here?" . . . "How do we keep up the momentum?" . . . "More important, how do we take advantage of the momentum so that the campaign endures with added dimension?" The obvious answer was the addition of sound and motion—television. The very idea of putting our corporate campaign on the tube in the metropolitan New York market generated some pretty lively debates within our bank. How could we recommend local television when our audience was corporate executives on a nationwide basis? Would the addition of corporate spots delete the effectiveness of our already substantial TV outlays in support of retail services? And, vice versa, would the retail spots take away from any message that sought to portray Manufacturers Hanover as an international superbank?

Ladd: The agency had reservations as well. It's one thing to tell a corporate treasurer reading Fortune that Manufacturers Hanover is financing a nuclear power plant in Spain. But it's something else to tell that to the average television viewer who has been asked to keep his thermostat down because of an energy shortage in New York.

Kelly: We weighed all the pros and cons on a scale with our five-year corporate marketing plan. Research showed us, for example, that there was a definite need to counterbalance the strong "blue-collar" and retail image built up by the bank. Another rationale for corporate commercials in this market is the fact that at least ninety-seven of the Fortune 500 are headquartered in the New York metropolitan area, not to mention the number of foreign "superbanks" that have been moving into the Big Apple. Finally, our corporation had extended its presence to offices in 198 cities in sixteen states outside metro New York. Thus, we wanted a vehicle which would permit us, as needs warranted, to move quickly into local markets where we desired to strengthen or support our corporate position. In the light of these factors, our management approved an opportune local television buy. This was the Democratic and Republican Conventions, plus election night coverage as well. Our management did not succumb to the temptation to divert funds from our print campaign—which remains the core effort in our corporate advertising strategy. Instead, management approved an additional expenditure for the added dimension of television. There is a recognizable similarity between our print campaign and the television spots. We're convinced that extending our corporate advertising into television was a good move—so convinced that we're now producing more spots to get our corporate message across. And, of course, our print campaign continues.

Well, we've gotten away from talking to ourselves in the mirror through what Jim Hoefer calls the "tough discipline" of corporate advertising.

How effective has it all been in helping us achieve our objective? Well, the readership scores and the awards and the feedback all tell us we're heading in the right direction. But we can't be satisfied with that. We've already launched an attitudinal survey among the corporate audience to find out to what extent we've changed corporate opinion about Manufacturers Hanover.

Ladd: Perhaps I'm being presumptuous, but I'd like to point out that since Manufacturers Hanover launched this campaign, the price-earnings ratio of the corporation's stock has gone up better than 33⅓ percent.

Kelly: And we've benefitted in one other very important way from our corporate advertising efforts. Remember the story of the wicked queen in Snow White? Every day she stood in front of her mirror and asked: "Mirror, mirror on the wall, who is the fairest one of all?" And the mirror would respond with a flattering reply. Well, we've gotten away from talking to ourselves in the mirror through what Jim Hoefer calls the "tough discipline" of corporate advertising. We've had to start with a definite objective and marketing plan, and we've had to be coldly objective about ourselves. In short, as far as Manufacturers Hanover is concerned, corporate advertising isn't done with mirrors. It's done with sound, proven marketing techniques.

Question and Answer Period

Q: *I believe you mentioned favorable effect on MHT stock.*

Kelly: It just happened and it was not as part of the original planning. That's a very difficult thing to project. But, I think it was just one of those fringe benefits. A lot of other things could have contributed to it as well.

Q: *On the corporate campaign, could you describe how you benchmark it. How often you do it. The strategy there.*

Kelly: I'll be very honest. This is the first time in three and a half years now that we have gone into the field again to measure where we have gotten with the campaign. As you know, it takes an awful long time for an advertising effort like this to begin to make its mark in the marketplace. Not only in terms of all the other advertising that's going on but also in terms of all the other financial institutions, the banks, and everybody else who is advertising as we are.

So we didn't want to do it too quickly. But we hope to, in the next few months. The study will get out into the field and we'll begin to get some indication of results. We have done other research within the bank in terms of the total saliency, I guess you'd call it. You know, how does Manufacturers Hanover rank in share of mind. We have seen this improving over the past several years. But that's the result of many, many things. We expect it's not only the advertising but just the general attitude people have about our bank.

Ladd: I think that one of the most important aspects of corporate advertising is continuity. It's not like a faucet that you can turn on and off. When you turn it on, you've got to turn on to a level that you can sustain because otherwise you're wasting your dollars. The other thing is that Manufacturers Hanover is doing a lot of pretesting of the creative concept and in particular this campaign. After we actually came up with the creative concept, we did go out to over a hundred corporate officers, nationally, to see whether or not this campaign communicated to them the points we were trying to get across. And it did.

Kelly: I think one of the most important of all the things we've talked about today is the discipline of a written marketing plan which states the goals and objectives of each division that is advertising. When a plan is written—and it doesn't have to be a long one, it could be a single page, in fact—the discipline is there and also it has the agreement of top management. Too many times if a plan is just in verbal form, we find that it has changed in concept overnight. The other aspect, of course, is that top management doesn't know what's been agreed upon.

So if there's one point that we want to leave with you this morning, it is the importance of the discipline of the written marketing plan to set goals and objectives.

Q: *You mentioned scrapping a couple of other campaigns. What can we learn from what you did wrong then?*

Kelly: It wasn't a question of doing anything wrong. Rather, it related to which execution scored higher in terms of the stated objectives. Basically it was a question, as I recall, of shorter copy versus longer copy and being very succinct in what we were saying. But I think the important thing there is to pretest the ads, and we took them around to ten different markets and researched them among a representative sample of our target audience.

Q: *Did you put the logo in color as a result of research?*

Kelly: No, we didn't put it in color in terms of research. But as you look at Starch scores you realize the need to increase visibility of your logo or company. This is not unique with our bank. And this is really an attempt to do whatever we can to increase the visibility and the association of our bank with this advertising. I don't know why we didn't think of this before but, with the agency, we said let's begin to put the bank name in color. We'll check the Starches and see what happens.

Q: *How has your corporate advertising program affected the bank's other advertising?*

Kelly: This really set up a format for us in many of the things we've been doing in the bank. For instance, our new leasing campaign has photographs which are very much in keeping with what we're doing in the corporate campaign. We've been experimenting once again with focus groups in developing advertising for our trust division. Another attribute of this advertising is that it's been very good for our personnel. We have 15,000 personnel and a campaign like this has great impact on them. This is very, very important because when a group gathers at a luncheon table everybody has a tendency to pick on advertising. In this particular case, however, they've given high praise to the campaign. They've been proud that Manufacturers Hanover is their bank. That's most beneficial.

Q: *In your tag lines, the financial source worldwide, how would you apply the program outside the United States?*

Ladd: We're just in the process of launching a program outside the United States. We're actually going to use the umbrella "Geobankers" but it will still tie into this.

One of our problems is that Manufacturers Hanover does not have the word bank in its name abroad. So we're talking about the financial banks worldwide and we're getting that connotation in there, which is very important.

But it will be double-spread tying into the Geobanking umbrella which we're using for the international division but in the same format as our corporate campaign.

Q: *How are you going to translate these words, which are not really standard words, into foreign languages?*

Kelly: We have enough trouble right now translating some of our ads into German and we have different people giving us different translations and it's a real problem. It's a real problem because not only is it difficult to translate words, but it's hard to translate concepts.

Basically, overseas, we'll be going into the Geobanking concept. It could cause problems. There's no question about it. Maybe we should just do it in English because we find that many people abroad don't have very much problem with our language. There was an article in the paper just recently about the incidence of corporations advertising overseas in English. So that would solve a lot of problems.

Q: *In reference to your usage of local television, I'm wondering if you had a particular demographic skew in mind.*

Kelly: Oh yes we do. Last year our agency got us into the conventions and election night programming on NBC-TV. We thought this was a very apropos vehicle. It's difficult to obtain programs with proper demographics on a local market basis. I mean you have *Meet The Press* and similiar shows on network but when you get into local markets, you're restricted. But this year on NBC Edwin Bird Wilson instituted for us a minute at the end of the NBC 6:30 local news. What that entailed was a thirty-second news recap and a thirty-second commercial by the bank. We figure that that's as fine a demographic skew as we could possibly achieve on a local basis. And it's important to keep this going. Now that we initiated it last year, we think it's really important for all the reasons we spoke of before—not only for counterbalancing retail in New York but as our bank moves into other markets around the country, it's good to be able to move into some of these selected markets, if the need arises, with an appropriate corporate message.

Ladd: The bank has just reorganized its metropolitan division. It is broken down between the so-called ma and pa business—that's you and I cashing our checks—and really gearing up to go after the smaller companies housed in the city of New York. So the campaign that we're developing right now will be targeted to hit that audience and we're obviously planning the media to reach them.

Q: *You mentioned in global markets the problem of not having the term "bank" in your name. The term "trust" is part of your official name but it's not a part of your ad signature. It was at one time, wasn't it?*

Kelly: Manufacturers Hanover Trust Company is an awfully long title to put in an advertisement. Manufacturers Hanover is long enough. One day I said to Bill Miller, the head of our department, I think we ought to run an ad, Bill, that says we've taken the Trust out of Manufacturers Hanover.

Mouth to mouth resuscitation followed. But, seriously, we have shortened the name by taking Trust out of it and our chairman has gone along with this because, if he didn't, we would have heard about it immediately. Even Manufacturers Hanover is long and we certainly can't use Manny Hanny because that would really do it. That's why we took it out.

Q: *You dropped Paul Lynde from your television commercials. Can you tell us why?*

Kelly: Paul Lynde just got terribly expensive. We brought him in three years ago this coming June and we've gotten very good usage from him. We have done tracking studies and he scored very high. In addition, the attitudes about us and the awareness of us have achieved the increases that we'd projected for them. But he just got too expensive. We have someone now who is equally good, Tim Conway. Before hiring personalities like these, you do attitudinal studies. When we did Tim Conway, he actually scored higher than Paul Lynde on a demographic breakout by income, by age, by men

to women. Tim Conway, we think, is more of an actor than Paul Lynde. So we'll probably be using Conway in everything we do, whereas Lynde primarily played the role of a critic and we did not use him for many of the auto loan ads. We really envision using Conway in all of our television now.

Q: *You mentioned that you have 30's as well as 60-second commercials. Have you had any indication of their relative impact? Are the 60's better?*

Kelly: No. I think basically they're very good 30's. They are very good takeouts and I think it comes down to availabilities of television.

As you know, in a market like ours, most of the available spots are thirty seconds. We have had 60's but primarily I'd say 80 percent of it is in 30's. Our news spot on NBC is thirty seconds; it's a very good takeout. Very, very good.

Q: *Assuming that you have other problems in New York, are you spending any money at all in social responsibility areas? Or, anti-red-lining stuff?*

Kelly: We've really been very, very active in supporting the local scene. We've done research, once again, which points out that the sports enthusiast is a better potential bank customer for our retail services than a non-sports enthusiast. Based on this, we're sponsoring the Yankees this year for the first time. We already do the Mets. We do the Knicks and the Rangers. We're a big sports-oriented bank. But more important, in answer to your question, is that during these past years we've taken an active role in marathons and in many of the arts, the Ballet Theater and, as I said before, we're on Channel 13, which is the public service channel. We're now going to sponsor a Met-Net Golf Tournament in our tri-state area.

We've become very much involved in a lot of the goings-on in New York City. Del and the agency came up with the Big Apple theme. We're the first advertiser institution in New York City to feature the Big Apple. We have prepared a record album on the Big Apple featuring all New York City songs, which is one of the promotional pieces of the bank. So we are very active. We donate funds to City University of New York for its team because, as you know, City College has had a lot of problems these last few years. We've taken quite an active role in gaining empathy with the city from the advertising communication standpoint. And I think that the new TV boards we have submitted to the bank on the continuation of this corporate TV program deal very much with the city and the bank's involvement in helping it overcome many of its problems.

Q: *Just to clear my own thinking. I've only lived in two states, California and Illinois. In California you can have banks all over the state. In Illinois, you can't even have a branch bank across town. What is the situation in New York?*

Kelly: We can have branches throughout the state. But in upstate New York our advertising message in the retail area is entirely different. We have free checking all through upstate New York, whereas in New York City free checking is related to a balance in a savings or checking account.

Q: *Do you run corporate advertising in upstate New York?*

Kelly: It's very interesting—let me make one more point. We are also in *Time*. In the April 18th issue we're taking our regular corporate campaign, which is the Export-Importers, and we're putting page 1 and 4 to it which depict our upstate banking personnel and talk about our upstate banking capabilities with the financial source of a $28 billion dollar bank worldwide—Manufacturers Hanover. We feel this is a good way to impress the local scene with the bank's capabilities. And so we're looking forward to a really fantastic job. It's a whole new edition of Time, Time T. They have to move advertisers on the first and fourth page to another part of the book to accommodate our particular ad. So that's basically what we're doing corporately. In upstate New York we're primarily still retail.

One more point about the corporate campaign. I think it's very important. The future of this campaign is really in the pictures. We must have good pictures to stop people when they're going through the magazines. We've been very fortunate. For instance, we just did a whole new group of pictures in Europe, which E.B.W. arranged for us.

And the important thing is that the international division told us that no matter what pictures we took they could always wrap words and copy around those pictures. For instance, if we're talking about our involvement with the automobile industry, we don't want to show a plant. That's the obvious thing to do. We want to show a picture that talks to that point but has scenic qualities that are unique. And I think it very important that our chairman, Mr. Gabriel Hauge, sees every single ad we do—not to approve it, but he's just so taken with this campaign that he also reviews with us the words we use, e.g., the Funders. The future of this campaign rests on the quality of the pictures we use.

Ladd: I think that's a very important point. The bank had the courage to commission photographer Marvin Koner. Armed with nothing other than some very general information that we supplied him from the international division, he had free license to travel throughout Western Europe. He came back with more than 5,000 pictures, which we've now screened down to approximately 200. It takes this type of commitment and this type of courage rather than to send a photographer to London and to tell him that we want a picture of that bridge over there. You just can't get dramatic graphics if you restrict these people to that degree. We plan to do the same thing in this country.

Q: *Do you pretest pictures to make sure they not only talk to people but snap them within the context of your message, or do you select the picture and then hope?*

Kelly: We select a picture that, based on our best judgment, would help create an effective advertisement. Not only a picture but an advertisement. We can get a good picture but it won't necessarily work in an ad. So that's really judgment and, fortunately, we've been very successful so far. Actually, some of the pictures we used early in the campaign probably wouldn't be recommended anymore.

Q: *Did you pretest them all?*

Kelly: No, no, oh no. We pretested the campaign but not the pictures.

Q: *Can you comment on media selection overseas? Are you going to go into international books?*

Kelly: This goes back to one of the points I was making before. We are waiting now for written instructions from the international division as to their marketing plans. We have a new director of the international division, Mr. Harry Taylor. We're really waiting to see how he envisions the course we will take. What we're waiting for is most necessary—to get

something in writing. Recently, we had lunch with Mr. Taylor, Del, and a few others, and he asked us why we were advertising in South America. The obvious answer was because the international division had requested it as part of their marketing. He said, "I don't agree with that." So there we were. My point being that had the plans been written and agreed upon, he would know exactly why we were or were not advertising in South America. So we are now awaiting further direction. We ought to know soon, because I'm sure we will be moving more into the international markets. It's up to them.

Q: *I realize opportunity to ask the same question of both the agency and the client. I'd like to ask Mr. Kelly what he demands, or the key ingredient, that he expects from his agency, and I'd like to ask Mr. Ladd what he considers the key ingredient he expects from the bank?*

Kelly: Well actually, I think one of the first keys you have to think about is creativity. I think that's critical. Everything else can be great but if you don't have the creative, I think you've got problems. But it goes well beyond that, of course. I think the agency and the client form a complete partnership, in which they know everything about each other. And they have to live together on a day-to-day basis in a close working relationship. But the key is still the creative.

Ladd: The point is really the input or the direction that we get from the bank. As Ed pointed out before, going back four or five years, the bank had one person in the marketing department. Today it has twenty, and each division has its own marketing group. Our people work daily with those people. And we're intimately involved in their problems, their strategies, their plans, their programs. When you get the proper input from the client, unless you're second rate, you can generally do a pretty good job. I think that's what we're getting. I'm very proud of the results over the last several years and I think it's because of the direction we're getting from all levels of management at the bank, starting with the chairman, as to what their goals, objectives, programs are.

Q: *I agree with Mr. Ladd about starting at the top to set objectives. I get the feeling that much of the advertising evolved is crippled along the way by the number of approvals or the chain of approval. I'd be interested to hear how that chain of approval operates in your organization.*

Kelly: We're very fortunate. We have a completely open door policy for top management. We report directly to the president, Mr. John McGillicuddy, through the head of our marketing department, of which advertising is a unit. Mr. McGillicuddy is a marketing-oriented person, which is very critical in the banking industry. Otherwise, you couldn't accomplish anything with various tiers of approval.

He also stresses the importance of marketing because, in the beginning, marketing is sort of—well, it has nothing to do with credit, it has nothing to do with what the bank is really about. And anybody who ends up in the marketing function has come to a dead end, because the real line is credit. But this is all changing. And now there are career paths in marketing within divisions, which is critical. We have, as I say, access to the president. We don't report to the chairman. The corporate communication section does. But he's very interested in the campaign. That's why he likes to see it.

But we don't have to obtain day-to-day approval from top management at all. As Mr. McGillicuddy said to me once, 'Ed, that's your job. If you do a good job, fine. And if there's a problem, I'll let you know. And if we have enough problems, we'll get another advertising director." And that's the way we want it because it gives us accountability. We've been very fortunate. I think Del will agree. When it comes to how advertising looks and all these dimensions, it's our responsibility. We're accountable for it. As long as what the divisions want is in it in terms of "what service" and "what markets." But in terms of "how" it's featured and so forth, that's our responsibility. We have very little problem with getting people to change it. We find out that the better our advertising gets, the less opinion we get and it makes it a lot easier.

Q: *That's fine that you can run it at your level as long as you do a good job. Where do you get the money?*

Kelly: A couple of years ago, when we first got into the question of television, we had our budgets approved for the year by Mr. McGillicuddy. And as long as we live within those budgets we're fine. If the national division wants to hold back and the international wants more, we can divert funds, if both divisions agree to it, as long as we keep the line. All right, so we had an opportunity in television. We wanted to go in. We wanted to have the extra dimension of television.

I'll be very honest. This costs $300,000 including the buying and the production of commercials. We brought our case to Mr. McGillicuddy. We told him the rationale that we tried to explain today—the counterbalance, the importance, the numbers of Fortune companies in the metropolitan area, the possibility that maybe we could move these spots into other markets. In four minutes, Mr. McGillicuddy said "You've got it." That doesn't mean to say that another time he wouldn't say, "You don't have it." But John is a very responsive person in terms of opportunities and opportunistic buys and they were additional funds that he approved for our use.

Ladd: On that score, each division runs a profit center and each division does have its own advertising or marketing budget. They determine and establish their programs in conjunction with the bank marketing department and the agency. On the corporate side, however, this is a decision made by the general administration board, which is the operating committee for the bank. The budget is determined at that level and then charged back to each of the divisions on some sort of formula basis. We have been through problems where some liked it and some didn't like it, but as the advertisements got better, the storm subsided, momentarily.

Kelly: The cost of the corporate campaign is divided among the different divisions of the bank. They pay the charges in different denominations. The metropolitan division, the national division, the international division pay a greater percentage than leasing, and so forth. Fortunately, Mr. McGillicuddy is the one who determines what contribution each of these divisions will make. Some of them really complain because they don't have that much money; in certain cases, to do what they want to do. So these dollars affect them and keep them from doing certain things in behalf of their division. But Mr. McGillicuddy once again feels that the overall umbrella that we're creating is most important for all areas of the bank.

Q. *What is the cost of your program?*

Kelly: Our corporate campaign is in the area of $2 million. And it can be eaten up very rapidly by color spreads. And when all else fails, they raise the interest rates.

Custer's Latest Stand

William A. Latshaw,
Manager of Advertising, Bethlehem Steel Corp.

Francis E. Cronin,
Production and Media Director, Bethlehem Steel Corp.

Or, how an advertiser measured the impact of his corporate advertising on an audience that includes hostiles . . . and then led a charge on his media mix as a result of his own research of readers' attitudes.

Latshaw: Although I haven't had the benefit of survey results on the subject, I have the distinct impression that many of our fellow citizens are relieved that the bicentennial year has now passed into history, enabling us to push ahead to other celebrations.

Nineteen seventy-six is behind us, but I *would* like to look back briefly at two memorable events of that year, two events that were somewhat overshadowed by all the bunting and the tunes of glory.

Last year also marked the centennial *observation* rather than celebration, except perhaps around a few open campfires, of Custer's last stand. The dashing colonel's blunder on the Little Big Horn has been debated by disaster aficionados ever since.

Why the debates is unclear to me. The answer is self-evident.

His intelligence officer was on leave, whooping it up with a girl named Sioux. Or, viewed parochially, his media specialist was conducting a one-man survey.

Had his media man not been engaged, or at least, involved, at the time I'm certain Colonel Custer would have given him orders somewhat in this vein:

"Now, Fred, I want you to be a good scout and run up ahead, look over the market, or target audience, and get me some demographics I can use to plan this campaign intelligently.

His intelligence officer was on leave, whooping it up with a girl named Sioux. Or, viewed parochially, his media specialist was conducting a one-man survey.

"I want to know how many Indians there are. How many are armed and with what kind of weapons? What are their drinking habits? What type of ponies are they riding and how many miles does the average pony have on him. Things like that, Fred.

"And, oh, yes, what's *their* frame of mind about *our* concept of Manifest Destiny?"

As it turned out, I guess it was a good thing Fred was busy elsewhere.

Let's leave Custer and 1876 and move ahead to 1976 when Bethlehem Steel carried out a survey that attempted to measure not the demographics, but the "mind set" of readers exposed to our corporate advertising messages—a task somewhat more complex than measuring the hostiles' attitude toward the Seventh Cavalry.

If you don't know where you're goin', any road will get you there.

For many years Bethlehem had been running corporate ads in major newsweeklies, business and cultural media. Our campaign had been directed toward informing readers of those policies and programs that characterized Bethlehem as a good neighbor. Our objective was to deepen the reservoir of goodwill and understanding in our audience.

Now there's nothing unusual or startling about that concept. But late in 1975 our public affairs department management asked us to stop, step back a moment, and reflect on the direction of all our corporate communications programs.

To quote a hit song, in some circles, of that period, "Do you know where you're goin' to?" That's a point so basic that we sometimes overlook it.

If you don't know where you're goin', any road will get you there.

As a result of that departmental rethinking and to clarify our goals, we decided that our corporate communications programs should concentrate on specific issues of vital importance to the future health of our corporation. Six issues were established. They are relevant not only to Bethlehem, but also to the rest of the steel industry. Some of them are equally relevant to your firms.

The issues include the problems, or challenges if you prefer, of capital formation, environment, energy supply, foreign trade, overregulation of business, and business concentration.

As part of our issue approach, we decided last year to begin a corporate *advocacy* advertising campaign. Our target audience: the opinion-leading influentials, professional and managerial, some college, twenty-five to sixty-four-year-olds, $20,000 annual income or above, active politically and in community affairs. Those to whom federal and state legislators,

governmental agency heads and others look when taking the national pulse.

We were also anxious to reach the general public, especially in areas where we have major operations. Employees, local businessmen, and professionals are key people everywhere. They can help because they have influence with their neighbors as well as with legislators. But in order to help, they need to be armed with facts and with industry's position on national issues.

We had a limited corporate advertising budget. (Why should we be different from anyone else?) We recognized that the six issues were too many to address in print advertising within that budget. So, we settled on three issues for 1976—capital formation, environment, and energy.

We were curious to find out whether a survey would reinforce our previous judgment, or whether it would provide a new road map for our copy and media plans.

Our campaign got started late and the ads didn't begin to appear until May. We ran out of time and funds around October. Energy was an issue we simply couldn't get to while attempting to do justice to the other two subjects.

The first ads might have carried less copy and been more effective. But ad by ad we began to wear away the nitpicks, the qualifying statements, and the supplementary information the early ads contained. By the end of the 1976 campaign we were fairly well convinced we were on the right track.

But how could we be sure, beyond human instinct—which, throughout recorded history, has gotten man and womankind into a lot of trouble?

Well, a useful planning tool grew out of our department's self-analysis: management by objectives—a concept not unfamiliar to you, I'm sure. Although many of our public-affairs divisions routinely functioned on an MBO basis, the formalization of the program and the implicit need to monitor results quite naturally led Bethlehem's advertising division to a tool that we had neglected in terms of our corporate advertising. The tool, obviously, is target group attitudinal research.

We were curious to find out whether a survey would reinforce our previous judgment, or whether it would provide a new road map for our copy and media plans. We decided to carry out an attitude survey. Complex and penetrating, its objective was twofold: (1) to determine and analyze the attitudes of our target audience readership on the six issues of concern to Bethlehem Steel in thirteen publications—those in which we were currently advertising, along with others in which we had considered or might consider advertising and, (2) to translate that data through computer banks so we could optimize our media by buying a CPM/A—cost per thousand *attitudes*—whether favorable, neutral, or unfavorable.

The attitudinal survey was carried out during May and June, 1976. As some of you may know, Bethlehem Steel prepares all of its own advertising. Our agency in New York, Van Brunt and Company, helps us out in many areas, especially in media recommendations and in advertising research. For the attitudinal survey we worked closely with Dick Barker, vice president of Van Brunt, and with the agency's associate, Richard Manville Research. They took our hopes and goals and converted them into a useful tool that we believe plows new ground in measuring audience attitudes.

In our advertising division we tell each other that this survey is unique. There's very little under the sun that's unique, but in our opinion our attitudinal survey is at least "medium rare."

We had asked ourselves: "How can we improve the effectiveness, the efficiency of our media selection? How can we improve the targeting of our corporate messages to reach people who will do us the most good? How can we improve the cost effectiveness of our media buying?"

Our research was based on a logical premise and a simple assumption. If media for product advertising can be bought not only on the basis of total number of people reached, but also on the number of prospects reached per dollar, why not buy prospects for ideas, attitudes per dollar?

Magazines, by the nature of the differences in their editorial content and in their editorial points of view, attract readers who also have differing points of view—opinions and attitudes generally compatible with the editorial viewpoints of the publications they elect to read.

The *Daily Worker* obviously attracts people of different views from those who read *American Opinion*, a publication of the John Birch Society. (Colonel Custer, had he lived, would probably have subscribed to *American Opinion*.)

This difference is undoubtedly true in more subtle degrees in magazines such as [illegible], as opposed to *The Wall Street Journal*, *Business Week*, and our host, *Fortune*. All of these magazines reach people of much the same demographic definition. But, because of their background, education, interests, or other reasons, their attitudes and opinions differ.

The odds also were that there are differences in attitudes among readers of similar publications such as *Time*, *Newsweek*, and *US News*, for example; and that there are differences among readers of the same magazine. But how different are these reader attitudes and where, specifically, do they dwell?

The thirteen publications we studied were: *Atlantic*, *Harper's*, *New Times*, *Saturday Review*, *Smithsonian*, *Newsweek*, *Time*, *Illustrated Time*, *U.S. News & World Report*, *Business Week*, *Forbes*, *Fortune*, and *The Wall Street Journal*.

A pilot questionnaire was developed, tested, and reshaped three times. From an original list of over a hundred questions, a final series of twenty-five was refined and adopted. All but one of the publications provided subscribers' names from our target audience. Some 4,000 interviews were completed, averaging 300 completed interviews for each publication surveyed.

The questionnaire was designed to ensure that respondents would categorize their attitudes on the six Bethlehem issues into these quintiles:

- strongly in favor of a conservative position
- moderately in favor of a conservative position
- neutral
- moderately in favor of a liberal position
- strongly in favor of a liberal position

For conservative, one might read "Bethlehem." Liberal might describe those who have an opposite point of view.

Once the identity of the various quintiles had been established, what would we do with the information? Several alternatives exist, bearing heavily on whom are we trying to reach, on what issue, and from what copy platform, or in what way.

For example, those who agree with us on an issue, we may wish to make a call to action. Those who moderately disagree, or who have little or no opinion, we may wish to educate or inform.

But equally important, if we could find where these readers' attitudes were among the various publications, then we could buy these specific target prospects efficiently, at the lowest cost per thousand attitudes. Lowest cost because now our dollars could buy a maximum of unduplicated readers.

Well, let's get on with it and see what we found!

We found that there are significant differences in attitudes among magazine readership, depending on subject matter and depending on which quintiles of that audience we wish to reach.

I hope you'll understand why I've chosen to delete the identities of the magazines on the slides you'll see in a moment. Remember that the survey measured attitudes specifically related to Bethlehem Steel's corporate interests and *our* target audience. If, in that context, a magazine didn't emerge as an ideal vehicle for *our* corporate messages, that does not mean that same publication wouldn't be absolutely perfect for *your* firms' corporate messages.

Let's take a look at an example.

It doesn't take a genius to figure out that the readers of a business magazine would reflect a deep concern about energy conservation and would have a conservative attitude about energy policies. And here is the typical business readers' "mental set" on energy.

It doesn't take a genius to figure out that the readers of a business magazine would reflect a deep concern about energy conservation . . .

There are no real surprises here. The great majority, 77 percent, have a viewpoint on energy that is close to Bethlehem's position. Neutral attitudes constitute 15 percent. You wouldn't expect to find many liberal attitudes in this business publication, and there aren't many. Just 8 percent are moderately in favor of a liberal position. There is no final quintile on the energy issue—that is, there is no group totally opposed.

Now let's look at a magazine that reaches a diverse and intellectual audience—a cultural magazine. How do these readers feel about energy conservation?

As you'd expect, there is a less conservative pattern here than in the business publication. If we add together the two top quintiles, which represent the strongly conservatine attitude and the less conservative attitude, we get a total of 49 percent. Neutrals make up 27 percent. And the remaining 24 percent represent liberal attitudes.

Here's how the attitudes of the readers of the thirteen magazines we studied break down on Bethlehem's six issues.

The first issue studied was capital formation. Across the board, a third of our target audience is strongly in favor of our viewpoint, while about 2 percent strongly opposes it. When you expand to the second quintile, to include those moderately in favor, our "friends" double. On that same basis, adding those moderately opposed to the bottom quintile brings the opposition up to 10 percent. Now if we could sway, say, half of the neutrals to our point of view we're looking at an issue that has a potential of attitudinal agreement of almost 80 percent.

Perhaps not surprisingly, the issue of business concentration has the largest group of what we call "swayables" . . .

Next, let's look at energy conservation. The questions asked on this subject had to do with attitudes on deregulation of natural gas, offshore exploration for oil, strip mining of coal, nuclear power plants, and so on. The whole subject of energy shortages, energy prices, and energy options is one on which most people have well-defined opinions. Most of the target audience is with us and there's very little opposition to our views.

On the issue of governmental interference, analyzing the audience across the board, averaging the percentage points of view, we have a lot of friends. In the top two quintiles, 74 percent appear to be on our side. The opposition in the bottom two quintiles is a mere 6 percent. I guess virtually everyone believes that the government is too much with us.

Perhaps not surprisingly, the issue of business concentration has the largest group of what we call "swayables"—the second, third, and fourth—the middle quintiles. There's no particularly strong feeling in favor of or opposed to our viewpoint on this issue. We may have to do a lot of convincing, but we have a large audience apparently willing to listen to our point of view.

Now let's move into the final two issues.

The environment is an issue that arouses strong feelings. Emotions run high. Our friends in the top quintile number less than 5 percent. The bottom quintile shows almost 15 percent. Add the moderates on each side and the friendlies rise to about 22 percent arrayed against an opposition of 45 percent. Our work is cut out for us, but it isn't all bad news—when you look at the swayables you'll find some 80 percent, which includes over 30 percent classed as neutrals. We'd better be very effective in our advertising on this issue if we hope to convince those who are willing to hear both sides of an issue and make up their own minds.

. . . when the magazines are identified—and grouped as business, cultural, or newsweekly publications—these data hold some significant surprises.

Finally, foreign trade. The audience on this issue is the least friendly and the most opposed. If we were to make an effort to shift audience opinion on the trade issue through print advertising, our target would have to be the large—almost 80 percent—center three quintiles.

There aren't many friends to rely on. Now you know how Custer felt at the Little Big Horn.

Perhaps in this format, with the magazines unidentified, you might conclude that the breakouts are predictable.

But I assure you that when the magazines are identified—and grouped as business, cultural, or newsweekly publications—these data hold some significant surprises.

Now let's compare the readership of two *business* magazines. All businessmen think alike, right? Wrong. All readers of business magazines do not share the same attitude on Bethlehem's issues.

Nor are the readers of two popular newsweekly magazines in agreement on Bethlehem's issues. The two cultural magazines follow a similar pattern.

I hope we've illustrated the point—without belaboring it—that the attitudes of people who read similar types of magazines can and do differ, at least on Bethlehem's six issues.

When you look at the research results you say, There it is! It's all spelled out for us. We know exactly what magazines to advertise in because we know what audiences in those magazines are fairly inclined toward our message.

But no, now is the time when you take the attitudinal information and translate it into cost efficiencies per attitude, and you come to the entire point of the survey: what the best media buys are.

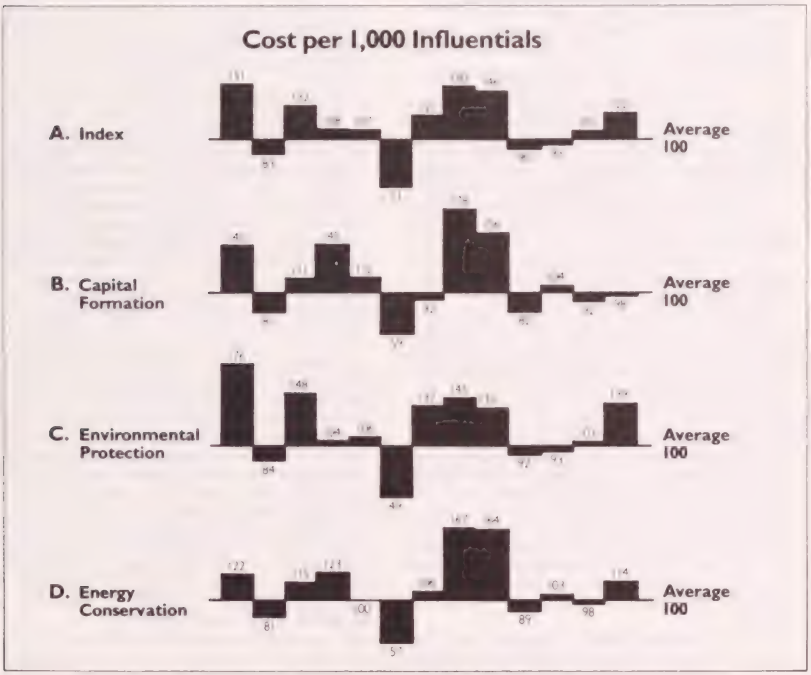
What does happen? Well, let me show you. Because on that basis the publishing world takes a few interesting twists and turns and, in fact, in some cases it turns upside down.

Some media, on that basis, take far higher prominence as media to be used efficiently, financially efficiently.

Let's examine the thirteen magazines from a cost per thousand for Bethlehem's desired target audience. Bethlehem's audience, as I mentioned, is twenty-five to sixty-four years old, some college, professional and managerial, $20,000 and above, and active—either politically or in their communities. In the chart below we used the figure "100" to represent the average cost-per-thousand target audience of all thirteen magazines, based on a one-page, black-and-white rate.

As examples, we'll look at just three issues—capital formation, environmental protection, and energy conservation, and we'll see what happened when we plugged the average cost data into the three middle quintiles.

Part A shows what happens to relative cost efficiencies when we deal with the specific topic of capital formation and a specific target audience. The perfect example is the third magazine from the left. Its relative efficiency went from 132 in



35

the index to 111, while the No. 4 book climbed from 108 to 145.

For environmental protection (Part B), the same magazine's relative efficiency is up from 132 to 148.

Energy conservation (Part C), when compared to our index, shows similar variations. The relative efficiency of the third magazine from the left dropped from 132 to 115.

And consider the first magazine on the left. Against that base of 100, the cost per thousand attitudes went from an index of 151 down to 145 on capital formation, up to 176 on environmental protection, and down to 122 on energy conservation.

So in the same magazine, the same audience—the swayables—costs less per thousand attitudes on one issue than it does on another.

From the survey, we also determined unduplicated circulation and frequency of readership. When we plug this information into our programming, the computer print-out tells us the most efficient magazines and their total target audience in our selected middle three quintiles.

. . . our management agreed to our corporate advertising proposals for 1977 and approved a budget increase of 50 percent to enable us to carry out our program.

It tells us the number of insertions, the percent of magazine target audience reached, the cumulative costs, by magazine and for the total schedule, unduplicated reach, percent of total target audience reached, marginal cost-per-thousand receptive attitudes, cumulative CPM attitudes and, finally, the mean exposure frequency by individual magazines and by all magazines.

We can now more efficiently choose a media schedule based on total dollars we want to spend or based on the total frequency we desire.

Voila! An optimum media schedule determined by cost-per-thousand receptive attitudes—for a specific issue and a specific audience—awaits the push of a button.

We carried out a second, more modest, study last year, again working with Van Brunt and Manville: a benchmark awareness survey and follow-up. It measured Bethlehem's standing in the minds of 1,300 readers of three major publications plus a control group.

It also measured the readers' awareness of Bethlehem Steel against their awareness of fourteen other firms that were carrying out corporate advertising during the same period.

The benchmark study and follow-up established two points of interest to us: (1) awareness level regarding Bethlehem Steel, and (2) awareness of our efforts and agreement or disagreement with our views.

So, the benchmark gave us a base from which to build. The follow-up, conducted *after* our 1976 advocacy ad campaign, showed a positive result. And the attitude survey told us where our audiences lie while providing a way to buy media for our corporate ad campaign more intelligently, selectively, and efficiently.

With this background and reinforcement it may interest you to know that our management agreed to our corporate advertising proposals for 1977 and approved a budget increase of 50 percent to enable us to carry out our program.

Our campaign this year will appear in three flights—on energy, the environment, and capital formation. The first flight began last month, on the subject of energy. Because this series is designed to position Bethlehem in a leadership role on an issue of national importance, our thrust on energy is to issue a call to action for a national energy policy.

For this message we aimed our ads at our "friends"—the readers whose attitudes were similar to Bethlehem's. Our energy ads had one page of copy and an impact/action page. The first ad provided the reader with an opportunity to present his views on energy to President Carter. The second and third ads amplified Bethlehem's own position on energy and provided action pages, to be directed to the reader's Senator and Congressperson.

This concept, we know, generated great attention and readership. We also know it generated letters to our national political leaders and to our corporate officers. And we're sure the recipients, and the readers, are aware of the ads and the sponsor.

We'll follow this campaign with advocacy ads on the subject of environment through July.

This will be followed with a similar campaign from September through December on capital formation, unless another issue assumes a higher corporate priority in the next few months.

Both the environment and the capital formation series will be directed at the swayables in our target audience—those readers who appear to be willing to listen to our viewpoint, and who, we hope, may shift toward our view on these issues.

The media list for the '77 corporate campaign? Well, an old friend or two died. Up to now the representatives from Fortune might have paraphrased Bill Shakespeare, charging that Bill Latshaw is "A man who hath cruelly scratched *Fortune*." The reshaped quote is from *All's Well That Ends Well*, and that's appropriate I believe, because four other magazines joined our schedule. And one of them is *Fortune*, no longer cruelly scratched, perhaps no more than mollified. But we're in the fold, and who can say what next year will bring to our relationship?

Was our attitudinal survey unique? We think so. I wonder how many advertisers have put together their media schedules on the basis of their own research, rather than on data provided solely by publishers and the syndicated services? (Or perhaps by the seat of their loincloths.)

We intend to rely on the computer to help us buy an optimum media schedule determined by cost-per-thousand receptive attitudes on a specific issue and for a specific audience. A series of follow-up awareness surveys will let us know if we've made the right decision.

The Bicentennial is gone. Custer has been court-martialed in absentia, but Fred, his intelligence officer, lives on in the form of Gene Cronin, my good scout who will now assist me in answering any questions you may have about media skirmishes, readership surveys, or girls named Sioux.

Question and Answer Period

Q: *How much did the study cost and how long did it take to accomplish?*

Latshaw: I'd prefer not to answer the question on costs either for this survey or for our corporate ad campaign but I think Gene would be happy to answer the second part of your question.

Cronin: It took us about two years. We came up with the concept. Then we proposed it to Van Brunt and Manville. Next, we developed the questions. We spent some time getting the names of the subscribers from magazines; finally there was the field work. It was about a two-year job, but I don't think it would take us that long next time.

Q: *Can you go into more detail on how you defined the universe for the survey and the method of selection of the sample?*

Cronin: We developed a questionnaire. The original 100 questions were reshaped as we went through a series of three pilot tests. The questions were so worded that the respondents had to place themselves somewhere in one of those five quintiles and the questionnaire was worded so they couldn't waffle. As respondents went through subsequent questions on the same issue which appeared further along in the interview, those questions, in effect, retested the attitude, the response, to the first question on that subject.

Q: *What is Bethlehem's objective in running [illegible] advertising?*

Latshaw: Our first mission has been well stated here, [illegible] and I'm sure you've heard it many, many times. It relates to the news media and their handling of corporations or industries and industrial corporate viewpoints.

We don't feel that we can rely just on the media to fully and objectively express our points of view, so we've chosen this advocacy campaign to communicate specifically what our points of view are and why. In addition, there's an element of trying to position Bethlehem Steel in a leadership role on an issue of national importance.

These elements are far more important to us than how many letters were written to Mr. Carter.

Q: *Was the survey carried out by mail?*

Cronin: No, it was conducted by telephone interviews in the twelve major markets.

Q: *I have the impression that the target for [illegible] is the people who are either neutral or undecided. Have you considered talking to the people who hold opposite views on these issues?*

Latshaw: We are addressing ourselves for the most part in these campaigns to those three middle quintiles. You're right. The bottom two of those three include those who are neutral and moderately opposed. So, yes, we're trying to reach those moderately opposed. Those who are totally opposed? I can't at the moment imagine a campaign we might conduct aimed at them, but it's important to know where they are and how many there are.

Cronin: Those with opposing views are also receiving our message. We're just trying to buy more efficiently in the area that we want to reach.

Latshaw: And judging from the letters we get, we know the opposition is reading it as well.

Q: *You sampled thirteen publications. Were most of these publications able to meet the demographics? I've had trouble with some of those publications, not being able to get a qualified sample.*

Cronin: On the problem of getting an adequate sample, we went to upscale locations in those markets that we wanted, starting with the income level. And then through surveying techniques we came up with the demographics that we wanted. There were a couple of magazines that would give us some demographics, but over the entire thirteen we felt the best way to do it was by surveying techniques. As was mentioned, only one of the thirteen did not cooperate with subscribers' names.

Q: *Did you conduct the telephone survey yourselves? Or did you [illegible] for you?*

Cronin: We hired a research firm to do that.

Q: *Can you be a little more specific on your objectives. That is to [illegible] what is it Bethlehem*

Latshaw: Bethlehem takes the viewpoint, whether in external communications or internal communications, that a better-informed employee is a better, more productive employee. The same philosophy carries to our outside communications. We can afford a grass roots campaign. The more we explain to the opinion leaders in the nation how we feel about an issue and why, the more we can hope that they will come to have a better, higher regard for us than they might have had before.

It's the old corporate aspect of wanting to have a good image but it's more directed toward that portion of the opinion-leading public to whom state and federal legislators, agency heads, and the like tend to speak when they go back to their constituencies. We're told time and again that to a large degree it's their constituency which is going to influence which way the Representative, the Senator will vote. The more we can educate that group to our viewpoint, the more we hope that there will be a spinoff back to the federal and state governmental and agency areas.

Q: *Are you interested in employee reaction and, if so, what have you heard?*

Latshaw: We are interested in employee reaction and this program, in a way, dovetails with an internal communications program on employee economic awareness. So there's much interlock in that. Gene handled that program. Would you care to tell us something about it?

Cronin: Among other things, we mailed a reprint of the first energy ad to all our employees. About three years ago, we started our present employee economic awareness program and it has been quite successful. We have used everything, including direct mail, to our 110,000 employees. That's a large expense. But we feel it's worth it. And the response has been good. We've measured response. We've also carried out a before and after survey on the awareness part of our program and the results have been more than gratifying. All in all, we believe the program has been successful.

Developing Objectives for Corporate Communications

Brian McBain, President
McBain and Small, Inc.

Richard Morris
Vice President—Corporate Relations, Carrier Corporation.

McBain: The central purpose of my talk today is to demonstrate how research can be helpful in establishing objectives for a corporate communications program.

We are all familiar with the kind of Roper or Gallup or Lou Harris research which tells us that, for example, 68.3 percent of the people would prefer proposition A to proposition B.

And we're also probably familiar with the kind of product marketing research which tells us that consumers prefer one formulation of chocolate pudding over another formulation.

Neither public opinion research nor product marketing research is what we're talking about today.

What we *are* talking about is a special kind of *qualitative* research aimed at uncovering attitudes and opinions held by one or more of management's key publics.

. . . companies which tend to rely heavily on research to market their products tend *not* to rely proportionately on research to market their companies.

The way we conduct this research is not by using the check-the-box kind of questionnaire, but by using a series of talk points which enable the people we interview to explain in their own words their opinions, their attitudes, and the reasons behind them.

The value of this approach is that we can get a much more sensitive reading on the problem at hand.

This approach to communications programming is important because, without research, a communications program runs the risk of being misdirected and off target—that is to say, aimed at the wrong people and with the wrong message.

This takes on added significance when we consider that today even a modest program can cost well over $100,000.

We have found some very surprising things in our research work.

Most surprising is that companies which tend to rely heavily on research to market their products tend *not* to rely proportionately on research to market their companies.

One of the things that seem to be endemic to the research field is that the people in it often try to make what they do for a living sound a lot more difficult than it really is.

While what we do isn't always easy, I will say that it adds up to little more than taking the time to find out what the people on the receiving end of your annual reports, press releases, speeches, and so forth, really think.

What is important is to do it—and for today's presentation, that's what we've done.

A few weeks ago, we met with Richard Morris, who's the vice president of corporate relations for Carrier Corporation. At that meeting Dick indicated that there were a number of things Carrier was concerned about. So for this, we conducted interviews, in depth, with a half-dozen analysts who were reasonably familiar with the company. The purpose of the interviews was to get analysts' perceptions of the problems that were of concern to Carrier.

In a few minutes, after Dick explains the company's point of view, I'll report on the highlights of those interviews and then discuss how they might be helpful in establishing objectives for Carrier's communications efforts.

From the analyst list that Carrier provided, we conducted a half-dozen in-depth interviews. In preparation for our interviews, we developed a loosely structured questioning guide—in effect, a series of talk points that covered Carrier's primary areas of concern.

Let me just take a moment to run through these points with you in order to provide a slightly more structured framework for the analysts' comments.

We asked first:

Questioning Guide

1. What is the company's main business? What other businesses is it in?
2. How would you describe the company's business?
3. What are the major factors affecting the company's business today?
4. How important are housing starts as an indicator of the company's outlook? What do you consider the single most important economic indicator for Carrier?
5. Approximately, what is the company's multiple? All things considered, is that a fair multiple?
6. What do you feel are Carrier's major strengths?
7. What do you think are its drawbacks from an investment point of view?
8. How would you describe Carrier's communications with the financial community? And here we probed for analysts' evaluations of Carrier's annual report, the accessibility of management, management's openness and willingness to talk, attitudes toward Carrier's advertis-

ing and what they felt it was attempting to get across.

9. We also asked analysts to describe the company's operational style, whether it was aggressive and innovative or old line and conservative.

10. Finally, we asked analysts to describe Carrier's press relations.

Although I recognized that a half-dozen interviews do not constitute a representative sampling of analysts, we nonetheless—for purposes of illustration at this seminar—treated the information as though it were definitive.

> I don't think that anyone is consciously lying, it's just that I don't think that they're all connected into the same information sources or something.

What, then, did we find out?

First, on the issue of determining analysts' awareness of Carrier's major business, we found that Carrier is seen primarily as an air-conditioning company.

However, analysts appeared to be very much aware of the company's other businesses.

One analyst said: "They're the leading air-conditioning company with an important niche in the compressor market, which is where they make all their money. I'd say about 15 percent of sales and 75 percent of profits are in the Elliott division."

Another remarked: "The company's main business is air conditioners. In addition to that, they have the Elliott pump. They have the Dempsey Dumpster, compressors and heat pumps." Let me add, the name of the company is Dempster.

Second, on the issue of Carrier's dependence on the vagaries of the construction market, analysts generally feel that housing starts are indeed a prime indicator for the company. At the same time, they cited a few other indicators of importance, such as fuel and gas demand, capital spending, and interest rates, among others.

Two quotes will illustrate. "As for major factors affecting the company, housing is one and energy is two."

The other: "As far as the stock market is concerned, housing starts are a very important indicator of the company's outlook. As far as the bottom line, (in earnings per share) it may be a 25 percent type of factor . . . 25 to 30 percent maybe. But, as far as the stock market is concerned, it's a housing stock."

With respect to Carrier's multiple, analysts feel it should be no greater or no less than the market multiple, which is 9 to 9½.

On the question of Carrier's major strengths, two important points emerged: First, the company's leadership role and dominant position in its major industries; And second, the quality of its products.

A typical comment here was: "The company's major strength is its dominant position in the air-conditioning industry, both in a design and a distribution sense. The Elliott division is a gem. It's an excellent market, if they knew how to use it."

Turning to Carrier's perceived problem areas, analysts voiced three principal concerns:

1. The company does not convey that it has a good grip on the businesses it is in. One quote points up the problem: "Their major drawback is that they really don't understand what's happening in their businesses in some respects. For example, they ignore the Elliott division. As far as what the true outlook for Elliott is, they were more in the right place at the right time rather than understanding where the demand for compressors is and has been going."

2. The second problem area relates to inconsistent information. One analyst put it this way: "You get different answers from different people. If you talk to all the people in the company and ask them the same question, such as, 'What's the backlog?', 'What's the capacity?', you'll get a variety of answers and I don't know which one to believe.

"I don't think that anyone is consciously lying, it's just that I don't think they're all connected into the same information sources or something."

3. A third problem that surfaced is the cyclicality of the construction industry. "The cyclicality of their business, of course, is a drawback. Most people would like to see an even, continuous flow of earnings."

With regard to Carrier's communications with the financial community, more interesting insights emerged. For example, one analyst cites an improvement. He said: "They're doing a lot better. I think, in their communications with the financial community. They've made an effort. They now have two or three people that you can talk to, in case one's out of town. Sometimes, though, you can talk to all three and get three different answers and that can be pretty frustrating."

However, a more typical attitude is: "They're less than stellar with their financial communications . . ." Or, "I can't say they're exceptional. In their policy of communicating with us, they don't seem to seek us out, but their information is fairly good."

By way of quickly summarizing the remaining findings: analysts are very vaguely aware of the company's advertising; management is generally seen as open and accessible; and opinion is split on whether Carrier is conservative or aggressive in character.

Finally, as for the company's annual report, it is viewed as being as good as—but certainly not better than—those of other companies.

> There are a number of possible courses of action that Carrier Corporation might take to make its communications efforts more effective.

One quote on the annual report that I thought would be of particular interest to this group concerns the company's image or identity: "Each year the annual report is different. One year they want to be an air-conditioning company and the next year they want to be an industrial machinery company. And this year they seem to be a resource/waste-management company. I don't see any value in emphasizing different aspects each year. Then people don't really know what you think you are. I think the corporation should make a decision as to what it wants to be."

I hope this discussion has been useful in demonstrating how qualitative research can be helpful in establishing objectives for corporate communications programming.

Obviously, we didn't do a full-scale survey here, so any recommendations for actions based on our interviews would be irresponsible. But assume for a moment that the comments of these analysts are at all representative.

There are a number of possible courses of action that Carrier Corporation might take to make its communications efforts more effective.

One would be a careful review of Carrier's internal information-gathering mechanism, with an eye toward ensuring a consistency in the information that the company discloses.

Another would be an evaluation of management's past public statements about its businesses, with an eye toward determining what has caused the sense among analysts that management doesn't know its markets as well as it should.

Yet a third course would be a review of the annual reports of recent years to see if a more cohesive editorial concept can be developed in the future.

There is really no end to what one can do with research findings. The point, though, is that by taking a careful sounding of your key publics—security analysts, brokers, environmentalists, activists, regulators, your own employees—you can make your communications program better focused, and thus more effective.

Morris: I was interested in the document that was sent to us before we came here because it made a distinction between objectives and goals. And I thought of the story about the objective and goal that President Carter set for himself. His objective, according to the report, was to change his address and the goal that he had was to sleep in the White House on January 20th. Johnny Carson came along with the remark afterward that Ford moved out and Carter moved in, and Rockefeller raised the rent.

The financial community to me means not only the people in Wall Street but the people who own the stock and the people who might own it.

I think sometimes we get a little tangled up in setting these objectives and talking about them. But with Brian McBain's help, I have learned that research we did before launching an advertising campaign at Carrier from the corporate staff level was borne out in research that he did just before the first ads appeared recently. But until now, our corporate communications efforts through advertising have been quite limited.

However, recently we've been more and more concerned with how the financial community, in particular, views us.

The financial community to me means not only the people in Wall Street but the people who own the stock and the people who might own it. By the way, about 65 percent of Carrier stock is held by financial institutions. They get a lot of messages about a lot of companies, so our objective here was to inform that group as much as anybody else about what we are and what we're doing. So we set forth to inform present and potential shareholders that Carrier Corporation is more than Carrier "air-conditioning," which is a perception that exists and one with which we are very pleased, but it's rather confined.

We want to inform the sophisticated analyst, money manager, trust officer, and so forth of the importance of our non-air-conditioning operations. We want to inform our audiences that Carrier is more than a construction or housing company, and that the stock is more than a housing stock. We've been classified in this area for a long, long time. There is not a category into which we fit nicely, under the various classifications that the government puts out, but we are classified, and we know it, as being tied to the housing industry and as being a housing stock.

More specifically, we are concerned about the notion that housing starts are the only determinants of our destiny. The audiences we're trying to reach, we've learned through research, even the people who follow us rather closely, are surprised to know that housing starts, which can be something of a roller-coaster, account for only about 10 percent of the total sales volume of the Carrier enterprise.

The research we did before we started this campaign told us that what we suspected was true. In some cases, the respondents may not have told us exactly what we'd like to hear. . .

But we are still known as a company that is affected by, and whose destiny is determined largely by, housing starts, as distinguished from existing homes, which use add-on-equipment and replacement equipment, and as distinguished from buildings such as hospitals, schools, and big commercial establishments, which use large installed systems. So we have devised a campaign based on the theme "Energy Ideas at Work." Energy is a very timely subject, and we think such a theme describes our total business rather well.

Our problem in that context is that we produce goods for the consumer, whether he be you as a homeowner or the people who run this very fine place where we're enjoying ourselves. While such products do use energy, the ones we produce use it more efficiently than others.

The other aspect of the energy question is that we're in the energy producing business as well, through a compressor company by the name of Elliott. The company has very good sales and very good profits by virtue of the fact that the world needs so much energy and Elliott compressors help produce it through gas gathering, for the petrochemical industry, in ethylene plants and so on.

So we came up with the idea that we should tell not only the world about it, but particularly that small part of the world that influences investment. The theme "Energy Ideas at Work" can be not only substantiated but projected in a believable manner.

The research we did before we started this campaign told us that what we suspected was true. In some cases, the respondents may not have told us exactly what we'd like to hear, but when Brian McBain asked us to give him the names of some people who follow us closely and the names of a few people who are somewhat familiar with us, it came through loud and clear that the original research was corroborated.

I think we're on the right track. Obviously, we will monitor the results. I don't know how much we'll learn, but I do hope that we will find that "Energy Ideas at Work" is a good theme, that Carrier Corporation is not an organization that moves freight from one place to another, and that it does a lot of things besides air-conditioning.

Question and Answer Period

Q: *I have a question for Dick Morris. First of all, do you have someone who is directly charged with investor relations in Carrier and*

does that person report to you? Second, how often do you meet with investment analysts who follow your stock?

Morris: We have a recently appointed vice president for investor relations who reports to the chairman and chief executive officer, to whom I also report. And the vice president for investor relations is my next-door neighbor in the office, but that's strictly an accident.

Previously, this function was performed by the corporate secretary. It was almost a full-time job for him in addition to being secretary. Most of his investor relations work was done in handling analysts, but he was almost a one-man band who had two important jobs to perform with one assistant. Now, it obviously is going to be improved by virtue of the fact that the investor relations rose is pinned on one individual full time.

As to your second question, our management meets with the analysts who follow our stock on an average of once every month. In June, we're going to attempt a meeting on a broader scale that will last from ten-thirty until four o'clock, including luncheon. I'm not organizing it. I'm just trying to help make it work. A hundred people will be invited. I understand this has been done by other companies rather successfully.

Q: *Were the interviews personal interviews or were they questionnaires? How were the interviews conducted on this particular research?*

McBain: We don't, as I say, use the check-the-box kind of questionnaire because we want to get these voluminous quotes where we can really hear how the people feel. We use just a series of talk points and generally they're done in personal interviews. It's a conversational format and we allow the analyst or whoever it is we're interviewing to go where he wants to go with the questions, to express everything that's on his mind. It is a very loosely structured kind of thing because we don't want to prejudge the information we're going to get.

Q: *Did you talk just with analysts or did you also speak with portfolio managers, institutional investors, and other people in the financial community?*

McBain: Generally, we speak to a number of different audiences. For today's purposes, we spoke only with analysts who were reasonably familiar with the company because we wanted to show you that even though you think you're talking to them and even though you think you know what they say and even though they're your friends, and so forth, it's surprising what your friends say about you.

In more elaborate surveys we sort out each of those audiences and interview them separately.

Morris: I could interrupt if I might and say that we did this first survey with forty-three analysts, as they were called by the researchers from N.W. Ayer & Co., our advertising agency, but they used the term "analysts" in a broad rather than a specific sense. So they did talk to money managers, portfolio managers, trust officers, as well as security analysts per se, and came up with very much the same conclusions that Brian did.

Q: *Dick, what percentage of Carrier's business is industrial and major because the word "housing" kept coming up, and that's one question. The second question is from Mr. McBain's interviews with these "analysts." On a scale of one to ten, how would you rate their capabilities?*

Morris: How many did you talk to, twenty?

McBain: No, I talked to six.

Morris: Oh, we gave you twenty to choose from.

McBain: How would we rate their ability as analysts in analyzing the Carrier Corporation? I think on a scale of one to ten, you'd have to say nine, because they are analysts that Carrier is quite close to. And they get all Carrier's information and they have attended any number of meetings with the company.

Navarro: I would like to suggest that that introduces a very interesting point to me. What are analysts like? How capable are they? What makes them tick? I'd like to say very briefly that I am a member of another misperceived organization, W. R. Grace & Co. Many people, some here perhaps, think that we're a shipping line. I often take a group and ask, well, how many ships do we own? Ten? Twenty? Thirty? And almost inevitably, because they want to be nice to me, they say the higher figure. The fact is, we don't own a single one. We sold the damned thing to the Greeks ten years ago.

But I had thirty analysts, not six, up in an airplane. A totally captive audience of chemical analysts. They could hardly refuse. So I put them through a survey and you know, they had to do something about it. So they did. I won't go into all the details. It was interesting. They did comment on the various publications and I certainly will not go into that here. Although it was flattering to all of them.

But I was struck by one thing. They said that they did not read our ads, then they proceeded to tell me what was wrong with the ads. Literally. You know, too much of this, not enough of that. Told me what other ads they thought were very good. I also have that list which should be of interest to many people. Anyway, there were only thirty but they were specialists and I came out of it confused and I don't know how you run your workshops. I've never been here before, but would very much like to hear how you perceive the analysts, what makes them tick. Are they serious? How do they do their work? Do they really not read the ads or is it a matter of being unprestigious to be influenced by an ad?

Q: *What [illegible] than the housing market?*

Morris: I just happen to have the figures here. We break down into three categories. This is the 10K approach. Some analysts think it can be broken down a little bit more.

We were into the billion dollar club in sales in 1976, fiscal year ending October 31. Of our total sales, air-conditioning and related products were 80 percent. Now air-conditioning and related products means heating, and cooling, and humidifying, air cleaning and air handling; and parts and service. Especially heating and cooling. Maybe "climate control" is the term, representing 80 percent of volume. Industrial machinery, which consists almost entirely of the Elliott Division making heavy rotating machinery which I alluded to earlier, was 16 percent on sales of $187 million. And "all other," about 4 percent, electronics, waste recovery, the Dempster-Dumpster Division in Knoxville, etc. Always thought that was a great name. It's too bad that people don't get it right. The fact is that the Dempster family, which founded the company, is sometimes called the Dumpsters, but I'm not sure they appreciate it.

So, that's sales. As to earnings, the analyst who gave that split of 15 percent and 75 percent for Elliott—sales vs. earnings—was not too far off in '76. Earnings were 33.8 percent for the large category of sales—air-conditioning and re-

lated products—and 65.6 percent in heavy rotating machinery or heavy machinery. So we don't ignore that division, as one analyst was quoted as saying. If we do, maybe we ought to ignore everybody else, because Elliott had 16 percent of total sales and made a 65.6 percent contribution to profits.

Q: *What is the breakdown on the air-conditioning side of the business, that is, industrial air-conditioning vis-à-vis housing air-conditioning.*

Morris: I don't have those figures, but I would say, generally, air-conditioning is 80 percent of corporate sales. Let's take the 80 percent as 100. I would say that residential constitutes about half of that, maybe a little bit more. But residential, again, goes back to meaning something besides housing starts, which constitute a small percentage of the original 100 percent.

Q: *Where do you go from here, Mr. Morris? Are you encouraged enough to use the interview technique with other groups important to you, besides financial?*

Morris: I have no inhibitions about it. But I'm in that business. Sometimes you have to persuade others to go along with you. But I think we are becoming much more uninhibited about talking about what we do and how much of it is in one area and how much in another and where the profits lie.

But in defense not so much of Carrier but of the fellows whom Brian called on the telephone, they just answered the phone. He said, I want to ask you some questions about Carrier. And they said, oh yeah, Carrier is one of the companies I keep track of. So he fired away ten questions. They didn't have the Carrier annual report handy so they could get the figures and they hadn't read any advertising from the corporate level because we hadn't done any at that point. Except in the *Wall Street Journal* on a one-shot basis, where the headline read, "With housing starts so low, how come Carrier's earnings are up 169 percent over last year?"

So that's the question we're attempting to answer in a much broader campaign. From here on, I'd just like to see it continue because we have an additional problem, as do some others, in the sense that our corporate name is the same as that of our largest operating division. Thus, Carrier Corporation is apt to become synonymous with the brand name Carrier. It turns out that there are four brand names in the air-conditioning end of the business as far as our company is concerned. There is Bryant, which is an old line heating company and now air-conditioning also. Then there are Payne, and Day & Night. So these are the BOP's—Buick, Oldsmobile, Pontiacs—of our air-conditioning business.

Navarro: *We have time for one more question. So, I'll ask it: How did top management, your top management, react to these interviews? Did they take them seriously? Did they challenge the analysts? Have you shown it to them?*

Morris: Oh, indeed they took them seriously. As a matter of fact, Ayer, which did the interviews before we made a decision to use advertising as a means to an end, made a presentation to us and we filled a room with probably twenty seats at the table. One of the executives of N.W. Ayer said he'd never made a presentation to so many people with such titles. And I think the reason for that was that the corporation management is very reluctant to embark on something of this kind without getting the operating executives into it and having them go along because they're going to pay the freight in the end.

So we told them what we found out. Nobody was terribly surprised. The divisions said, let's go! Someone said that Elliott has been ignored. Elliott has not been advertised in the consumer media because it sells to a very specialized trade. I doubt if there's one person other than some of our competitors in the room who ever heard of the company. But the Elliott people were delighted because the corporate campaign is using each of the divisional names, whether it be Spectrol, which is an electronics company, or Dempster or Elliott or Bryant or Day & Night, or whatever, as a flag and then coming in with the basic corporate message at the end. So they're getting some commercial identification and some commercial advantage out of the advertising.

International Trade: What's Ahead for Multinational Corporations

Ambassador William N. Walker
U.S. Delegation to the Multilateral Trade Negotiations

I'm going to speak tonight about the field of international economic policy. This is a subject that I think is appropriate for this group to deal with because it is so central, so important, and because it is a subject which you, as corporate communicators, are going to have to become more familiar with.

It is important for a couple of reasons. Intrinsically, it is important because international economic issues are increasingly overshadowing the kinds of traditional geopolitical and national security issues that have dominated American foreign policy and the foreign policy of other nations during the postwar period. One has only to look, for example, at the continent where I now live, Western Europe, and at the governments in virtually all those countries, where the party in power and the President or the Chancellor or the Prime Minister, as the case may be, is governing with a coalition whose fragility is caused in large part by the fissures, the strains within the society that have been brought about by the economic tumult of the past five or six years.

In addition, of course, the new President is heading for his first Economic Summit in London, at Downing Street, on the 7th and 8th of May, where he will meet with the chiefs of government of six other nations and the European Communities. Central to the talks which they will have, and the unifying theme of their discussion, will be problems of international economic policy and how the industrialized nations of the world can better harmonize their policies in order to bring about improved conditions. So it's important for its own sake and, therefore, it is a subject you will all have to pay attention to.

It's also a good time to talk about it because the Carter Administration is in the process of formulating its policies, deciding what it's going to do and how it's going to approach the family of issues that are involved with international economics. The Administration has not finished naming the individuals who will make up its top economic team. I haven't been replaced yet, among others, but I will be soon. I've met with Bob Strauss, incidentally, whom the President named as a special trade representative last week.

Strauss is the former chairman of the Democratic National Committee; he is a clean page as far as trade policy is concerned, but he is a man of stature, influence, and importance and his appointment as special trade representative by President Carter has to be a signal to the United States and the rest of the world that the U.S. is concerned about and interested in international trade and is going to deal with it in an important way in this Administration as in the last.

So, as the new team gets itself together it's a good time for those of you who may not have been following all the trials and tribulations of international economic policy to get on board and follow the new Administration as it decides what to do.

My remarks tonight will deal with four separate but related subjects. I want to talk to you first about the multilateral trade negotiations in Geneva, where I am the U.S. negotiator, because I suspect a few of you may not have hung on every word of the talks.

I also want to suggest some broader considerations of the long-range impact and importance of these negotiations and what they signify for the next couple of decades in international economic relationships. I want to say just a word about allegations of American protectionism. And finally, I want to talk a little bit about the structure of trade between the United States and Europe, which I think is badly misunderstood and which I think could create serious difficulties that we should seek to head off.

. . . it's a good time for those of you who may not have been following all the trials and tribulations of international economic policy to get on board . . .

First, the multilateral trade negotiations. What are they? This is the seventh round of major international negotiations that have taken place since the end of World War II aimed at reducing tariffs and nontariff barriers to trade—or stated the other way, at liberalizing world trade. It is the largest commercial negotiation ever undertaken, involving ninety-six nations.

Tariffs are still an important impediment to world trade. During the Kennedy Round, which took place between 1963 and 1967 and was the last major international trade negotiation before this one, tariffs in industrialized nations were reduced by an average of about 35 percent, so that today the average tariff level (that's the average now—you can drown in an average stream, as you all know) the average tariff level in the European Community and the United States is about 9 percent. It's a little bit higher in Canada and higher still in Japan. You might be interested to know that Mike Blumenthal, the new Secretary of the Treasury, had my job in the Kennedy Round. He was our chief negotiator there. He did a first-rate piece of work, I might say.

Tariffs have become less important because they've gotten lower, although there are still some serious impediments. Tariffs are also less important because we've moved to a floating exchange rate where swings in the value of currencies can be so significant as to dwarf, in terms of a barrier, the impact of a tariff.

Nonetheless, we are seeking further major reductions in tariffs in this round, in no small part because there will be no

tariff barriers to trade within all of Western Europe as of the first of July 1977. All industrial trade will be free among the countries of Western Europe. But there are external European tariffs against the United States. So one of the things we are seeking to negotiate in this round is a reciprocal reduction in tariff barriers vis-à-vis the Europeans in order to reduce the level of what amounts to discrimination against American imports into Europe.

. . . the field of government procurement represents a growing market as governments become more interventionist and larger buyers.

But tariffs are not the central theme of this negotiation, unlike previous rounds. We are now for the first time seeking to address what are called nontariff barriers to trade. These include various kinds of impediments which governments can impose upon the shipment of imported goods into their market, under policies which heretofore have been considered and treated as matters of domestic sovereign interest and not the sort of thing that is the subject of international negotiation, despite the fact that these domestic policies have international consequences.

I want to tick off very briefly the things we're dealing with so that you have some idea of the diversity of what is involved. We're dealing with a standards code, an effort to create an international set of procedures governing the way in which standards are established. This would include health, environmental, safety, and performance standards. Standards can be barriers to trade; they can artificially eliminate the products of your company abroad or the products of a foreign company coming into this country because of a requirement that may have a perfectly justifiable motivation but adverse international consequences.

Our effort in this undertaking is to establish a procedure that would favor internationalization of standards. This would force standard-setting bodies here and abroad to take into account the international trade consequences of adopting a particular standard.

Second, the field of government procurement represents a growing market as governments become more interventionist and larger buyers.

We believe we can compete effectively in government procurement on such things as telecommunication, power generating equipment, computers, and a number of other export items. In part we are now barred from doing this because foreign governments have a very shadowy and very unclear—but very effective—buy-national bias in their procurement policy.

The United States has the buy-American act and we are very clear about discriminating in favor of domestic suppliers within specific limitations. We also have elaborate procedural regulations that determine the way in which offers are made public, competitive bids are awarded, bidding results made public, and so on. That's not true overseas and so we are seeking to open this market up by establishing an international code that will make government procurement subject to international competition.

We're also dealing with the subject of customs valuation, what the rules are for valuing goods that come across national borders. We're dealing with the subject of subsidies and the enormous variety of ways in which governments can artifically assist their exporters to enter our markets and vice versa. And we're dealing with the subject of quantitative restrictions and licensing texts.

We're also dealing with the question of structural reform of the institutions under which international trade is regulated and has been conducted for nearly thirty years, particularly GATT, the General Agreement on Tariffs and Trade. Both mechanical issues, as to how governments can consult better with one another, and broader policy reforms are being addressed. This includes such questions as what is the proper role of the international trading system vis-à-vis the needs of the developing countries and how better to accommodate east-west trade which was not contemplated thirty years ago when the rules were written, but which is growing and will continue to grow.

So we have this enormous agenda of a dozen or so different substantive negotiations all going on under the umbrella of the multilateral trade negotiations, with all these ninety-six nations.

It becomes a rather complicated three dimensional kind of chess game. It's no wonder that there's not been substantially more progress. We really began negotiations in early 1975. The groundwork has been laid and we're waiting for the policy decisions to be made by the political leaders. One of the outcomes that you should look for from the Economic Summit at Downing Street is an announcement dealing with the subject of these negotiations, what kind of timetable and what kind of priority the governments involved are prepared to assign the negotiations and the extent to which they're prepared to take the hard political decisions, to make the concessions that are called for.

Now, what is important about these negotiations is not just the specific elements that are involved, some of which will have a direct bearing upon the ability of your company to compete overseas and the ability of your company to defend itself against overseas competition. What is more important is the role which the MTN is going to play in laying the foundation for the conduct of world trade in the 1980's and the 1990's.

It becomes a rather complicated three dimensional kind of chess game. It's no wonder that there's not been substantially more progress.

Paradoxically, as the reality of economic interdependence becomes more substantial and more readily apparent, differing national responses to economic conditions seem to create more conflicts; so that even as we come closer together, we are more likely to get into conflict. One sees an example of this in a talk I had with a chap in the audience from the Ericsson Company: The French government is engaged in a major procurement to improve their telephone system. They want to spend about $25 billion over the next eight to ten years to upgrade their equipment. But the French government took the position that Ericsson, a Swedish electronics company, and ITT had to sell out their French subsidiaries to French interests in order to be able to compete successfully for a chunk of this telecommunications business.

There are legions of other examples of how European or Japanese interventionism—which is far more extensive than it is in the United States—is going to involve those governments in taking an active part in trade decisions that will affect our private interests. And that is a sure-fire formula for conflict. It's not fair, we say, to force private American companies to compete against public treasuries. Private capital shouldn't have to compete against the public purse. What is needed is a series of new mechanisms, international institutions that don't now exist, to provide a way for governments to talk about these problems and to go about—if not solving them—at least minimizing the adverse consequences that could result.

. . . the fact of the matter, of which very few Americans are aware, is that we have a whopping trade surplus with the European Community.

We in the West have an enormous security stake in ensuring that economic conflicts between us, which are inevitable and the result of healthy competition, are resolved in a way which is not destabilizing and which doesn't weaken us vis-à-vis Eastern Europe and the Soviet Union.

And so this negotiation is important because it is laying the groundwork, in some of the nontariff barrier agreements that I've talked about, for the shape of commercial diplomacy in the decades ahead.

I want to say a word or two about U.S.-European trade because, as I mentioned, there are misconceptions on the subject. It is widely believed that entry to the United States market for goods manufactured in Europe is a privilege to be conferred by the U.S. only grudgingly and only by exacting substantial costs from the Europeans.

However, the fact of the matter, of which very few Americans are aware, is that we have a whopping trade surplus with the European Community.

In fact we have had a trade surplus with the European Community in nearly every year since its founding in 1958.

In 1975 we had a $7 billion trade *surplus* overall in the United States. We had a $5.2 billion trade surplus with the European Community that year. Last year, we ran a very substantial trade *deficit*, $15 billion overall (in large part accounted for by increased imports of petroleum). But even though we shifted to deficit from surplus, our surplus with the Community grew to more than $6 billion. And it's going to be big again this year.

Now that's all fine and it's an economic plus for the United States. But it does pose the problem of the Europeans feeling, as they now feel with respect to their trade deficit with the Japanese, that they're being taken advantage of by the U.S. Even if we can compete better, even if we're more efficient, they may feel the imbalance between the United States and the EEC is so substantial as to require some additional concessions on our part, which we're not going to want to make. That's a danger point I would flag for you.

Finally, just let me say that as the United States confronts the end of the 1970's and as it looks to the longer trends, we have a substantial competitive advantage in dealing overseas and we ought not to be defensive. The United States has controlled its rate of inflation better than most other countries except West Germany. We have also controlled our rate of unit labor cost increase better. And third, the dollar is more competitive than it was a few years ago. All three of these elements make us more competitive than we were and give us the opportunity to face the future with great confidence in our economic strength and our ability to compete. This will recreate, I think, the era of the successful Yankee trader.

Question and Answer Period

Q: *Mr. Walker, can you tell me how you appraise the effect of Mr. Carter's human rights policy on our international business in the future?*

A: To be perfectly candid, it's much too early to tell. The subject of human rights has not been raised in the trade field. I rather doubt that it will be, although it's conceivable. There is likely to be some rub-off in the trade field of the decision by several Latin-American nations to renounce military credits under their agreements with the United States. But certainly on the basis of what has been said so far, and the reactions that have been received so far, I don't see any rub-off yet. It's much too early to cast any judgment.

Q: *What about Cuba? The question of human rights.*

A: The Ford Administration had gone quite a way toward seeking a normalization of relations with Cuba until late 1975 and the involvement of Cuban troops in Angola. There is every reason to believe, based upon published reports, that the Carter Administration is moving in that direction as well, although President Carter is insisting that a more acceptable Cuban attitude on human rights be made part of it.

Q: *You omitted the remarks on protectionism in the first part of your speech. I'd like to ask you to come back to it and explain it. It was almost assumed in your speech that everybody would blindly support trade—which sounds good but sometimes gives us the feeling that we're being had. I can think of Italian shoes or Sony television or whatever it is and I wonder whether short term or medium term this is in the best interest of companies represented here tonight.*

A: I'll insert now that section of my remarks that I skipped over. I'll keep it short though.

The subject of American protectionism has a variety of elements. On the one hand, and at one level, we have the very obvious desire to reduce barriers, increase economic efficiency, avoid resort to "beggar thy neighbor" policies like those of the 1930's that led to the breakdown, the collapse of the economic system, and in turn brought about World War II. There's a universal determination, a universal conviction that we must avoid that. And in the face of the very serious crisis of the mid-1970's, the so-called trade pledge taken by the major industrialized nations to avoid restrictive trade actions has avoided that. Protectionism in this traditional sense is still important. Being against protectionism and for liberal trade, over the longer term and in a general sense, has been the policy of the U.S. and is in our interest.

Yet, at the same time, there are undeniably specific industrial experiences that force one to confront the trade-off between the adverse employment effects of increased imports on the one hand and the very general benefit of liberal trade on the other hand. One must then ask—as you put it—are we being had? The President now confronts four major requests for protective action for the footware industry, for the sugar industry, for the television industry, all of which have decisions

rendered by the International Trade Commission, and by the specialty steel industry, where quotas are now in effect. The reports assert that these industries have been injured by increased imports, that there has been unemployment caused by increased imports, and that the reaction ought to be either to increase tariffs or to impose very stiff quotas.

It's a very tough trade-off. In the case of television, the Japanese have clearly targeted upon an industry and a market and have had substantial impact. Yet what's the answer? Ray Scherer is sitting over here representing RCA Corporation. As you saw in the paper today, RCA is the only one among the major TV companies to vote against the recommendation of the rest of the television manufacturing industry to ask President Carter to impose the remedies suggested by the Trade Commission.

The question of whether government should support this or that industry presents very, very tough specific trade-off problems. And so that's another level of the issue.

A third level is one suggesting that the whole notion of "protectionism," in its traditional sense, has become irrelevant in the kind of environment in which we have major investments by nations in industries that are so critical and so central to the economics, the national security, indeed to the whole system of the society, that it is implausible that governments would permit them to be badly hurt by foreign competition. I speak, for example, of the steel industry or the shipbuilding industry. My colleague from Japan and I were talking earlier about those two. These industries are so important that no government can permit them to be severely affected or seriously damaged.

So, what is protectionism or what is liberal trade in that kind of environment? Again it comes back to the point I tried to make earlier: as we become more economically interdependent, our responses to the kinds of economic pressures that we confront will lead paradoxically to more conflict. Therefore we need international institutions that will give us the opportunity to talk together and find even some imperfect way of resolving conflicts among industries that are so important that no nation can sacrifice them on the basis of comparative advantage to some other nation.

Q: *What about the multinational corporation that really maximizes profits by switching production facilities among countries. How does your discussion impinge on that reality?*

A: The multinational corporation is under assault virtually everywhere. Yet it is recognized—in trade circles at least—as being an extraordinarily effective and efficient allocator of resources. The question is the extent to which the U.S., as a developed nation and the home of many multinationals (although not anywhere near as many as Western Europe), is prepared to impose constraints upon the way in which our corporations operate overseas on the one hand, and the extent to which the nations in which these companies operate—particularly the less developed nations—are prepared to permit them to operate.

There is a perverse attitude among the developing nations that limits investment in the kind of plant and equipment and efficient operations that will lead to employment, which will, in turn, lead to a process by which poverty can be alleviated, education provided, and growth prospects enhanced. The missing element in the developing country's demands for new international economic order and a transfer of wealth from rich to poor is the element of investment. That, along with the element of stability, will draw funds from the developed world to create the industries that can provide an environment fostering growth and efficiency.

There is no easy answer. There is a process that is going to go forward. Developing countries have seized upon a couple of issues in the economic field as the device by which they are carrying forward their political struggle for increased transfer of wealth from the developed countries.

The language may be economics but the struggle is political and we ought to recognize it and treat it as such. That being said, therefore, one ought not to expect that economic logic will dominate the discussions that take place.

Q: *Would you care to comment on the economic ramifications of the Concorde dispute between Great Britain and the United States?*

A: I've been asked about the Concorde when speaking before some French audiences, which is some sort of fun.

I've used this response. Let's suppose that the French Parliament in 1970 had a very bitter and divisive debate in which, by a slender majority, the French decided against building the supersonic aircraft because of its cost, because of its inefficiency, and because of its environmental problems. It just decided against it. But the bloody Americans, you know, hardheaded, uncouth, uncultured Americans, they went ahead and they developed this damned aircraft. After they finally built it they found it made a lot of noise, and it had lots of problems, but still the Americans came around to the French in Paris and said, "We want to land this bird at Charles DeGaulle Airport."

And what do you suppose is the answer the French would have given us?

But make no mistake about it. The French view the decision on the Concorde as having nothing whatever to do with our particular cultural values or with our environmental sensitivities. They see that for years they have been buying Boeing aircraft, McDonnell-Douglas aircraft, or Lockheed aircraft (98 percent of the world's commercial aircraft are U.S. made). Now the French and British have developed an aircraft that has something that ours do not and our refusal to permit landing rights to the Concorde is viewed as nothing but a device to protect American industry against foreign competition.

Q: *Have you tried to second-guess how President Carter is going to resolve these trade dilemmas on shoes, sugar, television, and so on, in light of the conflicting pressures he confronts?*

A: President Carter has made it abundantly evident, both during the campaign and since he has been in office, that he supports and will work for an improved, more efficient—more liberal is the word that we use—world trading system.

It is significant that hours after the inauguration, he sent Vice President Mondale on his round-the-world trip where one of the messages he delivered to Europeans and to the Japanese was the determination of the U.S. to make freer trade an important element in our policy.

At the same time, he has to resolve the trade-off between employment effects and freer trade. There is no doubt in my mind that the President means what he says, that he is a free trader, and that he will seek to move American policy generally in the direction of free trade. There is no question in my mind

either that it will be extremely difficult for him to make that kind of policy credible if he goes to the Summit on the seventh of May having taken a series of protectionist actions. And so there are great pressures upon him to maintain a freer trade environment.

On the other hand, he has a number of supporters in organized labor who helped pull him over the edge at the end of the presidential campaign and who have a deep and abiding interest in the employment effects of these issues. Particularly as an outgoing lame duck, I am not about to predict how he's going to resolve that conflict.

Q: *Ambassador, what advice do you have for those of us who would like to get our point across in these trade matters in the next round? How could we—as companies—get our thoughts across to you on what our problems are in respect to the next round?*

A: One of the enduring legacies of the Kennedy Round is that we lost; that the Europeans and the Japanese had industry advisers sitting with them, breathing information in their ear at just the right time, whereas the poor American negotiators were sitting there inadequately advised and consequently we were outbargained.

Well, I don't think that's true, but it's part of the conventional wisdom of the Kennedy Round.

In any event, to ensure that that would not happen again, the Congress, in its wisdom, adopted legislation as part of the Trade Act granting us negotiating authority, which created, would you believe, forty-five—forty-five, count them—separate advisory committees composed of 900 individuals, experts from agriculture, labor, business, academia, consumer groups, and so on.

The fact of the matter is that these committees have been damned helpful and damned successful.

I would bet that fully 75 percent of the companies represented in this room have representatives on one or more of these private-sector advisory committees. If you don't, you damned well ought to. Because these committees help us determine what American interests are. Not what the State Department wants or what the Office of the Special Trade Representative wants, but what is truly the American interest, as represented by its companies and its farmers and its labor unions. And so we've got to ask you, we've got to find out. Massive reports have been prepared and they're being used.

It is also, from our standpoint as administrators for the program, a device by which we can communicate to the leaders of American industry what American trade policy represents and build through that policy a genuine political coalition to support the agreements that we ultimately reach in Geneva, which require approval by the Congress.

So that's the mechanism. It's being actively used and if your companies aren't involved, get them involved.

Q: *Can you comment on the prospects for liberalized trade when every country in the world is running a deficit except a few oil exporting countries and two industrialized countries, West Germany and Japan. Isn't it more likely you're going to get more restrictions?*

A: In the short term we may get some specific product protective actions such as those that are being pressed upon President Carter by the shoe, the TV, the sugar people, the steel people, and so on. There may be a little weakening in resolve. Although not much, I might say. I think the OECD trade pledge will hold. But I think to view the multilateral trade negotiations, and the effort to liberalize trade, in the context of the economic conditions that exist today or will exist in the next year or two, is to miss the point. Because these negotiations are going to establish the framework within which economic and commercial relations will be conducted in the 1980's and the 1990's.

We are creating in these negotiations the environment in which trade will take place for the balance of the twentieth century. It will have very little effect in the short term. Look at tariffs for a moment. We're going to be reducing tariffs over a period of up to ten years. Well, if one has, say, a 6½ percent tariff, one supposes that it could be reduced by two or three percentage points over ten years and it might not hurt all that much.

I just don't think that these negotiations ought to be viewed in the context of the short term. It's much more a longer term systemic effort to improve the commercial environment. The nontariff measure codes are the same. They won't have any appreciable effect until several years down the road.

Q: *Mr. Ambassador, I have one question that is probably not as hard for you to answer as some of these others but, obviously, it seems the United States is going to take a far more liberal attitude and is trying to reinstate negotiations with Cuba. What effect do you think this is going to have on the economy in the Bahamas, Nassau, and the islands a little closer?*

A: Not much at all in trade terms. My greater concern is the extent to which Cuba is going to continue with its process of exporting political instability to other countries. One looks, for example, at Jamaica and one has to be very concerned about the influence of the Cuban government upon the Jamaican government and the attitudes and the stability in that region.

Looking ahead, those of you who are looking for trouble spots to be concerned about (and who have already given up trying to figure out southern Africa, which is going to be a very messy place) should watch the Caribbean. The Caribbean is a very unstable area. It is close to the United States and there are threatening elements—politically, from a national security standpoint, and economically. It bears watching.

The Ups and Downs of Corporate Advertising

Robert S. Marker
Chairman-Executive Committee, Needham, Harper & Steers, Inc.

Barry Biederman
Senior Vice President, Needham, Harper & Steers, Inc.

Marker: From the director of corporate advertising's point of responsibility, most activities move either up or down the organization.

Up—to top management in establishing the need and defining the role, policy, strategy, and budget for corporate advertising.

Down—to staff and advertising agency in the planning, creation, and implementation of corporate communication.

In both directions the human nature of the organization comes into play.

The corporate advertising director deals in the strongest of human personalities as the function relates to top management and its view of why and how the corporation should advertise itself.

And, the director deals with the most sensitive of beings in pushing the call button for creativity from inside and outside sources.

There is no such thing as a corporate conscience in any substantive sense.

Our presentation today offers the corporate advertising director some suggestions for applying energies up the organization to position corporate advertising effectively, then down the organization for managing the development and creation of corporate programs.

We come at this subject with two hypotheses:

1. Corporate advertising is bought by the chief executive officer because it will let him or her accomplish something he or she wants to accomplish. If it doesn't, he or she won't buy it.
2. The best corporate advertising running today comes not so much from what the corporation knows about advertising, but more from what it knows about advertising people.

Our suggestions, we feel, have good reason to be heard; corporate advertising is in a new era.

- Today it is the voice of corporate leaders, not merely the corporation.
- There is no such thing as a corporate conscience in any substantive sense. Conscience develops in individuals and it is the influence of individuals on corporate behavior that gives effect to conscience. These individuals in the modern corporation are its leaders.
- Today corporate advertising must demonstrate results. Generalized effectiveness does not appeal to top management. The issues are too serious, costs too high to leave to murky evaluations.
- Today corporate advertising has little time for bureaucracy and indecision. It must often move quickly in response to pressures, change drastically to meet new and often surprising conditions.
- Today corporate advertising requires new skills, a new kind of advertising people, assembled and managed in new ways.

Barry Biederman will take you up the organization—how to position the needs for corporate advertising with top management.

I will then take you down the organization—how to increase productivity and quality of the corporate staff and how to get the most of the best from an advertising agency.

We came upon our subject from personal experiences and it may be helpful to relate them to you, immodest as spouting one's credentials always sounds.

Barry heads up our subsidiary Corporate Futures, a unit specializing in corporate advertising. In response to mailings and advertising heralding our record and specialization in this exciting field, we were frequently approached with varying versions of the question: "How can I sell corporate advertising to my management?"

We heard things such as, "I know we need a campaign; five vice presidents know we need a campaign; even our sales organization says we need a campaign, but the big boss isn't sure."

Barry is both the writer and senior account representative on one of the finest and toughest corporate accounts in the country—ITT. In the past he has written and supervised the work on other corporate accounts—Xerox and Atlantic Richfield, among them. He's encountered top management perspectives in Bristol-Myers, General Mills, General Motors, to name a few.

I've worked with the top officers and the advertising managements of nineteen of the Fortune top 500 corporations—"worked with" meaning developing advertising plans and strategy with top officers, making presentations in the often frigid environments of walnut-paneled board rooms, and experiencing at first hand their advertising management and agency relationship procedures.

My conclusion is simple.

Some corporate executives know how to get good advertising planned, sold, and executed; some do not.

The reasons for success can be identified; the background for failures is shockingly universal.

But to the starting point: What are the most effective selling points for corporate advertising?

Here's Barry Biederman.

Biederman: When I began as a young cub copywriter in the advertising business, a quarter-century ago, I made a fortunate investment.

Some corporate executives know how to get good advertising planned, sold, and executed; some do not.

It was a book on retail advertising. The author thoughtfully provided a checklist of forty-eight selling stratagems (as he called them) that would guarantee a sale. They stood me in good stead. I've managed to peddle quite a few clients' wares since then. I've also managed to survive—and as Peter Drucker points out somewhere, survival is the first obligation of anybody in business.

This morning, I propose to give you some of my own "selling stratagems": eight arguments to sell a corporate advertising program to your chief executive officer. Or, if you already have a campaign, to justify continuing it. They're a kind of verbal survival kit.

The first thing you might say to your c.e.o. on behalf of corporate advertising is this: "You (meaning the c.e.o.) are too busy not to do it."

If your chief executive is like most, he's spending more and more time these days on activities only distantly related to your principal business. Activities of a public relations or public affairs nature.

They're taking a lot of busy executives' time. A partner in McKinsey & Co. said: "Just a few years ago the c.e.o. of a big company spent 10 percent of his time on external matters. Today the figure is generally 40 percent." That quote is from 1974. The percentage *hasn't* gone down.

Now some of those activities are unavoidable. For example, a meeting of security analysts where the c.e.o., and nobody else, is asked for.

But what about all those other PR-related functions where the c.e.o. himself isn't required. There are dozens, and in many instances corporate advertising would be just as effective.

Your product marketing people wouldn't dream of sending a salesman out to make a sale that an ad or commercial can make. Why shouldn't the same principle apply to sending a busy chief executive out on the talk circuit?

Selling point two: "Your competition is doing it."

Just because somebody else is running corporate advertising, that's no reason why you, necessarily, should.

But it's a fact that more and more companies are running corporate advertising. And they do represent competition, whether or not they're even in the same business you're in.

You're competing with them for investors' dollars. You're competing with them to attract the best employees. You're competing with them, very possibly, in wooing potential merger partners. And so on . . .

And the fact is, these competitors are using corporate advertising in ever increasing doses:

- In 1975 (the last date we have figures for) corporations spent over *$200 million* in corporate advertising on TV alone.
- And according to another 1975 estimate, the total for all corporate advertising was about *$1 billion*.

Impressive figures. The corporation that fails to raise its voice in this Babel is likely to go unheard.

Here's the third selling point to justify corporate advertising to your top man: "You never know when you'll need it."

At this late date, nobody has to be reminded again that business has fallen in public esteem. You all know what the Harris and Yankelovich figures say.

The only question, from week to week, is: Whose turn is it in the barrel?

You can never be sure where the attention of the antibusiness critics will turn next.

Obviously it's prudent to store up public warmth toward your corporation before the icy headlines blow your way.

And that's a key function of corporate advertising.

It's not only *prudent* to build up a bank of support and understanding—it could be *crucial*. We noted before that the first obligation of management was to survive. And there are cases where a high regard for management has made all the difference.

. . . it's prudent to store up public warmth toward your corporation before the icy headlines blow your way.

Let me cite just one example—the experience of Xerox and RCA, when both of them decided to pull out of the computer business.

- RCA's decision—which, after all, was an admission of bad corporate investment strategy—was reportedly one of the principal reasons why the chairman of the board lost his job.
- In the case of our client, Xerox, there was a greater confidence in the management; a confidence based on its overall record—and on a successful, long-term corporate communication program. When Xerox said goodbye to computers, the decision caused only a momentary flurry.

Corporate advertising: you never know when you'll need to fall back on it.

Which brings me to selling point number four: "There's no time like the present."

For several depressed (and depressing) years, much of what business had to say about itself fell on unreceptive ears. The vogue word was "credibility"; business didn't have much.

Things have improved somewhat since then. Not that the world is flocking to sing your song.

But there are distinct signs that the people out there are at least readier now to give you a fair hearing.

What this means to a corporate advertiser is that his message—whatever that message may be—stands a greater likelihood of being listened to.

And that's reassuring, whether you're a first-time corporate advertiser or a veteran.

Selling point number five to lay on your c.e.o.: "You don't

want your people to feel left out, do you?"

Like Seventh Avenue, the world of management has its fashions. One of them, for several years now, has been the talk about worker alienation.

. . . there are distinct signs that the people out there are at least readier now to give you a fair hearing.

The bigger your companies get, the harder it is to explain to your people what it is that you're all about. Irving Shapiro, the chairman of DuPont, said: "In the past people wanted a steady job, and income was all important. In the future, people will want a sense of participation, satisfaction, contribution."

This matter has taken up considerable time on the part of personnel directors, to say nothing of the editors of the *Harvard Business Review.* And certainly there are many things to be done about it.

But I'm here to put in a plug for corporate advertising as one contributing answer. Not that keeping a smile on your employees' faces justifies, by itself, a major advertising program.

But every time you advertise to the general public, explaining your corporation and what it does, you make yourself more understandable to your employees too.

You give them some sense of what the corporation's mission is—even how they fit into it.

I can tell you, from personal observation among our clients, this *can* make a difference. It can help shape job attitudes among the people who work for you, and ultimately even do something about the kind of people you're able to recruit.

Besides, so far as this selling point goes, you can always quote the chairman of DuPont to your c.e.o.

Here's selling point six: "You owe it to your: shareholders, board of directors, wife (pick whichever ones fit)."

This list is only the beginning. Most chief executives have any number of different publics. Everybody from the people who work for them to the critics who wouldn't work for them on a bet.

Corporate advertising can be enormously helpful and efficient in this regard—particularly when, as is usually the case, you want to say something a little different to different groups.

By way of illustration: last September we questioned our Corporate Futures Sounding Board—a panel of 78 top communication executives at Fortune 500 companies, whom we query periodically on key issues. (Incidentally, a quarter of the companies represented here today are also represented on our Sounding Board—and eleven of our panelists are in this audience.) We asked the Sounding Board: (Slide) "Which of the following impressions about your company do you want these publics to hold most strongly?" They were asked to select five, ranked in order of importance, one being most important.

We've abbreviated the original list for simplicity.

Note the variations in ranking from public to public. The most important message to convey to the general public, No. 1, "makes quality products," comes out in the plant cities as No. 3.

In the plant cities, the No. 1 impression to convey is, understandably, "cares about plant community." This drops to fifth in importance as a message to the general public—and doesn't even show up among the other groupings.

To make our point again: the more complex your corporate communication tasks are, the more useful corporate advertising can be in managing them.

You owe it not just to your shareholders, board of directors, wife, employees, and so on—but also, Mr. Chief Executive, to yourself.

Selling point number seven: "You'll always know what you're getting for your money."

This is particularly persuasive for the result-oriented c.e.o. who doesn't realize yet that corporate advertising has become result-oriented.

For unquestionably, it *has.* Any number of major corporate advertisers are using regular periodic tracking studies to make sure their advertising is still on target and working.

Every good advertising agency knows these research techniques.

And some agencies—Needham, Harper & Steers, and possibly others—have unique techniques of their own.

The point is corporate advertising today is just as geared to delivering a measurable return on the advertising dollars you invest as product advertising has always been.

And that's something irresistibly interesting to a chief executive. Just *how* interesting we learned recently when we ran this house ad for Corporate Futures, our corporate advertising subsidiary.

"Is anybody keeping score on *your* corporate advertising?" The response in phone calls and letters was noteworthy, indeed.

That may be a tribute to the pulling power of the magazine we chose to run this ad in—Fortune, of course.

But surely some of the impact traces back to the subject matter—and the urgent desire of the boss man to know what his corporate advertising dollars are buying.

Which leads us to our eighth and last selling point for your c.e.o.:

"You already have a corporate campaign whether you realize it or not."

Bruce Barton (*the* Barton of Batten, Barton, Durstine & Osborne) advanced this argument in a speech thirty years ago, and it seems, if anything, even truer today.

. . . corporate advertising today is just as geared to delivering a measurable return on the advertising dollars you invest as product advertising has always been.

Your corporations are so big that you really have no choice in the matter. You cannot adopt, in that now passé phrase, a low profile.

Any corporation that has plants in half the states, tens of thousands of employees, a couple of dozen regulatory bodies birddogging it, and consumerists, environmentalists, and other critics gunning for it—any such corporation has a public image, whether or not it wants to.

Why not just ignore this whole image business? Because the public personality a corporation projects *can* affect the corporation's ability to conduct its affairs. To put this as strongly as I can, how people think about your corporation can directly

affect its value—the equity value, as expressed in shares of your company's stock.

Recently, a well-known research firm did a study of how Wall Street and the investment community regarded a major U. S. corporation.

For obvious reasons, we won't name either the research firm or the company. But two verbatim quotes from that study seem appropriate.

Your corporations are so big that you really have no choice in the matter. You cannot adopt, in that now passé phrase, a low profile.

A portfolio manager said of the company's stock: "I believe it's undervalued because of bad press in recent years, not because of quality of the business which is very high."

And this, from a security analyst: "speculation . . . It's a speculation because of the uncertainty of how long you will have to hold it. If the newspaper prints [more] bad news about it . . . the stock price will overreact and you'll have to hold it longer to realize its rightful appreciation."

Let me repeat, for the c.e.o.'s benefit: You have a national campaign, whether you're advertising or not. The things people say and know about your corporation, Mr. Chief Executive, can affect your ability to do business. It can even affect (to go back to the beginning of our talk) your ability to survive.

"The only question you have to decide," said Mr. Barton thirty years ago, "the only question . . . is whether it is worth a little money, a fraction of 1 percent of your annual sales, for advertising of your company that will be factual, informative, and constructive."

That still seems like wise talk (even if it does come from a onetime competitor) and something well worth recalling to your man on top.

Marker: The need is recognized, the objectives set, the budget allocated; back down the elevator you go to get it all done.

It's a long and lonely ride, for now you realize how much help you need, how little time you have, and how many forces and faces you must please.

Up until now you were of one mind: to persuade top management to move in a specific direction, make a certain commitment, take a single course of action—a corporate campaign.

Now you're faced with choices as you move to get it done.

I'll risk naming four choices you'll have to make. And even more hazardous, I'll venture the best choice in each case.

Choice number one—your priority. Make it advertising effectiveness; results against specific objectives. This priority, articulated clearly and repeated often, will help you withstand the pressures to compromise. Opinions, judgments, and suggestions will come at you from many directions—marketing management, sales personnel, media, your legal and financial executives, and many more.

Accommodations you'll have to make, but keep returning to this professional priority: advertising effectiveness. And keep research sophisticated and continuous to give you factual, tangible support.

The tone you set here is crucial. A tone of strength, conviction, and professionalism—or a tone of fear reaction and weakness.

You can say, "That's easy rhetoric at Sandpiper Bay but it could cost me my job or cut my bonus in the real world back home."

In some corporations true perhaps. But the facts are these: the most persuasive corporate advertising running today comes out of situations where the corporate advertising director is enlightened and strong and the chief executive officer is highly respectful of those skilled in the art of communication.

Any other situation leads to mediocrity, not to mention the time wasted reworking and rewriting, nor the cost of sedatives to keep us calm while we go on guessing at what it is managements really want.

Make this known to all concerned: This will be the most original, most effective, most awarded, highest quality corporate campaign ever to run anywhere for any corporation. Say that at the start of every day, at every meeting, to everyone involved.

Choice number two—your staff. If you must choose between a corporate career person whose job in your department is a stopover en route to other things and an advertising career person who wants your job someday, take the latter, threat though it may be.

Corporate careerists temporarily residing in corporate communications are sometimes more interested in survival (getting through the assignment unscathed) than they are in advertising effectiveness.

If you have trainee or entry level positions in your department, don't let a beginner get near the corporate campaign.

Working on a corporate program of any scope will either turn fresh-from-school employees into slobbering sycophants (if they're so inclined) or, if they're in heat about social responsibility and don't know what it means, move them toward con-

An executive charged with high volume production tasks is rarely able to manage strategic and creative roles, too.

About three years' experience in advertising or public relations gives you a better base to work with in young staffers.

Women have much to offer corporate advertising management. The able ones are in such great demand they haven't yet turned into lackeys, and their sensitivity to human factors forces a conscience on the creative process.

Try to separate as much as possible the service and strategic functions in your department.

An executive charged with high volume production tasks is rarely able to manage strategic and creative roles, too. Organize to get the creative efforts as far from the service activities as possible.

One highly strategic position you should fill with care is that of the person, other than yourself, who will work with the advertising agency.

Give good thought to this liaison. Too many advertising managers give too much of their time to the managing of advertising things, and all too little to the inspiration, development, and motivation of advertising people. Including those in their agency.

Why should you or your appointed associates have to be

concerned with this? Isn't it the agency's responsibility to inspire and motivate its own people? Yes it is, and the good ones do. But there's competition for the best talent in an agency and I'm surprised that more advertisers don't realize this. The smartest clients of any agency are in there nurturing and drawing on the best talent for their account.

Choice number three—should you have an agency at all? You could say: "Corporate issues are complex. Confidentiality is often essential. Who knows our company better than my own people? Won't I spend more time explaining my problem and needs to an agency than it would take to do the work in my department? And couldn't I save money doing it with my own staff?"

Many advertisers don't know the difference between someone who acts, talks, and looks talented and someone who is talented.

Maybe some services are better done in house. But when truly talented advertising people are needed, you're better off in an agency. No substitute has been found for the problem-solving, strategic, and creative brainpower gathered in the best agencies. And it never will be found because the people who provide the brainpower are in short supply and thrive best in the relatively unstructured, creative environment of an agency whose first business is solving problems and generating ideas.

You will, in the right agency, get an objectivity you sorely need in corporate communication. You need it more, perhaps, than you do in product advertising. There are more emotional and subjective elements at work in corporate advertising.

An agency can be close, but not too close; it can be inside, yet remain outside; it can see a problem your way and it can see it your adversary's way. Treasure this unusual situation; there's nothing else like it in American business.

You should get experiences from a good agency that will broaden your base of knowledge. An agency working on several corporate advertising accounts finds astonishing parallels of problems and opportunities among them. Your tendency to think of your corporation as wholly unique limits solutions; your agency can help you remove the limitations.

Choice number four—what kind of advertising agency? As similar as we must look when you read *Advertising Age* or view the glass boxes we work in on Madison, Michigan, and Wilshire, we are as different from one another as are the advertisements and commercials we create and the clients we work for.

Three things distinguish one advertising agency from another:

- *The focus of management.* Where it puts its money, time, and emphasis. And, more specifically, what its commitments are to corporate advertising.
- *The talent assigned to your account.* Its abilities, experiences, interests, and motivations. Is it the best people in the agency, or has corporate advertising been assigned to the unimaginative, those who couldn't cut it elsewhere?
- *The working environment.* The organizational atmosphere the people work in.

The focus of management: Look first at the top layer of management. Does it manage advertising or does it manage only an advertising agency? Is it fat or lean? Is it cumbersome or neat? What do they do with their profits? Do they use them to make themselves better or just bigger?

Is corporate advertising a sideline, just an opportunity for more billing, or a highly professional part of helping their clients succeed? What have they invested in corporate advertising to give them special expertise?

The talent on your account: Here's what one major advertiser had to say: "The magic words are small and capable. Although we employ two large agencies, they have small numbers of capable people working on our business. I don't believe that agencies which put large numbers of people on an account necessarily turn out the best work. And what work they do turn out is apt to be turned out more slowly."

Many advertisers don't know the difference between someone who acts, talks, and looks talented and someone who is talented.

Truly talented corporate advertising people have problem sensitivity—an ability to recognize that a problem exists. They see corporate problems as intriguing communication problems. This distinguishes them from the many spineless defeatists who become as much of a problem as the problem itself.

And they have an abstracting ability, the ability to break down the complex into easy-to-handle components.

When pseudo talented people are given problems they tend to become bewildered or confused by the whole ugly mess. They waste much time in trying to figure out where to start.

Truly talented people will start by biting off a convenient chunk and going to work on it.

They have a synthesizing or organizing ability, a skill that pulls seemingly unrelated parts into a working whole.

A productive creative environment has a minimum of approval layers. It is bolstered by rapid and rational decisions.

The working environment: Your department and your agency create a working atmosphere. It is in the control of somebody and if it's not you and the head of your agency who is it?

Reno Taquiri of the Harvard Business School writes, "The way an individual carries out a given task depends upon what kind of person he is, on the one hand, and the setting in which he works on the other." And he's not talking about interior decoration.

There are three settings in corporate communication:

1. Chaotic, angry, confused
2. Placid, dull, inactive, uneventful
3. Bright, innovative, decisive, active

Only the last (bright, innovative, decisive, and active) is attractive to high talent people. And they crave measurements of their work, feedback on performance. They thrive on praise and appraisal.

A productive creative environment has a minimum of approval layers. It is bolstered by rapid and rational decisions.

The greatest wastes, errors, and blunders in corporate

advertising today result more often from an environment of confusion, tension, politics, and agency cowardice.

So, seat solidly your priority for effectiveness in corporate advertising.

Staff for talent and dedication to advertising effectiveness, not corporate security. Hire young people who are fired up about communication, not corporate ladder climbing alone. Welcome women to this dynamic field.

Separate as much as possible the strategic staff functions from the service staff functions.

Choose skillfully the people who work with your agency.

Engage an agency that's in corporate advertising for the right reasons. Demand a small team of the right specialists. Deal with agency management willing to invest in being better, not just bigger, who foster and manage a working environment of tough objectivity and inspired creativity.

In closing let me show you the results of two especially rewarding corporate advertising environments, advertising we've done for our clients ITT and Xerox.

ITT, beleaguered as it is from crisis to crisis, stays cool on corporate communication. The creative approval process involves only two executives and our team on the account is lean and fast. We do good work and they praise us when we do.

Xerox knows how to use an agency. The corporate personality is a clear profile. The place of products in its advertising is in good focus. The corporate advertising director and his staff are innovative, lean in organization, heavy in responsibility, respected by top management, decisive, open, and with no secrets from their agency.

The I Imperative

Stuart B. Upson
Chairman and Chief Executive Officer, Dancer-Fitzgerald-Sample, Inc.

Philip S. Boone
Senior Vice President, General Manager/Western Operations, Dancer-Fitzgerald-Sample, Inc.

Upson: I deeply appreciate Fortune's affording us the opportunity to address such a distinguished group of communications professionals (including my brother, my captive audience for the first time).

This is a kind of special world for me, for I have spent my thirty-one years at Dancer-Fitzgerald-Sample concentrating on consumer goods and services (except for Consolidated Edison and the Glass Container Institute).

But to me, the world of corporate communications has assumed increasing importance in the last six or seven years.

Not only are corporate communications improving dramatically, they are fundamental in this world at this time. I deeply believe they are vital to our economic system.

So, while today's DFS star will be Philip Boone, our preeminent expert on corporate communications, discussing "The I Imperative," I am going to steal eight minutes of Phil's time to tell you my I Imperative and issue a challenge which I hope you can't refuse.

It goes like this: I have to assume a key goal of most of your companies is to stay in business, profitably, over time. Seems like a reasonable goal for your stockholders!

A strong obstacle to that goal is what Mr. Kirby yesterday described as a "hostile business atmosphere." Hostile is perhaps too gentle a word—and I certainly need not define it further for you ladies and gentlemen!

So we truly have no choice but to "amplify the voice of business" (courtesy of Mr. Drosethes).

We have no choice other than strong, honest, simple advocacy advertising. We must market our free-enterprise system or we stand to lose it.

Not only are corporate communications improving dramatically, they are fundamental in this world at this time.

Many of us use test markets to try out new products or concepts. For twenty-five years in Europe we have been able to observe, absolutely free of cost, a massive test market of controlled enterprise systems.

A favorite uncle of mine, and a relatively objective columnist, Roscoe Drummond, described that test market some months ago: "Much of the Western world—Britain, France, Italy, Scandinavia—has been moving deeply into socialist economics in which the state plans, owns, directs, subsidizes, and foots the losses. Taxes on what we would call middle incomes range from 50 percent to 80 percent or above. The incentive to earn, to invest, to save, to expand is nearly nonexistent."

Yet we are continuing down the same road—we are reading a disastrous test market and doing our best to imitate it. Unbelievable!

So what's the challenge to you? Simple—to get the advocacy job done!

Why is this? Lots of reasons, but one is that business, the power of business, the honesty of business, is still reacting not innovating—there are far too many "low profiles."

In consumer selling, the initiators, the creators, the innovators are the winners. The reactors lose. Reacting is expensive. And risk of loss is multiplied.

Now, let's quickly recognize that business has made a start. There are solid, thoughtful jobs in many areas—forestry, petroleum, energy. We even have one realistic regulator who said: "Regulators are all too prone to substitute their judgments of what is good for people for the judgments of the people themselves." That's Alfred E. Kahn, Chairman, State of New York Public Service Commission.

The "hostiles" keep piling it on. How about saccharin? Business could have started to fight the Delaney amendment years ago.

How about the job "60 Minutes" did on J.P. Stevens a couple of weeks ago? How about the paper industry's statement in yesterday's New York *Times* that in 1977, 20 percent of its capital spending will be largely unproductive, simply to meet regulatory requirements? Not to mention the incredible costs consumers pay for buzzers, lights, and other gadgetry on their cars. We all have our horror stories, past and present and contemplated, and they won't go away without help from you!

So what's the challenge to you? Simple—to get the advocacy job done! To marshal your company, and your c.e.o. and an affordable share of your budget behind the free-enterprise system.

Why you? Individually and collectively for four good reasons:

First, your unique opportunity to be the catalyst in your or-

ganization. You are professional. You must have access to the decision maker. You believe in corporate communications or you probably would not be here. You are business leaders.

Second, unless you or your c.e.o. initiate this kind of pre-crisis communication system, no one else is likely to. Why? It takes money, and very few subsidiaries or marketing divisions will volunteer money. They have other fish to fry, other goals to meet (as you well know).

Third, you are in a position to battle for a continuing budget commitment, to get such a program into the five year plan and have some defense against being the first budget cut in a crunch. And continuing commitment is essential.

Fourth, if you do not accelerate advocacy, with large steps or small, no one else is going to do it for you.

We cannot wait for the "other guy." Industry associations (except in crisis) are neither equipped nor funded for this.

The press won't do it.

The politicians won't.

The era of the low profile is over. Heaven knows, as does my long-time friend and client, Jim Ling, I've said this many times. I have been the advocate of "low profile" on the premise that people (and even politicians) have short memories, so today's crisis will be forgotten tomorrow. But that is no longer true.

Consumerists, ecologists, columnists, protectionists, broadcasters do not allow the people or the politicians to forget.

In media terms, their four week reach and frequency is probably a 98 reach and a 112 frequency or more.

We cannot wait for the "other guy." Industry associations (except in crisis) are neither equipped nor funded for this job.

So little problems become crises. Crises become political platforms. Political platforms become state law, federal law, or maybe worse. They become a regulation with the power of law as promulgated by one of our federal agencies.

In wrapping up my I Imperative, let me quote (with minor editing) from a talk made last October 21 to the Conference Board by Ed Harness, chairman of Procter & Gamble (a formerly "low profile" company): "Laws are passed and regulations are adopted which do not serve the best interests of the consumer or of the economy. I believe each one of us in business has an obligation to influence public policy toward marketing and advertising. One way to do this is to be sure that the people who shape public policy have the benefit of our experience and our understanding of the marketing function."

Gentlemen and ladies, I submit that only you and your c.e.o.'s can take the lead in the critical area. That you people, and your peers at DuPont, General Motors, Ford, Kodak, you name it, are the people most qualified to innovate and initiate action in this critical area. That your time is now. That free enterprise cannot wait. That you can and must become the catalysts for marketing the business principles which have brought our country so far!

Boone: Several of us at DFS in San Francisco have been involved in the execution of corporate advertising for well over twenty years. I say several of us because it is our view that, from an agency personnel standpoint, certain specific qualifications are essential to serving effectively in the area of corporate communications. I shall return to those qualifications in a moment.

In preparing for this discussion, our corporate service people and I read virtually all that has been said in these Fortune seminars over the past years, and concluded that the wisdom and counsel that have been so ably expressed needed no further amplification from us.

But because we believe so firmly in the American business system, and hope that we can contribute in some measure to it, we concluded that my talk should focus on just what does happen inside DFS in connection with this highly challenging and dramatic aspect of communications.

A brief word about program objectives.

While they may be stated in varying ways, and, indeed, many may be added, we identify seven basic objectives for corporate advertising:

1. To stimulate awareness of the corporation's financial achievements and potentials.
2. To position the company as a technological leader in its industry or industries.
3. To create a climate conducive to desirable mergers or acquisitions.
4. To create a sense of unity in a company composed of widely scattered or broadly diversified parts.
5. To reinforce the marketing programs of individual divisions or subsidiary companies.
6. To create a climate of understanding between the corporation and its multitude of respondent groups, including government, now and into the future.
7. To interpret corporate responsibility in terms of the society as a whole, the economic system, the environment, and again the future.

And now to the I Imperative, the condition upon which the success and quality of such programs depend. That imperative is that there are three elements which must function as one throughout every stage of planning, execution, and administration:

1. The corporate chief executive and his immediate management team.
2. The corporation point man.
3. The agency team.

To begin with, corporate advertising is a tool of corporate management. To make it work it must accurately reflect the attitudes and thinking of top management, and that means that top management must be involved.

We serve no corporate client whose c.e.o. is not keenly concerned with every element of the program: concept, copy, graphics, media, timing, planning, and review. This interest finds expression in direct, face-to-face discussions.

It enables the agency to perceive and grasp the essentials of position, the spirit of the leadership, and the personally expressed objectives. The c.e.o. in turn can weigh and measure the agency's point of view, interpretation, and actual development of the advertising itself. The c.e.o. "feels" the quality of his team, develops confidence in it, and true interchange results.

There is a passion in what we are trying to do together.

The contribution of the c.e.o. and his management to our professional performance is priceless.

One of our clients did not provide this opportunity. There were nine intervening layers between the c.e.o. and the agency. Nine separate approval steps, and never a face-to-face meeting with the c.e.o. The system created innumerable difficulties, constant disruptions, and, in my opinion, the ultimate destruction of a vitally needed communications program.

Now let me speak about the point man, and why I created this particular designation. I am from California—the far West—and the first member of my family to establish us there arrived in San Francisco in 1849. I still have a number of things that arrived by wagon train.

The contribution of the c.e.o. and his management to our professional performance is priceless.

Crucial to the success of those wagon trains was the point man, the point rider, who, hour by hour, day by day, exercised the leadership and judgment required to reach the established objectives. A man deserving the confidence, trust, and respect of everyone connected with the enterprise.

The point man. I can think of no more fitting way to describe that critical functionary inside the corporation whose interpretations, judgments, and day-by-day stewardship determine the success or failure of the corporate program.

The point man is an executor. He reflects and interprets to the agency the philosophy and policies of his c.e.o. and top management. Digs for and provides the information the agency needs. Involves division and operating managements in the program and the approval process. Keeps the lines open between agency and management, so the program may have the benefit of their mutual interest and enthusiasm.

No corporate program has ever achieved success unless such a man was there, riding point the whole way through.

Third and finally, the agency team.

It has been our experience that agency personnel suited to corporate advertising are "a separate breed of cat," not from the standpoint of brains or ability, but from the standpoint of background, experience, interest, and mental process. If I were asked to identify some of the most important attributes, I definitely would include these:

1. An unflagging belief in the principles and long-term potentials of our economic system.
2. A studious familiarity with the affairs and procedures of corporate and equity financing.
3. A high degree of literacy.
4. A strong sense of logic.
5. An ability to communicate with management at the level of its important interests.
6. The patience to labor, examine, refine, discard, and begin all over again.
7. A sense of economic history, of the origins, evolution, and challenges of our business system. For we here in this room are all engaged in the same struggle, one of the most important in our history: to preserve economic freedom, to preserve human hope and inspiration, to keep human strengths and capabilities developing, to keep alive man's productivity and sense of independence.

Three elements, then—c.e.o., point man, and agency—working together, form the I Imperative. What makes it work?

- Availability of each to the other in the whole advertising process
- Absolute confidentiality and trust
- Access to information:
  - —Client's self-perceptions.
  - —Client's own research. If it is wanting, then external perceptions must be sought *in depth*. Only with accurate information can the right action be taken.
  - —Interviews with client personnel, division heads, department heads, whoever is closest to the needed information.
  - —Total agreement on target audience, objectives, and strategy.
  - —The confidence and planning of a long-term program commitment.
  - —Exchange of ideas and opinions during the creative process in order to reach what truly becomes the c.e.o.'s personal statement.
  - —Continuing research to evaluate campaign performance, resulting in agreements on future actions.

To some of you, what I have said may seem standard procedure. If so, you will agree that these factors are essential if we are to produce the level of work the corporation expects.

I must say, at this point, that I am tremendously impressed by the scope, the imagination, and the continuing excellence of programs which fine agencies all over America are turning out for corporations that are the very backbone of our economy. It is an outstanding accomplishment, and we at DFS are proud to be part of the fraternity contributing to it.

I should like to illustrate how the creative idiom can shift gears and adjust as corporate objectives change, for they are seldom static.

For example:

(Slide shown.) Thirteen years ago, Boise Cascade was a modest-sized regional forest products company, centered in Idaho, and virtually unknown beyond the mountain West. Its need: to become known as an up-and-coming manufacturer of building products and paper. "Who counts the growth rings?" and—

(Slide shown.) "We won a business with a stack of chips" were typical ads in the early campaign. Building and maintaining awareness were to remain advertising goals for the next several years, during which time recognition of the company grew dramatically.

I should like to illustrate how the creative idiom can shift gears and adjust as corporate objectives change, for they are seldom static.

In 1974, a new and entirely different corporate campaign was prepared, one focusing on the company's five-year $1.1 billion capital program. Its very explicit message was aimed at the investment community. Its objective was to increase awareness of Boise Cascade as an attractive investment opportunity. Each advertisement stated corporate goals, strategies, and rationale for planned success.

Today, the investment community is still a target audience that will receive an information-packed campaign. But added to it is an overall campaign aimed at an audience ten times as large: the opinion-setting public, the "educated initiators." Recognizing that an ever increasing public actively affects the future of corporate life, Boise embarked on a massive research program to determine in depth how it was perceived by its employees, stockholders, investors, security analysts, portfolio managers, labor, environmentalists, and the public at large. Each had its particular perceptions. Each had much in common with the other. For we all play differing roles in our lives.

(Slide shown.) Hence, the four faces are the worker, the consumer, the citizen, and the investor within you. To you, in each of these roles, Boise Cascade has something to say.

(Slide shown.) For FMC, our first-year program, which made its appearance in 1972, was a dramatization of the surprising contrasts in capabilities of a company that is deeply involved in two major industries, machinery and chemicals. Example: fire engines and fashion fibers.

> The original English of these ads is so simple and non-idiomatic that translation problems have been reduced to a virtual minimum.

Also in 1972, a new c.e.o., Robert Malott, took charge; corporate headquarters was moved from San Jose to Chicago; and an important program of reorganization was begun, including a complete revamping of corporate graphics. The advertising response (slide of hungry child ad shown) was a program descriptive of FMC's broad problem-solving capabilities in areas of critical contemporary need. The production of food: "No nation can afford a hungry child."

(Slide shown.) Agricultural machinery and chemicals: "Every seed has one precious chance at life."

(Slide shown.) Food processing: "No bowl can be filled until the food is at hand."

(Slide shown.) A baby in its bath dramatizes FMC's extensive technology in the treatment of wastewater and sewage.

(Slide shown.) "Coal is no longer the dark horse of the energy race" describes FMC's capabilities in coal mining and processing equipment, its technology for converting coal to synthetic oil, and a patented process for controlling the sulfur dioxides resulting from coal combustion. On this same subject (slide of Navy destroyer) the U.S. Navy in November, 1973 conducted a highly successful test run on synthetic fuel oil produced by FMC's coal conversion process. This became the subject of a presentation in early January, 1974, in the business press, which FMC has used for a number of statements on subjects of similar topicality.

(Slide shown.) FMC is a worldwide company, and for several years identical ads appeared domestically and overseas, except that the latter were translated into several languages.

Translations require eternal vigilance. When this headline, "Oil has become a race against time," came back from the Japanese translator in Tokyo, his poetic gift had changed it to, "A candle flickering in the wind must not be blown out." Having very little to do with either oil or hourglasses, we corrected that, of course.

(Slide shown.) Two years ago, in order to increase FMC's coverage overseas, a single page format was adopted, but one which made it possible to include four important capabilities in each message.

(Slide shown.) The original English of these ads is so simple and non-idiomatic that translation problems have been reduced to a virtual minimum.

Incidentally, FMC corporate ads will be appearing this year for the first time in the People's Republic of China.

(Slide shown.) As you may know, Esmark is the very young name of a major corporation that evolved out of one of America's oldest companies, the hundred-and-twenty-year-old Swift & Company. Yet despite the fact that Esmark is one of the thirty-five largest U.S. corporations, and one of the thirty making up the Dow Jones averages, its visibility across the nation is rather limited.

The challenge was to make both its name and its businesses known, and, to this purpose, the name itself became the illustration—in this case in terms of the agricultural fertilizers manufactured by Esmark's chemical company. It seemed to work both as spreads and as single pages.

(Slide shown.) The springboard for this message is Swift & Company's bestselling Peter Pan peanut butter, but, as in each case, copy is careful to describe Esmark's other businesses in fertilizers, energy, and personal products.

(Slide shown.) "Esmark has a tender regard for your taste in beef" focuses on Swift's unique method of tenderizing beef by including papaya enzymes in the diet of cattle.

(Slide shown.) When Esmark acquired Playtex in late 1975, it added a company that was an acknowledged leader in products for women. Yet some elements of the financial community thought we were living in a bra-less age. Their daughters notwithstanding, this simply wasn't true. Hence they needed the facts. This ad had a startling effect in the *Wall Street Journal*.

(Slide shown.) Esmark also runs a sustaining series of smaller ads reiterating its involvement in such fields as food, fertilizers, and petroleum energy.

(Slide shown.) Spelling the Esmark name in Playtex packages was not the easiest of assignments, but it finally came together like a jigsaw puzzle.

> The challenge was to make both its name and its businesses known, and, to this purpose, the name itself became the illustration . . .

It is gratifying to report that Esmark's communications program, of which corporate advertising is but one element, achieved a 31 percent increase in awareness in the first nine months.

The foregoing exhibits and, indeed, the successful advertising of the entire corporate world, are the product, not of ivory tower impulses, but of a diligent communion of effort by those concerned three factors: management, point man, agency. Their oneness is the indispensable ingredient. Without it no program can achieve the clarity, luster, and conviction that each distinguished corporation deserves. The unison of the team. This is the Imperative I.

What Are You Trying to Do to Whom?

James B. Orthwein
Chairman of the Board and Chief Executive Officer, D'Arcy-MacManus & Masius, Inc.

Walter Armbruster
Executive Vice President, Director, Creative Planning, D'Arcy-MacManus & Masius, Inc.

Orthwein: Wally Armbruster and I are delighted to have this opportunity to address such a distinguished gathering.

Our topic is corporate advertising, and we've been given thirty minutes to tell you everything we know about it. I'll admit it's better than the thirty seconds of air time we get for TV commercials.

So, as we do for television, we're going to stick to basics and make just a few key points, rather than attempt to cover the whole territory.

What I hope we *can do* is offer some insight into what we think is a unique, logical, and effective method of approaching the very important decisions involved in conceiving and carrying out a corporate communications program.

Ours is a system that seeks to prevent you from talking to yourself, as so many corporate campaigns do.

It's a system that will prevent you from thinking your communications program is actually doing something, when in reality it's only disseminating information which only you care about.

D'Arcy is using this system in the eighteen countries where we have offices, and not only for corporate advertising, but for all kinds of products—like Budweiser and Michelob, for Ralston-Purina pet foods, for Standard Oil Products, for Bell Telephone, for the American Dairy Association, and many others.

It was used to develop the new Westinghouse corporate campaign. It is even credited with helping elect a new government in Australia.

Usually, the behavior an advertiser seeks is purchase of his product.

But the system works for corporate communications as well. It's just that too many corporate communicators never decide what behavior they are seeking.

And, as you will see, that decision is crucial.

If you don't know what kind of human behavior you're trying to effect, you should not spend one dollar on corporate advertising.

I don't know how all of your specific companies now approach corporate communications. But I do know that too many firms begin by deciding what they want to say.

Is that really the first thing to decide?

We think it isn't. In fact, it really should be the next-to-last decision.

The D'Arcy system is called belief dynamics. And it is built upon three basic premises—premises so basic that they usually are overlooked.

First: All behavior is based on beliefs. Together, a person's beliefs trigger his actions. This is belief dynamics.

Second: To create behavior you must create beliefs. To alter behavior you must alter beliefs. To sustain behavior you must sustain beliefs.

Third: For advertising to work, it must encounter a person's beliefs in a way that will lead to the behavior the client seeks.

If you don't know what kind of human behavior you're trying to effect, you should not spend one dollar on corporate advertising.

If you want to get your money's worth from your corporate advertising, you must demand that subordinates be totally objective and honest in their reporting to you.

The purpose of corporate advertising is not simply to get people to think well of certain aspects of a company. It must also get them to do something quite specific if it is to be effective.

What you and your boards and stockholders should expect to get from corporate advertising are behaviors such as: a better recommendation from security analysts, more applications for jobs and lower personnel turnover, less uninformed pressure from various "action" groups, consumers who eagerly try new products from your company, etc.

Before I yield this podium to Wally, who will explain belief dynamics in greater detail, I'd like to make one more point.

Corporate advertising is like most other decision-making situations in a company. To make a good decision, you need the best and most objective information.

But because you're in top management many people are hesitant to give you bad news, no matter how accurate and important it may be.

If you want to get your money's worth from your corporate advertising, you must demand that subordinates be totally objective and honest in their reporting to you.

If you make that clear to them, and still get no bad news,

then you probably don't need any corporate advertising and perhaps you'd also better check your pulse to make sure you haven't passed on to that great board room in the sky.

I got so tired of guys coming to me with a creative problem and defining the target audience as "18 to 49 year old housewives." I'd say, "Who the hell is that?"

Now I'd like to introduce the father of our belief dynamics system, a man who is so totally objective with me that I truly do look forward to his vacations every year.

Gentlemen, Wally Armbruster.

Armbruster: I can't tell you a whole hell of a lot about belief dynamics this morning because it takes a long time to really understand it. But I hope to tell you, in just this half-hour, enough about belief dynamics so you'll want to apply it to your own corporate advertising projects. If it works for you as it works for us, it'll work not only in corporate advertising, but also in product advertising. It might even help you figure out why you can't get your daughter to clean up her room or why you're having a fight with your wife, or your husband.

Belief dynamics, as Jim said, forces us to always address ourselves to behavior and beliefs. And I'm going to tell you why we started this, not because I care that much about history, but because it dramatizes why belief dynamics is really necessary to all kinds of communication.

I got so tired of guys coming to me with a creative problem and defining the target audience as "18 to 49 year old housewives." I'd say, "Who the hell is that? You know, that's a woman and her mother and her grandmother?" Then they'd say, in an effort to sharpen the picture, "Uh . . . oh, yes . . . they live in A and B counties." Or "They are *middle-income* housewives." To me that's like giving directions to this place (Port St. Lucie) by saying, "You don't need a map. It's somewhere between Key West and Buffalo."

So we say . . . hey, let's break these people down into groups that mean something. I don't care how old they are. I want to know which are saying "yes," which ones are saying "no," and which ones are saying "huh?" And then I can figure out what's getting that behavior to happen and what in the world advertising's supposed to do to them.

And it's the same in corporate advertising. Here's the kind of "target audiences" we usually get: "The financial community." (They all think alike, huh? Yeah? People in the big business community all believe the same?) Employees. Line them up. (They all alike? You've go no bitchers? You've go no happy people?) The press? Customers? Suppliers? Stockholders? That's a target definition? There's no behavior? No verbs attached?

Let's take the financial community. Who is it? Is it a guy who says, "Buy that stock!" Or is it a guy who says, "Sell it!" Man, that's different behavior, right? Are we going to say the same thing to both of these cats? Or to the guy who says "Who? Never heard of 'em!" That's a different guy. Now in belief dynamics what we do is specify the behavior we're seeking and then determine what beliefs could possibly cause that behavior. And with a little or sometimes a whole lot of research we find out if they really do believe as we hypothesize.

This one single picture tells you how we think advertising works. (Slide shown of Belief-Cluster Man.) Here's the way we picture people, not as a certain age or height or weight or family income, but as a house full of 486,413 beliefs.

The person you decide to approach with advertising always comes tailor-made with all his beliefs inside of him. And the advertising goes into his intake valves—into his ears and his eyes and his sense of feeling (which I think some people ignore), and the result of all those beliefs is what causes behavior. If it's purchasing your brand or somebody else's brand, if it's saying at a cocktail party, "That's a lousy company" or "It's a good company." That's behavior. And beliefs cause that behavior.

And those beliefs were created by advertising. Oh, not just the kind that you pay for and agencies get 15 percent commission on, but also the kind that started when you were in your mother's womb and some siren went off and you got scared. Or when your mother said, "When you grow up and get married"—you know, that got you to believe you've got to get married or you're some kind of freak. Or when your swimming teacher said, "Put your head under, you won't drown." It's all that kind of advertising plus the kind we do that creates beliefs. And this advertising can get through the ears, the eyes, the nose, the sense of touch, or the mouth; we call them senses, but they shouldn't be called senses because you're not sensitive there. You're sensitive only in your head and in your guts.

That's why I can say something to an audience and some of them will laugh and some will cry and some will yawn, depending on what their beliefs were when I encountered them. That's why I call them intake valves instead of senses. Now, look here, in between the intake valves and the marvelous mixer (which is how those beliefs mix) is what some of the fancy researchers call "cognitive dissonance." Well, we've got our own word for it. We call it "the bullshit cluster."

Now, in that belief system are all kinds of beliefs. There are beliefs of a high order—about God, the flag, parenthood. There are beliefs of a low order—like whether Nicklaus is better than Johnny Miller.

I have talked about belief dynamics to people from eighteen countries and every time I'd ask, "What's the word for bullshit in your country?" the answer would always be "bullshit!"

Everybody's got one. You know they've got them in France, Mexico, every place. And I think there are a lot of us in this room who ignore it. We say something and try to slide it right by and we think the guy bought it just because we said it. Watch it!

Now, in that belief system are all kinds of beliefs. There are beliefs of a high order—about God, the flag, parenthood. There are beliefs of a low order—like whether Nicklaus is better than Johnny Miller. There are beliefs about people living and dead. Some beliefs are very personal, like how good I am at my job and how good my boss thinks I am; and there's often a difference. What? You say "2 + 2 = 4" is a fact? Well, I don't care whether you call it a fact or not. It's whether you believe it or not. But, be careful.

If you're talking to a four-year-old child, Santa Claus is a fact. And that's what we forget. This is why I am astounded that

people run ads on "free enterprise" in Fortune and *Business Week*. Of course! But they already believe it, right? But not everybody believes it. And I think this is a very important thing to keep in mind.

And there are beliefs inside people's bodies about products and about corporations. The whole key is to find out which beliefs a guy has now and what you've got to fix and how you've got to fix it. Now look, I don't have a whole lot of time left, but I want to talk about what Jim said earlier—that you shouldn't decide first what you want to say. It's second to last. And it ties right in to belief dynamics.

Don't expect to change a guy who hates you to a guy who loves you. Be realistic. Just get him to not hate you so bad, first.

First, you should decide who has current behavior that you'd like to change. Be specific. Write it down. And put a verb in there. What are they *doing*? It ought to be like: Somebody who recommends against buying our stock. Somebody who doesn't apply for a job with us even though he's just the guy we need. Somebody who rejects our request for a loan. Somebody who says he's out when your salesman calls but says he's in if your competitor calls.

Somebody who says of one of our product's minor failures "Just what I'd expect from that outfit." Somebody who writes a negative comment in his column for no apparent reason. Or who says something negative about us at a cocktail party when somebody mentions our company. Or a guy who works for us but hangs his head a little when somebody asks, "Where do you work?"

Now, with behavior that specific, you can decide (second) what new behavior you would like. Be specific, but be realistic.

Don't expect to change a guy who hates you to a guy who loves you. Be realistic. Just get him to not hate you so bad, first. Suppose you run an ad for Cadillac. What do you expect the reader to do? Call the dealer up and say, "Send me over a Cadillac"? You've got to be specific and realistic.

Third, you should make a list of current beliefs that could possibly cause their current behavior. You can find out what people believe if you have good research and if you also have a talent for insight. Objectivity is not enough. You've got to be "subjectively objective" to be good in the communications business or the research business. If you're talking to a kid, you've got to get down on your knees to be face to face. And that's very important.

And then, after you've decided what current beliefs cause the current behavior, you can decide what it will take to cause the new behavior you'd like. But, again, be careful. You know, make sure that that "new belief" you write down is achievable and that it should cause behavior. The fifth thing—what can we say, show, or do as evidence that he should believe that? Here again, be objective. You can't just say, "Love our company." You've got to give the guy something to go on, a reason to believe, permission to believe, something that makes sense up in the head or down here in the guts.

Sixth, how shall we say it? As I told you, the fifth thing was what should you say and the last is how to say it, because you've still got to have "creative execution." A lot depends on the guy who knows *how* to say what you have to say. The caution here—if you're a client—is don't be chicken. Very often, when a guy comes to you with a good idea, it will scare you a little bit. If an idea is so safe that it will get right through the board of directors, probably the only beliefs it will affect are those of the board of directors.

I have talked about belief clusters and brought a few slides of what they look like. Now here, for instance, is one you'd like for your company. "XYZ Company is excellent. They have an excellent product. They make very small profit. They're primarily concerned about customer satisfaction. And they're lovable people." You'd like your customers to believe that. Right? But then you turn right around and want your stockholders and the guy reading *The Wall Street Journal* to believe "XYZ Company's excellent, excellent products, but maximum-profit oriented. It's a company primarily concerned about stockholders and they're tough."

Make up your mind. You can't talk out of both sides of your mouth.

How about this one? You know, there are a lot of companies advertising, trying to get people to believe that their company is "a solid old company with a glorious past . . . established 1849 . . . their founder was outstanding."

If that's what you want people to believe, fine. But maybe you ought to think, especially if you're IBM or an advertising agency or anybody who makes modern products, maybe this is a better belief for people to have: "It's a solid contemporary company with a glorious future! I've no idea when they started. Who cares? The current people are outstanding." That's what I'd want for my company. Unless I was selling wine or something, then I might like that old . . .

We've done a belief dynamics study on "free enterprise." I can't go into it very deeply, but I just thought I'd like to show you what kind of objectivity belief dynamics brings out. We did the beliefs of three guys. Daddy Warbucks, Charlie Brown, and Doonesbury.

I don't know if you get Doonesbury in your funny paper, but he's a real character. I mean if Daddy Warbucks is over there, Doonesbury is over there. Charlie Brown's in the middle. Anyway, they all believe: "I love America," and "I believe in democracy." Except Daddy Warbucks believes "except in business!"

"Executives don't work." I mean the really *top* executives don't work. Now where does a belief like that come from? It comes from advertising.

And Doonesbury believes "even in business." All I'm trying to say is I've shown this free enterprise belief dynamics to a lot of big shots (what do you call them? chief executive officers). And they kind of backed off and had a chip on their shoulders until finally they started to listen. You know, because I said, "Hey, look, you know, if you think those guys are stupid because they won't listen to you, what's that make you if you're so educated and you won't listen to them?" You can't talk to anybody, you can't really advertise to anybody unless you listen to what they believe. You've got to know where they're "at." And I don't mean Philadelphia.

Here's a belief that Charlie Brown has.

Executives don't work. What the hell do executives don't work. Now where does a belief like that come from? It comes from advertising. Who did the advertising? Those executives. You know, he gets his picture taken. He's dressed better than when he goes to church. He doesn't carry anything. There's nothing in his "in" box. There's nothing in his "out" box. He doesn't sweat. I mean, what the hell does he do? And really, executives went to such great pains to get people to believe that. They really did. But you see some now that are starting to act differently—they're starting to take their coats off at meetings. Jimmy Carter is wearing a sweater. And I talked to Bob Kirby the other day and he said, "Yeah, I noticed Jimmy Carter carried his own luggage!" That, my friends, is advertising. But when you advertise, you should clearly know what beliefs you're trying to change.

I'm going to close this out in a minute. I just want to give you one example about how it works, even in real life.

I remember this time—and maybe there are a lot of guys in this room the same thing happened to. It's a story of advertising, beliefs, and behavior that happened to me a few years ago. I'm sitting at the breakfast table and one of my teenage sons comes in and sits down. I notice his hair's getting a little bit long. So here were my beliefs: "My boys will not have long hair." (It was just coming in, you know.) "Boys should have crew cuts." "Fathers should rule." "My friends at work would razz me, they'd say 'Is that your daughter?' "

So I started to advertise. I said, "You're going to get your hair cut, do you hear?" He said, "Yes, Dad, pass the sugar." The next day I thought I'd try a different tack. I said, "Good morning, Alice!" And he said, "Would you pass the sugar?"

It just didn't work. I did this a lot of times. And finally, I did my research. I said, "Did you hear me?" He said, "Yeah, I heard you, Dad. I'd better get my hair cut because I look like a girl." Now, see, my advertising campaign was perfect. I mean, I had plenty of reach, plenty of frequency. And now—splendid recall!

But his hair kept growing!

If I had looked at his belief system I would have seen that *he* had some beliefs too. You know? He believed: "I must have long hair. It looks great. If I don't, my friends will razz me. Dad will yell and threaten. I will be quiet and it will go away. Fathers are square." And what I call the "aha! belief": "Mother will be on my side if it comes to blows."

Disseminating information is easy. Advertising is hard. It's advertising's job to address a person's beliefs in a way that will lead to whatever behavior you seek.

And so if you want to find out why we're buying products made in Japan, or why people don't praise your corporation as highly as your chairman of the board, you do your little belief dynamics and I think you'll find out.

All behavior is based on beliefs. Together a person's beliefs are what triggers his action and that's belief dynamics. To create behavior, you've got to create beliefs.

This is really how advertising works. It's how *communication of any kind* works. I hope you're not just communicators, disseminating information.

Disseminating information is easy. Advertising is hard. It's advertising's job to address a person's beliefs in a way that will lead to whatever behavior you seek.

Expanded Horizons for Corporate Communications

William T. Ylvisaker
Chairman of the Board, Gould Inc.

I am not addressing you tonight as an expert on communications. I am not. I am, however, a corporate executive, with thirty years' experience of trying to make the "bottom line"—company profits—improve each year.

As a management person, specifically as chief executive officer of a large corporation, I am profoundly aware of the importance of communications in helping to meet corporate objectives.

In preparing this talk, I came to the realization that in many ways, Gould typifies the situation in which many good-sized companies in this country find themselves today (by "good-sized" I mean most of the companies on the Fortune 500 list of industrial companies)—with the exception of the top fifty.

Those top fifty companies are, by and large, household words—General Motors, A.T.&T., I.B.M., Ford, Exxon—but beyond them are hundreds of large and profitable companies that are not nearly so well known.

These companies, like yours and mine, are often in competition with each other and with hundreds of smaller companies, to get their story across to a great many important publics: the general public, employees, stockholders, customers, suppliers, the financial community, and others. It is a competition of communication.

In a nation of free enterprise, we as businessmen and women are flooding the media with our messages and the public is overwhelmed by the resultant outpouring of stimuli.

Because of that, the message and the method of communication we use are increasingly important. It is especially important for Gould because our company today is several light-years removed from the Gould of just ten years ago. Trying to get across to our publics exactly what kind of company we are today is not only a very important aim, but one that is very difficult to achieve.

In a nation of free enterprise, we as businessmen and women are flooding the media with our messages and the public is overwhelmed by the resultant outpouring of stimuli.

To get some understanding of our problem—or rather opportunity, as they say on Madison Avenue—it is necessary to know something about Gould.

Our history dates back a hundred years. Only ten years ago, in 1967, we were known as Gould-National Batteries, Inc. We were at that time basically a battery company with $115 million a year in sales and $2.8 million in profits. We had 4,300 employees working at twenty-seven plants in the United States and overseas. And we didn't even make the Fortune 500.

Today, Gould ranks approximately 164th on the Fortune 500 list. In 1976, we recorded $1.2 billion in sales and profits of $66 million. We now have 35,000 employees at 128 plants throughout the United States and in sixteen foreign countries. We are no longer simply a battery company, and this year our sales will exceed $1.5 billion and net profits will approach $90 million.

While we are still a very important factor in the battery business, 69 percent of our business today (batteries included) is in electrical products and 31 percent in industrial products. In terms of electrical products, it appears that Gould now ranks among the top five producers.

This growth rate has left many of our employees, customers, and stockholders somewhat unsure of what Gould is today. That is why communication is so important to the company.

We have six groups, forty-five divisions, and we produce a wide range of products. For instance, we make the J.C. Penney battery, electric motors for swimming pools and industry, oscillographs, transducers for use in hospitals, and the Mark 48 torpedo for the Navy, just to name a few.

Much of our growth has been through acquisitions—twenty-six to date, the most important of which was our merger with I-T-E Imperial Corporation last spring.

On a pro forma basis, our sales have grown at an average rate of 18 percent a year since 1967, net profits at 23 percent and earnings per share at 15 percent. Most important, our stock is almost four times higher than it was ten years ago.

This growth rate has left many of our employees, customers, and stockholders somewhat unsure of what Gould is today. That is why communication is so important to the company.

Until recently, we were considered a battery maker with a business closely tied to the vagaries of the automobile industry, both in the financial community and among the security analysts who cover the automotive industry.

An image study done in 1971 among security analysts and the general financial community came up with these results:

- Gould was primarily known as a battery manufacturer.
- Association of Gould with electrical products was low.
- Analysts didn't know Gould's principal areas of interest.
- Two-thirds of the financial community were not very familiar with Gould.

- Analysts were hesitant to recommend Gould stock.
- Electrical and electronics analysts did not know if they should follow Gould.
- Gould was not highly thought of as being innovative.

If that were a report card, it would have rated pretty low. It certainly wasn't pleasant reading. Moreover, this image problem hurt us in many places—including our value in the marketplace. Part of the problem was due to the fact that we were so closely related to the automotive industry, which earned a fairly low P/E multiple. But much of the problem was directly related to the fact that we were not well known. We were not effectively communicating our story.

Compounding our frustration was the fact that Gould management thought we had created something special. It was obvious, to paraphrase Adlai E. Stevenson, "that we simply had to develop better methods of communication . . . because there is no better system of ultimate reliance than the discriminating choice of people. But first, they have to be informed."

You know how important it is to have the financial community understand your company. It is important that Wall Street put a fair evaluation on your securities and on your price-earnings ratio. Put another way, I prefer a 10 to 1 multiple to a 6 to 1. In our case, the difference in P/E ratio could mean an additional $300 million in market value. A higher P/E ratio can be more advantageous in making an acquisition with common stock. It also means our employee profit sharing plan (which invests 50 percent of the funds in Gould stock) can benefit. And it also means our stock option program would have some substantial opportunities for participants.

Over the last ten years, our research laboratories have produced, and continue to produce, a flow of improved or new products which has helped us achieve market or technical leadership in many of our product lines.

We also have attracted some very talented managers and scientists to Gould. All of these developments are paying off in the increased profits I mentioned.

In addition to being innovative in our research and development, we have tried to be innovative in other ways within our company. We built a new corporate headquarters in Rolling Meadows, Illinois, a suburb of Chicago. It has the atmosphere of a small college campus. Besides our corporate headquarters building, we have one of our research laboratories, a management education center, a separate facility which is our "mini" business school, complete with classrooms, bedrooms, and teaching facilities with a visiting faculty of distinguished professors from all over the country. We built an indoor sports complex, with tennis, squash, handball, swimming, racquet ball, and exercise rooms adjacent to our headquarters. And our offices and grounds have an extensive collection of art, including a twenty-eight-foot Picasso sculpture. All of this was done to provide a pleasing and creative environment for our employees—a place to work, create, communicate, play, and relax, a place to enjoy and have pride in—and it's an effective way of communication.

So our communications interest and needs for the past four to five years have been substantial. We want our various publics to know who we are, what we do, what we have achieved, and to think well of us.

We also want them to think we are somewhat special. I imagine that this desire is harbored by every chief executive officer in this country.

The question is "How does one achieve this goal?" Obviously, many companies have used many different approaches. What I will outline tonight is how we approached the problem. And I must tell you by "we" I mean Gould's management team, the company's communication staff—and Del Fuller, our vice president of communications, who is in the audience tonight—our advertising agencies, and our public-relations counseling firm.

We also want them to think we are somewhat special. I imagine that this desire is harbored by every chief executive officer in this country.

To address our problems we have used several communications approaches—internal communication, advertising, public relations, corporate identity programs, financial public relations, and others, as most companies do. A few are unique in either concept or execution. I won't discuss our routine programs, but I will deal with those we believe have some unique element.

For example, our advertising program. One major mission in corporate advertising is to reach, inform, and we hope impress the investment community—analysts, fund managers, individual investors, stockholders, bankers, and others in a position to offer or confirm investment advice. Obviously, other important audiences are reached through such ads—customers, prospects, employees, potential employees, government and community leaders and others, all important in their own right.

Our aim in developing an advertising campaign was to stand out from the crowd, to create a unique identity for Gould.

Our thinking quickly gravitated to the concept of technology. Gould considers itself a technology-oriented company. Our success in great part has been due to our concentration on integrated technologies and our spending on research and development, which this year will amount to over $67 million. Gould has a large number of managers who are scientifically trained, and we have hundreds of Ph.D's and other well-trained scientists and technicians who have a firsthand feel of what technology can do and how important it can be.

We also have an important resource in our scientific advisory board composed of such distinguished scientists as Dr. Edward David, former presidential adviser and executive director of Bell Laboratories' Research Communications Division, and Dr. Eugene Fubini, former Under Secretary of Defense and vice president of research and development at I.B.M.—and others equally eminent. They consult with us constantly on our research efforts and directions and point out new opportunities and frontiers for technology as well as meeting quarterly to review Gould's research and development projects.

It is clear to any thinking person that technology has provided the solutions to many of society's problems. Yet it is also frequently blamed for many of our problems. Some people would have us believe that there is too much technology today, that this very abundance is the basis for many of our ills.

I firmly believe that solutions to societal problems lie in the intelligent application of technology. A misunderstanding of technology's role in man's advancement can only lead to his inability to provide those solutions.

Consequently, at Gould, we decided that our advertising campaign should provide an indirect yet clear understanding of what technology is. The program we developed would identify us as a technology company. It would provide us with a campaign that was unusual and provocative. And we hoped it would show that Gould has unique ideas on topics not only related to its own business but of national importance.

It is clear to any thinking person that technology has provided the solutions to many of society's problems. Yet it is also frequently blamed for many of our problems.

Input for the campaign came from many sources. We asked Isaac Asimov, one of the most distinguished writers of technology and science, to help write a series of white papers. Editorial comments came from Gould executives, scientists, agencies, and our scientific advisory board members.

The result to date has been seven white papers—which are available for distribution in the back of the room along with this speech and our annual report. The white papers led to seven ads on the ideas they presented. I won't go into detail about the papers, but a listing of some of the titles will give you an idea of the general themes.

One was entitled "Technology: sputnik, economic chauvinism, and world peace." This dealt with the increased competition in science and technology from other developed countries, and what this country's direction should be. Another was "Technology: population, pollution, and the prophets of doom." Another was "Whale Oil, Arab Oil, and No Oil." Still another was "Adam Smith, Uncle Sam, and Big Brother."

Each of these papers touches on some important aspect of technology and how it relates to the way we live and hope our children will live in the future. The tag line on some of the papers was "Science and Technology can solve many problems. If they don't, what else will?"

The ads started running in the spring of 1974 in publications aimed at the financial community, opinion leaders, and our other important audiences. Among the media selected were: Fortune, *Business Week*, *Time*, *U.S. News*, *Wall Street Journal*, *Barron's*, *Forbes*, and *Scientific American*. We spent a modest amount on the program, less than $1 million in all.

The results? Managers are always interested in the bottom line, but when dealing with advertising and communications programs generally, hard figures are not easy to arrive at.

However, we did get some solid statistics. The ads reached 42 million people. And many readers saw the messages two, three, and four times. According to readership studies, the ads drew a rating well above average. In 1975, just four years after our first unflattering study, we had a second opinion study made. The conclusions were that:

- Roughly half the financial community were now familiar with Gould. On the negative side, obviously half still weren't.
- We were still thought of by many as a battery manufacturer, but a growing number were aware that we were in the electrical products field.
- The technology story had penetrated the financial community and Gould received favorable ratings on technological capabilities and management.
- The financial community thought Gould was a better overall investment in 1975 than they did in 1971.
- The business community thought of Gould as a leader in the market in which it competed, and also that it made quality products.

So maybe our image was improving. It improved because we informed our publics through a well thought-out communications program.

We also received some reactions from our programs which are more difficult to evaluate. We sent copies of our white papers to a number of people we thought were important. But we were surprised when we got 21,000 requests for copies of the papers as a result of our ads, including 3,000 requests from schools. And schools in countries around the world are now using them as textbooks.

We received over 20,000 letters from readers including Ed Cole, president of General Motors; Paul Thayer, chairman of LTV Corporation; Willard Rockwell of Rockwell International; David Packard of Hewlett-Packard; Jerome Weisner, president of M.I.T.; Pete Peterson of Lehman Brothers; and Frank Cary of I.B.M., praising us for tackling an important and difficult topic and making some sense out of it. (In fact, Ed Cole subsequently joined our board.) Employees, customers, suppliers, and others chimed in with the same refrain.

And if you think long copy ads don't work, our full-page *Wall Street Journal* ads were full of type, and still drew more than 1,000 letterhead replies each. In addition, a feature article in *Business Week* linked Gould with Borg-Warner, I.B.M., Xerox, and other high technology companies.

Since the quality of the ads depends on the unique ideas and thoughts expressed, there is no desire to push through ads just for the sake of meeting a schedule.

We think so well of this particular campaign that we will continue to run it as we come up with appropriate subjects.

Since the quality of the ads depends on the unique ideas and thoughts expressed, there is no desire to push through ads just for the sake of meeting a schedule. When we have something unique to say, we will say it.

Our newest corporate advertising campaign has evolved into a positioning campaign. It emphasizes the idea that Gould is a major electrical company and indicates the many different electrical products we are involved with. This is particularly timely following our merger with I-T-E Imperial.

To make our company more understandable to our publics, particularly the financial community, we have simplified our company organization by dividing it into three major components: electrical products, batteries, and industrial products. We have also simplified our presentations so that they can make six or seven major points and leave out the myriad details that simply serve to confuse and obscure.

Gould management has appeared at meetings with the investment community throughout the United States, in Europe, and in Japan. We believe we have been able to get various publics to really understand what Gould is and does. Equally important, we have built a track record of credibility in our statements and financial forecasts in the past several years. We explained our financial goals, how we proposed to meet them, and then let people know when we had met them—and most important, we have exceeded these goals. We only forecast financial results quarterly, such as: "we expect to exceed X cents per share this quarter," and speak only to general percentage ranges on an annual basis such as: "We expect to show improvement in line with what our present trend has been."

In October a major presentation was made to the financial community when we had 138 analysts and professional investors attend a two-day meeting at our headquarters. It was very well received, judging from the comments of those who attended. Most of the analysts were those who cover the electrical industry. Apparently, many analysts have been convinced that this is the industry group in which Gould belongs. It is very difficult, of course, to measure the results of our financial public relations program. There are many factors involved that go well beyond good communication. First, our company's financial performance has been good. Our sales and earnings have increased at an above average rate, and so has our dividend rate.

Without a good financial record, even the best communications program to the financial community can lay an egg. Second, we passed the billion dollar sales mark, and, third, we have a greater number of shares outstanding—23 million—than ever before. This, too, can make a security more attractive, particularly to the institutions.

In the past twelve months we have had a dozen very favorable reports on Gould by analysts and the price of our stock reached a new high of 33 in 1977. We are now selling at a higher price-earnings ratio—about 10 up from 6 in 1974. Trading in Gould stock in terms of daily volume on the New York Stock Exchange has increased, and in that same period, in the past year, eighteen institutions have made initial purchases of 100,000 shares or more of Gould stock, or increased their holdings by 100,000. So, based on these statistics, we think we are on the right track in terms of our communications program.

But communication at Gould has another role to play—one which goes far beyond our corporate headquarters to the very heart of our free enterprise system. I, like those of you here today, am a strong believer in free enterprise. It has been the backbone of our nation for over two hundred years—but it may not last much longer if we don't begin communicating more effectively, to wider audiences, what our system is all about.

Without a good financial record, even the best communications program to the financial community can lay an egg.

Never has big business been held in such low esteem. In a recent poll Americans ranked big business sixteenth in terms of honesty, dependability, and integrity—just above politicians, labor leaders, advertising agencies, and bureaucrats. There is a strong anti-big business attitude prevalent today, one which goes hand-in-hand with widespread economic ignorance. Ignorance in the classrooms, ignorance among politicians, even ignorance among our educators.

We can, and we must, reverse the attitude that big business is alien to a democratic society. It is not alien, but essential.

I agree with many of my concerned business colleagues who say we should speak out again and again, in better and better ways, to explain in realistic terms how our economic system works—its shortcomings and its successes.

We can, and we must, reverse the attitude that big business is alien to a democratic society. It is not alien, but essential.

We can accomplish this by expanding our corporate communications horizons. Companies, their management, their employees, should be politically active. We should encourage them to participate in political affairs on the local, state, and national level, and they should be helped in understanding the issues of concern. At Gould, we are trying to tackle this problem of economic education in a variety of ways—in talks, booklets, a special section in our annual report, visits by high school and college classes to our plants and offices, the hiring of professors as summer employees so they can learn about business firsthand rather than from a textbook.

We have a company policy that encourages employees to spend part time or full time on political and community affairs, and we are very generous with leaves of absence for this purpose.

We don't believe in keeping a low profile. If there is an issue in which we have some concern, some knowledge, or a viewpoint, we send letters to our Congressmen, and we encourage our managers and employees to do the same. I will not hesitate to call up political acquaintances and tell them my views on an issue. I know many of our other executives do the same, and so do some of our employees. The freedom to do so is a fundamental right, even an obligation, in this country.

If business doesn't speak out to present its ideas and viewpoints, who will? The answer is "no one." Business cannot afford to sit on its collective hands and say, "Let someone else do it," or "It's too difficult a job for us," or "We don't want our views known." Every voice heard is a step toward more respect for the business world.

What is needed is for business to concentrate and coordinate its efforts by speaking out on major issues, to become a more important voice.

One problem with business is that it does not have an organized constituency. It doesn't have an effective, strong, unified voice on such national concerns as inflation, unemployment, and fiscal and monetary restraint. Many other groups—some even small in number—have much louder voices. Vocal minorities have often controlled government policy. In England, the voice of organized labor has helped cause that country's present economic crisis and possible decay. In this country, New York City's current financial problems can be traced to the lack of a strong vocal opposition acting as a restraining force.

What is needed is for business to concentrate and coordinate its efforts by speaking out on major issues, to become a more important voice. Today, there are hundreds of companies with their own programs for communicating on major issues. There are also dozens of groups like the NAM, the United States Chamber of Commerce, and the Business Roundtable. But they often go their independent ways, thus diluting their efforts. It seems to me two things are needed: First, companies should devote a portion of their advertising and communications budget to deal with important national, state, and local issues.

If we are so enterprising, so energetic, so innovative, and so smart, we should be able to help formulate ideas and programs that will alleviate the societal problems we face in our third century.

And second, perhaps business needs to consolidate the communications efforts of the various firms and trade associations so that it can speak with a more powerful voice, addressing problems of national importance. Once those problems are identified and addressed, however, business must act to solve them. Communicating, talking about solutions, is not enough. Industry should be taking an active leadership role in the solution of those problems.

We can employ the best speakers in the world to discuss why our economic system is best, and how we can solve unemployment. But if these speakers—no matter how eloquent—are addressing their comments to groups of seventeen-to-twenty-year-old blacks, with an unemployment rate of 40 percent or more, their voices will fall like so much rhetoric on deaf ears.

If we are so enterprising, so energetic, so innovative, and so smart, we should be able to formulate programs that will alleviate the societal problems we face in our third century.

At Gould, we are currently developing a model program, for instance, which would help make jobs and job training available to the unemployed in the inner city—particularly the young and disadvantaged. We are attempting to develop a plan whereby there is a net cash advantage to government in the long term in taking people off the welfare roles and producing, with the cooperation of business, productive employees. Such a plan could enhance inner-city business and in time make a major dent in our high unemployment level. If the ideas seem sound after further study, we will try to get the government to consider them. We hope to follow our good intentions with action.

Communicating is a vital aspect of solving our problems. But alone, it is not enough. Without substance, without well thought through ideas, and without good performance, the best communications programs in the world simply become a clutter of paper and a flood of rhetoric.

On the other hand, real performance, realistic ideas, innovative programs, and a concern with national problems, backed by good communications efforts, can be the driving force behind an informed public, an informed investment community, and a healthy free enterprise system.

Turning Corporate Communications Failures into Success

Eberhard Faber
Chairman of the Board and Chief Executive Officer, Eberhard Faber, Inc.

Well, look alive, everybody! Kind of looks to me as if I can see some dead faces out there. Too much dinner? Not enough sot-fee? Both clearly has fallen under the usual illusions about me being a great communicator. This is an illusion I foster and cherish. But I don't have to pretend with you. You finally got to the point in the program that you've all been waiting for—the comic relief.

It is true that I'm very much in demand as an after dinner speaker but this is the first time I've ever been asked back.

I addressed the Fortune Sales Conference in Puerto Rico in 1972, and I hate to tell you what I told them at that meeting. I told them that they ought to use a certain very bad four letter word in their magazine more often than they do. And they haven't. But they have asked me back. At this point I want to show you that Fortune . . . you think that Fortune has been in existence for a long, long time? which it has! and is a very successful publication . . . That Fortune really has come a long way in the last five years and I don't know how many of you are really aware of that. But I'm going to prove that to you now. (Takes off jacket to reveal old red Fortune sweatshirt.) You see this was a handout five years ago.

I think you've got to admit that things have improved a lot since then.

There's a great appeal to failure. There really is. And I try to capitalize on it wherever possible because I have a lot of opportunities to do so.

Well, we've heard a lot of stories of corporate communication successes here this week. An awful lot. I am really an expert in corporate communications failure. This is the subject of my speech. You don't have to believe me, by the way. I mean, you can ask my marketing people. My board of directors. You could ask even my mother!

What I'm trying to say here is related to what Walter Armbruster said much better this morning about belief dynamics.

There's a great appeal to failure. There really is. And I try to capitalize on it wherever possible because I have a lot of opportunities to do so. To be an expert in corporate communication failure, you have to have a good education because if you don't have a good education, you can't communicate at all and you know, you can't make the magnificent failure.

You can be a success in business without a good education but you can't be an expert in corporate communications failure without it. I went to Princeton and pursued this goal and almost immediately ran into my first magnificent failure. My roommate and I tried out for the Press Club in Princeton, which is the organization there which services newspapers —you know, the *New York Times* and the wire services and so on. We were the only two people who failed to make the Press Club after two eight-week competitions. That discouraged us a great deal. So he went off and became chairman of the *Tiger*, which is the Princeton humor magazine, and I became chairman of the *Daily Princetonian*, which is the undergraduate newspaper. And that was my first real insight into the tremendous potential of failure.

I followed that up with a couple of beautiful failures as the chairman of the paper. The first one concerned the Alger Hiss story. I don't know if anybody remembers the time when Alger Hiss was released from Princeton—I mean from prison—and was asked by the undergraduates to come down as a first public appearance to speak at Princeton University on the Yalta Conference. Well, the alumni were up in arms and were not going to give any more to annual giving and the American Legion picketed the campus and we had pumpkins full of little typed manuscripts in them.

The whole thing was very exciting. And I wrote an editorial for the paper which said more or less that, you know, the guy's done his time and why not hear what he has to say about Yalta and so on. And that was a magnificent failure because that got read into the *Congressional Record* by a Congressman named Tumulty, 300 pounds, from Jersey City, who was most noted for saying at the time of the Yugoslavian arms shipments, "when we buy votes, they stay bought!"

Anyhow this Tumulty was up for election and so he read my editorial into the *Congressional Record* as an example of Communism in American universities.

And my next great failure was the story of the election of the President of Princeton that year—Robert Goheen, who eventually proved to be really an excellent president. But the story I wrote about it, which I had from an unidentified source on the board of trustees, was that Goheen was the sixteenth or twenty-sixth choice for the job. I forget which it was.

And the board of trustees of Princeton was very unhappy with that story. Because even though it was true, it was not something that they wanted to print.

And that eventually cost me a Rhodes Scholarship, by the

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way. I got asked a lot of questions about that at my Rhodes Scholarship interview. And then I decided to pursue my career of success from failure by going over to France on a Fulbright Scholarship. I had a year at the University of Poitiers in France and then they asked me to become a teaching fellow. And I gave my first lecture series at the University of Caen in Normandy. It was a series of three lectures on the Growth of the American Executive Power from Andrew Jackson to Franklin Delano Roosevelt, a subject about which I knew nothing, having been an English major and so forth. But I worked very hard at this and prepared the lecture series. I was very scared and went into the lecture hall for the first lecture and it turned out to be an enormous auditorium and it was just packed with people hanging from the rafters. The university community was there and the town was there. And oh my God, who wasn't there?

And the board of trustees of Princeton was very unhappy with that story. Because even though it was true, it was not something that they wanted to print.

Somehow I got through that lecture and after it was all over, I asked my wife—I'd just gotten married and at that time my wife was my severest critic—I said, how was it? And she said, "Oh, it was really terrific. I was really very impressed. It was one of the best lectures I've ever heard." So I felt pretty good about it. That was a mistake, right?

Had I known as much as I do today about the Faber failure principle, I would have been very worried by that comment. But I came back for the second lecture and found that the place was about half full. That was still a lot of people but I figured to myself, well, how many people are really interested in the growth of the American executive power in Caen, France? I mean, you know . . .

So I gave the second lecture and I managed to get through the material in time and, of course, I was lecturing in English because that was part of the program there. They wanted their students to pick up the foreign language and so forth. But I got through the material in time and my wife liked that one too. Well, I was starting to get a little distrustful, but I came back for the third lecture. And in this enormous auditorium there were I think three or four people.

And now I'm in a state of total terror. I somehow got through that lecture and I grabbed one of the three or four as they were leaving the hall and I said, "Excuse me," in French. "Could you tell me, you know, there were a lot of people here in the beginning and now there are only three or four left, what happened?"

And the guy answered me in sort of accented English. He said, "Oh, oui, Monsieur Faber, it's very easy to explain. You've been lecturing for three weeks and you've been talking so fast that no one has understood a single word that you said."

Well, I've never been able to duplicate that for a magnificent failure. That really was the tops.

I went to graduate school after that and had a really marvelous teacher in the art of communications failure, Professor Richard P. Blackmur. I don't know if any of you have ever heard of him. But he was an excellent critic who died a few years ago, author of *The Lion and the Honeycomb, Language as Gesture,* and so forth. Marvelous, marvelous critic. The only trouble with Professor Blackmur was that he was so good that no one ever understood a word of what he was saying. About 5 percent of his students felt that they got something, but the other 95 had to confess, in varying degrees I hasten to add, that they really hadn't understood anything. People were really in awe of him because he was the only member of the Princeton English Department who didn't have a PhD. and yet he was clearly so far above everybody else that they were totally in awe of him. And the fact that nobody could understand him made it worse. I learned something from that.

Finally I went to work for Eberhard Faber Inc. and spent five or six years in various innocuous positions there—didn't enjoy myself very much. And probably the problem was that I didn't have any magnificent failures to turn into successes because there wasn't anything much to do there. So I decided to retire.

Now I had been voted by my Princeton class the student most likely to retire before the age of forty. And they were right and wrong about that. They were right in that I was thirty-two and I was retiring. But they were wrong in the fact that I didn't have any money to retire on and had to support myself playing poker. And my family. And that's when Fortune came into my life, as Bob mentioned. And they were also wrong because I did go back to work and I'm now forty and I'm afraid I'm showing no signs of retiring at this point.

I wrote that story, *"How I Gave Up the Good Life and Became President,"* and there was the kind of reader reaction that Bob mentioned. And at this point I realized that something important was happening here.

I think what it was (rather than any merit the story had in and of itself), was that a lot of people were relating to the fact that the story did deal with the human side of business, which I think is something that doesn't get as much play as the public would like and it's not because people like those at Fortune don't want to print the stuff. It's because it's difficult getting people like you to tell it. And especially when they think it might affect their jobs and so forth. But there was a lot of highly favorable reaction to that story and that approach to things.

. . . a lot of people were relating to the fact that the story did deal with the human side of business, which I think is something that doesn't get as much play as the public would like . . .

I found out at that time, by the way, that the readership of Fortune is substantially greater than its subscription list. There must be a very large number of people who read each copy of Fortune, because the kind of letters I got were from all kinds of people who you just know are not Fortune subscribers, like university students, for example, civil servants, little old ladies in sneakers, as well as the corporate executives that you expect to hear from.

Many people from all walks of life really do read Fortune. But before you start thinking that I'm a shill for Fortune at this meeting, let me say that I'm definitely not and I've got good reason for not being. Did you all get this thing in your handouts? It's a Big Red Parker fountain pen. . . . (Throws pen on floor and stamps up and down on it).

When I took over this job of running a company, I really didn't know anything about it at all as Bob mentioned—rather unkindly, I thought—and I decided that I had to communicate with the people because the reason I was chosen for this job was because people thought, just as Bob thinks, that I'm a communicator. And the consultants who were called in to help figure out what was wrong with the company decided that although the management had called them in because they thought they had a labor relations problem, indeed they did not have a labor relations problem. They had a management problem.

Consultants always do, you know. And they found that what was needed was somebody who could really communicate with the people in getting them to work together again. And for some reason they thought I was the person to do that. And I figured that to uphold this image the first thing I had to do was get all the people in the place together and tell them what was going on. We were reorganizing the management. We were going to lay a lot of them off. We were going to cut a lot of these guys out.

It was a real problem in communication. The guy I was replacing was in that room. You know? And it wasn't just a whole lot of fun. But it was a success, if you can call it a success, a meeting where you have to talk to all the people in the company in the cafeteria in seven different speeches because you don't have a room large enough for them all. And that's a lot of speeches even for a guy who likes to hear the sound of his own voice as much as I do.

And unfortunately, again, success always brings with it the seeds of failure because you get satisfied with yourself.

We got through it though and we did start to turn the company around and they were right about the communication and the people did buy being told what was going on and we told them we understood that they wanted to make more money and so did we and why couldn't we do it together and that seemed to be a good idea. The only trouble with this big success, because we really did start to generate some cooperation with people, was that it led to another failure, as it always does. And that happened when I decided that speech day was so much fun and such a good idea and everybody liked it so much that we should have it as a regular feature of our year. And I made a speech three months later and that was well received, but during the speech I said as far as I know there won't be any further layoffs in the company. We'd done all the cutting we were going to do. And it turned out that three weeks later when we made up the fourth quarter broadload, we had to cut out another bunch of people. And the next thing I heard was that there was a member of the union committee out on the plant floor who was going around saying that I was a liar and it was just like it always was. So I figured I had to do something about that and I went out on the plant floor and found this guy. And boy, all of a sudden, all those machines stopped. And I said, look, I understand that you're calling me a liar and saying that it's just like it always was. And I said, I want you to know something. I said, I may be stupid, but I would never try to disrupt the momentum we've got going here by telling you people anything but the truth, or something like this.

And I said, at the time I made that speech the fourth quarter broadload wasn't finished. I didn't know we were going to have to lay some more people off. And I think you owe me an apology. Well, he agreed.

And you know, out of colossal failure, because it was just total negligence on my part that I hadn't checked out properly beforehand whether we were going to lay anybody else off or not, came an enormous success, which is one of the first times I realized the true merit of the Faber Principle.

But it's a good thing for the boss to be a horse's ass. And it's a good thing that people can tell you that you are, once in a while. That's communication, right?

And unfortunately, again, success always brings with it the seeds of failure because you get satisfied with yourself.

Like all these people from Fortune here, you know, the ads keep rolling in. They're a good bunch but they really ought to try to sell pencils for a while.

Anyhow, I got cocky again and I decided I was going to write this story about the guy on the rubber plant floor for a magazine that couldn't possibly get back to the United States. There's a magazine called *Amerika*. It's published in Russia and Poland. In Russian and Polish, right? And I figured well, I can tell the story. I can really be frank about the whole thing and I'll get this out of my system. You didn't know I wrote for anybody but Fortune, did you, Bob? Anyhow, I did write this story and boong! another failure, of course, because two weeks after the story was published, I ran across the president of our union reading a copy of *Amerika* in Polish. We've got a lot of Polish-Americans in Wilkes-Barre and a lot of them work for us, and some relative in Poland had sent a copy to one of them. Soon it was all over the plant and the boss was a horse's ass again, right?

But it's a good thing for the boss to be a horse's ass. And it's a good thing that people can tell you that you are, once in a while. That's communication, right?

It is! It is! Because if they can tell you you're a horse's ass, that means you can tell them they're horses' asses. After all, you still have the decision-making power, you know, and you can change those horses.

So, anyway, I moved on to the flood of '72, clearly a major disaster, and we did a story on that in Fortune and a lot of good did come out of that. I don't know whether I ever told the people at Fortune about that. At least partly as a result of that story, we got a heck of a lot of federal funds for the Wilkes-Barre area and boy, did we need them! And really a lot of good came out of that too. I must say, also, that the first Fortune story did a terrific amount for our company in that turn-around period. It really gave a lot of momentum to the people—we were doing something and it was terrific.

Finally, during all this time I was preparing my masterpiece of corporate communication failure. And that was the subject of *How I Lost The Great Debate On Corporate Ethics*. The sweetest deal I ever made. I'd never seen such a beautiful deal and I couldn't even sell it to my own board of directors. Now you've got to admit, that's pretty mammoth. But, as usual, I couldn't even convince my own mother. She voted against the deal.

It had to do with payoffs. This company was paying off the government and we were going to get 40 percent of the stock of this company for nothing but know-how and name—no cash, nothing.

In addition, we were going to get a large profit on a big machinery sale. I'd never seen such a deal. But oh no, they were paying off the government and even though I had corporate counsel's opinion that there was nothing legally wrong and the IRS had said, no, that's not what we're interested in and so forth. No, that board wouldn't touch it.

I'd never even given a thought to the fact that this would be rejected. I was interested in what I wanted to sell and not what they believed, you know. But, as usual, success in proportions undreamed of came out of these failures with this story in Fortune and all that mail you've heard about. Now, instead of being the bad guy who wanted to acquire part of a company that was paying off its government, I'm now an expert on corporate ethics.

And I've been invited to speak at Harvard Business School, the Wharton Business School, the Tulane Graduate School. They really think here's the guy we need to tell the students about corporate ethics. I could spend a lot of time doing that if I wanted to. I don't want to. There are many ways, I think, to communicate besides the usual advertising, public relations, and so forth. I don't mean to imply that those aren't important. But I think that Faber's Principle of Failure still holds, even in those things. I've got a little story on that one. There was a guy I went to Princeton with who was a very hard worker, very nice guy. Always a little short in the brains department. He went to work for a major New York bank and his first assignment after he got through the training program was to set up—this is a true story, by the way—a big window display for the bank's principal office. Right? And he thought about this and he thought about this and finally he came up with a lot of beautiful trees. It was a little like the Natural History Museum. Beautiful trees and in the trees is a big bunch of squirrels. Right? And this is really a beautiful thing. It cost a lot of money and everything.

The only trouble was that the legend at the bottom of the display said, "Do as the squirrels do." And boy you should have seen what those squirrels were doing there. They weren't saving, I'll tell you that.

Yes, and Ed Kelly, you've been dreading this moment. It was the Manufacturers Hanover Bank.

But it was a long time before you and Del Ladd got involved with Manufacturers Hanover. You wouldn't have had an idea for a magnificent failure like that, would you?

Now, we're not in the Fortune 500, we wouldn't be in the Fortune 5,000 if there was one.

There are a lot of ways to communicate with the public besides simply the usual ways. I was talking to Dick Young of IBM about the IBM School. Fantastic way to communicate with the consumers. Not for everybody, very expensive, but in a high technology area like that, just unmatched.

I'd like to see a show of hands here just for one moment. I'm really interested in this. A show of hands on how many people in this room before coming to this meeting had heard of Eberhard Faber. The name.

Would you get those few people who didn't raise their hands out of the room please?

Pretty much everybody I saw raised their hand.

Now we're not in the Fortune 500, we wouldn't be in the Fortune 5,000 if there was one.

We do about $30 million in sales and I think that's about 1/50 of what Bill's company did, if I heard his figures correctly. Just 1/50. Two percent. And yet, everybody in this room knows the name of this company. Right? Now how did that happen? What's it all about? Well, one way of course that a company communicates with the public is through its product. And, of course, with pencils you have a product that is sold in enormous numbers of units, if in very small numbers of dollars, throughout the world. I recently was in charge of the first international pencil-makers' association meeting in San Francisco. And by the way, your reaction was exactly the same as that of NBC News. I tell you, I was sitting in a darkened room waiting to go on and give the opening address and they say, hey, NBC News is outside. So I go trotting out and they say what's this? An international what?

Well I didn't remain anonymous very long with a name like that. And I soon became known as "Leadhead."

Pencil-makers! And they just break up laughing. Just everybody is in hysteria over this. See?

Well, I had to do a little work for that meeting and one of the things I found out was that approximately ten billion units of pencils were sold in the world last year. And that's a heck of a lot of units. The whole sale probably comes to something like $250 to $300 million but that's a lot of units and that's a lot of ways for that name to get spread around the world.

In conclusion here, I just want to tell you a little something.

The chief executive officer's role does have something to do with communication with the outside. And I want to tell you a little bit about what it's like to have the name Eberhard Faber.

First of all, it's known all over the world, of course. I shouldn't say "of course." Why should it be "of course"? But in fact, I do a lot of traveling and wherever I go, people do know the name.

When I was in the Army, I tried, as one is always advised to do, to remain anonymous.

Well I didn't remain anonymous very long with a name like that. And I soon became known as "Leadhead."

It was Leadhead this, Leadhead that. Give me another twenty-five pushups, Leadhead, you know. And then there are all the people who ask me if I've got any lead in my pencil.

And now all of that's kind of a big drag. Right? And then there's another thing. Bob said that he didn't know that there was really somebody named Eberhard Faber, you know, he thought that Mr. Eberhard and Mr. Faber got together a long time ago, maybe something like that.

A lot of people think that. Right? And they find out there really is somebody, right? And that ought to be pretty terrific, right? Wrong!

You see, they've got this idea—it's what belief dynamics is about. Right? They've got this idea well, if there is a Mr. Eberhard Faber, he's got to be some sort of Teutonic dream.

You know, in fact, one of Margery Allingham's early mysteries had a character in it named Eberhard Von Faber.

And this guy was kind of a mixture of Beethoven and Bismarck. He was a very villainous character, by the way. But he was very big and strong and he was a genius, even though he was a criminal. You know people see me and say to themselves, "This little schmuck?" You know?

And the next thing they want to know is whether you have hemophilia and might bleed to death if you cut yourself shaving. Will he die from eating a surfeit of lampreys?

Anyhow, finally they find out you're just an ordinary Joe and it's comforting because there's that failure principle again, right? So I say, don't let anybody change your name or replace you by a corporate symbol if you've got a good name. The ABC Corporation can't have failures, but people can and the success that inevitably follows them.

Corporate Growth and Communications Challenges

Robert H. Malott
Chairman of the Board and President, FMC

My comments will focus on communications as an integral element in the various phases of corporate growth. And I want to challenge each of you to identify your own firm's position in relationship to the discrete phases of development through which most organizations evolve.

In my opinion, timely recognition of these phases of corporate growth is essential to both sound management and effective communications. Top management, including those responsible for communications, must then respond appropriately or run the risk of being a part of a crisis of abrupt and painful executive suite change. I am reminded of a Vermont maple syrup farmer who faced a problem that might be likened to a corporation passing from one phase of its development to the next. As his trees matured, he found the taste of his maple syrup was changing for the worse. So he sent a sample to the state agricultural station for analysis. Several weeks later he received a letter from the government which began, "Dear Sir, We are sorry to report that your horse has a severe case of diabetes. . ." As in your firms and mine, failure to identify a problem correctly could well lead to an incorrect response.

From our educational institutions have come a number of theories about the phases of corporate growth. One theory maintains that growing organizations move through several distinguishable phases of development, each of which contains a relatively calm period of growth that usually ends with a management crisis. As many of you are keenly aware, organizational crises present formidable challenges for top management, including those of you responsible for communications.

I do not intend to examine such theories in depth but will use them to point out the phases of development through which my company has progressed since our origins in 1883. As I proceed, each of you will have the opportunity to judge the position of your own company in relation to these identifiable phases—to muse on the communications crisis just past, or to speculate about the challenges that lie ahead.

Phase I may be described as the *creative phase*. In this phase, the emphasis is on creating both a product and a market. This period of creative evolution has some clear characteristics: (1) The company's founders are usually technically or entrepreneurially oriented and they disdain management activities. (2) Long hours of work are rewarded by modest salaries and the promise of ownership benefits. (3) Control of activities comes from immediate marketplace feedback—management acts as customers react. (4) Communications among employees are frequent and informal. Usually, top management knows all the employees by their first names, knows whose wife is going to have a child and where many are going on vacation.

Government relations are made up of conversations with the local city fathers on zoning or perhaps the need for a traffic signal where the employees leave the parking lot.

Stockholder communications are minimal since, usually, the company is privately held or at best its stock is sold over the counter. Not much time is spent by management in the shareholder relations area of communications. After all, the company is one of thousands started every year. Until it establishes an awareness for its product and shows a growth trend for sales and earnings, not much attention will be paid to it by the financial community.

Advertising at this creative phase is all product-market oriented. Management isn't concerned with establishing an image for the company. There is no thought given to any corporate identification advertising; nor is the company so complicated that it needs explaining.

Government relations are made up of conversations with the local city fathers on zoning or perhaps the need for a traffic signal where the employees leave the parking lot. The need for international communications has not yet arisen for this company.

It's a nice place to work, isn't it? Unless you started with your company at the time it was founded, you have probably never experienced such an environment.

At FMC this would have encompassed the period between 1883 and 1906, after a man named John Bean invented a continuous pressure pump for orchard spraying. He founded a company in Los Gatos, California, to manufacture these sprayers for the farmers in the area. The Bean Spray Pump Company, a forerunner of FMC, was actually started in a blacksmith shop. In a significant upgrading of facilities, production was moved to a small fruit shed nearby. The product invented by John Bean was soon recognized as a boon to agriculture, and the huge demand for these sprayers led to the company's first crisis. This was a *crisis of leadership*.

As any company expands, efficient production requires the use of more sophisticated management tools. Growing numbers of employees cannot be managed exclusively through informal communications. New employees are not motivated by

an intense dedication to the organization or its product. Additional capital must be secured and new accounting procedures are needed for financial control.

Thus, the founders find themselves burdened with unwanted management responsibilities. It is at this point, then, that a crisis of leadership occurs. Who is to lead the company out of confusion and solve the managerial problems confronting it? Obviously, a strong manager is needed, but the founders are often reluctant to step aside even though they may be temperamentally unsuited to be managers. So, the first critical decision is to locate and install a strong business manager who is acceptable to the founders and who can pull the organization together.

Communications between top management and employees are often by memo, sometimes placed on bulletin boards in the plants.

Those companies that survive the first phase of installing a capable business manager usually embark on a period of sustained growth. This is Phase II and might be called *growth through direction*. There are certain characteristics of this evolutionary period: (1) A functional organization structure is introduced and job assignments become more specialized. (2) More sophisticated accounting systems are installed. (3) Incentives, budgets, and work standards are adopted. (4) The new manager and his key supervisors take most of the responsibility for establishing strategic direction.

Communications during this phase become more formal and impersonal as a hierarchy of titles and positions is developed.

Communications between top management and employees are often by memo, sometimes placed on bulletin boards in the plants. Verbal communications are passed through intermediate managers to departmental employees. Management's communications must now be broadened to encompass financial people, stockholders, plant community leaders, and key customers both in the U.S. and abroad.

This era of growth and increasingly complex activity inevitably leads to an *autonomy crisis*. Now lower-level employees find themselves restricted by what can become a cumbersome and centralized hierarchy. They have come to possess more direct knowledge about production and marketing than do the leaders at the top. Consequently, they feel torn between following established procedures and exercising initiative.

This crisis leads to the next era of growth, the *delegation phase*. In this phase, much—if not most—growth responsibility is given to the managers of divisions, plants, or market territories. Profit centers and bonuses are used to stimulate motivation. Top executives at headquarters strive to manage by exception. Management often concentrates on acquisitions that can be integrated into other decentralized units.

Communications from the top are infrequent—usually by correspondence, telephone, or visits to the field. The company finds it has a number of spokesmen; and although each represents a specific area of business, it rarely seems to the public that the spokesmen are representing the firm as a whole.

Each profit center spends an increasing share of its management effort on creating a separate business image, and advertising is accordingly narrowly focused. Loyalties are often devoted to just a segment of the organization. No attempt is made to coordinate these semi-autonomous communications efforts because the separate units of the company regard attempts to standardize practices as unwarranted.

FMC spent much time in Phase III—from about 1929, when the John Bean Manufacturing Company merged with the manufacturer of food processing machinery and formed the Food Machinery Corporation, until about 1970. It was the era of the present company's first five presidents, during which time the company grew from a $5.5 million company to a $1.25 billion company.

After the merger that created Food Machinery Corporation, our activities were extended into packaging machinery and then into agricultural chemicals. World War II drew us into the ordnance business, which was followed by entry into industrial chemicals, film and fiber, power transmission equipment, and materials handling systems.

By the time we entered the Seventies, FMC was facing *crisis No. 3*—the *crisis of control*. At this point management realized it was beginning to lose control of a highly decentralized organization, and the Phase III revolution developed when top corporate management sought to gain more effective control over the company. Although the vast scope of operations precluded a return to tightly centralized management, greater corporate direction was warranted.

Phase IV, or the *coordination phase*, follows and decentralized units are merged into larger and more logical groups. Formal planning procedures are perfected and bottoms-up plans are intensively reviewed. Staff personnel located at headquarters initiate a variety of company-wide programs: capital expenditures are carefully scrutinized against corporate criteria and certain technical functions such as data processing are centralized. Daily operating decisions remain decentralized.

FMC has been going through this phase during the last four or five years. As president and c.e.o. of the company during this stage, I have tried to ensure that our communications are responsive to the rapidly changing demands of the organization.

In 1972 we hired an outside firm to study our identification programs and make recommendations.

First, we evaluated the appropriateness of our company name. While we were advised not to retain a "letter" name, we decided to continue to use "FMC" because of the substantial investment we had already made in this identification symbol. However, we did develop and adopt a new logo.

Next we tackled the problem of renaming most of our thirty-five domestic divisions and many of our international operations. For example, we had divisions named after *states*, such as the Florida Division, or *cities*, such as the Riverside Division. We had divisions named after *people*—the John Bean Division—or sometimes after *two people*, such as Hudson-Sharp. Then we had divisions named for their *product lines*, or their *overseas location*, or sometimes with seemingly *inexplicable* names like Chiksan, which means "Gold Mountain" in Chinese.

In addition to the fact that these names failed to identify clearly the product lines produced or the markets served, each of these operations was bent on establishing a strong divisional identity. Their lack of tie-in to FMC created an impression in the marketplace of thirty to thirty-five separate companies!

Many divisions had their own trademarks, and even some of our divisional employees were unaware of the fact that they worked for FMC.

New *generic* divisional names, plus new stationery, business cards, and forms have helped solve the problem of an overly diffuse identity.

Many divisions had their own trademarks, and even some of our divisional employees were unaware of the fact that they worked for FMC.

When we analyzed our paperwork, we found we were generating nearly ten million letters and memos each year, and many millions of invoices, purchase orders, computer cards, checks, bills of lading, and shipping notices. All of these were standardized.

This process led us to review our more than 1,000 trademarks and brand names and to establish a rather ruthless program for phasing out most of them. Some of our old brand names were historical and reflected acquisitions, such as Link-Belt and Bolens. Some were coined words—Autoscan and Sterilamatic. Some were initials such as P.I.V. and O.C.T. And then there were descriptive names, usually the brainchild of some budding product manager and typified by one of our cotton pesticides, which we were promoting as "Wicked Willie Weevil."

Our program to phase out brand names is still active, and we now have reduced the list to just over a hundred.

While we realize that brand names have advantages, the cost of identifying a product with a brand name, protecting the name, and advertising and promoting it may far exceed its worth, particularly if the product is frequently purchased on company reputation or by generic name. To date, we are well satisfied with the results of our effort to concentrate on FMC as our primary brand and trademark.

We are also standardizing colors for products, standardizing our packaging, and standardizing signs for our more than 500 plants, offices, and distribution centers. In addition, we have established company-wide guidelines for advertising signatures and trademark usage.

While we realize that brand names have advantages, the cost of identifying a product with a brand name, protecting the name, and advertising and promoting it may far exceed its worth . . .

A new brochure format was developed to assure that the $3 million worth of literature produced at different locations each year follows uniform guidelines and results in publications with an FMC family resemblance.

We set up a coordinated company-wide approach to our participation in trade shows. Until our identification program was established, we sometimes had four or five divisions exhibiting at a given show, each exhibiting in a different area of the hall and all competing to see how cleverly they could promote a unique division—as opposed to a corporate—image. Now, unless there are excellent marketing reasons for not being together, you will find FMC in a single area in each trade show we enter, projecting the FMC image as professionally as we can.

Recently we have tried to make it easier for the potential customers for our 10,000 products to communicate with our 129 domestic plants that manufacture those products. We surveyed about forty plant locations and found that we were getting more than 200 calls a week that were not being properly handled. This occurred because divisional personnel understandably lacked a complete knowledge of the breadth of our product lines. Now, with a budget of approximately $100,000 a year, we have established a toll-free 800 number for an FMC information center where any caller seeking product information on anything manufactured by FMC can be put in touch with the correct division immediately. This experiment is only six months old and it is too early to be sure of its value. But apparently this innovative service is proving to be an important sales tool for our divisions.

All of these steps may seem to be obvious and simple to implement. Those of you who have been through the process, however, know the difficulties. Dire predictions of disaster became more vociferous as division management realized that top management was committed to change. Not surprisingly, the prophecies of gloom and doom have turned out to be largely unwarranted, and our program has been successful.

For those of you contemplating changes of this kind, I have one bit of advice: do not create a decision-making committee. Emotionalism based upon division name and product brand loyalties runs deep, and will create major problems for consensus-style management. A senior executive who is known to have the support and confidence of the chief executive officer must be given decision-making responsibility. You should realize, and accept, the fact that in many cases he will have to exercise his authority.

Only if more businessmen are willing to be actively involved in business-related public issues can we hope to arrest the relentless growth of government . . .

In addition to improving what I call our "operational" communications, we are also working aggressively to develop the means to communicate more effectively *externally*. Only if more businessmen are willing to be actively involved in explaining the business world to government regulators, academicians, consumers, and members of the Fourth Estate—many of whom have become increasingly hostile—can we hope to reverse the adverse trend of public opinion.

Only if more businessmen are willing to be actively involved in business-related public issues can we hope to arrest the relentless growth of government and the "crowding out" of private enterprise.

I see not just an opportunity, but an *obligation* on the part of the business community to assert itself more courageously.

What are we doing?

First, we are encouraging our managers to communicate frequently with public officials at the local, state, and national levels. With plants and employees in 141 congressional constituencies, we can express our views on congressional legisla-

tion, for example, with a nationwide voice (as can many of you!).

Second, we are encouraging greater voter participation in the election of responsible public officials. Poet Ogden Nash has written about one aspect of electoral lethargy that should concern all of us:

"They have such refined and delicate palates
That they can discover *no* one worthy of their ballots,
And then when someone *terrible* gets elected
They say "There, that's *just* what I expected."

In addition to exhorting our people to vote, we have established a nonpartisan political action committee which enables many of our executive and administrative personnel to make contributions to the election campaigns of candidates who are knowledgeable about business viewpoints.

Third, we are exploring ways to have our managers speak more often in public forums about national issues. We *all* can do more to stimulate the public-mindedness of our employees, our shareholders, our plant communities, and our customers—whose interests are often the same as our own.

Let me discuss another way in which corporations can influence their external environment—namely, by thoughtful, objective, tough-minded, self-interest-oriented management of corporate giving. Corporations' charitable contributions exceed one billion dollars a year. This magnitude of financial support can have an enormous impact if administered effectively. I maintain this has not been done in the past.

Establishing rigorous criteria by which to evaluate contribution requests by no means needs to jeopardize traditional giving to charitable organizations. While I feel FMC has substantially tightened up the standards by which we evaluate requests, we continue to contribute generously to those organizations that we supported when the criterion for support could be described as "the squeaky wheel gets the grease."

The areas that I feel deserve more attention from many of us are education and public policy research, both of which will have an enormous impact on our nation's future. And to put my philosophy succinctly, I would suggest that since corporate support of these areas arises directly from the success of the private enterprise system, it makes sense to target our funding to institutions supporting that system rather than to those that would weaken it.

At FMC we have developed a philosophical "screen" against which we judge requests for support. One result of this is that we make very few unrestricted grants to universities and very few contributions to college or university associations, since in both of these cases it is difficult to determine where and how our funds will ultimately be used.

I would add that our screening process is not merely a reactive one. Rather, it also includes actively seeking out worthwhile institutions that we feel are doing work of interest, and which may not have identified FMC as a source of support.

We take the same approach in the area of public policy research, where there are a number of organizations doing excellent work that I would describe as balancing the liberally inclined efforts of several well-known, well-endowed institutions.

It seems to me that business must become more intelligent about philanthropy. We must formulate goals, criteria, and priorities. Purposeful corporate giving can have a positive effect on our operating environment. Let's take advantage of this opportunity.

It seems to me that business must become more intelligent about philanthropy.

I hope this overview of the phases of corporate growth, and their linkage to corporate communications, can be related to your own companies. An awareness of these cycles of growth and resulting crisis should enable all of us, as managers, to better anticipate problems associated with growth. Likewise, since forewarned is forearmed, our understanding of these cycles can equip us to take advantage of the *opportunities* which change invariably presents.

What will be the characteristics of the next phase of growth for many of us? What will be the challenges for those charged with communications responsibility? Well, at least one thing is abundantly clear. All management—*especially* those charged with communications responsibilities—must do more to shape our increasingly important external environment. To date, U.S. industry overall has not been effective in mobilizing its "natural constituencies" of employees, stockholders, customers, and plant communities to deal with business-related public issues. Nor have we been tough-minded in our corporate giving, or active enough in maintaining a dialogue with public officials. Only if it is generally recognized that the public interest is inextricably linked to corporate growth can we expect private enterprise to continue as the driving force behind national progress. And responsibility for achieving such public understanding falls squarely on us.

Question and Answer Period

Q: *Yesterday morning in a break-out session, some discussion was had with re corporate identification. One firm went from names to initials. One went from an old familiar name to a made-up name. Mr. Baker said right, but he would choose his over the ABC Corporation. I wonder if, in retrospect, your firm would make the same decision, to go with initials, as you did.*

A: I don't really pretend to be an expert on this, and you probably would find as many opinions as people who wish to express themselves on the subject. I would guess we'd make the same decision at that point in time. I think if we were to start all over again, I'd rather be Kodak or Xerox or something unique like that.

There probably are some real drawbacks to initial names. We have a terrible time communicating what we do. People think we make bowling equipment. Occasionally, they make the mistake of thinking we manufacture automobiles and I don't discourage that one. But you do have a bigger challenge, it seems to me, in creating an identity for yourself when you use initials.

But I still think, in retrospect, at the stage we were and with the effort we had put into creating an identity for FMC, we probably would have made the same decision. I'm not sure it's right.

Q: *I have three questions on the political action front. How well do you think your good-government program is working? What level of executive participates in it? What sort of committee decides on the candidates?*

A: As you may know, there was a lot of controversy in connection with the legal aspects of our ability to raise money last year. I regret Elizabeth Ray didn't leak her story about two months earlier because her Congressman friend was responsible for most of the procrastination.

As a matter of fact, the law Buckley took to court, which was found unconstitutional, was a dramatically better law than what we ended up with in terms of flexibility. We're fairly restricted in terms of the level to which we can go. What it amounts to is that you can solicit those people who have administrative responsibilities. Now that's a little vague, and we've taken advantage of that to define the law as broadly as possible.

We solicited about 2,500 employees, and we got about 20 percent of them to participate. Now that is not too bad since we didn't have a lot of time because it took us so long to fully understand the law. I suggested that there be a place on our salary review form to indicate participation in our political action program, but I was quickly advised by a number of people that this would *not* be appropriate.

But I do hope we can find the means for increasing participation. I don't think it was too bad for a first cut. We raised about $35,000. We only supported senatorial and congressional candidates, no support to the national campaign, none to state campaigns. We supported forty-seven candidates and thirty-five of them won. I think there were twenty Republicans and fifteen Democrats.

The fund is administered by a board of trustees. We're very careful to get a spectrum of political position and opinion on the board. So, to date, we're happy with it. I'd like to see, and I think we can generate, broader participation.

Q: *I was fascinated by your descriptions of the various stages of growth of corporations and agree they could well parallel the history of many companies represented in this room. Do you have any speculation about what the next generic phase might be for FMC or American business in general?*

A: I think it really might be associated with the crises of communications—the amount of time that we should be spending relating to the outside world, as opposed to running our business. It is absolutely incredible. But if we don't respond to that need effectively, it may well be the next management crisis. It's going to take people who can communicate. I was interested in a comment that Reg Jones of GE made at a Business Roundtable meeting when someone thanked him for all the work he's been doing on the new revenue bill. Someone asked, "How do you run GE?" And he said, "I'll tell you, I can make a hell of a bigger contribution to GE by spending my time influencing the House Ways and Means and the Senate Finance committees than I can sitting home pricing washing machines."

Unfortunately, that's true. And I repeat, unfortunately. But we have to recognize the situation. I don't know for sure what the next phase is going to be but it's certainly going to involve a heck of a lot more understanding and participation in terms of businessmen communicating and interfacing with external environments.

Q: *You became more centralized in both your structure and your corporate identity. Did you detect any loss of motivation in your subsidiary and divisional managements?*

A: That's a big problem, and I'd say it's a continuing one because what I'm talking about in terms of the changes we have made is not the centralization of decision making, but inevitably that is the way it's perceived. And that perception has to be overcome. It takes time and we haven't succeeded yet.

Basically, all we have really tried to do is to reserve the right to participate in strategic decision making. The day-to-day decisions are still made by the divisions. We do impose on them certain requirements. For example, we don't want to see a budget and just one long-range plan. We want to see alternatives in the long-range plans. (Budgets are short range.) We want to see several of them and we'll participate in the decision as to which one is appropriate. People in the division have to understand they don't have the corporate perspective that is necessary in terms of the allocation of resources and the direction the corporation is taking.

There's a common denominator that runs between alternatives, on the assumption that you have able management that's coming up with these alternative plans, and that is risk. A division manager can't determine risk. In the past he was really making the decision as to the amount of risk he should take. That to me should not be a decentralized decision. It is a centralized decision. Whereas we have centralized things like that, we really have not inhibited management in its ability to run the business. There is a perception that we have, and that is a problem. It takes some effort to overcome.

Q: *Is your corporate advertising budget a separate one, or do you allocate it back to the divisions?*

A: It's a separate budget and it's not allocated. We've been on both sides of this allocation kick and basically my general philosophy is that allocations are inappropriate. I want to be able to evaluate divisions on things that they control. They're aware, and we make them aware in different ways, of the overhead expenditures incurred, presumably for their benefit. But we don't allocate.

Q: *Is there any trend in your company toward broader participation, toward having a broader base of employees involved in decision making? Do you see that as a thing of the future?*

A: You mean vis-à-vis the European worker board concept?

Q: *Is there a need to give a wider feeling of participation in decision making throughout the employee group among the young people coming in, wanting to participate? Wouldn't this give a greater diversity of opinion, rather than having a tight decision-making group at the top?*

A: I think we all see pressure in that direction. But I don't think you run anything by consensus management, frankly. And you know a horse designed by a committee is a camel. I think basically the tough decisions in the company can't be made that way. The effort to solicit the opinions of a broader group of employees is appropriate and valuable. To delegate to a broader group of employees the decisions as to how you run the company—I don't think that's appropriate. But I could be part of the next management crisis by not understanding.

Q: *In your company giving programs, do you take into consideration employees' wishes?*

A: We have a range of sensitivity to that. We have a matching gift program, which is of course completely sensitive to the wishes of our employees. That's one extreme. We attempt to encourage management participation in a lot of community activities. And we go about this fairly formally—we do research

in our major locations to determine the kinds of things our employees should be participating in. To the extent to which there's a match between their interests and what is available, we urge them to participate. Also, we generally support those organizations more heavily than we would others. That is the kind of thing we take into consideration.

Q: *How do you distinguish between product identity and brand name identity I'm referring to, say, FMC and Chiksan. How do you use these?*

A: Maybe I should ask my point man, Al Campbell, to answer that question. Al, do you want to tackle that?

Campbell: FMC is our house mark, and it applies to all products. Then we still have some product brand names. We have not done away with all brand names—we still have about a hundred of them. We realize that when you do have a product brand you've got to promote that brand, otherwise it doesn't do you any good. We had a lot of brand names that were not being promoted; and as a result there was just confusion. Customers didn't know what they were buying. The brand that you named, Chiksan, happens to be a brand that was a company name but it also identifies one product line. We can continue to use that because it's a valuable name.

We had difficulty when we had a well-known brand and company name that came to us by acquisition. I'll give you an example, Link-Belt. The company had a variety of products; and if we continued to use that brand name to describe all of those products, then we'd create some confusion as to whether there's still a Link-Belt Company or an FMC Corporation producing those products. We try to use FMC as the overall house mark for all of our products, and then use a product trade name where it's still appropriate to do so.

Change and Opportunity: The Present and Future on Wall Street

Donald E. Weeden
Chairman, Weeden Holding Corporation

Weeden is a semi-family firm. I have two brothers who are also in the firm and an eighty-three-year-old father who doesn't understand that he's retired. They have all asked me to emphasize to you that my remarks reflect my thinking and not that of Weeden Holding Corporation.

I want to start out by taking a note from our dinner speaker of last night, Eberhard Faber. Not to be outdone by a pencil manufacturer, I'd like to ask how many of you have heard of Weeden & Co.? And how many have heard of our biggest competitor, the New York Stock Exchange?

You can see that Weeden has a corporate communications problem. I do a lot of speaking to people in our industry, and about six months ago I was in Hartford talking to financial analysts. The gentleman who introduced me at a luncheon meeting started out by saying, "Our speaker for today needs no introduction." Then there was a long pause and I think that he forgot my name.

You ought never to mislead the people on Wall Street. They don't like to be misled. They don't like to look foolish and they have long memories.

I never asked him but I think he did. Anyway, someone saved the day down at the front table, in front of the podium, by calling up in a loud stage whisper, Bernie Cornfeld.

It was difficult to structure a speech for you because I know very little about corporate communications, particularly when it has to do with Wall Street. Our business doesn't involve research analysts and we don't merchandise ideas or stocks to the public and so we have no occasion to find out much about your companies.

But I guess I ought to say something about it.

You ought to be accessible but not terribly aggressive in talking to Wall Street. You ought to be even in your discussion of your company with Wall Street. That is, don't push one day when things look good and not be available when things don't look so good.

You ought never to mislead the people on Wall Street. They don't like to be misled. They don't like to look foolish and they have long memories.

I would also say, don't puff. These are all obvious things but they're ideas that I thought might be useful.

You ought to focus on the long-term view rather than the short term. Sometimes you tend to get bothered and upset and disoriented because of the fluctuations of your stock's market price. A lot of the reasons for those fluctuations have absolutely nothing to do with the corporation's image or corporate communications or the existence or non-existence of profitability at that particular time.

You have to understand that when your company is viewed as an investment, you've got a hell of a lot of competitors. And those competitors are not just those in the industries in which you have products but they're in the whole spectrum of equities. Equities in turn have many competitors in the form of other types of investments. You will never have control over any of those things. Included in this list are economic cycles, changes in people's vision of the future, uncertainties that develop domestically and internationally.

Again, I say with respect to your corporate communications, "Take the long view." And remember it's also useful to have a good product and to make a little more each quarter. If you can do both of those things, then I think you're in good shape.

I have taken the subject "Change and Opportunity: The Present and the Future" because that's what I like to talk about and I think it has some interest for you. To begin, I'd like to ask a couple of other questions. How many read the cover article in the last Fortune?

If you read it, you would have found that it points up most of the issues that are confronting Wall Street today in terms of market structured change, our concerns about profitability, the increase in competition, the uncertainties of where Wall Street is going. I think that it's a very good article, well written. Wyndham Robertson does an extremely fine job of presenting the issues and I would suggest you read it.

I might make a couple of comments about it. It overemphasizes the possibilities that the New York Stock Exchange is going to change a hell of a lot in terms of its attitude toward competition. I also think it places a tremendous burden on Mil Batten to effect that change in what is still quite clearly a private club oriented toward the floor of the exchange and its specific economic interests.

Let me ask another question. How many of you are happy with your specialists? How many of you would like to see your stock mandated to be traded in only one marketplace by one market maker? That's what the national market system is all

about. It's an attempt by Congress, after a great deal of study and many hearings, to come up with legislation that de-emphasizes regulation and re-emphasizes competition as the major force for change and improvement in the securities industry.

Congress is also saying that the marketplace for equities ought to be national in scope rather than focused physically on the floor of one exchange.

Increased competition will encourage the use of modern electronic technology, which in turn will improve the efficiency and increase the accessibility of the marketplace. While these changes are troublesome to Wall Street they do have within them opportunities for increasing the public interest in the buying and selling of equities.

Congress is also saying that the marketplace for equities ought to be national in scope rather than focused physically on the floor of one exchange.

By means of electronic contraptions, you can transform the physical centralization of the marketplace into a centralization through communication and computers. Thus you can have market making throughout the country, upstairs and on the floor of exchanges, and still have the kind of centrality, the kind of disclosure, the kind of surveillance, the kind of regulatory oversight that is a part and parcel of the auction exchange market.

The result will be to encourage a great deal more capital to participate in the market-making function. There are two things that create liquidity and depth for your stocks. One is fundamental public buying and selling regularly in the secondary markets. The second one is participation by the industry using its own capital to buy and sell on a temporary basis in order to facilitate the buying and selling interest of the public, to round out the ups and downs of supply and demand created by the public.

In almost every other type of security bonds and stocks, we have multiple markets that are pulled together through fairly sophisticated communications. They are actively and aggressively competing with each other. The only place where we don't do that is on the NYSE in those stocks whose characteristics are more conducive to the highest levels of competition and liquidity.

Let me give you a glimpse of what it could look like if we do go this route.

There could be electronic TV terminals at the desk of every registered representative in the country that would be connected to a central computer. Its job would be to collect information from every market maker around the country who wanted to buy or sell. The computer would also collect all of the public orders that have a limited price attached to them. Then it would make this information available to registered representatives, showing the inside bid and offer with the size, and showing all the other bids and offers contracted in "its Book." These bids and offers would be firm, and would allow the registered rep to execute and trade by means of a couple of taps on the keyboard, and to receive a hard copy printout of the execution. He would not have to send his order anyplace; there would be no delays in time, no uncertainty about whether or not he's going to get his stock or sell it at the price that has been indicated to him. In effect, you would be bringing the center of the marketplace to the public investor and would allow him for the first time equal opportunity to buy and sell and trade in the marketplace. I mean equal to anybody else in the marketplace including floor traders, specialists, upstairs market makers, block positioners, whomever.

To the extent that you can do that for the public, his interest, and confidence, and trading activity will increase significantly. Let me describe some of the cost savings in this type of national market system. First of all, there is a saving of about $50 million. That is the amount of money paid to 384 specialists on the floor of the exchange for the purpose of holding limit orders. It is done today by means of the most archaic bookkeeping system imaginable. Through our computerized system you could eliminate that cost immediately.

In addition you would eliminate much of the cost involved in the activities on the floor of the exchange. The amount of needless running around that occurs today is obvious if you have ever been to the visitors' gallery of the New York Stock Exchange.

There are also those internal communications costs, and the costs connected with errors and delays, and costs of frustrated customers and non-executed trades that would be saved by this kind of system. We estimate $300 million could easily be saved by a national market system.

There could be electronic TV terminals at the desk of every registered representative in the country that would be connected to a central computer.

Wyndham's article speaks of an alternative. Do it through the existing facilities of the New York Stock Exchange. While Mil Batten should be commended for his willingness to take on the job of changing that organization, it's a tremendously difficult job to reorganize their thinking so that they will accept competition in a field that has been devoid of it for so long. I am speaking about the specialists' role on the floor of the exchange. New York does not have the ability on its own to change the rules and regulations governing market making in a manner that would create an atmosphere of competitive equality sufficient to induce Weeden & Company — much less Salomon or Merrill, Lynch — to become market makers on the floor.

It seems to me the opportunities of reducing cost and increasing the efficiency of the marketplace go beyond merely saving money. It would be the first step toward making accessible the buying of equities at a level and in a breadth equal to that offered in most other products and services in our country.

For instance, the savings banks and the commercial banks have made it extraordinarily easy for people with $25 and $50 and $100 to put their money into the credit channels, into the lending process. Why don't we have a system that makes it just as easy for people to invest those amounts of monies in equities? In fact, wouldn't it be better for our free-enterprise system if those millions of people who do have $100 or $25 to invest on a monthly basis put it into a partnership relationship with private corporations rather than in a creditor-debtor relationship? The latter doesn't encourage one to think capitalism,

to think free enterprise, to go to the voting booth and elect people who finally support the maintenance of the private-enterprise system."

Why has our industry been so slow in this respect? I suggest a couple of reasons. One, we don't think we'd make any money doing it and therefore we have no interest.

We have a high cost on every ticket because our systems are inefficient, and consequently we feel that those people with $100 are not profitable to us.

That's unfortunate. If we had a lower cost system available, these traders could become profitable to us as well as doing the idea of free enterprise a good turn by establishing a base of equity owners far broader than what we now have.

We have a high cost on every ticket because our systems are inefficient, and consequently we feel that those people with $100 are not profitable to us.

At present, Wall Street is suffering from the illness of "coping with competition." Actually, it's a very healthy illness. Few have gone out of business. We haven't lost any liquidity in depth in our marketplaces because of the changes from fixed commissions to negotiated rates. The auction market still functions. Our nationwide army of merchandisers of equities is still intact despite increased efficiency and greater competition. If anything, competition has stimulated a higher degree of quality in our services and in the more aggressive people selling our product than we had in the past. We are cleaning house! Competition has been a very healthy thing. It will in the long term stand well for both our industry and its future profitability and the interests of the public and the corporations that the public will be investing in.

Question and Answer Period

Q: *By providing access to the market to a broader range of people, you seem to say that the money, instead of going into a bank, would now go into securities.*

A: There are two sources of funds for private enterprise. One is through debt securities and one is through ownership. And unfortunately, because of our tax laws, because of the differences in the structure and accessibility of equity ownership and debt ownership, we have increasingly encouraged both the owner of $100 and the corporation that wants to use the $100 to go the debt route. I don't think this is wise.

We ought to be encouraging equity ownership, equity participation, partnership participation. It's much healthier. For instance, it would help to minimize the ups and downs in the corporate liquidity that have occurred in the past. Of course other changes are needed, such as elimination of double taxation of dividends. But the fact is that most people in this country think that it's a tax on the rich because only 18 percent or so of the people in our country own equities. So why the hell should they change it?

If 60 percent of the people owned a little bit of equity and received quarterly dividends and reports, you might have a change in attitude toward this tax. If we can get 80 million people in this country with direct equity ownership, we have a better chance of having government insist that the free-enterprise system be preserved instead of taking all of our present responsibilities away from us. That's what I'm saying.

Q: *If you had the computer-based system that you described, who would be responsible for any particular stock? The role—the theoretical role—that the specialist plays now in terms of maintaining . . .*

A: I'm glad you made it theoretical because if you've ever read their responsibilities, there are so many caveats that it's meaningless. Wyndham Robertson wrote a fine article in Fortune about five years ago, pointing out how meaningless that responsibility is. I imagine most of you are listed on the New York Stock Exchange. Is there anybody who isn't listed on the New York?

If you opened up market making in stocks listed on the New York Stock Exchange, I will say categorically that every single one of those stocks would have more market makers continuously competing with one another than you have today. Every single one of them, even the most inactive dogs on the New York Stock Exchange, would have more than one market maker.

Competition is the main force that creates responsibility. You only legislate minimum responsibility in anything that you do. Competition forces a sense of responsibility on people that goes far higher than the minimal and let's not ever forget that. Regulation is not the way to move toward increased responsibility—competition is!

What you want to do is open up those markets to competitive market makers. Witter & Co. has already indicated 50 to 100 stocks it's willing to make markets in but they're not Gulf Oil, General Motors, IBM. There are lots of stocks that you've never heard of and that specialists consider to be the dogs, that they only reluctantly make markets in. They say they aren't profitable, which incidentally is not true. Open it up and you'll be surprised at how many market makers you will have in your stock.

Q: *I have a great deal of trouble trying to see how the national market system, as you describe it, is going to bring in the small investor. It would appear that many companies are going to have that television screen in front of a specialist of their own and he's going to watch those stocks. The professional trader is going to benefit from this system because he's going to know the position of every stock he owns, and he's going to know what all the buys are and what all the sell prices are and he'll know everything else that the specialist now knows. But I can't afford to sit down with my broker to watch that screen. So I don't understand how I'm going to benefit as a $100 man in the market when this guy is going to be the pro and is going to take advantage of not only me but of everybody else. I can't really buy the theory that the brokerage house is going to pass the saving on to me. I think they might have their finger in that to help pay for the television screen the guy is sitting in front of, but it seems to me we ought to be working on that tax situation because I can understand that. If you tell me I'm going to have to pay a higher tax on my dividends, I want to get out of the market because it doesn't do me any good to make that money anyway. But if I can get that money over and above, or with less tax than I pay on my income, then I'm kind of happy to put whatever savings I can back into the market as an individual. Isn't that an area that we should be concentrating on? I don't know.*

A: I agree that that's one place that we ought to concentrate on. The problem is you've got to get over the hurdle of the

attitude in this country that it's a tax on the rich. I would say this also—those professional traders are in the market today and they know more than you do. In the market of the future, you're at least going to know as much as they do.

Second, you're going to have the ability to respond to information as quickly as they because there will not be any time or space advantage to being on the floor of the New York Stock Exchange over being out in the office of Paine, Webber in Bakersfield, California, because in a real sense the center of the market will be in the terminal that's right in front of your registered rep. When you decide to buy, all you have to do is have him flick a couple of keys and you've bought it. There is no sending that order across the country, no delays, no uncertainties, no chances for the market to change in the interim—no way that anybody can get ahead of you in terms of the moment that you've made the decision.

The interesting thing is how much it costs to process a transaction. What is it? $35? More? Off-track betting in New York processes over a million transactions a day versus 35,000 on the New York Stock Exchange. The average bet is $2.40 and the cost of processing those trades averages 20 cents! Now you'd say, well, that's because it's a different business, and they're not doing the same thing. But what aren't they doing? The only two things they aren't doing is giving advice and taking risks. They do everything else. They've got the offices, they've got the personnel, they've got the sophisticated computer systems that track all of these transactions, keep records. They allow people to bet by phone. They even give you hard copy confirmation printed by the American Banknote Company. And they do it all for 20 cents.

I don't know why we can't do it for less than $35, or whatever it is. I go into Grand Central Station and I can deposit or withdraw money from Chase without anybody touching it. I can go to the OTB booth and bet on the horses. But if I go over to Merrill, Lynch's booth and want to invest in General Motors, I can't do it. That's a hell of a commentary on our systems.

So I think that there are lots of opportunities to cut costs and to make the equity market more accessible.

Q: *We've seen a number of firms either merge or disappear from the Wall Street scene. Are we going to continue to see that kind of attrition?*

A: There are a couple of kinds of attrition. There's attrition of personnel and attrition of firms and I think that when Baker, Weeks merges into Reynolds, you don't have an attrition of those people. They just move. Actually, there was an increase in availability of very fine research advice because that research advice is not just available to large institutions but now it's available to all of Reynolds customers, big and small.

I don't believe that competition is going to bring about concentration. If you make the market as accessible as I've described, the wire houses will find that they have lots of salesmen and research people located around the country who would just as soon put their own shingle outside the door. They might prefer to represent themselves and realize the full potential of the commissions that they charge rather than being tied up with a very large, possibly cumbersome, maybe uninterested organization with lots of unnecessary overhead.

Q: *If this goes the way you suggest, from a communications standpoint, we've got one hell of a problem, haven't we? Because we're going to end up with people all over the country trading our stock and reading the position paper or whatever.*

A: I'm glad you asked that question.

Q: *We're going to have to get that message out a zillion times.*

A: You're damned right. Listening to you worrying about your communications with financial people, I say you're focusing on the wrong people. The reason that you have to focus on us is the fact that right now all of the buying in your securities goes through someone who's merchandising. We don't have any non-prescription drugs in our business. You know, where people can go in and just buy it, and don't have to pay some professional to give them advice or to be the intermediary. What I'm saying is we ought to develop a non-prescription service where people who have $100 can go and buy what they want without having to go through anybody else. That's the significance of the national market system.

Q: *What do you think the chances are that this national market system you describe ... or become a reality?*

A: From a technical standpoint, a national market system has already been created and is operating through the facilities of the Cincinnati Stock Exchange. It is a prototype of exactly what I described to you. The problem is that the most powerful organization in our industry has very strong economic reasons for preventing its development. I am speaking of the floor of the New York Stock Exchange. It has no interest in the development of a national market system that allows market makers all over the country to compete on an equitable basis for Paine, Webber's order flow. And they're the ones who make the decisions for the New York Stock Exchange and their power is felt through the matrix of relationships that the N.Y.S.E. has throughout our industry and through all of you people.

Despite what they say a national market system will broaden and deepen the auction market process in a way that has never been available. If everybody in the country can be part of the auction process wherever they are, either as a market maker, or a broker with a limit order, or a customer with a market order, then I think that you have the ultimate of auction markets with maximum centrality, disclosure, surveillance, and regulation. The only reason that we won't get there is if the New York Stock Exchange floor is successful in preventing it.

But things are changing. A lot of the upstairs members of the New York Stock Exchange are beginning to see some of the cost savings to them and the opportunities for them in market making and I think slowly but surely they are going to move away from the majority view of the New York Stock Exchange and begin to support this direction. It's inevitable!

Simple Is Smart—Changing Lingo to Language

Alan M. Siegel
President, Siegel & Gale, Inc.

Smart is simple; simple is smart. But simple is better than smart. That's what the Amish say in Pennsylvania's barn country. They speak in a language known as Pennsylvania Dutch that's difficult for outsiders to understand. This is just fine with the self-sufficient Amish who don't much care whether people order goods and services from them. As a matter of fact, hiding behind their language makes them feel pretty special.

All over America there are other people hiding behind their language. And many of them care a lot about selling goods and services. They want to be understood, and they try to communicate clearly. But this isn't easy.

Many of us, in fact, are victims of our own specialties. For us, the language of our business seems so simple that we forget it may be jargon to those we wish to sell, serve, or instruct. We are surrounded by alien tongues, only a few of them ethnic. In our complex society, lawyers talk legal, bankers talk fiscal, doctors talk medical, psychologists talk sex, and politicians talk. Scientists cherish their own vocabularies as well, while ghettos and bureaucracies communicate in dialects of their own devising.

But it's the business of business to overcome obstacles. Buffeted by the economic and social stresses of our times, increasing numbers of corporations now realize audience contact is not communication. Sooner or later, all of us in business have to talk sense to sell goods and services, to establish mutual understanding between buyer and seller.

Over the years American business has put some formidable language barriers between itself and its customers. Until recently, there were few complaints on this score. Customers obligingly signed the most impenetrable contracts that corporate attorneys could draft. But the consumer movement and disclosure laws alerted borrowers and buyers to the double-talk. In turn, this has sparked interest in readily understandable consumer documents.

Even the White House has expressed interest in clarity. In his first fireside chat with a nationwide television and radio audience, President Jimmy Carter promised: "We will cut down on government regulations and make sure those that are written are in plain English for a change."

Language simplification—my term for the art of making the obscure understandable—has a well-defined objective: the revision of complex legal documents to make them intelligible to the average consumer while retaining the binding force of the original text. This emergent communications discipline has already been successfully applied to loan agreements, insurance policies, securities and mutual fund prospectuses, proxy statements, condominium sales contracts, apartment leases, product warranties, employee-benefit manuals, and other documents used in the consumer marketplace. The basic attitude applies to all legal, quasi-legal, and technical communications.

The possibility of simplifying the language of consumer legal instruments surfaced over three years ago when my firm was redesigning and consolidating the forms used by New York's Citibank (then First National City Bank) in its retail operations. At the outset there was no particular interest—on our part or the client's—in making the legal documents readable; the assignment was to improve their appearance and make them easier for customers and bank employees to deal with.

While reviewing the material, however, we became dismayed at the prospect of confining our efforts to design without doing anything about the muddled text of, for example, the bank's consumer loan note. At first, our suggestion that it be revised was not received with great enthusiasm.

We prepared a radically simplified draft of the note that complied with all legal requirements. The principal opposition came from the bank's outside counsel, who were worried about federal and state regulations. Staff attorneys in the collection department also opposed any change. Even marketing personnel, though pleased with the simplification of process applications and other forms, were doubtful about securing legal approval for a rework of the basic credit agreement.

In any event, the Citibank consumer note was our first major simplification project. It provided access to a vast array of other legal instruments. There are no absolutes in language simplification. But many of the techniques used to simplify the Citibank loan note have proved to be applicable to simplified consumer contracts. Following are some examples.

- First, the document was totally reorganized to present information in a sequence intelligible to the lay consumer.
- A personal tone was employed throughout—I, we, ours, you, and yours rather than undersigned Borrower(s) and Bank.
- Language was radically simplified—for example, "To repay my loan, I promise to pay you . . . " instead of "For value received, the undersigned (jointly and severally) hereby promise(s) to pay . . . "
- Where possible, sentences were shortened and contractions used. To enhance clarity, active verb forms were used in preference to passive.
- Material not required by law was added to make the document informative as well as legally binding. To illustrate ". . . if this loan is refinanced—that is, replaced by another note—you will . . . " The term refinanced had not been explained in the previous version.
- For ready reference and readability, the note was separated

into a series of subsections, which were highlighted by boldface headlines in the left-hand margin. These devices catch borrowers' attention and assist them in finding specific information.

• Design improvements included the use of twelve-point type in green on light brown stock; this treatment, in place of the previously intimidating format, is visually appealing and serves notice that the document is easy to read.

The principal stumbling blocks to securing approval proved to be clauses and remedies inserted in the contract to protect Citibank against borrowers' defaulting. Obviously the retention of draconian recourse provisions was not consistent with the spirit of the undertaking. Indeed, when severe protective measures like waiver of trial by jury and wage assignment are put into plain English, they become visible and doubly offensive.

Carl Felsenfeld, a Citicorp vice president who played an important role in the project as legal counsel for the parent company's consumer-related operations, points out that conventional commercial loan agreements contain many events of default—failure to pay, insolvency, bankruptcy, and encumbrance or removal of assets, among others. "But experience indicates that the typical consumer transaction needs only one event of default—failure to pay," he observes. We didn't fare quite that well. But in the Citibank consumer loan note, a significant number of remedies were deleted.

Analysis of the document revealed that the law firm had been collecting a fee expressly banned by a five-year-old amendment to state lending laws.

Along with scores of clients, I've learned a lot about language simplification in the past three years. Many communications professionals, however, still have misconceptions about this discipline. For one thing, some fail to appreciate the fact that language simplification is a cleansing rather than cosmetic process.

The process probes deeply, revealing as it revises. This in turn provides contracts or other instruments that are compatible with the way business is actually being conducted. In this connection, executives frequently are dismayed by the offensive or unenforceable provisions unearthed in material subjected to review.

By way of example, we found language in one loan agreement that would have allowed the bank "forcible entry" of a borrower's home to recover security for an overdue obligation. The bank's attorney quickly conceded that exercise of this "right" could make any lender liable to criminal charges; the clause was deleted.

In another case, a language simplification session provided an embarrassing surprise for the institution's outside counsel.

Analysis of the document revealed that the law firm had been collecting a fee expressly banned by a five-year-old amendment to state lending laws. Without simplification of the loan note and security agreement, the attorneys probably would have gone right on rendering illegal bills.

Second, wordiness is a natural enemy of clarity. But it is not necessarily true that brevity produces precision. While the language simplification process frequently turns up shorter ways of saying things, in many cases it may prove vital to explain fully complex legal concepts. The objective is to provide customers with a complete picture of their rights and obligations. Excerpts from old and new condominium sales contracts used by Arlen Realty & Development illustrate this point.

A third misconception is that disclosure equals communication. Congress has been mandating disclosure for a number of industries. Among the more conspicuous examples of lawmakers' handiwork is the so-called Truth in Lending Act. Among other things, this statute requires that credit customers be given complete and understandable information on the cost of borrowing; it also specifies where and in what size type disclosure must be made on forms.

Unfortunately, this legislation and the regulations that have grown up around it are almost perfect examples of what can go wrong when government gets into consumer protection. Here's what Senator Proxmire, the original sponsor of the bill, had to say on the subject: "The basic idea of Truth in Lending is as sound as it was in 1968 when I sponsored the original bill. Consumers still want and need usable credit information. But when the regulations carrying out the law get so intricate that creditors honestly aren't sure how to comply and consumers are faced with disclosure statements three feet long, it's time to take a second look."

Proxmire went on to state: "Recently, the Federal Reserve Board issued an eight-page proposed regulation, plus an eight-page explanation, all to implement five lines of statutory language. With this kind of regulatory approach, it is no wonder that there has been an explosion of lawsuits claiming Truth in Lending violations. Where these lawsuits are based on unintentional violations that cause no actual harm to consumers, their net effect is to increase creditors' costs. And these cost increases are reflected in future disclosure statements in the form of higher credit costs."

Senator Proxmire realizes disclosure does not equal communication. But neither legislators nor regulators have shown much appreciation for the art of communication in their efforts to protect consumers with disclosure measures. Prescriptive language and other bureaucratic excesses needlessly complicate what otherwise could be integrated,' informative documents. Thus, companies struggling to comply with the letter of the new laws get bogged down in technicalities and fail to satisfy the communicative spirit of such legislation. Consequently, borrowers or buyers, flooded with figures and facts couched in legalese, remain as baffled as ever.

States also have been active in consumer affairs, often muddying the waters with measures that conflict with federal statutes. For example, my firm simplified and redesigned an auto installment purchase agreement for a major West Coast bank. Unfortunately, at the end of the new version we were required to insert a convoluted notice of buyers' rights, the exact language of which is prescribed by state law. Terms like Full Unpaid Balance and Service Charge required by the state are inconsistent with the equivalents—Amount Financed and Finance Charge—specified by the Truth in Lending Act. Small differences, perhaps. But they are totally confusing for some customers.

Finally, language simplification is not a pigeonholed concept. For best results, projects must encompass a full range of material. It would not be sufficient, for instance, to revise only a bank's loan agreement without simplifying related customer

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brochures, application forms, payment booklets, and account letters. Further, to deliver the message about product or service improvements, language simplification must be introduced into advertising programs. Such a comprehensive approach represents the most effective way to capitalize on the discipline.

The purpose of language simplification is not to turn fine print into fine art. But words must be presented attractively if their message is to be delivered. Although studies show a high degree of correlation between readability and design, most lawyers send their typewritten copy to print shops with minimal instructions on type face or size, layout and color. Not too surprisingly, the resultant business forms or contracts lack visual appeal and are difficult to read. Indeed, it's the rare individual who bothers to plow through such documents.

Eventually litigation may make fine print too expensive, even for insurance industry traditionalists. Last year (1976), an Ohio judge ruled that the holders of an accident policy were not bound by its terms because it used "a size of type that would drive an eagle to a microscope." The admittedly unusual case turned on the question of whether a paragraph buried in the policy provided adequate notice of a one-year time limit placed on making claims. The court concluded: "It cannot be reasonably assumed that the insured having average sight of a human being would be aware of the questioned clause, at least in the absence of special optical equipment."

In addition to exotic litigation of this sort, there's convincing evidence of consumers' interest in easy-to-read contracts. Using Citibank's old and new loan agreements, Batten, Barton, Durstine & Osborn International surveyed consumer attitudes. Close to 80 percent of those polled expressed positive attitudes about borrowing from an institution employing the simplified form. Even more revealing, though, was the fact that respondents also showed great interest in using the other services offered by a bank with a streamlined document.

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San Francisco-based Crocker National Bank, which now has simplified 95 percent of its most frequently used consumer forms, took full advantage of these cross-selling opportunities. Its marketing department ran a highly successful three-month advertising campaign using the theme: "Bank forms for people, not bankers."

Banks are by no means the only institutions that have been guilty of verbal overkill. David Mellinkoff, professor of law at the University of California, Los Angeles, noted in his landmark book, *The Language of the Law*: "By the time he has found his way to the end of an insurance policy, the alert and unusual householder (layman or attorney) cannot know what he is covered for, because there is more in his policy than he can read and retain even if he understood every word as he read it. The reading has left him—nay, made him—ignorant."

As noted, organization also plays a critical role in language simplification. This is a key consideration in light of the legal profession's continuing concern about sacrificing precision to idiom. St. Paul Fire & Marine Insurance, for example, was among the first to integrate definitions into the text instead of listing them in a separate section. This makes for easier reading since there's no need to flip back and forth. Apprising borrowers or buyers of their rights as well as responsibilities in straightforward fashion helps generate appreciation and good will.

Among the financial documents that are obvious candidates for language simplification are securities prospectuses, proxy statements, annual report footnotes, stock repurchase offers, and tender offers.

Further, the individual sections of simplified insurance policies or other contracts must be at least somewhat self-sufficient. Having made access easier with boldface headlines or related design techniques, companies can ill afford to have customers retrace their steps in search of a definition when all they want is a specific piece of information. Accordingly, it's important to keep the text instructive and informative as well as legally binding.

Thanks to ERISA (Employee Retirement Income Security Act of 1974), it is now the law of the land that all employee benefit programs must be clearly explained. Corporations are just now beginning to realize that ERISA requires that employees be understandably informed about all benefits, not just those involving retirement and pension plans. It seems to me that this mandate represents an opportunity rather than a problem for business. Fringes now account for roughly 35 percent of the corporate payroll, according to Chamber of Commerce surveys. In most cases, though, companies are not doing a very good job communicating the value of the packages they offer. Lost is the chance not only to improve morale but also to gain an edge in recruiting scarce talent.

The objective in making consumer contracts explicit and readable is to give customers an additional reason for buying. There are side benefits as well. By clearly spelling out the terms of a contract, companies can head off complaints. I have no figures, but it seems likely that most hassles result from misunderstandings.

Individual investors—clearly an endangered species on the evidence of annual tallies prepared by the New York Stock Exchange—might be lured back to the market if extended a similar courtesy.

Among the financial documents that are obvious candidates for language simplification are securities prospectuses, proxy statements, annual report footnotes, stock repurchase offers, and tender offers.

For years, the Securities and Exchange Commission, the accounting profession, and the courts have advocated ever greater and more detailed disclosure in such material. Unfortunately, these groups have missed the communicative spirit of their own recommendations. Quantity, not quality, of information continues to be the principal yardstick, and investors in most cases are faced with a volume of data that cannot easily be absorbed.

Particularly troublesome are statutory or regulatory mandates on the where, what, and how of certain inclusions. The

results are overly rigid formats that impair rather than enhance readability. At this stage of the regulatory cycle, it is still possible to accomplish certain things in simplifying prospectuses and other financial documents, which after all are supposed to help investors make informed decisions. Among the more important:

1. Reorganize formats to produce a more intelligible and comprehensible sequence.
2. Develop a narrative style that will accommodate illustrative examples and definitions. The purpose, of course, is to inform, not intimidate.
3. Extract and highlight essential information. So far as many investors are concerned, less data is more.
4. Where possible, put important information in perspective for the investor. A case in point might be certain financial ratios that could be compared with industrywide data.
5. Develop a visual style that is inviting and enhances readability. Most prospectus or proxy statement presentations are arbitrary. Inclusion of a few color pictures or charts does not solve a basic communications problem.

For at least a decade, the SEC has been circulating releases on the preparation of short-form or summary prospectuses. The latest covering proposed Form S-14A went out last September with a requirement that comments be submitted by mid-December. In its release, the agency made two principal points:

1. Many investors cannot realistically be expected to read and study complex prospectuses or proxy statements. Their interests may be better served by shorter, simpler documents.
2. Investors who want detailed information should have access to it, at issuers' expense.

The commission's release contains this instructive paragraph: "The proposition that an investor need not be directly furnished all material information about an issuer before making an investment decision is not new. Billions of dollars worth of securities are purchased and sold in the trading markets each year by investors who are not provided copies of prospectuses before they make their investment decisions. However, considerable information is available to the markets and thus to investors in the form of annual, quarterly, and current reports and proxy statements on file with the commission. And the commission has recognized that, in a number of situations, economic reality does not require that an investor be provided with a full prospectus, or any prospectus."

Develop a narrative style that will accommodate illustrative examples and definitions. The purpose, of course, is to inform, not intimidate.

As yet, however, economic reality has not prevailed. Indeed, disclosure requirements have pyramided to the point where only the most dedicated professional will plow through the turgid and disorganized prose of a prospectus or proxy statement.

A conspicuous failure in this regard is the SEC's doctrine of "differential disclosure." Under this arrangement, firms in the debt or equity market include brief summaries of their business in the front of a prospectus for presumably unsophisticated investors and detailed discussions for professionals in the back. This odd coupling of the terse and needlessly verbose simply does not work as a communicative technique since there still is not an integrated and informative presentation of facts and figures.

Naturally, regulatory authorities would have to develop new standards of materiality to limit issuers' liabilities.

Inertia, however, may prove the principal obstacle. Lawyers tend to follow lawyers, points out Les Ogg, assistant general counsel at the Investors Group of mutual funds managed by Minneapolis-based Investors Diversified Services Inc. and a former Securities and Exchange Commission official. "It's common practice for attorneys at one company to copy verbatim the language another has used in a prospectus — once it's been approved by the SEC. This approach saves time and trouble since the examiner can check off boilerplate without the need to think," he says.

Although legislative and public pressures have provided some impetus, many consumer-minded companies have been moving toward language simplification on their own initiative.

Despite the perceived risks of innovation, IDS last year produced the simplified version of its Investors Stock Fund prospectus. Hamer H. Budge, a former SEC chairman and now president of the Investors Group, states:

"We want the reader to know just what Investors Stock Fund is and how it compares as an investment. We believe in mutual funds and want people to understand them better. Our theme on the first project was 'less is more.' We think we've informed prospectus readers by avoiding jargon and long paragraphs." Indeed, in some cases the shrinkage was dramatic. Cases in point are the old and new sections on lending portfolio securities: The word counts are 322 and 113, respectively, for a saving of 65 percent. More important, though, the simplified version is significantly easier for prospective fund investors or owners to understand.

In an allied area, the recent offer by IBM to repurchase 4 million of its own common shares was announced in a double-truck newspaper ad whose wording can most charitably be described as muddled. When the stockholders had waded through this, they were confronted by confusing and hard-to-fill-out forms. Significantly, the Wall Street Journal reporters who covered the story managed to include most of the offer's relevant facts in less than a single news column.

The point is that financial and securities documents — proxies, prospectuses, tender offers — are just as integral to corporate communications as annual reports and facility brochures. There are tremendous advantages to making them informative and readable. If the initiative is left to regulators, legislators, and the legal community, reform could remain an unresolved issue for some time to come.

Comparable contracts and documents have been simplified for banks, insurance underwriters, real estate companies, and firms in allied consumer industries. Language techniques are available to make the obscure understandable, and there's no apparent reason why securities forms should be left to the not so tender mercies of regulators and lawyers — by default.

Although legislative and public pressures have provided

some impetus, many consumer-minded companies have been moving toward language simplification on their own initiative. They have done so for a variety of practical reasons. For one thing, documents that inform rather than intimidate add distinct values to goods and services offered in the consumer marketplace. For another, they plug credibility gaps and build customer loyalty.

Language simplification also can enhance employee morale and productivity. To illustrate, sales personnel working with understandable documents are able to handle customer inquiries without having to admit ignorance or turn to superiors for clarification of difficult sections. Simpler forms also help streamline procedures and reduce operating costs.

In short, for most concerns, language simplification represents not only a customer courtesy but also good business.

"Understandable policies are cost-effective," asserts Waverly Smith, president of St. Paul Fire & Marine Insurance. "The more consumers know before they buy, the more we can save on adjustments, complaints, and explanatory correspondence. Beyond these considerations, we're following a clear trend in our society. The buyer of insurance as well as other consumer goods and services expects to understand what he is purchasing. A policy is a legal contract, but we think a contract can be written so the layman can understand it."

There are possible risks involved in simplifying the language of legal contracts. In consumer markets, though, communication rather than the spurious precision of legalese now seems to be the trend. This is not to say that we translate every unfamiliar term or phrase. But when they are used, we incorporate informative definitions that satisfy the technical requirements of the law and the communicative needs of the agreement.

In short, for most concerns, language simplification represents not only a customer courtesy but also good business.

Worth noting in this regard is the fact that the legal record, while brief, is unblemished. "Contracts that are understandable are far less likely to be breached," reports Richard Fischer of Morrison & Foerster, counsel to Crocker. "So far, we have had no difficulties whatsoever."

At the moment, however, American business is not taking full advantage of language simplification's potential. The situation is unfortunate since profit-making enterprises now face severe credibility problems. In particular, consumer-oriented companies may find themselves on the horns of a dilemma. Even those that have not made conscious efforts to obfuscate the language of their contracts—the vast majority—may be accused of doing so if revision programs are not launched.

Also at issue is the question of whether comprehensible documents can be drafted under the gun of inflexible federal and state disclosure that mandates volumes of material written in statutory language.

Quality rather than quantity of information should be the yardstick. And in this regard, language simplification could prove valuable—albeit as a catalyst, not a cure-all. But it may take some time for government to realize that disclosure does not necessarily equate with communication.

But while judges, legislators, and consumer advocates have castigated business for unreadable and incomprehensible contracts, there's been precious little comment on the simplified new agreements. Needed, then, are reliable guidelines as to exactly what constitutes intelligible prose.

Quality rather than quantity of information should be the yardstick.

Some readability standards, based on the average number of words and syllables per sentence, are subject to manipulation. In challenging the adoption of the Flesch Formula in Pennsylvania, Allied Insurance pointed out that an eight-word sentence like "Herbert Denenberg is the Insurance Commissioner of Pennsylvania" was rated very difficult. Indeed, it scored a minus 13, against plus 11 for Allied's policy, on a scale of 0 (very difficult) to 100 (very easy). Nonetheless, a dozen or more jurisdictions are pressing ahead with legislative programs featuring quantitative readable formulas.

By adopting readability tests—the Flesch Formula or others—states will preclude companies from experimenting with a wide variety of techniques to develop simplified contracts. In my opinion, it would be unwise to stifle creativity at this early stage since so many possible solutions have yet to be explored. What's required is time to test the notion that smart is simple; simple is smart. But simple is better than smart.

"When you read regulations such as the FTC Preservation of Claims and Defenses Regulation, you might be reminded of the difference between a layman's approach and a lawyer's approach, using the example of an orange. If you were to offer me an orange, you might say 'Walt, have an orange.' But if a lawyer were asked to put the transaction into legal form, he would probably write:

"'I hereby give and convey all and singular, my estate, right, title, claim, and advantages of and in said orange, together with all its rind, juice, pulp and pips and all rights and advantages therein with full power to bite, cut, suck and otherwise to eat the same or give the same away with or without the rinds, skin, juice, pulp or pips, anything hereinbefore or hereinafter or in any other means of whatever nature or kind whatsoever to the contrary in any wise notwithstanding.'

"Of course, there is always another lawyer already preparing a brief which is designed to take the orange away from you."

—Walter W. Vaughan, chairman of the installment credit committee, American Bankers Association, at annual consumer credit conference of New York State Bankers Association, Albany.

Question and Answer Period

Q: *Have you been able to simplify financial documents that must be approved by the SEC? If so, what specific problems have you faced? How long did the whole process take?*

A: To date we've simplified a series of prospectuses for Investors Diversified Services and are currently finishing up a simplified proxy statement for one of the top twenty companies in the Fortune 500.

The biggest problem lawyers face in trying to do anything different, and this of course includes simplifying a financial document, is the extended period of time they face in getting SEC approval. Based on our limited experience it seems that the SEC is receptive to simplification. But its staff is overworked

and if it's given boilerplate language—that is, language seen before—you get quick approval. When you try something out of the ordinary, the approval process slows down. So if you're planning to simplify a financial document you have to provide longer lead times for approvals.

The proxy was completed in two and a half months. I don't think this is an excessive period. Most companies we've dealt with allot at least that much time to write, design, and complete something as important as a proxy statement.

The major stumbling block we ran into in simplifying the prospectus was the financial statements. Current SEC rules make it very difficult to explain complex accounting principles, simplify balance sheets, and put growth rates, percentages, and so on into the proper perspective for the average customer.

I also believe that the SEC disclosure requirements, which mandate that specific information be included in these documents, make it increasingly difficult to develop comprehensible financial documents. What's really needed is less information intelligently presented and properly explained. It seems self-defeating to require the average investor to wade through pages of data that he can't possibly understand and that are not necessarily critical for making an informed investment decision.

Q: *Have you thought of the possibility of talking to the Internal Revenue Service to see what they can do about simplifying their forms?*

A: I haven't given a lot of thought to dealing with the IRS but we have been talking with various federal departments and agencies. We expect to start work shortly on an exciting project for the Department of Labor.

Until recently we've concentrated on building relationships with progressive companies in private industry. This has proved extremely productive because we've been able to get prototype contracts completed relatively quickly and onto the market. This has helped to overcome inertia and build credibility for the concept of simplified legal contracts.

We've begun to focus on some areas in the public sector during the past six months, and with the interest that's been expressed by President Carter in simplifying the language used in government regulations, I'm confident that we'll make some headway.

I don't know about the IRS. Perhaps there's a need to simplify the law before anyone can realistically tackle those forms. But I certainly hope to see language simplification in the food-stamp program and the employee-benefits area.

Q: *Can you describe the process when you undertake a project? Is it face to face? Or do you send drafts back and forth?*

A: That's a good question. Essentially, we prefer to involve the client and the lawyers directly in the project for two reasons. Number one, these are fairly complicated projects and we need a lot of information. We recommend setting up a task force which usually involves a lawyer or two, a marketing person, operations and technical people. By involving these people in the process, we get information quickly. They learn from us through participation. Over a period of time they learn the skills and can take on future work themselves.

Second, we prefer to involve the lawyers at the beginning rather than to spring a radically simplified contract on them because we found that when you do that with a lawyer, you end up waiting two months and getting back a memorandum with eighty points of criticism. On the other hand, if you're dealing with them from the beginning, they usually get into the spirit of the project and make a positive contribution.

In summary, I'd say that we prefer to have the continuing involvement of the client on a task force type basis.

Q: *What about product liability?*

A: We've simplified some warranties for a number of hardware companies, but we haven't worked in the product liability area. Essentially, we've found that simplification represents an overall attitude. The approach we take can apply to almost any document. We've been able to deal with leases, life insurance policies, employee benefits manuals using the same basic approaches to create readable documents.

Business and the Press

Joseph Angotti
Executive Producer, NBC Nightly News

Jack Egan
New York Business and Financial Correspondent, Washington Post

Ray Scherer
Vice President, Washington, RCA Corp.

Paul Weaver
Associate Editor, Fortune

Moderator:
Robert Lubar
Managing Editor, Fortune

Lubar: The subject before us this morning needs no introduction. It's been on the agenda of the Corporate Communications Seminar before, a couple of times. Three years ago, when we met in Phoenix, Arizona, I called the relations between business and the media a massive communications failure. And it still is.

It's a subject which bears continued discussion. It's one of those rare problems which talking about actually may do some good because there's a good deal of mistrust behind the whole question.

Business distrusts the press. The press distrusts business. And the public ends up mistrusting both of them. The only way you can overcome mistrust is through discussion and understanding. We're going to try this morning to talk about various angles of the problem. There are a number of angles and I think we have a diversity of people on the panel who can do it that way.

Business distrusts the press. The press distrusts business. And the public ends up mistrusting both of them.

To set the mood, I'm going to read what the publisher of the most powerful newspaper in the country, *The New York Times*, wrote on this subject. Arthur Ochs Sulzberger, a couple of weeks ago, sounded off this way:

"It is not so much a matter of the press being anti-business, which I have to admit it sometimes is, nor is it a matter of business being anti-press, which you will have to admit it usually is. That tension between the press and business is a healthy tension in a land of separated and balanced centers of power."

He then condescendingly said that business ought to do something about it themselves because, he said, it has just as much right to be heard as any other force in our society.

I don't think anybody at this table necessarily agrees with Mr. Sulzberger but that's just to show you that there are a number of different ways of looking at the subject.

Our panel consists of a producer of a major network's news program; the financial correspondent of a major national newspaper; a switch-hitter, a veteran TV newsman who turned corporate executive; and a writer on the staff of Fortune.

To introduce the first speaker, I want to say that it's not news to you that various polls and surveys have shown that an overwhelming majority of Americans get their news from TV and an overwhelming majority of that overwhelming majority get their news on the nightly news program of the major networks. Joe Angotti is the Executive Producer of NBC Nightly News which is a job somewhat like that of managing editor. He chooses the subjects, picks the schedule, has a lot to say about the emphasis, and I'm looking forward to hearing what he has to say on this question.

Angotti: There's a simple but important number that I have to live with every day that I'd like to share with you. It's twenty-two. Twenty-two minutes, to be exact. That's the amount of time in a network newscast devoted to news. I want to impress that on you, because it represents a very serious limitation on what we can and cannot do in a network newscast. And it's part of my answer to your persistent criticism that we don't put enough business news on the air.

I'd also like to suggest to you that you may be as much to blame for our sparse diet of business news as we are.

For example, most businessmen don't like to be restricted to our time limitations. And I will quickly admit that they are severe. In an average, hard-breaking news story, an interview that may have lasted five minutes is reduced to forty seconds. I understand how that might be upsetting. But other newsmakers, especially politicians, have made the most of it. They have learned the fine art of speaking in forty-second bites. They know what the reporter is after, they know what they want to say, and after some initial fluff, they get down to saying it in a very precise and usable form.

Another thing: most large corporations are still not geared to react quickly to the speed of our business.

When I tell this to businessmen I know and love, they make the same general response. "We deal with complex economic and statistical concepts," they say, "and you just can't boil that down to forty seconds." To which I say, rubbish. There is always a bottom line, and I can show it to you in every stockholder report that's ever been filed. I think businessmen can get to that bottom line a lot easier than they sometimes think.

Another thing: most large corporations are still not geared to react quickly to the speed of our business. I can't tell you how agonizing it is to have a Ralph Nader, or a congressional investigator, or a union leader make a serious charge against a corporation, and then wait for a response. It's like waiting for an elephant to finish the mile run. The first response is usually that the executives are studying the charge. As air time gets closer, we send a crew over to the corporate headquarters, so that when a statement is made, we'll be there to cover it. Then we wait some more. Many times we're forced to go on the air with no response at all. Then, twenty-four hours later, someone shows up with a statement and demands equal time. It's a frustrating experience, and it happens far more often than it should.

Another irritating thing is that businessmen, for some reason that escapes me, don't like to admit on television that they're in business to make money. Am I wrong in assuming that most of your decisions are based on the motive of making profits? Then why don't you admit that? Not long ago, an oil company was charged with withholding natural gas by not activating some leased fields in the Gulf of Mexico. There was nothing illegal about what it did. But when we finally got to a spokesman (which took a long time), it took him forever to get to the point. He went into a long discussion of leasing policies (which I couldn't understand) and finally, after repeated questioning, he said it just wasn't profitable to drill for gas in those fields for another two years. It was a great moment for truth in our times. I'm convinced that most people found that response both honest and logical. But he was actually reluctant to come to that conclusion. Again, I don't understand why.

I also think that businessmen sometimes look down on network news because we don't have a very elite or exclusive clientele. Which is true. When Jack Egan writes a story about the collapse of the Franklin National Bank, he can make certain assumptions about his readers. He can assume they are of above-average intelligence. He can assume they are well educated. And he can assume that they have a high degree of interest in financial news. We can't make those assumptions. We have to consider those people in our audience who are waitresses, steelworkers, farmers, bakers, and used-car salesmen. That's why we ask you to simplify complex problems. That's why we limit a response to a headline and little more. That's why we approach business news simplistically. We can't afford to have people turn us off. We're motivated by an obligation to inform the masses, and we can do that better than any medium in the history of communication. Even more important, we are reaching people who would not bother to be informed in any other way. It may be one of the great ironies of all time that you people spend millions of dollars in advertising and promotion to communicate with those very people. Yet when we offer you the opportunity to do it free, you become suspicious and hesitant.

Lubar: Our next speaker, Jack Egan, is financial correspondent of the *Washington Post*. He works in New York and is at the cutting edge of the *Washington Post* coverage of the business system of the country. As you know, the *Post* has a reputation for investigative journalism and Mr. Egan is in that activity.

Egan: Thank you. I must say I feel a little bit uncomfortable being on a panel that is giving advice to anyone. I think that reporters, in general, are feeling a little uncomfortable with the notoriety that has come to the press. The *Washington Post*, in particular, finds it a little bit funny that though we appreciate the good will around the country from many people, many more people know us by a movie than have ever read our newspaper. So, with those caveats, I'd just like to make a few comments.

Even the companies that were subject to the sensational corporate payoff disclosures went pretty much unscathed, in a business sense.

I've heard a lot of distress and seen a lot of handwringing over the bad press that business gets, but I've heard few specifics of how press coverage has actually affected a company adversely in the few days that I have spent with you people.

Even the companies that were subject to the sensational corporate payoff disclosures went pretty much unscathed, in a business sense.

Northrup, Gulf Oil, Lockheed, these were some of the most publicized companies. I think all had very good years in spite of what everyone must concede was some very bad publicity. I would say most companies here would have managed to thrive in the last two years and you bounced back from a recession where the downturn was caused by economic conditions and not by the press.

At the same time, there's an uneasiness about the overall environment in which business is operating today. The press is seen as aiding and abetting the hostility, if not as the actual main instrument for this hostility. I think your apprehensiveness about the hostility that exists is quite valid but I think some of the analyses may miss the dynamics of what has been happening.

The downturn in confidence in business coincides with the downturn in confidence in most institutions in our society. A government official at the height of the Watergate scandal explained it by saying that government was undressing for

everybody to see and the sight wasn't very pretty. Well, the striptease didn't stop with the Nixon Administration. It extended to a lot of agencies of the U.S. government and then it extended to the business community through some of these corporate payoff disclosures.

Our economic system is really based on self-interest.

The press has gotten a lot of heat for dwelling on these stories. I would only say that the activities that were disclosed were ones that could not continue once they'd seen the light of day and the press really would have been derelict in not reporting them to the fullest extent possible. But as I've noted, these really haven't hurt companies very much. At the same time that these disclosures were going on, I think a more important factor was a severe bout of inflation. Record inflation for this economy in 1972–73 led to a very severe recession in 1974 and 1975. The expectation of constantly rising living standards that became embedded in the consciousness of most Americans was fostered by the promises of politicians and by a lot of the advertising that your companies put in magazines and on the air. And when this stopped, it was only natural that there would be some kind of a crunch.

Our economic system is really based on self-interest. This is the principle of the free enterprise system. I don't think business should be too surprised that its self-interest in raising prices, attempting to improve profit and recover costs would not be greeted enthusiastically by a public that found its real disposable income shrinking, and therefore did not easily buy such arguments.

The third thing that has been happening is the phenomenon of bigness. Growth has been continuing and perhaps accelerating, and this country has a strong populist streak that goes back to the very origins of the United States. There have been periodic attacks on big business and there is a suspicion of bigness in business as actually being anti-competitive and antithetical to the basic dynamics of the free enterprise system. I was interested to read in today's *Wall Street Journal* a piece by James P. Gannon on the relationship of the Republican Party and big business. It's called *The G.O.P. and the Fortune 500* and it quotes Senator Paul Laxalt of Nevada, who was one of Ronald Reagan's chief campaign workers, asking to get the Fortune 500 off the backs of the Republican Party. They're tired of being identified with big business, of having to defend it. Laxalt is also quoted as saying that big business, big labor, and big government are politically sleeping with one another and they depend on each other for their political and economic survival. *The Wall Street Journal* editorialized today that the free enterprise system needs to be protected from the businessman.

We are trying to find out as much about the situation as possible at the same time that you really don't want to tell us very much.

It surprised me and it surprised some other reporters, I think. There's a lot of criticism of government regulation, government intervention. But as soon as you start talking about eliminating some of it, the industries that are regulated are often the first ones to cry out in an effort to keep the system as it now exists.

These are three elements, I think, that have contributed to the general uneasiness, the deteriorating environment toward business in the last few years. It's not so much a problem of business and the press as it is of business and the public. I think that business is basically responsible; and the press is basically responsible. When either is irresponsible, it should be called to account and called to account forcefully. But to say that they're both basically responsible doesn't mean that business and press relations are basically amicable, or should be. I would paraphrase what Bob Lubar quoted Mr. Sulzberger as saying. There's a kind of built-in antagonism between business and the press that's similar to the antagonism between reporters and government officials, between reporters and celebrities: often we want to know what you don't want to tell us. And you can talk all you want about open communications but at some point there is a situation that will develop in which our responsibility is to find out what is going on. It may often be an embarrassing situation. It may be a shuffle in the executive suite. It may be some kind of a problem with a pesticide.

We are trying to find out as much as possible at the same time that you really don't want to tell us very much.

They want to have it both ways and I think it is the responsibility of business to explain that there is no free lunch and that the benefits derived from the system are possible because the system works as it does.

I don't see any way around this typical kind of problem. But I do think that it is better for an official of a company to be available for some response, some kind of comment. I think reporters would appreciate not only being given a statement but being able to discuss the statement with someone who could elaborate on it. Besides that, I would reiterate that business should state its case as forcefully as possible. There is an ironic situation in which the fruits of business—the products that you people make, the services that you offer—are very much in demand, not only in the United States but around the world, not only in the Western world but in the developing world and in the Eastern Bloc. At the same time, people don't like the basic system that makes possible their ability to buy these products, to get these services.

They want to have it both ways and I think it is the responsibility of business to explain that there is no free lunch and that the benefits derived from the system are possible because the system works as it does. Business has not been effective enough in making this case. I think that business has to show how its self-interest ties in with the self-interest of the American public, the American consumer.

Lubar: Thank you very much, Jack.

Our next speaker is Ray Scherer. For twenty-eight years he was a newsman with NBC and his job was getting the news where he could get it. Then suddenly he switched and in 1975 he became vice president in Washington for RCA—an entirely different kind of role in which he became the spokesman for a major corporation and saw the other side. We asked him to

come and give his illuminating view of the situation from that standpoint.

Scherer: It's now been a number of months since I flung the trenchcoat in mothballs, put on grey flannel, and crossed over to the other side. After a whole life spent in journalism, I was persuaded to switch from NBC News to RCA. It was an easier transition than I had thought possible, partly because a lot of what I still do is reporting. Instead of putting it all together, going to a studio and emoting in front of the little red light, I report directly to the top men at RCA in New York. Instead of reporting on what the Ways and Means Committee did that day to the tax bill, I report to a much smaller audience on how the Ways and Means action will affect RCA. So many of the same skills of synthesis and news judgment are involved in my new job.

On the strictly personal side it's a lot more comfortable working for a corporation than for a news division. You can live your own life, set up your own lunches, plan your own weekends, and there are the various perks which would embarrass me if enumerated here. My RCA waistline is three inches larger than my NBC measurement.

But I haven't come here to bask in the creature comforts of life in the corporate realm. I would like to talk a bit about the tensions that seem to exist between business and journalism, tensions I was never fully aware of until I took this new job.

Soon after I joined RCA, I accompanied the president of the corporation to a hush-hush meeting of corporate tycoons at the Links Club in New York. The purpose of the affair was to plan corporate strategy for the new tax bill. The speaker was Senate Finance Chairman Russell Long, up from Washington.

Businessmen complain, and I hear a lot of this, about how business is covered on television. All they put on is higher prices, consumer complaints, product recalls, stories about corporate bribes.

This was just after I had moved to RCA and many of the corporate executives, I was to learn, were unaware of my changed status. During the cocktail hour, I spotted three of them in a corner, eyeing me and whispering. Finally, one of them walked over and said, "We'd just like to know, if it's all right with you, what you are doing here. We were told," he said, "that this meeting would be off the record and that no reporters would be allowed."

"Well," I said, "I am no longer a reporter. I am, in fact, one of you. I am the new Washington vice president for RCA."

The fellow's jaw dropped and he welcomed me as the prodigal son returned from outer darkness. He took me all around the room, introducing me as "one who has come over to our side" and who was now going to evangelize for business to all those skeptics and zealots in the press corps. Not only that, he bought me a drink and suggested I be invited to sit at the head table during the dinner.

I tell you this to point up what you already know, that business and the press really do not understand each other very well. There is a lot of mutual suspicion. As the president of Prudential put it, "They are like two strange dogs, circling each other warily, suspicious of each other's intentions."

Businessmen complain, and I hear a lot of this, about how business is covered on television. All they put on is higher prices, consumer complaints, product recalls, stories about corporate bribes.

The charge then is that reporters are out to get business. The other complaint is that too many reporters are way over their heads when it comes to reporting business news.

For their side, reporters complain that business is afraid to talk to them. Business hides behind bland handouts and since television is a visual medium, it is damn hard to get business news on the air.

. . . think hard beforehand about what you want to say to the camera and concentrate on how to say it succinctly.

I suppose there is some truth in these charges but I am here to say or at least to hope that the situation is improving.

Businessmen are doing better. One agency has a three-day course for business executives. It teaches them how to handle themselves on TV. People tell me it's pretty good.

TV, for its part, is using men who have become sophisticated in business and economic news. NBC has Irving R. Levine. CBS has George Herman, Ray Brady, and Nelson Benton. ABC has Dan Cordtz who used to work for Fortune. Their problem, one that I never really learned to live with, is that they rarely have more than a minute and a half to tell their story.

That means, if you get the corporate spokesman before the TV cameras, you'll get about thirty seconds on the air.

Thirty seconds, you say, is not worth bothering about. I say it is. Companies spend millions on thirty-second commercials. You can say a lot in half a minute if you work at it.

If I were to offer any free advice in this department, I'd say: think hard beforehand about what you want to say to the camera and concentrate on how to say it succinctly. If you know in advance what you want to say about your company's problem, you can find a way to say it even if the reporter's question isn't put quite the way you expected it.

Say it simply and say it pungently. I don't know how many times I have filmed a thirty-minute interview, taken it back to the editing room, and been unable to find one thing that was usable, not even twenty-seconds' worth. I haven't interviewed that many businessmen but, while covering the Capitol, I used to put politicians before the cameras all afternoon long. The ones you see over and over on the nightly news are the ones who have learned how to say it crisply and in thirty seconds. They have learned to capsulize.

TV newsmen are not so much trying to trap you as trying to get something they can use on the air to make their point or your point. Don't allow yourself to be trapped into saying something you don't want to say. Say what you want and then shut up.

Another piece of free advice is to put more candor into business pronouncements. If you blow one, admit it. And if you don't know the answer, say so. Jimmy Carter got high marks in that two-hour radio phone-in program for twice saying, "I don't know." Another gambit is to give them everything. Tell them more than they want to know. If you smother them with facts, they may go away and never come back.

At RCA, our new chief executive has been inviting the trade and general press to free-for-all interviews. He doesn't duck. He uses candor. The result has been a surprisingly good press. He happens to be an unusual man who knows all about every facet of the business. Because of this, he can be specific. If your c.e.o. has this broad knowledge, turn him loose. You spend a lot of time getting him ready for Evelyn Davis at the stockholders' meetings. Give him a little skull practice before a press conference.

And there are other signs of progress. A number of colleges have courses in business journalism—Columbia, Princeton, Missouri. Editors are learning that just because a man does a good job covering the courthouse, it does not mean he can do a professional job on the business page.

There are still important newspapers that give eight pages to the sports news and two to business. But that is changing. Editors are picking up the challenge to go beyond the superficial and probe into the interrelationship between government and business, and between business and society.

In sum, I see progress. Industry is taking the press more into its confidence. Businessmen are beginning to realize that the responsibility of the press does not include the obligation to be a cheerleader.

For their part, newspapers, magazines, television, and radio are beginning to realize that many business stories are page one news.

It's a little like some young men and women I know these days. They may never get married but they at least learn to live with each other.

Lubar: Thank you very much, Ray. Paul Weaver has been associate editor of Fortune for the last three years. And, of course, that means his major job is to report and write about business, in various manifestations. But on the side, he's always been intensely interested in the press and TV as phenomena in American life. And he's made a study of them. So he speaks to us from a double vantage point.

Weaver: It's easy to point to lots of instances in the last decade or two where the press has covered business affairs from a viewpoint that is fairly described as critical and that often works to the disadvantage of business enterprise. That sort of experience has given rise to the complaint that the press is antibusiness. And this morning I would like to explain why I think this complaint is misplaced. I do indeed agree that there is a problem in business-press relations, but I do not think that the problem stems from an antibusiness posture on the part of the press or a leading part of the press or on the part of some of the reporters who work for the national press.

I'm sorry to say that I think the problem is not nearly that simple and not nearly that easy to deal with.

When you look at the history of American civilization as a whole over the last two or three hundred years, I think you have to conclude that Americans have never been probusiness as such. There have indeed been periods in our history when businessmen have occupied important and valued cultural roles, and business has always been a pervasive and valuable institution, but it has never been true that we are simply a pro-business civilization. For Americans have always been ambivalent toward business enterprise.

I tend to think of this phenomenon from the viewpoint of a political scientist, and this is how I would put it: the culture has always been torn between Madison and Jefferson and Jackson—or, perhaps even more accurately, between John Locke and the philosophy of classical liberalism on the one hand, and on the other Jean-Jacques Rousseau and the philosophy of democratic egalitarianism. The Lockean strain in the American culture has always held that individual liberty is the central social aspiration and fact. It has also held that society is and should be democratic, but less centrally so. This conception of American civilization is favorable to business; it has held that there is an important and indeed a central role in the civilization for business enterprise and for the people engaged in it.

On the other hand, our culture has also been Rousseauistic. We have believed for centuries that we are an essentially egalitarian and democratic nation, that the nation is most completely at harmony with itself when it is unified in a kind of consensus. This way of looking at America implicitly depicts the people as a whole, the democracy, as being opposed to, or in conflict with, the parts of society—the interest groups, the private institutions, and the other associations—that live in and flourish under the Lockean or liberal order.

Public opinion is, of course, a force of enormous power, so if only because the press seeks to foster public opinion, it is deeply involved in the distribution of power in society.

Both traditions of thought have been present throughout American history. I think it's fair to say that historically the American press has always been allied with the Rousseauistic and against the Lockean idea of American society. The press has always spoken the language of Rousseau rather than the language of Locke. Therefore, in general, the press has tended to reinforce our Rousseauistic aspirations and leanings and to denigrate the status of business enterprise and of all other private, or partial, or factional institutions.

Yet it is not correct to say that the press has always been an institution that harms business. Throughout the 19th century and well into this one the press has generally helped business, and even today, as we approach the end of the 20th century, there are many newspapers, in smaller towns especially, which are very favorable to local business and to the local elites.

In the last two or three decades, however, some elements in the press have begun to behave in a way that increasingly is unfavorable to business. To understand how and why this has happened, you have to understand a primordial truth about journalism, which is that journalism is about power. It has always been about power. It is so today, and it was so when it first emerged in the 17th century. The press is about power in part because the press is an effort to create public opinion. Without public dissemination of information on a regular basis—which is what the press does—there can be no public opinion.

Public opinion is, of course, a force of enormous power, so if only because the press seeks to foster public opinion, it is deeply involved in the distribution of power in society.

In addition to that, there is the further fact that the people who go into the business of writing for a broad public are, almost by definition, attracted by the idea of finding a voice and

reaching an audience and moving the audience. In other words, people who go into journalism are people who in some sense are interested in moving the society, in exercising power. They are also people who are attracted to people who have power and high position. They enjoy being near these people, they're interested by them, they like writing about them, and they're easily persuaded by them.

That last fact is a very important one. For over the last thirty years, business, as an institution and as a part of the American civilization, has become considerably less powerful. As a result, the press, while behaving as it always has, has become less and less sympathetic to business institutions, and more and more enthusiastic about the part of the society whose role is more influential and on the ascendancy.

There are many reasons for the decline in the cultural and political role of business; let me describe the two that I think are most important. The first of these is what one can fairly describe as a social revolution. Once upon a time broad areas of American life were dominated by an upper-middle class that participated in the traditions of the bourgeoisie, which is to say it was an upper-middle class that had made its way in the private sector, as founders of businesses, professionals, and the like.

What we have seen in the last thirty years is a radical transformation of the cultural and economic make-up of the upper-middle class. It is no longer a bourgeoisie in the traditional sense of a class defined by ownership of property. Increasingly, it is an upper-middle class that is most accurately described as a managerial class; to use Irving Kristol's term, it is the New Class. It finds its social power not so much in the private sector as in the public sector. It does not own wealth but it manages wealth owned by anonymous or generalized or abstract social institutions like the corporation or a pension fund. And it is implicitly and sometimes explicitly hostile to the old bourgeois upper-middle class and constantly seeks to expand its role in society, which is a public-sector role.

This development is most clearly seen by the drastic changes in the political affiliations of students at our better universities. A generation ago, at Princeton, Harvard, Yale, our leading Ivy League universities, the student bodies were overwhelmingly Republican. In 1972, if I recall correctly, a poll showed that 80 percent of Harvard undergraduates preferred George McGovern to Richard Nixon. That is an extraordinary shift of social, political, cultural attitudes in the space, really, of one generation.

> The result is that the people who manage American business today themselves have a weaker sense of the legitimacy of business, of their own legitimacy . . .

So there's been a social revolution. As a result, more and more people from the new class are writers and editors in the press. Even more important, these people have moved into government and — most important of all — they have moved into business.

The result is that the people who manage American business today themselves have a weaker sense of the legitimacy of business, of their own legitimacy, than did the managers and owners of business one or two generations ago. The press senses this. The press has a very good nose for feelings of legitimacy and illegitimacy in people and in institutions, and it has behaved accordingly.

The second fact I would point to is what I call a quasi-revolution in our political system — in particular in our system of political parties. Until a generation ago, we had a genuine two-party system. Today, I think it's fair to say that we have a modified one-party system. What's happened in the interim is that the Republican Party, the traditional party of the old bourgeoisie, if you will, has declined to the point where it no longer seems a serious threat to the Democratic party's control of our legislative institutions, though it will always have a shot at the presidency.

> The tensions that we see increasingly between press and business are tensions that come from a fundamentally altered social environment.

This is important for business because the Republican Party was an important source of the political power that defended the business system. And it was a force, therefore, that made business, at least indirectly, a powerful and reasonably well-protected institution politically. Business has now lost that protection. This is another fact that the press senses. And this is another reason why the press increasingly covers anti-business or at least, non-pro-business institutions and social elements, accordingly.

What all this means is that the problem between the press and business is not a problem of the climate of the moment. It is not just a passing phase or mood.

The tensions that we see increasingly between press and business are tensions that come from a fundamentally altered social environment. This is a fact of considerable importance and everyone who thinks about this problem has to deal with it. How to deal with it is another story for another occasion.

Lubar: I'm sure you've all got a lot of questions for us. Please address them to a specific panel member.

Question and Answer Period

Q: I'd like to direct [illegible] question. I don't know how well we've been getting to see, in our contacts with the various members of the press, I think we've learned to live with newspapers and with magazines, with the printed word. But we have not yet learned how to live with television. We're training dozens of people in twenty-second segments. We're training people to do this all over the United States so that when they are approached, they can respond quickly and candidly to television.

Where we cannot reach television — and perhaps you can tell us how to overcome this — is in providing background. It seems that some of the major stations do not have a business reporter. There is no one with whom we can speak in advance, to whom we can give some background. All it would do, a different person every time. We can talk to John Cahill for the newspapers. But now can we do this in [illegible] television environment?

Angotti: I hope in the next month or so we will have on the NBC staff another business reporter, outside of Washington. Irving Levine is our business reporter but because of the amount of Washington and government news that he has to get involved with, he's not often available to corporations and

their needs and their desires.

I hope we're going to have somebody in another couple of months who will be based out of New York and he or she will be someone to whom you can direct your needs. We also hope to expand that portion of our program we now call special where we try to allow three-and-a-half or four minutes to background a subject. And we're doing more of that now. I think we're going to do even more in the future. And when that happens there will be a vehicle for doing background stories.

Once we make that time available and we have a correspondent who's available to do that, I hope that'll answer your needs.

Q: *I want to direct this question to Jack Egan. Don't you think that one of the problems and misunderstandings between business and the press is that business fails to realize that media themselves are a business and that the public really isn't interested in having public relations releases from big corporations presented on a news program. The public gets enough of that in the commercials. In fact, if the ratings decline because people are bored with the content that was being promoted by business during the news portion of the program, business itself would suffer because it wouldn't be able to get its own messages across to the people, through advertising, because people wouldn't be listening or reading. Is that a fair proposition?*

Egan: What the editor feels is news by any of the various objective definitions there are, and what a company wants to put forward and instill in the mind of the public as news, are often very different. We're looking for impact, we're looking for novelty, we're looking for humor, we're looking for anything that the public wants to read in the paper or watch on television. Hopefully, there is an underlying sense of responsibility when making what in effect is a wide range of judgments on the treatment of subjects. But you do want to make these judgments based on these different criteria, reader interest being at the center, and it is different from what the companies want.

Q: *I'd like to direct a question to Mr. Scherer, since he's been on both sides. It's my feeling that the conflict between business and the press is a conflict of basic rights. I think corporations as well as private citizens have some rights. The issue that I address really is the right of privacy. It seems to me that businesses have certain rights that the press does not necessarily recognize. For example, a corporation is considering a plant closing. Does the press have a right to that information? If business is considering a management change, does the press have the right to report the information? If a business is talking to another business with the thought of acquisition or merger, does the press have the right to that information?*

I think that's the area in which business and the press are more frequently in conflict. Where are our rights to privacy?

Scherer: I would say that most of the time the press does have a right to that information. If you're doing something which, if exposed, is going to hurt both sides in an acquisition situation, that can be very sticky. But once it's out, it's out, and I don't know how you can prevent it. We're living in an age of investigative reporting and there are a lot of people who think this has gone too far. Everybody wants to become Woodward and Bernstein these days, and the problem that Managing Editors have with young reporters is that they all want to crusade and all want to advocate. That is a problem that bothers a lot of us old-timers and it gets into the very thing you're talking about.

One of the things that struck me most forcibly today is something I think business has never quite learned to live with and that is the fact that we, as Joe Angotti put it, are uncomfortable with the fact that we're out to make a profit. There must be a better way to get this across without being apologetic about it. One of the major tasks business has to do is to explain the profit motive. If you read on the financial page day after day that such-and-such a firm is up 67 percent over last year—or maybe 110 percent over last year—the average guy has the impression that you're making an enormous, an extraordinary profit. When polls are taken, you ask the average man how much company A or company B makes and he thinks maybe 35 or 40 percent. When you tell him that it's less than 5 percent, it may be only 1 or 2 percent, he can't quite believe it.

This isn't answering your question but it is one of the main things that business has got to get across. Business has to explain and not be apologetic about the free enterprise system.

Q: *I'd like to ask a question of Joe. First of all, let me compliment you on the brevity of your remarks and for getting across the point in no uncertain terms that your objective is "audience" which in our terms is "profit." Let me suggest, at the risk of appearing altruistic, that neither one of us has the responsibility, nor should it be our objective, to just achieve competence. That is a necessity for our survival but we're both here only for as long as we serve the public's needs well. When we fail, we hope we're eliminated.*

I think we have been sensitive to the press criticism and are adjusting our business ways to respond to that criticism. It's difficult and progress is slow but I believe it's been made.

You have a problem too in adjusting to criticism. I think that Walter Cronkite mentioned the difficulty of packaging a hundred pounds of news into one pound of text. But do you recognize the problems that we face? It's very easy to tell us, to make a charge; it's very difficult to respond.

How do you give balanced reporting, recognizing that real problem, and can you comment in that area?

Angotti: I appreciate the fact that usually when we put a business representative on the air, it is in response to something that's happened earlier. Most of the time he or she is put in a position of responding to an adversary, whether it's a Ralph Nader, or a union official, or somebody else. That's not a good position for you to be in. And I worry about that.

For some reason the other guys, your adversaries, are much more aggressive and on the attack more often than you are. They have learned how to use us, I will grant you that. It's a shortcoming of ours. But I wonder if you couldn't take some of their principles and some of their tactics and work them to your advantage. I wonder if you couldn't do more that puts them on the defensive.

Q: *My question was aimed at what you said. In other words, a charge is made without foundation, without inquiry, without background—why is that news? Why do we have to support every claim we make while you do not press those who make the charges with the same intensity?*

Angotti: The biggest limitation we have is time. The thing that we do best is to present news quickly.

Q: *But you never report the charges as not being correct, once they are disproved.*

Angotti: In most cases, the amount of time that we have to investigate the charges doesn't allow us that luxury.

Q: *Post facto, after the charges are made.*
Angotti: Oh, I see. I see what you mean.

Q: *Why is Ralph Nader's charge today not news two days from now?*
Angotti: Simply because the cycle of news has moved on past that. I mean, news is change. News is what's happening now. You have a good point. We probably should come back to things. We probably should do more. Even though we have the immediate responsibility of putting news on the air, we probably do not follow up well enough. We don't come back and say, "hey, remember what happened a couple of days ago? Well, we found out since then . . ." We could probably do a lot more in that area.

Q: *A lot of misunderstandings arise, it seems to me, because executives don't understand, sometimes, even the simplest rules: What is an interview? Is it on the record? Off the record? The whole question of attribution, background interview, and so forth. Many chief executive officers don't even understand when they're talking to the press. They sometimes take a phone call from the press, but they don't think of it as an interview.*

Do you think it might be useful to have some kind of simple handbook—not for the guy who is well advised, but for those people who aren't sure of the basic rules?
Scherer: It sounds like a good article for Fortune. You're quite right. This is very tricky ground. When somebody calls you on the phone and your guard is down, you say something. You're horrified the next day to find the whole thing in the press. Chief executives have to learn there are ground rules. The reporters do obey ground rules as long as they're understood on both sides. This is fairly easy to do. The easiest thing is to have a sophisticated guy on your staff who used to be a reporter or at least has worked for some part of the media. A lot of companies are doing that. That is a kind of luxury.

Another thought occurred to me this morning. I lived in Britain for a number of years. They had a marvelous weekly show on the BBC called *The Money Program*. And it was like a weekly edition of Fortune. There were three or four stories that ran for an hour, I think, devoted to business and it was very, very good. I don't know who would sponsor it in this country, but it would be great ventilation for a lot of these things.
Voice: Perhaps that's the reason non-commercial television is good.
Q: *Several of us in the audience are former members of the press and a few are from the business press. The thought struck me when I was listening to the panelists that when I first broke in as a reporter, we were trained to cover both sides of the story. In those days a city editor would throw the story back at you if you didn't have the other side of it. Over a period of years interpretive journalism has come to the fore. The assumption seems to be that the public is too dumb to interpret the facts themselves; therefore, media must interpret them. This morning, a couple of members of the panel did remark that it's primarily the bad that does make news. I don't quarrel with that but on the other hand you must make a more effective case for free enterprise.*

If media are primarily interested in the bad, how are we going to make a more effective case? And if the interpretation is concentrating on the bad, does that not erode the free enterprise system?
Weaver: I think you're right. The focus on the bad by the press is a part of its routine operation, and over time, it can lead to bad consequences. I'm not sure there is an answer to the problem in the sense that there is something business could do to counter this effectively.

I do think there are a lot of things that can be done in the margins, as my colleagues on the panel have mentioned. But I don't know that there is any corrective that can be effective in altering the underlying transactions between people in business and working men of the press. I don't think there's any basic "solution" that will work.

Q: *Mr. Weaver, you talked about Irving Kristol's "New Class." You say that it is increasing in importance and power and, as I remember, that new class—as he defined it—included all intellectuals, the media, clergymen, foundations, advertising people, all of those. Doesn't that almost ensure a further increase in anti-business sentiment, if not the demise of the free enterprise system?*
Weaver: I think it guarantees that there will be a growing potential in our society for response to anti-business themes. Whether that potential for response is always activated depends on all kinds of things. I don't think it's correct to say, though, that the presence of this growing responsiveness necessarily means that the free enterprise system—and of course, we don't have one; we have a mixed economy—that the mixed economy will become greatly less mixed than it is today. There's a big difference between public opinion, especially the sort that we're talking about, and public policy.

Remember that, at the same time that there is a lot of hostility to aspects of the workings of the market economy, there's a terrific loss of confidence in the capacity of government to manage the economy. The opinion polls show that the only thing people like less than business is government and the press. So what we may experience over the next decades is a stalemate.
Lubar: I want to thank the panel very much for its contribution this morning. If you have any more questions, I'm sure you can discuss them with the members afterward.

Workshop Session

Presenter: John R. Purser
Vice President, Public Relations & Advertising, Jones & Laughlin Steel Corp.

Moderators: Robert Marker, Barry Biederman
Needham, Harper & Steers, Inc.

My topic is employee communications. I suppose the best way to describe employee communications at Jones & Laughlin in the four years since I've been there, is both a revolution and an evolution.

I hope you will be impressed with the employee communications, but keep in mind that we started from a very low base. In early 1973, the company's major communication to employees was a black and white company magazine. It had six editions. It had an eight-page, wrap-around corporation edition, and the inside eight pages were planned specifically for each one of our major works, the general office, and for retirees. It was not an example of good communications.

I like to look at our employee communications in very simple terms. There has to be continuity, there has to be credibility, and the program has to be consistent.

I've some figures, which I'll talk about later, that show the contrast between the awareness and readability of that publication and some of the things we're doing today.

Perhaps the easiest thing to recognize as we go through our employee communications efforts is management's commitment to the program. We've had a management, fortunately, that has encouraged us to communicate on all levels. It's important, we feel, that you start at one end of the spectrum and go all the way to the other end.

I like to look at our employee communications in very simple terms. There has to be continuity, there has to be credibility, and the program has to be consistent. "Consistent" is a word that gives some people trouble, but "consistent" to me means that the communications to employees have to be as professional as the other communications they receive in their homes. Our communications have to compete with a Fortune, or a *Time*, or a *Newsweek*, or a *Reader's Digest*; and in the case of our videotape programs, they have to compete with the television news programs that our employees see every evening.

Let me start by showing you some slides. The first series will be on our videotape programs. Called the Strategy Series, these programs go to about 7,000 salaried employees throughout the corporation. We use a professional studio for recording, but we do the writing and so on. We also use a professional moderator, Frank Blair, formerly of the *Today Show.*

In the Strategy Series, we start the year in January with a twenty-five-minute presentation. We always have Tom Graham, president and chief executive officer, as the main speaker. We always try to have another guest, one of the vice presidents or some other interesting individual who can speak to an important segment of the corporation.

We cover the main topics at the beginning of the year. We update Strategy every quarter and call it Stategy Plus 1, Strategy Plus 2, Strategy Plus 3.

We allow our employees to take off the twenty-five minutes to view the presentation. We also provide cards, for asking questions. Most of the supervisors who attend these programs can answer most questions. If there is a question the supervisor can't handle, it is sent to us and we try to get an answer back to the individual. Or, if the question has a broad appeal, we have the person ask that question on the next show and Tom Graham answers it.

We do a regular survey of the show to determine viewing and so on. Our latest survey—based on a 30 percent return—revealed that about 78 percent of our employees watch every show. Seventeen percent said "most of the time." That rounds out to about 95 percent of respondents viewing the program on a regular basis.

Other questions were asked:

- Do the programs provide timely and adequate information on important corporate matters? Ninety-one percent said yes; 8 percent said no.
- Do you like having the top corporate officers, including Thomas C. Graham, presenting the information? Yes, 91 percent.
- Does Mr. Graham make a good impression on you in the programs? Yes, 87 percent.

Tom, by the way, tells it like it is, and sometimes this offends certain people. But his credibility is high.

To give you a break-out of the types of people that we're reaching, we ask for their job classifications.

Supervisory, 49 percent; technical, 12 percent; clerical, 27 percent; secretarial 12 percent. Those are percentages of survey respondents.

These survey results have been consistent over the years.

We also have at our major works the capability to put on videotape training programs for employees These programs, which are conducted by the works training department, may

not be as professional as you get in a regular studio, but they have proved effective.

We also do a local works television program, which is an adjunct to the Strategy Series. It's called *Update: Cleveland*. We attempt here to work down the inverted pyramid from the corporate Strategy Series to the local issues and deal with them on a local basis.

Update: Cleveland is filmed at Parma High School in Parma, Ohio, which runs an educational television setup.

All the work is done by students under the guidance of a professional. They've got a pretty handsome setup. And they are as conscientious, by the way, as anybody you could possibly find. The first one was done in December. Nothing fancy, but it gets the message across. This was again shown to all of the supervisory personnel at our Cleveland Works.

All the work is done by students under the guidance of a professional. They've got a pretty handsome setup. And they are as conscientious, by the way, as anybody you could possibly find.

The moderator of the program is Bill Gibbons, manager of communications. The main spokesman is George Lane, works manager. The format is basically the same as the Strategy Series.

At some of our works, because of a particular set of circumstances, it is not practical to do a local videotape program. As an alternative, we've gone to a weekly management newsletter. It talks in direct terms about performance, about priorities, about shipments. It contains no fluff and it comes from the works manager.

We've been working for quite some time on our Telephone News System. This is a series of telephones that are set up at all the major works and the general offices. By dialing a four-digit number, the individual can listen to a one and a half minute prerecorded message. At the works, the messages are given by superintendents, works managers, and various other people. At the general office, every department has a day a month. Each department talks about what it thinks is interesting on a broad-based scale. We also record pieces, now and then, from outside sources.

The number of calls we receive in a non-summer month has gone as high as 80,000 corporate-wide. More typically, we average about 50,000. The cost on a 50,000-call month is one-tenth of one cent per caller.

Recording is very simple. A man comes in with his message. We try to look it over beforehand, to make sure that what he is saying is understandable. By the way, if he can't make it in, we can record directly from any telephone.

A survey showed that 83.6 percent of our employees paid little attention to the magazine. As a matter of fact, they had no comments about it, and the biggest category of readers was the retirees.

So we changed the publication, retaining the name. We put some color into it. We designed a logo using the letters *J* and *L*. It became the "30" mark on all the stories. And to kick it off, to show that it was a different type of publication, we did a centerfold "Jalmate of the month." This is an actual steelworker at our Pittsburgh Works.

We also introduced, at the same time, Jake and Looey. Jake and Looey are a couple of characters we developed, obviously playing on the name J&L, that have been very well received. They can talk to a wide range of audiences. In the next issue, we had a lady "Jalmate of the month." We did get some reaction, positive and negative. But we got their attention. This was the revolution part of our communications that I spoke about earlier. We continued with this format—*sans* centerfolds—for a year and a half. We thought we had a pretty good publication, but we decided to conduct a survey.

In 1973, 83.6 percent did not read the magazine; in 1976, approximately 80 percent said they did read it. More important, since we had started sending the publication to the home, about 68 percent of the survey respondents said their wives and their children were reading it.

Something else of interest, too. Somewhere around 85 percent of the people wrote comments, which I think shows an involvement with the publication. One of the comments was that since so many women were employed at J&L, why did we still use that chauvinist title *Men in Steel*. So we changed the name to *JalTeam Almanac*. We started off with an open letter to male chauvinists, which told them why we had decided on the new name.

So there is the evolution—from *Men in Steel* to *JalTeam Almanac*. A further evolution brought us to another publication called *Update*. We have dropped the *JalTeam Almanac*. If it was so successful, why?

You can get, I think, a general idea of the type of message that's carried. This message is changed every day. It runs on a twenty-four-hour cycle, but the message can be replaced any time for an emergency or other late-breaking corporate news.

At our Aliquippa Works, located on the Ohio River, the people were recently very concerned about the danger of flooding. So, for a period of time, we ran weather forecasts that were updated every two hours.

Employees' families also call in. They, of course, use a seven-digit number.

One-way communication, as I'm sure you know, is not the best way to proceed. So we have what we call an idea line. By dialing another four-digit number, an employee can pick up a phone, either identify himself or not, and comment about something. When an employee has a complaint, it is typed and routed to the individual who can best handle it. We try to have the complaint answered within forty-eight hours.

One-way communication, as I'm sure you know, is not the best way to proceed. So we have what we call an idea line.

In the case of an individual complaint, the answer is directed to that individual. In the case of broad-based questions, we post the question and the answer on the bulletin board.

Earlier, I talked about the major piece of communications when I first came to Jones & Laughlin, a publication called *Men in Steel*.

One of the things we found in our surveys is that the publications introduced at the various works and on other levels were providing people with the information that they desired from the local level. What was really needed was a factual

hard-hitting management piece that went to one and all, and talked in terms of the overall corporation.

So, *Update* became the publication in which management people talk about their individual areas in a very candid and forthright manner.

We started a series of publications on a local level. We have our own coal mines, and for them we have *Mine Line*. This is a four-page tabloid that talks about interests in the coal mining area and relates them to the corporation. We have our own ore operations, and another publication does the same thing for this segment of our work force. Editorially, we try to bring the corporation and the local level together.

We started works newspapers. *Steelmakers* is for the Pittsburgh Works. And *In the Works* is produced at Cleveland.

We decided to drop the *JalTeam Almanac* before some of our survey work was completed. We hoped our decision was going to pan out. Based on a 25 percent return, on a survey completed March 16, we find that 70 percent of the work force at Cleveland read every issue of *In the Works*.

Again, we send it to the home, and two-thirds of the responders said it was normally read by his wife and children.

Rating *In the Works* as an employee source of news, 64 percent said it's an extremely important and valuable source of information for them.

Believability: 78 percent said they always or usually believe the material presented in *In the Works*.

We encourage not only our employees, but their families and other people, to get to know us a little better. So we provide tours of our steel operations.

We asked in our survey for a ranking of the communications that our employees receive at the Cleveland Works, in their order of importance.

The Call Line, which is the telephone news system, is ranked first. *In the Works* is ranked second. Other sources, such as supervisors, are ranked third. The Cleveland *Plain Dealer* is ranked fourth. Other local media, such as radio and television, were at the bottom of the scale. Those results run pretty consistent. The Pittsburgh Works' survey tracks almost identically with the one from Cleveland.

It's interesting, however, from our standpoint, how well the employees' communications rank with communications outside the company.

Center View is our steel service center publication. (We have ten service centers around the country.) *Center View* is very well read, I feel, because it is very well written, and very well designed.

We encourage not only our employees, but their families and other people, to get to know us a little better. So we provide tours of our steel operations.

We're proud of what we've been doing from an environmental standpoint, proud of our work force, and we want people in the community to know that we are a reasonable and responsible company.

We've also run employee-related community relations ads.

Q: *What kinds of publications do you run those in?*

Purser: We run them in the Cleveland Indians programs, in *Cleveland Magazine*, and occasionally in the daily newspapers. We also do radio commercials as a take-off on these subjects.

We use Jake and Looey in some of our community ads. We take an amusing look at the way people perceive the steel industry. In one ad we show our soaking pits in Pittsburgh. Few people really know what soaking pits are or their importance in the steelmaking process. So we tried to give people a better understanding of some of our problems and some of our successes and improvements.

We try to run Jake and Looey ads in a simple manner and yet get home our point. One of the reasons we are successful with the Jake and Looey approach is that the artist, Lee Sokol, is a forty-two-year veteran of J&L working at our Pittsburgh Works.

We also do various brochures, which are designed both for employees and the general public.

We did a series of calendars for a sales promotion campaign, and they became so popular that we ran a craftsman ad. Our employees were very proud of the fact that in many areas they were still thought of as craftsmen, and indeed they are.

We also use Jake and Looey for spot-radio. This happens to be in conjunction with the Pittsburgh Steelers, who are very popular in western Pennsylvania, where we have about 18,000 or 20,000 employees. We get involved in such things as computer-commuter, for our employees. These posters (using Jake and Looey) encourage our employees to travel by mass transit. We post these in the plants, and on buses that carry passengers past our works.

We also turn out a variety of other publications. *Steel, Air and Water* is a pretty candid report on what has been done, what we are doing, and what is expected of us in the environmental area. We turn this out for a variety of people, but a number of our employees request this publication. I feel they are proud of what we are trying to do within the bounds of the capital and technology available. We distribute it to the media and to governmental people and offer it in the communities in which we have facilities.

It's written in lay terms. It highlights our problems and some of the solutions, and then just some of the problems for which, at the moment, there are no available solutions.

We have a recruiting brochure, which we provide to employees on request and use as our general corporate recruiting piece.

We also do individual works brochures for the general public. We distribute these as the employees request them.

And we run Jake and Looey tours, a service we set up, which is run through a travel agent.

That concludes our revolution-evolution. If you have any questions, I'll be happy to field them.

Question and Answer Period

Q: *How many monitors do you have?*

Purser: We have about thirty-five to forty playback units, located at our various operations. In some locals, for instance, where we have both a sales office and a service center, they use the same unit.

Q: *How do you block out the time to have these 7,000 employees look at these video sets?*

Purser: We provide a schedule as a guideline for showing,

We normally videotape on Wednesday morning. Tom Graham and the guest arrive at eight-thirty and by ten-thirty we're done. We have a master by four in the afternoon. We review that at the studio, and overnight they start making the dubs. They are in the mail sometimes Thursday afternoon, but normally on Friday, ready to be shown the following Monday.

Q: *Is this Strategy Series, monthly, ever?*
Purser: No, we do this at the beginning of the year, in January, and then every quarter thereafter.

Q: *What other types of videotapes have you done?*
Purser: We've done special tapes on error reduction, mixed steel, on product liability, and so on.

Q: *What are you doing on employee benefits communications?*
Purser: We have used videotape. We produce letters, and of course a sizable benefits book, which is updated regularly, on the wide range of employee benefits that are available. We work very closely with the personnel department in trying to meet their requirements.

Q: *Any benchmark studies?*
Purser: The initial surveys served as the benchmark. We have conducted several communications surveys at all of our works. We have a pretty good handle on where we stand, and whether the communications are effective and whether they have the credibility that one hopes for.

Q: *Do you perhaps get that out of readership studies? The question is, are you having any effect on the employees?*
Purser: I think we're producing results, insofar as the perception of Jones & Laughlin is concerned, both internally and externally.

Q: *Do you get good cooperation from the union with your efforts?*
Purser: By and large, yes.

Q: *Do they think you're trying to take over the lines or interfere?*
Purser: No. We don't clash with them, in providing information. They never, to my knowledge, come back and say, that's a lousy editorial, or anything like that. As a matter of fact, we've had quite the opposite. I think, on a company-wide level, we have a pretty good relationship with the union.

Q: *Do you report to the c.e.o.?*
Purser: Yes, I do.

Q: *This unfortunately is very helpful.*
Purser: Indeed it is.

Q: *There is a risk, when you install a gripeline, that you'll get a backlash because of those percentages of complaints that you can't respond to. From your experience with the gripeline thus far, is this of real significance to you?*
Purser: Some are valid gripes and some are not. That runs through human nature, so it doesn't make any difference whether you're in a company or an editor of Fortune. We do go out of our way to provide an answer to an individual who has a gripe. That still may not satisfy him. But to your base question—have we had a lot of outlandish gripes—the answer is no. We have some that are irritating; for instance, the water is never warm in the washrooms, the cafeteria food is bad. We need to know these things and we strive to correct the complaints where we can. The era of the noncaring, public-be-damned attitude—both inside and out—that once was attributed to our industry certainly isn't reflected at J&L.

Q: *How many people and dollars do you have committed to your employee communications effort, the effort that you describe, in terms of employee and community levels?*
Purser: I would approximate the budget at between $400,000 and $500,000. Most of the work is handled by twelve professionals.

Q: *Does that include your local level, as well?*
Purser: Yes, it does.

Q: *Are you faced with zero-based budgeting?*
Purser: No, not per se. However, at budget time we thoroughly review all of the programs in force. That's what happened to the *JalTeam Almanac*. We reviewed that situation and the need it filled and ended up saving $50,000. We review every program and start from scratch to see how much money should be allocated to it and to decide if that program is still valid.

Q: In figuring the cost of a program—for instance, the telephone program—do you figure the cost for the time of the employee on the telephone?
Purser: No.

Q: *If there are thousands of calls, that's significant.*
Purser: Well, I think you have to look at that in light of what you gain from informing your employees. You may not be able to quantify the results, but I firmly believe an informed employee is a better employee.

Q: *But you don't figure that as part of the cost?*
Purser: No. Nor do we figure in the cost of time spent watching the videotape programs.

Q: *What obstacles, if any, did you meet in selling this idea, this program, to the works managers in the various plants?*
Purser: Well, there were certain obstacles to overcome, sure. But the program's proved itself to be a workable way to communicate.

Q: *Can I change the subject briefly and ask our distinguished gentlemen up there at the head of the table, who have been sitting through this entire half day of discussions, whether they have had a chance to read Paul Belknap's article here, which is primarily aimed at communications—how to go about it, and so on. Have you got any gems that you could give us, to tell us how to get into it in this?*
Voice: I think it's addressed to the role of the c.e.o. I think we tend to use our own terms to try to get his interest. What he's interested in is running his corporation well. It's put into the context of how the c.e.o. relates to this function and manages it as the chief executive officer. It would simply get his attention—this whole business of trying to get it past his secretary and all of that, is kind of strange, because we're really telling him how to better manage a major investment. It's big money you're talking about. I'm not sure I have the solution, but he has a personal interest in getting hold of this, and getting attuned to it. The dollars alone are not as important to the corporation as is the basic success.
Voice: The importance of corporate communications has been shown by the particular view of it that we have had in the last half hour here, the corporation's many different publics out there, and the corporation's many messages by which you reach those people. It seems to me that what everybody is searching for is how to help the c.e.o. to recognize the impor-

tance of communications, in all we publish, and make him willing to have the right kind of organization to fill the need. I doubt if too many have the time to think the thing through carefully and say, here's what I need. Therefore, both the needs and the solutions must come from people who are better versed in that. The advertising agencies involved have a great contribution to make, in bringing the focus on that.

Voice: I think one way is through management training. I looked at the curricula of the advanced management programs in the universities, and the subject of corporate advertising never was on the agenda.

If this group wants to find out where it should start, it should start with the business school, the MBA program, and go to the advanced management program. Executives rise to the top through finance, production, marketing. Some that we run across are a bit timid, because they are so good at finance that they feel very insecure in other fields. A great contribution by industry would be to sponsor certain kinds of scholarships or chairs in the graduate business schools on the management of corporate communications. This is lacking. If we don't get them when they start, it's too late when they get to the top.

Voice: There's one thing that bothers me. I heard a figure this morning of, I think, one billion dollars spent on corporate advertising, and I think . . . we have to face the question, are we doing our job?

Voice: Where is the audience that says we are doing our job? Do you mean that the situation would be terribly worse if we didn't have any dollars in this field?

Voice: I would suggest it would be, yes. I think there are terrible wastes and inefficiencies in this whole field. I guess that's why we're all down here, trying to study it. There's a lot of garbage in corporate communications. But I think if that money was not being spent, and if many good efforts were not out there, we'd probably have more of a disastrous kind of picture than we're looking at. This country is still alive and kicking very well.

I do think that there's no way to measure that, because we don't know what the condition would be if we hadn't done that. It's not just corporate advertising. I'm talking about the involvement and the visibility of the corporation. I think there are many things that work.

I think, despite the fact that we're all kind of angry at the press, from time to time, the press has done one hell of a job in this country, in surfacing many corporate misdemeanors. I think the handling of that in a free society is really going across, all the way.

Exhibit 54: "Corporate Advertising—Its New Look"



CORPORATE ADVERTISING: ITS NEW LOOK

Is strictly professional and painfully truthful, as it fights in all media for the attention of many publics

BY AUDREY ALLEN

MORE CORPORATE advertising, more professionally planned and executed, carried by all kinds of media, with the emphasis on social awareness. That's the trend for the coming year, say admen.

What used to be described as institutional or "our founder" advertising, and evolved into corporate or image advertising, is changing into what Herb Zeltner, Needham, Harper & Steers corporate director of marketing services, likes to term general purpose advertising. The New York ad agency executive observes that corporate advertising based on the company—"This is what our company is doing"—is changing direction to advertising based on the citizen—"This is why we're doing these good things for you."

This social awareness theme won't be limited to ecology and a few other prominent subjects, he feels, but will cover a broad gamut of social issues. It will present the corporation as a force for good, a force in the community where the corporation is housed, in the financial community, and among consumers generally.

• *Growing Trend*—"One of the trends we noted a couple of years ago—and boy, it's accelerating now—is that general purpose advertising, the voice of the corporation itself, is most often being handled by the very best talents in the business," Zeltner points out. "Understanding the purpose of that kind of advertising, understanding the nuances, being able to explain sensitively what needs to be said to the public, is almost more compelling than an out-and-out merchandising sales job. It's a much more sophisticated communications challenge. In the past a lot of it was small budget, handled in-house, or by a secondary ad agency, but today it's conceptualized and worked on by some of the best creative brains in the business. Competition is fantastic. Just look at the various campaigns—some of them are absolutely stunning!" Not that there weren't some stunning corporate ads 10 and 15 years ago, he admits, and aren't there some horrible ones today, but for the most part corporate advertising is gaining more prominence at major corporations, and being produced by professionals.

The planning of the social awareness-social involvement ad calls for an "exquisite sense of what is right," Zeltner cautions. It presents the corporation as a hero, a responsible citizen, a force for good, presenting information on the work the company is doing in community relations, assisting the less fortunate, minimizing pollution, controlling drugs, ameliorating poverty." This kind of advertising must ring true," Zeltner adds, "it cannot be blatantly self-

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serving. It's not an easy kind of advertising to do properly—and if done poorly, it can really backfire."

During the next year the good public service and general purpose ad campaigns are going to be timely and very important for corporations, more worthwhile than they ever have been, he believes, "but the mediocre and poor ones will do a disservice to their sponsors, and a disservice to the whole business of communicating ideas."

• *Nothing But The Truth*—General purpose advertising, Zeltner advises, must strive to be "almost painfully honest and direct in its approach, with no latitude for a shaded truth, no room whatsoever for a pious pronouncement that can't play out. It must accurately reflect the psyche of the senior management of the corporation, not someone's dream of an ideal world. The corporation must be presented honestly, forthrightly, and maybe with some of its worts showing. Any ad less candid may well fall afoul of the law, and will certainly lose its value and be worse than useless, because today a corporation's publics are sophisticated and knowledgeable."

Examples of the kind of ads Zeltner applauds are those sponsored by Atlantic-Richfield, International Telephone & Telegraph, and Xerox (all Needham, Harper & Steers clients, coincidentally), but he "throws a bone to the competition" with the remark that "Humble Oil isn't doing badly with its ads, and that Ford's 'We Listen' campaign (Grey Advertising) is extremely well received."

Zeltner, who got his basic training with Procter & Gamble and later became media director of Lennen & Newell, points out that media usage for general purpose campaigns is changing, because advertisers are learning that they can use any media form if it's a proper stage for their message. So these ads are being carried in the traditional print media, but also in major newspapers ("Look at the New York *Times* or the Washington *Post* any morning"), and very importantly in major television events. Some of the better campaigns have been particularly well done in a match of television and print," he notes, "and I've heard some on radio, where it comes across very impressively with the great power of that medium to work in imagery. And I've seen some great examples in outdoor."

SOME OF BEST, WORST

• *The Corporate Ad: Tool, Not Toy*—Needham, Harper & Steers Chairman Paul Harper contends that while some of today's best advertising is corporate advertising, so is some of the worst, and some of it is "sheer nonsense." Corporate advertising's purpose is something other than immediate sales of a specific product or service, and its effect is not measurable by warehouse audit, Nielsen Report, or sales analysis. But it must have some purpose. This purpose, he says, must be to produce some form of discernible action or

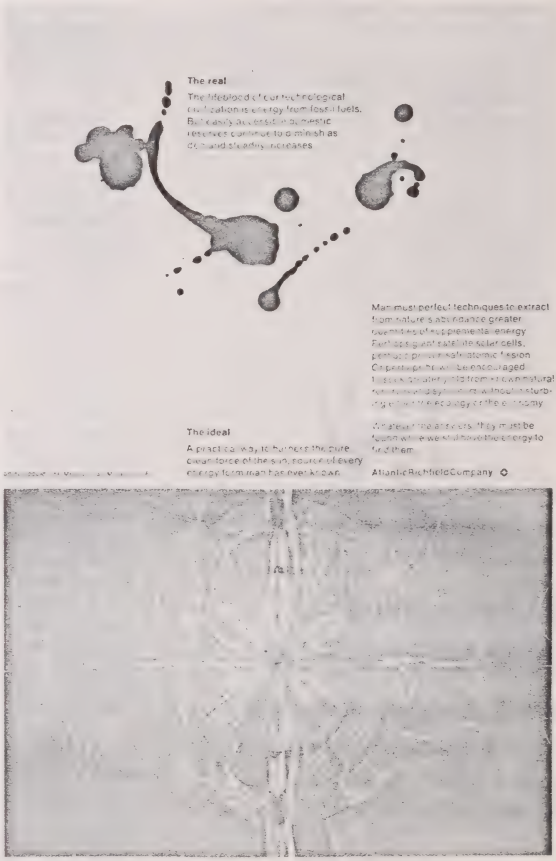


Image ad points to firm's concern and capability for the future.

change in some segment of the public. Corporate advertising that doesn't produce measurable action or change, warns Harper, is *waste*.

An ex-Marine captain and a 58-hour-a-week worker, Harper, by example, has inspired fellow workers to eschew wasted time, and seems to be attempting to inspire admakers to stamp out waste in corporate campaigns. His deep interest goes beyond the knowledge that corporate advertising—top management talking with the public—is not only a powerful way to stimulate action to benefit the company, but also helps business to remain "a fully accepted member of an increasingly depersonalized and complex society."

In a talk (which was read into the *Congressional Record*), he dubbed the businessman "The Invisible Man, the key man in our society, the man who takes more risks, works longer hours under greater pressure than any other—and who gets less public credit for it."

• *Mr. Important to Mr. Unknown*—"Long age he used to be the man in the big house on the hill. His ideosyncrasies were known and discussed. He was either loved or hated—but at least he was recognized—as an individual. Today," Harper points out, "he is known only to his peers. No one else knows who he is, where he lives, or what he stands for as an individual. The communications media are crowded with statesmen, politicians, entertainers, and ordinary citizens airing their gripes, but somehow the businessman, the man who really makes things go around, has gotten left out. His critics are part of the communications environment, but he is not."

Harper noted that there are two avenues leading to visibility that the businessman can take. One is to lead attacks personally on a wide variety of social problems. He conceded that for years businessmen have lent their names, time, and money to worthy causes, and sometimes been personally involved, but insisted "business has to be represented personally, first hand, and all the time, by its own leaders." The other route is media, through corporate advertising.

For several years the Xerox Company and its officers have boldly identified themselves, via television, with leading social issues and advanced art forms, Harper notes, and adds that Standard Oil of New Jersey has done the same. But he stresses the growing need on a broad front for personalization of issues by businessmen on the popular media. "I'm not talking about defensive statements on the contributions of business to the common good," he makes clear, "I don't think these kinds of communications work. They are necessarily too abstract. Im talking about bold and visible deeds and acts of espousal, sponsorship, advocacy, that clearly identify the businessman as a living, breathing, thinking, and fighting individual—rather than as a part of a gray, impersonal monolith."

• *Communications Gap*—Admitting that managers' first obligation is to manage their businesses he cautions, "If we seek to improve the environment in which we do business, we'd all better recognize the gap that has



Example of an ad describing a company's contribution to cultural fulfillment. Sponsorship of such programs is becoming increasingly popular.

Image ad that tells public how conglomerate company has changed.



been created perhaps 10 per cent by knives, but 90 per cent by the gradual depersonalization of relations between business and the common man. When you have a communications problem, the only solution is to communicate in the most meaningful way you can. In American society today, this means that businessmen must speak loudly, clearly, and simply. But above all, they must speak.

"Corporate managements have become increasingly aware that business improves as the welfare of society and the attitudes of the public improve. This awareness has been intensified by the growing presence of government, which John Kenneth Galbraith notes is fast becoming a partner of business. Involvement with the human needs of society has added a new dimension to corporate advertising," Harper points out, "and is certainly a factor in its rapid growth."

It is not enough for the Weyerhaeuser Lumber Company to be engaged in conservation, he stresses, it must keep the public aware of its engagement. It isn't enough for U.S. Steel and Jersey Standard to let a handful of purchasing agents know that they have some of the answers to the pervasive problem of water pollution. They must, as they are, gently nudge government and the business community to spend money to correct pollution problems.

Another contribution to the growth of corporate advertising is the emergence of great numbers of small investors, and the need to maintain communications with them, as well as the development of intricate and varied methods of distribution, the need to maintain relations at each level of marketing, and the shortage of talent and the need to recruit it. Both the budget and the principles of communication demand that each objective be given appropriate weight. Harper points to the haphazard jumbling of objectives as a major source of waste.

• *Bruce (Tell It Like It Is) Friedlich*—Noting the demise of the self-serving "our founder" advertising with the Army-Navy E after World War II, Bruce Friedlich, outspoken

IF THE ANSWER TO THESE QUESTIONS IS YES—CORPORATE ADVERTISING IS A MUST

A company's size isn't the determining factor in whether a company should utilize corporate ads, according to Paul Harper, chairman of Needham, Harper & Steers.

"If a company can answer these four questions affirmatively, then it should schedule a corporate advertising campaign no matter how big or small it is (as long as it can afford an ad budget, of course)," Harper advises.

1) What change or action do we want to bring about—and where?

2) How much money is this change or action worth to this company?

3) Can the desired change or action really be accomplished by advertising—or would the company be kidding itself?

4) Assuming that advertising is appropriate to the problem, what is the cost-benefit relationship between a certain number of dollars spent on advertising and the same number of dollars spent on other means of persuasion, such as public relations, industry-wide activities, sales promotion, lobbying, and so forth?

He cautions that questions 2, 3 and 4 can't be answered relavantly unless question 1 is answered candidly. What attitude do we want to produce in whose mind? What action do we want to produce in what segment of the public? And if the first two questions were answered candidly, he speculates, "a quarter of current corporate advertising wouldn't be running at all."

PLAYING GAMES AT NEEDHAM, HARPER & STEERS

To try to determine why some large corporations' names are household words, and others completely unknown, Herb Zeltner, NH&S corporate director of marketing services, played an in-house game surveying the agency's workers on which names they knew best.

He found that the company names that everyone was familiar with either: 1) have been around since the Ark; 2) have a consumer line bearing the company name, or 3) have been particularly imaginative and effective in their corporate communications.

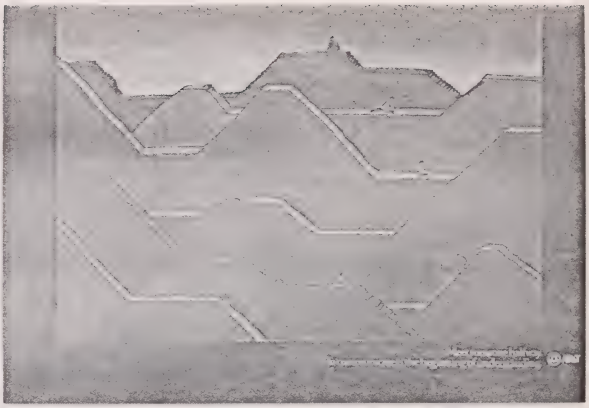
There's nothing a company can do on the first count if it doesn't already have that sewn up. It can start the second, but the desired effect will take awhile. But the third is there waiting to be put into action. "Corporate advertising is much more difficult than product advertising," Zeltner finds, "since it deals with working on attitudes and underlying predispositions. Eventually it has to pay off with some action that's favorable to the company's finances. Otherwise the advertiser is simply a Medici, providing worthwhile entertainment for the masses."

chairman of Friedlich, Fearon, & Strohmeier, New York, submits there is still "some pretty bad corporate advertising around today, and all you have to do to find some is to look through *Fortune* or *Business Week*. The chest-beating ads get very poor readership, he points out, while those more pertinent to the reader are "getting a helleva lot better reach."

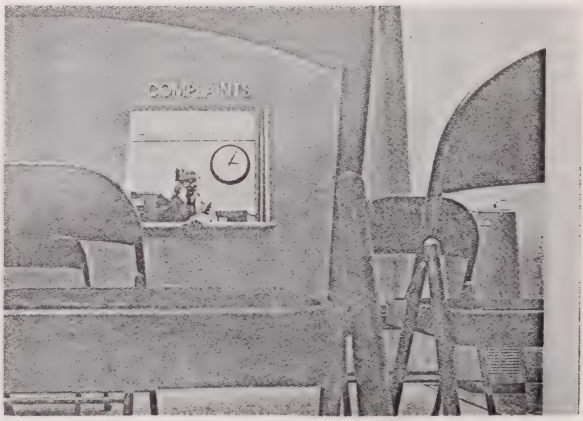
Corporate advertising is growing up, Friedlich notes, and corporations are trying to reassess their role in areas of social concern. Read the annual meeting reports of various corporations, he says, and you'll find that most stockowners' questions have to do with the corporation's role in social matters. But in researching the security analyst community for its new client Indian Head Inc., the agency found that analysts "don't give a damn" about how a company performs its social responsibilities, all they want to know is "How many dollars per share this year?" But most corporations can't sit silent, they need to talk about what they're doing, he believes, because the company behind the product and what it's doing is important in selling the product, especially to the young, who care more about how a company dispatches its social responsibilities than about how good its products are when they're deciding whether to buy the product, work for the company, or invest in it.

So the trend is toward social awareness, Friedlich agrees, but the best corporate advertising will swing away from wide angle blue sky, and get to specifics about just what the company is doing. Talk about the company's products, policies, and accomplishments, he advises, attend more to business and the more practical substantial things. Friedlich, admitting it's difficult for a company to decide what posture to take, considers one company's campaign that invites consumers to step up and give their opinions about all kinds of things, to be "warm puppy shit." (We warned you he's outspoken.) This large national corporation and its agency, may think it's great ad-

(Continued on page 68)



A company's concern with communication (above), and an announcement of a service firm's determination to develop a "zero defects" attitude (below).



There's a way to fulfill this American Dream.

When quality talk worries me
There are companies and companies of
failures of technology. But the failure of
humanity. Be people's attitude.
Suppose you were told that hospital
personnel are promoted to doctor
one month or one percent of all babies
Or that you must tolerate at least
two mistakes a year in your monthly
bank statement.
Acceptable? Not likely.
Yet people will say "nobody's
perfect" and allow the makers a certain
percentage of error at work.
The attitude must become
And we believe as little as possible.
Doing it right every time.
We have a planned program for
preventing defects.

It starts at their source. With people.
People must be encouraged to
develop a dramatic personal
consciousness to do it the right
the first time, every time. To develop a
zero defects attitude.
Give it a name. A standard of doing
it right. Set a date.
The cost of quality.
Each person now knows that quality
means conformance to standards.
And they must measure
it somehow. Find the most economical
The quality improvement is what we
call the Cost of Quality, the additional
expense of not doing things right
Waste, engineering and test, scrap which
many companies spend 20 to 35
percent of the sales dollar.

ITT and you.
Our commitment to a "zero defects"
attitude means a true return on
investment to you. We up the quality
but hold down costs. By making
or providing it the first time can sell
it for less.
Attaining the goal of "zero defects"
may be the great American Dream. But
it's not an impossible dream. And
we're working to make our products
and services the standard for quality,
worldwide.
International Telephone and
Telegraph Corporation, 320 Park Avenue,
New York, N.Y. 10022

We've spent the last fifty years getting ready for the next.

Fiftieth Anniversary 1920 ITT

CORPORATE ADVERTISING: ITS NEW LOOK

(continued from page 13)

vertising, he says, and believe that it makes people like the company because it's offering them a soapbox, but he thinks corporate advertising "has got to grow up and be more specific, and talk about why the company is a good one to buy from, work for, or invest in."

FF/S's corporate advertising (30 per cent of its billings) accounts include Liggett & Myers and Indian Head, and the agency considers some of the work it does for Morgan Guaranty Trust, Piper Aircraft Corporation, and Pleasant Valley Wine Company as corporate.

Burt Zelner, FF/S vice president, notes that just as his agency works at being a total communications company, involved in marketing, public relations, graphics, as well as advertising, today the top PR man at a large corporation is a new breed, a communications guy who knows a little of everything—costs, graphics, advertising, media. "Today's public relations man is way beyond the old newspaperman-turned-PR man whose only responsibility is to sit down and knock out a couple of press releases, and then try to get some stories placed" he says. "It's shaping up to people like Paul Miller of Indian Head, bright guys who can take a multi-division company and pull it together to let both the consumers and the business world know of the company's social involvement."

COMMUNICATIONS TRIAD

Confirming this evolving of the communications director is H. Walton Cloke, vice president-public relations and advertising for North American Rockwell Corporation, Pittsburgh, whose name regularly crops up whenever good corporate advertising is discussed. Cloke tells *PRJ* that corporate advertising, public relations, and corporate identity are "a communications triad comparable to Tinkers to Evers to Chance. Unbeatable in combination, a total communications approach, but a wheel-spinning exercise when used independently of each other."

The rapid growth of corporate advertising has brought top management closer to the media-buying picture than ever before. Presidents and chairmen are likely to confer about, or at least approve the media choice of their communications director or public relations executive and agency when corporate advertising is concerned, where they leave product advertising media selection to their marketing people. They are so concerned, as one agency man says, because "It's top management's product."

ELEVEN NO-NOS

The chairman of another New York ad agency has dubbed the third stage of corporate advertising, "societal," rather than general purpose, as Zeltner terms it. Summing up "sins in societal ads," Richard Lessler of Grey Advertising, finds 11 such no-nos:

• *An excessive concern with fairness*—What is vital isn't whether consumerist complaints and governmental regulation is fair or not, but how to react productively. Businessmen are justified and even duty-bound to fight unrealistic pressures, he says, "No one expects business to lie down and murmur, 'Rape me.' "

• *Failure to recognize the persuasive power of frank admission that necessity is a motive for business behavior*—"Take profits," he says. "Attempts to hide the fact that corporate actions are stimulated by the profit motive are self-defeating." The successful Ford "Listen Better" corporate campaign, completely frank about the profit motive, points out, "We make money because we listen to you."

• *The tendency to indulge in technocratic terminology when talking about corporate achievements*—Clear communication is vital; technological gobbledygook is out. Technical or laboratory jargon turns consumers off, increase the gulf between the public and the company, and colors it as technically-oriented, impersonal, and unfeeling.

• *Not being serious about serious issues.*—Emotionally-charged problems generally cannot be trusted frivolously or dealt with in flip tones.

• *Inappropriate use of history*—A recent ad by a steel company, headlined: "This fellow used to foul up Lake Erie," started by blaming Erie's pollution on local farmers. Only halfway through it is any guilt assumed by the industry—and then very incidentally. This approach widens rather than closes business' credibility gap.

• *Careless generalization from inadequate specifics.*—Nothing convinces like the facts, or bolsters statements better than concrete evidence.

• *Non-admission of error.* Companies needn't be more afraid than people to admit past failures as they try to improve. Honest admission of corporate imperfection establishes that peer-to-peer tone that characterizes any successful dialogue.

• *Non-recognizance of reasonable credit for effort*—Given the facts, people are willing to give the benefit of the doubt to companies that are trying. A dramatic example is the anti-drug abuse campaign Grey did for The National Institute of Mental Health, aimed against heroin use by blacks. The posters, equating "mainlining" with slavery, were being ripped off buses in Washington, D.C., although they had tested well with black groups, including militant street groups. Uniformed Black Panthers calling on the Institute, admitted to ripping down the posters. Why? "Because they weren't reaching the people. We've been putting them in the men's rooms and candy stores, where they'll do some good." they said. "Now we need some more."

• *The urge for self-justification*—The old "You hit me. Why?' "Because you yelled at me" syndrome. Like an ad series by a machine tool company that told the public: "Of course America isn't perfect, but neither is Cuba, nor any Socialist or Communist country." Such self-conscious defensiveness is counter-productive.

• *The "stretching" of accomplishment—the cure that can kill*—A

lumber company ad in *Time* stated: "It cost us a bundle but the Clearwater River still runs clear." Great copy, and great picture. But The *Wall Street Journal* noted that the photograph of the river had been taken more than 50 miles upstream from the plant, and that critics of the company "suggest that perhaps one reason the picture was taken upstream is that downstream the Clearwater isn't so clear. Fishermen say the foam and the smell, both products of the Potlatch plant, are sometimes evident 60 miles downstream."

• *Ignoring the mutuality of interest between the company and the public*—There's tremendous potential in showing consumers how business' self-interest and their benefit go hand-in-hand. A good example is the phone company. By making less money on the long-distance calls through promoting the economics of direct dialing, the company speeds automation and helps solve its labor problem.

• *Media Sellers on Corporate Advertising*—In 1963 *Time* began a continuing research project on corporate advertising, conducted by Thomas E. Ryan Inc., concerned with the effect of corporate advertising on high income managers and professionals, and financial specialists in 13 metropolitan areas. Several thousand of these businessmen have been interviewed, reporting their attitudes and opinions about several dozen leading U.S. corporations, and these attitudes have been cross-tabulated with the interviewees' readership of the corporate ads of these corporations. This year's project is a survey of 16 companies, being published this month. For the first time it includes data on corporate advertising placed in television, versus print.

• *Special Invitation to You*—A presentation of this continuing study is part of *Time's* communications workshop, initiated six years ago. There have been some 400 workshop meetings with executives of various corporations, Bob Fuiks, *Time* divisional sales manager, estimates. *Time* scrupulously avoids put-

For The Corporate Advertiser's Library

▪ MEASURING STRATEGIC ADVERTISING EFFECTIVENESS—Results of an extensive six-year study (Thomas E. Ryan Inc.) measuring the relationship between strategic advertising and the reaction of management groups.

▪ CHANGE IN THE '70s—A compendium of facts compiled by *Time* on the changes expected in the next decade in such areas as education, population, business, industry, and finance.

▪ THE SILENT ROOTS—A look at the broad case—and deep roots—of the money market a modern corporation must influence today.

▪ WHY ADVERTISE?—An outline of the important considerations behind a corporation's decision to invest in advertising.

▪ CASE HISTORIES—Reports on how corporations such as Monsanto, Armour, Bethlehem Steel, General Telephone & Electronics, Connecticut General, and Continental Can have used strategic and corporate campaigns creatively to reinforce their corporate entities, describe their products and technologies, inform the public of their policies and practices, and emphasize their capabilities.

▪ STRATEGIC ADVERTISING, INTERNATIONAL STRATEGIC ADVERTISING — Two portfolios illustrating actual campaigns.

TIME'S COMMUNICATION WORKSHOP — Workshop techniques, subjects covered, what corporations-agencies have attended.

SEND FOR FREE FROM: Bob Fuiks, *Time*, Time & Life Bldg., Rockefeller Center, New York 10020.

▪ MIXING BUSINESS WITH TELEVISION—R. H. Bruskin study of the reading and viewing habits of management personnel.

▪ THE LANGUAGE OF TELEVISION—Dictionary of terms frequently used in the television industry.

SEND FOR FREE FROM: Bill Firman, ABC Television Network, 1330 Sixth Avenue, New York 10019.

▪ THE WINGS OF MAN—Study of the impact of network television in launching a new Eastern Airlines campaign.

SEND FOR FREE FROM: Josh Kane, NBC Television Network, 30 Rockefeller Plaza, New York 10020.

PACKET OF MATERIAL ABOUT *SPORTS ILLUSTRATED* —Includes information about the weekly magazine's subscribers, and the corporate ads it's carried.

SEND FOR FREE FROM: Al Reffler, *Sports Illustrated*, Time & Life Bldg., Rockefeller Center, New York 10020.

For the Corporate Advertiser's Library

BUSINESS WEEK: 1970 CORPORATE ADVERTISING LEADER—Includes a company-by-company breakdown of corporate advertising space run in six leading general-business-news magazines during 1970.

SEND FOR FREE FROM: Malcolm Russell, McGraw-Hill's *Business Week*, 330 West 42nd Street, New York 10036.

PACKET OF MATERIAL ABOUT THE *WALL STREET JOURNAL*—Includes information about the newspaper's subscribers, and the ads it's carried.

SEND FOR FREE FROM: Ted Vallas, Dow Jones & Company's *Wall Street Journal*, 30 Broad Street, New York 10004.

▪ THE CASE FOR CORPORATE IMAGE ADVERTISING—How advertisers can sell products while achieving specific image objectives in specialized business publications.

SEND FOR FREE FROM: Judy Little, American Business Press, 205 East 42nd Street, New York, New York 10017.

▪ THE IMAGE BUILDER—Brochure of reprints of corporate ads.

SEND FOR FREE FROM: Don Garson: *Forbes*, 60 Fifth Avenue, New York, New York 10011.

▪ CORPORATE SOCIAL RESPONSIBILITY—A bibliography of books and pamphlets about good corporate citizenship activity.

SEND FOR FREE FROM: Harry Thompson, *Newsweek*, 444 Madison Avenue, New York, New York 10022.

▪ VIEWPOINTS AND OPINIONS ON CORPORATE ADVERTISING

SEND FOR FREE FROM: Stanley Posthorn, *Fortune*, Time & Life Building, Rockefeller Center, New York, New York 10020.

▪ THE CORPORATE SYMBOLS BLACK BOX—Contains three booklets: a white one, "Symbols," on corporate logos; a blue one, "We sort It Out," on the contents of *U.S. News & World Report;* and a red one containing pertinent data.

▪ BUSINESS AND INDUSTRIAL KIT—loose pages of facts and figures.

SEND FOR FREE FROM: Inga McKay, *U.S. News & World Report*, 2300 "N" Street N.W., Washington, D.C.

▪ HOW 30 COMPANIES SPENT THEIR CORPORATE AD DOLLARS—A summary of dollar expenditures in 1970 by 30 major firms for corporate advertising in 10 media catagories.

SEND FOR FREE FROM: Joseph Johnson, Information Services, Needham, Harper & Steers, Inc., 909 Third Avenue, New York, New York 10022.

▪ COMMUNICATING THE TOTAL CORPORATE PERSONALITY—Traces the history of corporate advertising from its origin.

SEND FOR FREE FROM: Bill Paul, Magazine Publishers Association, 575 Lexington Avenue, New York 10022.

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ting in a word for itself at these meetings. Telling the purpose is not to get commercial, but to talk about the concepts, objectives, and problems of corporate advertising.

Many of the participants have been PR men, Fulks says, and he's been told that the meetings have been extremely helpful to the many executives who have been thrust suddenly into the responsibility of advertising. *Time* is now planning a corporate round table for public relations executives, and Fulks extends the first invitation to *Journal* readers concerned with corporate advertising. (Call him at 212-Ju 6-1212 if you'd like to attend a session.)

Allen Reffler, corporate-business-industrial ad manager for *Sports Illustrated*, points out that if a corporation doesn't have an "effective, truthful story to tell about its public concern, it's in trouble. And if it has one and doesn't tell it—well, who does it think will speak for it?" *SI*'s promotion director, Bob Fisler, maintains that today a corporation is "more than the sum of its parts, and that's where corporate advertising fits in, to spell out that "more."

Where does *SI* fit in? A few years ago most corporate advertising went only into horizontal business publications like *Business Week* and *Fortune*, and into the newsweeklies, Reffler notes, and while many of these ads are still placed there, corporate advertisers are now looking for new, dynamic ways of communicating their messages. He understandably applauds the new avenues they're utilizing, because they include *SI* as well as other magazines, television, and other media.

Where the old institutional advertising talked mainly to a corporation's technological capabilities, resources, research and development, he says, today many self-enlightened companies' advertising is more public service-minded, and addresses the leadership community on its social awareness and responsibility.

• *At the Television Networks*—Executives at all three television networks have corporate advertising on

For The Corporate Advertiser's Library

- SPOT RADIO TEST PLAN
- THE COMPUTERIZED BUYING SERVICE
- THE INTRIGUING WORLD—A guide to 14 markets
- POW (A commercial production offer)

SEND FOR FREE FROM: Jerome Greenberg, CBS Radio Spot Sales, 51 West 52nd St., New York 10019.

▪ THE NEW YORK *TIMES* OP-ED PAGE—12-page newspaper-sized three-color piece telling why the Op-Ed Page is the "optimum showcase" for corporate advertising. Only 160-line by four column ads are accepted.

SEND FOR FREE FROM: Jim Wilson, New York *Times*, 229 West 43rd Street, New York 10036.

▪ BETTER COMMUNICATIONS WITH SHAREHOLDERS, FINANCIAL OPINION LEADERS, AND THE INVESTMENT COMMUNITY—18-page booklet showing corporations how to best use the *Times* to tell people about dividends, stock options, etc.

SEND FOR FREE FROM: Stuart Falk, New York *Times*, 229 West 43rd Street, New York 10036.

▪ INDUSTRIAL OR INDUSTRIOUS ADVERTISING—"The Real Challenge"—Speech given to Assn. of Industrial Advertisers by Norman (Pete) Cash, president TvB.

SEND FOR FREE FROM: Murray Gross, Television Bureau of Advertising, One Rockefeller Plaza, New York 10020.

▪ THE IMPACT OF CORPORATE ADVERTISING ON THE INSTITUTIONAL MONEY MANAGER — Erdos & Morgan study of the ability of corporate advertising to move the financial mind to the purchase of securities.

SEND FOR FREE FROM: Fred Sibley, *Barron's*, 30 Broad Street, New York 10004.

▪ SOCIOECONOMIC STUDY OF HIGH SCHOOL STUDENTS —Student's attitudes about companies, working for them, etc.
▪ WHERE HIGH SCHOOL YOUTH STAND ON CURRENT ISSUES—Four polls covering the 1970-71 school year, including teachers' opinions.

▪ A QUESTION FOR CORPORATE EXECUTIVE OFFICERS —Reprint of an ad that appeared in the Nov 4, 1971 New York *Times*.

SEND FOR FREE FROM: Bruce Barton, Scholastic Magazines, 50 West 44th Street, New York, New York 10036.

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their minds. Both ABC and CBS call on advertisers with special corporate advertising presentations, and suspicions are that NBC is making plans for a similar venture.

Bob Firman, vp marketing for the ABC Television Network, calls on corporate PR men and other executives concerned with corporate advertising. His presentation is in three parts: First, quotes from *Fortune* 500-listed companies about what they expect from corporate advertising, why they use it, and what results they've had. Second is a reel of corporate commercials for companies such as Clark Equipment Company, Borg-Warner, Standard Oil of New Jersey, and DuPont. Third, a 1970 ABC Television-R. H. Bruskin study detailing reading and viewing habits of management personnel, showing that these executives watch television as much as they read business publications and newsweeklies. He's contacted 300 companies-agencies across the country in the last year and a half.

"The project has borne fruit," Firman says. "These corporate advertisers like what they see, and it gives them an opportunity to think a little bit more positive about television as a corporate advertising vehicle." They tell us, "Television is fine, but it reaches too many people for a corporate campaign."

Firman asks them, "Do you care what security analysts think of the management of your company? Is there anything that any state or national government is doing that's antithetical to your company's best interest? Is keeping your employees and recruiting new ones important to you? Do you care whether someone buys a share of your stock or sells it?

"All of a sudden the universe is a helleva lot bigger than just some guy in a tee shirt sitting in front of his TV set with a glass of beer in his hand," says Firman. "Business has found out that it's failed to communicate to its various publics, and that's why it's gotten such a lousy name. We explain that we're flexible, that you don't have to be a multi-millionaire to get into television." □

Exhibit 55: "Business Faces a Change of Voice"



BUSINESS FACES A CHANGE OF VOICE

The traits and skills of professional public relations will be summoned forth to help guide the revolutionary transformation of advertising

BY PHILIP LESLY

ALL ELEMENTS in our society, when they assume overwhelming influence or stature, are wrenched back from their excesses. The cause may be either "countervailing forces" or the emergence of new competition that takes advantage of entrenched immutability. Labor unions emerged to restrict the almost unlimited power of capital in the early part of the century. The seemingly limitless sway over communications held by the newspapers in the '20s has been dispersed by radio, television and the growth of special-interest media. Male chauvinism and white supremacy; the velveted cloisters of college presidents and faculties; the almost unquestionable autonomy of the doctor of medicine—all have been shaken by new challenges to their excessive entrenchment.

Until recently, the force of advertising was extreme. Almost all the media of communication were dependent on it. The whole structure of our economy largely revolved around it. Life styles and even the self-identity of most people were shaped by it. Scarcely any consumer goods or services could thrive without it. (The largest noted holdout, Hershey, came into the fold not long ago.) Industrial manufacturers, universities, governments, politicians, hospitals seeking nurses, medical centers seeking doctors—even these often have been dependent on the effectiveness of their ads.

Advertising in all forms has become so entwined in the fabric of American life that it is only when we live a while in another country that we are able to recognize its omnipresence here.

But as it has to other forces that carried their power to the top of the pendulum, the reaction is clearly setting that will realign the role of advertising. The implications are crucial for everyone, for they permeate in concentric circles through the planning and judgment of every manager, every public official, every consumer.

Perhaps the most-telling clue to what is happening is seen in a survey by Stephen A. Greyser and Bonnie B. Reece of the Harvard Business School, reported in the May-June 1971 issue of *Harvard Business Review*. They found that among businessmen, 80 per cent feel that "consumerism will lead to major modifications in advertising content," and 86 per cent think this is good.

The reshaping of advertising's role is coming from many directions:

- The requirement by the Federal Trade Commission that all advertisers be prepared to submit proof of any claims. Significantly, this was favored by 90 per cent of the businessmen in the *HBR* survey.
- Activation of a new privately

PHILIP LESLY *is president of the Chicago-based counseling firm bearing his name.*

sponsored review board for advertising, arising out of a proposal made in 1970 by Victor Elting Jr., then vice-president of Quaker Oats.

• Advocacy by the FTC that any advertiser found guilty of misrepresentation be required to give equal attention to corrective information. The makers of Profile bread have already been committed to this.

• Restrictions by law on any advertising in certain categories—cigarettes, contraceptives and liquor on TV now; on any advertising directed to children, now being actively proposed.

• Strong movements to limit the extent of advertising used in political campaigns—now centered on television, but already showing signs of being extended to other media by fixing limits on permissible expenditures.

• A movement to impose the "fairness doctrine" to require TV and radio stations to carry commercials that counter the claims or effects of various advertisements. Proposals have already been made to grant time to opponents of the automobile and gasoline who consider them "polluters."

• Pressures to hold down promotion of products either in short supply, such as electric or gas power, or that pollute the environment, such as one-way bottles and "unnecessary" driving.

• Strong consumerist reaction against advertisers whose promises, real or implied, are not fulfilled: Miracle cosmetics, artificial "demonstrations" of shaving products in TV commercials, headache cures that work only as fast, fast, fast as their competitors.

• Pressure from government, health groups and consumers against creation of a "drug-oriented society" by depicting instant solutions to most problems through ingestion of pills.

• Growing reaction against cost differences between heavily advertised products and their private-label counterparts. Half of the businessmen in the *HBR* survey said too much is being spent for advertising. The Government is pressing tougher restrictions on advertising-related promotion techniques, such as cents—off deals and sweepstakes.

• Increasing public skepticism. Higher education levels and a wave of iconoclasm combine to strengthen resistance against overt efforts to influence thinking and tastes. In the *HBR* study, 42 per cent of businessmen feel that "the public's faith in advertising is at an all-time low."

• The rapid development of many new communications media, many of which either forego advertising or use it sparingly. The list includes cassettes (which in cars, especially, displace radio); cable television (which so far, at least carries considerably fewer ads than over-the-air TV); videotapes (still a gleam in many developers' eyes but coming up fast); the growing support for public television (a struggle, but holding out promise), and countless publications for special audiences, most of which carry few or no ads.

• Segmentation of the American public into many discrete audiences, making it harder and more expensive to reach large numbers.

• Lessened enchantment with institutional ads, both because of their misuse to try to "con" audiences, and because too many ignore the rules of sound communication by trying to impose the advertisers' message on the public.

As a result of these developments, skepticism among the men who make the decisions on using advertising is high: 50 per cent feel that most of the money now going for advertising is not well spent. The climate of changing ground rules for advertising was highlighted by extensive hearings by the FTC which began October 20. The whole spectrum of intention, effects and alternatives for advertising was due to be aired and widely publicized.

It seems virtually impossible that the most complex economic structure in history could function without the most sophisticated and widespread technique of communication, which advertising represents. But it now seems certain that the nature and use of advertising are already undergoing a revolution, and that the consequences will be profound throughout our social fabric.

They will be felt, certainly, among many of our communications media, whose credibility and rapport with their audiences may well go up as the acceptability of the advertising increases. Consumer buying behavior is unlikely to be cooled any more than it might be by the possible spread of the Consciousness III syndrome.

There has been "lessened enchantment with institutional ads, both because of their misuse to try to 'con' audiences, and because too many ignore the rules of sound communication by trying to impose the advertisers' message on the public"

Instead, the greatest impact is likely to be felt, except for the advertising profession itself, among the decision makers of business. The free range for establishing distinctiveness for a company or its product is being narrowed. If all claims must be substantiated and the nature of ads must meet third-party standards, the opportunity for the individual firm to show itself as different by unrestrained means will be curtailed.

The point of distinction is likely to become the delineation of the company itself, its acceptability as an institution. In a society increasingly aware of the interdependence between all its forces, what the company is, as well as what its products do,



A BEST PR PHOTO: To inform the small fry on the importance of traffic safety. Photographer: Ben Kosmeder for Miami-Metro News Bureau.

takes on much greater importance.

Our educated young people are more aware of the social impact of a company than their elders. (With the inconsistency of youth, they often practice what is opposite to their awareness, buying foreign cars instead of similar-priced domestic ones when the viability of our economy is in peril, or littering the parks with their beer cans and underground newspapers at rallies demanding protection of the environment. But they are a growing force through their pressures on politicians, decisions on where they prefer to work, selection of targets for their activism and often their choice of products).

It seems likely that the shifts affecting all companies' human climate will bring about a shift of focus, from overt hard-sell advertising whose chief morality was the resulting lubrication of our economy, to more subtle and more difficult milieux.

These will include:

• Active sensitivity to the attitudes of all the firm's publics, in a continuum from today toward where they are heading in the next year or two.

• *Realistic* commitments to performing within the company's social context. Profit-making will be the focal point of a multi-faceted function, instead of a one-dimensional spearhead. But it will be necessary to show restraint in holding out promises of what can be accomplished. Business is already suffering from a backlash of frustration because its widely heralded social efforts have not solved all the problems man has been heir to for hundreds of millenia. Uncharacteristically, business will have to soft sell even its role in stirring its powers for social, as well as economic, gains.

• A combination of *real* action to meet *real* needs with high visibility.

• Since this is an age of visibility—when what the public thinks is true becomes the real reality—policies and practices must be built on the ingredients of visibility: Careful selection of just what the organization's *distinctive* role is to be; of actions and practices that demonstrate that role; of anticipation of where the climate of attitudes will be when the firm's actions will have registered on the public awareness, and responsiveness to the events, the accusations, the unexpected needs that arise along the way.

The classic "tight ship" company will be the most vulnerable, because the premium is increasingly on sensitivity, adaptability, responsiveness, visibility, rapid adjustment—all antithetical to the carefully structured and "disciplined" corporate pattern.

The transformation of advertising is the transformation not only of the voice of business, but of its posture and its relationships with the rest of society.

The specific course of change is unpredictable. But it seems probable that the new posture imposed on private organizations will bring to the fore the traits and skills that make up professional public relations.

Sensing what the public climate is and where it is going . . . helping the organization shape its character to achieve both its own ends and the interests of the publics . . . using the latest communications skills *in total* to achieve a confluence of understanding and mutual appreciation with the publics—these seem to be emerging even more as the requirements for vigor in any organization. □

Exhibit 56: "Corporate Advertising"

CORPORATE ADVERTISING:

MORE THAN JUST A NICE WARM FEELING ALL OVER



Corporate advertising for its own sake is stupid, immoral and a waste of time and money—puffery which throws its small reading public into fits of composure. Image advertising that relates to performance and service, conversely, is producing results with the public

BY ANTHONY GALLI

NOT TOO MANY recessions ago, the hard sell boys were regaling themselves with a description of the soft-sells or institutonal advertisers. The institutionals were the guys who would put on a black suit, black hat and black shoes, slip out into the blackest night and, under a dark tree, shamelessly discharge fluid waste material within their suits. Nobody every saw them. Nobody ever heard them. Nobody ever knew what they were doing. But it gave them a nice warm feeling all over.

If institutional advertising made little sense then, when times were good and ad people laughed, what earthly sense does it make to embark on a corporate public relations and advertising campaign when the market is down, money costs are up, taxes are off the page, and labor is going out again for another record settlement? None obviously, if corporate advertising and public relations together don't directly contribute to the corporation's survival and to the general public good.

• *What's wrong with it?* Corporate advertising for its own sake is a waste of time and money. It's stupid and immoral. The market place is polluted with ego-tripping, mis-directed identity programs and just plain me-tooism. But if corporate advertising achieves an *honest* ambition, if it informs, if it provides needed input which, taken together with other random information, can help the public make value judgments about that business, then it is worthwhile. The trouble is, much of it is wrong. *Advertising Age* had this to say not long ago about corporate "selfless" advertising:

> "The gap between corporate claim and performance is at least as sizable as the generation gap—and that's a whopper. And the total disregard for the role the corporation played in bringing about some of our major ecological problems has genuine Alice-in-Wonderland characteristics . . .

"Business is just becoming aware that, if it is to survive, it must accept the social cost of doing business as an integral part of the total cost of doing business. That cost will, in the end, be paid by the public—not by business. The public will pay in higher prices, higher taxes, etc.

"The public doesn't buy corporate images primarily—only secondarily. It buys products or services primarily. Consequently, the public really doesn't relate primarily to the corporation. Therefore, corporate image advertising requires more memorability, more persuasion than product advertising if it is to close the gap of disinterest. It rarely achieves that degree of persuasion in these corporate social responsibility campaigns.

"When the public tries to communicate with most corporations, it runs into a solid wall of indifference, runaround, even of silence—or an obviously form reply from public relations. Our modern corporations just don't listen to the

ANTHONY GALLI *is a senior vice president, N. W. Ayer & Son, Inc., New York City.*



Products that fit people's needs—even the blind—are described in this corporate advertisement by AT&T.

public. How can they conceivably expect the public to listen to them?"

Ad Age was talking about corporate social responsibility advertising. And while it's true that a good corporate citizen may wish to declare its intentions as a morally and socially committed custodian of public funds, natural resources and human energy that it takes to keep a business going, there are many more reasons for corporate advertising beyond social responsibility.

No message at all may be some sort of message in itself, perhaps the wrong one. Silence is not golden when the world wants to know where you stand or why you exist. No business today can afford the luxury of anonymity.

Aside from the PR reasons for taking a corporate stance and communicating that position, a company must be vocal for a very pragmatic reason—survival. The concerted actions of Nader's Raiders and other citizens' groups can result in unfavorable legislation that could hurt that company and curiously, if the company is large enough, can hurt the hurters and the entire U.S. economy. It seems strange but a large corporation must speak up in order to prevent the public from doing harm to itself as it harms an AT&T or a General Motors.

COMPANY NEEDS PERSONALITY

Since nobody can belly up to a cold impersonal, faceless, thoughtless monolithic society of a company, give the company a corporate identity, a personality with which people can relate. Liking the company increases the probability of liking its products or services. This is perhaps the best reason of all for corporate advertising.

• *What's really right about it?* Plenty, if you really have something to say and you live up to your word. Arthur Page, who was perhaps the dean of public relations men in this country, thought that good public relations depends on performance, and that performance is an expression of character.

The secret of Page's success with American Telephone and Telegraph Company, was in firing up his top management with the belief that all business, including the telephone business, begins with the public's permission and can only proceed with the public's approval.

Page was insistent on public commitment. What would the business commit itself to do? What would it say that would obligate and bind it to action along certain specific lines? This of course is a matter of stating goals—but the question is, what kind of goals are they going to be?

One can state objectives in all sorts of mushy ways—in terms of hopes or fond expectations, or, conglomerate gobbledygook. Page's notion of goal-setting, however, was different. To

33-291 O - 78 - 36



Twenty Million Voices

A PERFECT understanding by the public of the management and full scope of the Bell Telephone System can have but one effect, and that a most desirable one —a marked betterment of the service.

Do you know what makes the telephone worth while to you just about the most indispensable thing in modern life?

It isn't the circuit of wire that connects your instrument with the exchange.

It's the Twenty Million Voices at the other end of the wire on every Bell Telephone!

We have to keep them there, on hair trigger, ready for you to call them up, day or night—downtown, up in Maine, or out in Denver.

And to make the telephone system useful to those Twenty Million other people, we have to keep *you* alert and ready at this end of the wire.

Then we have to keep the line in order—8,000,000 miles of wire—and the central girls properly drilled and accommodating to the last degree, and the apparatus up to the highest pitch of efficiency.

Quite a job, all told.

Every telephone user is an important link in the system—just as important as the operator. With a little well meant suggestion on our part, we believe we can improve the service—perhaps save a second on each call.

There are about *six billion connections* a year over these lines.

Saving a second each would mean a tremendous time saving to you and a tremendous saving of operating expenses, which can be applied to the betterment of the service.

The object of this and several succeeding magazine advertisements is *not to get more subscribers.* It is to make each one of you a better link in the chain.

First, give "Central" the number clearly and be sure she hears it. Give her full and clear information in cases of doubt. She is there to do her utmost to accommodate you.

Next, don't grow fretful because you think she represents a monopoly. The postmaster does, too, for the same reason.

The usefulness of the telephone is its *universality, as one system.* Where there are two systems you must have two telephones—and confusion.

Remember, the value of the service lies in the number of people you can reach *without* confusion—the promptness with which you get your response.

So respond quickly when others call you, bearing in mind the extensive scope of the service.

The constant endeavor of the associated Bell companies, harmonized by one policy and acting as one system, is to give you the best and most economical management human ingenuity can devise. The end is efficient service and your attitude and that of every other subscriber may hasten or hinder its accomplishment.

Agitation against legitimate telephone business —the kind that has become almost as national in its scope as the mail service—must disappear with a realization of the necessity of universal service.

American Telephone & Telegraph Company

And Its Associated Bell Companies

LOCAL AND LONG DISTANCE TELEPHONE

One Policy—One System Universal Service

UNITING OVER 4,000,000 TELEPHONES

JUNE 1908

UNDERSTANDING

AT&T, one of the first to employ the corporate advertisement, urged customer cooperation and understanding in this 1908 ad, AT&T's initial image advertisement.

use his words, he thought of making policy commitments as "giving hostages to performance."

"Giving hostages to performance." Page's students and disciples called this "matching words with deeds." We can call it putting your money where your mouth is. The point is, the advertising and public relations program had better have substance to it.

Many programs today do not. Some of them merely hold mirrors up to the advertiser, reflecting the kind of self-serving harrumphing, double-fapping, our-plant-and-founder puffery which throws its small reading public into fits of composure.

Page's old company is not one of these. It has publicly commited itself to service, realizing its reputation depends ultimately on the quality of that service. And it's advertising and public relations efforts are designed to show specifically how the commitment is being met.

AT&T also concerns itself with the problems of the inner city. Aside from moral considerations, it's just plain good business. The past, present and future success of the enterprise depends upon urban America. It has launched seed programs throughout the system to aid in the employment of the undereducated and underprivileged. It has even created a Department of Environmental Affairs, tended by an executive vice president, Robert Lilley.

The Bell System is and always has been committed and motivated. And it straightforwardly matches its deeds with words, reporting its successes and shortcomings alike, encouraging others to communicate freely. Even young people who have been inspired to "Reach out for Someone" or "At Least Talk to Each Other" in AT&T's much heralded ad series, "To Communicate is the Beginning of Understanding."

So if we match corporate claim with performance, or at least honestly try, we have something else that's right about corporate advertising. The kids think it can be done and we'd better not let them down.

Not too long ago, MBA candidates at Harvard Business School, responsible young men and women in their late 20s and often veterans of military or corporate life, polled 600 U.S. corporations on their intentions in such areas as pollution, minority employment and consumer protection.

Some of the instigators of the plan admitted they planned to use the business schools as a "power base" to demand corporate reform. They got the idea from students in the law school who are prodding the major law firms in the same manner. Columnist E. B. Weiss interviewed their professor:

"Am I correct in saying the consensus of this table is that you all want to get power in business so that you can change this country?"

The answer was a unanimous yes, and "just about everybody in our class is coming to feel that way.'" Their professor reported:

"We are first of all moving beyond the point where corporate and technical enterprise, privately and profitably pursued, can be viewed as an unmitigated good in its own right. The looming problems of the 70s are public problems and they simply are not being met within the 'private' market mechanism. Continue to think that they are, that the economic end justifies the means, and the American productive system seems to have less and less point, its managers seem to become more and more 'bored,' its blue-collar workers more and more cynical and demanding, and the nation's youth less and less interested in being part of it.

"But present the problem in another way. Put your managers and analysts to work defining the public needs as skillfully as they have come to define defense needs. Assign other young economists or business students the task of converting corporate energy to an attack on those problems, while keeping intact the managerial structure and the disciplines of the profit mechanism.

"Suddenly we find ourselves engaging the best of government, academic and corporate management in a new 'social benefit' sector that offers a richer opportunity for growth and skillful management than does defense in wartime. My guess is that a large slice of youth—at least youth searching for a system it can identify with—will be energized by this shift of goal. I would guess as well that the confession of humility involved in the realignment of corporate objectives would be food for the managerial soul."

What then is the really big reason for a corporation to speak corporately? Survivability if nothing else. Who will speak *for* the company if the company itself does not? There are plenty who will speak against. And there are plenty more who will listen. And follow. And hurt.

SELF DEFENSE IS ESSENTIAL

It is as essential for a company to state the facts in behalf of its own corporate enterprise as it is for one of its divisions to issue specs on a new product. More so. But those words will ring hollow if there is no substance behind them. It must make and clearly state its commitments, both business and social. It should speak *strongly* and *clearly* and *consistently* for the public record, especially on matters of public concern, matters that the public is holding the company accountable for whether the company is indeed responsible or not. Because it's always fun to kick a Goliath.

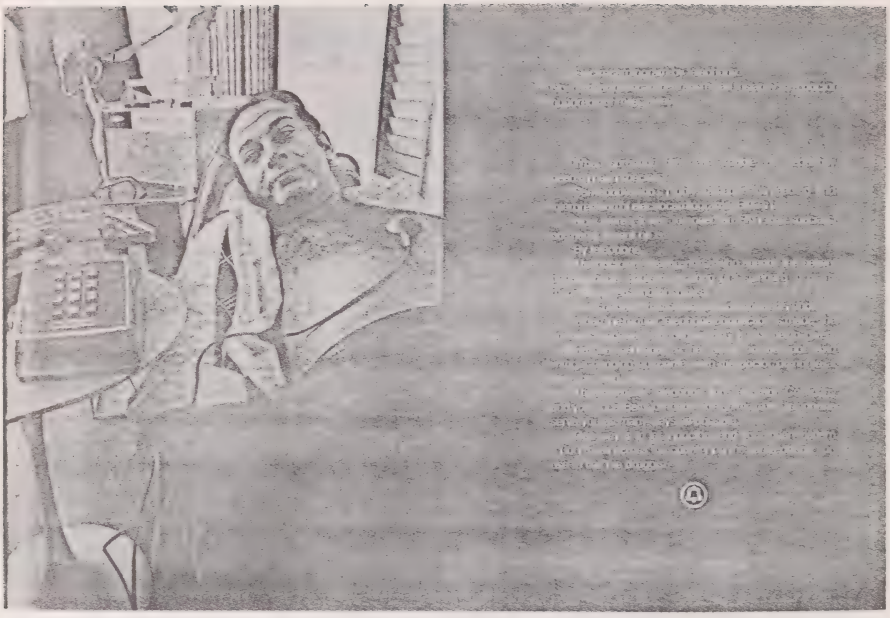
• *Why and how one company advertises*—Less than a year after Arthur Page became public relations vice president of AT&T, Walter Gifford, the president, issued this public statement:

"The purpose of the company is to render the best possible service at the least possible cost consistent with financial safety."

That sounds a bit pious and general but the full text delineated the obligations and goals of AT&T quite specifically and became a landmark in Bell System history. That was a half-century ago and Bell is still living by it.

Much of the Bell System's advertising is sales advertising, designed to increase revenues through the pro-

(Continued on page 75)



A new service with life-saving appeal is presented in this AT&T image advertisement.

CORPORATE ADVERTISING: MORE THAN JUST A NICE WARM FEELING

(Continued from page 23)

motion of new and existing services and by increasing the volume of usage. For example, the introduction of Touch-Tone® service or Picturephone®. Or promoting off-peak calling on weekends and evenings to save customers money.

Much of it is "service aid" advertising which tells customers how to use the service they have more efficiently and how to derive more benefit and convenience from it. Like how to instruct children to call for help in emergencies, how to deal with obscene or annoying calls, or new dialing or calling procedures.

But its main thrust is corporate advertising designed to improve public attitudes towards the Bell System. It helps demonstrate that AT&T is committed to delivering the best possible service at the least possible cost. This advertising:

- Explains company policies, practices and objectives.
- Stresses commitment to excellence and desire to serve the best interests of customers and the general public—"now and in the future."
- Informs the public that we are making a conscientious effort, in concert with other businesses, government and other segments of the community, to assure the continued progress of the communities we serve.
- Renews the commitment and dedication of its own employees by making public its policies and goals.
- Projects a positive picture of the Bell System as a competent, dynamic and committed organization that knows where it is going. This enhances its ability to attract new employees (around a million) and the huge amount of new capital required to meet the growing communications needs of the public.

So the reasons for advertising at all begin with the Bell System's responsibilities to those it serves. As a public utility—and as the largest private institution in the world—it has a continuing obligation to inform the public of its plans, policies and programs.

This is a philosophy that stretches back to the early 1900s when AT&T became the *first* American company to conduct a "corporate" advertising program. In that first ad, prepared by N. W. Ayers & Son, Inc., still its agency, AT&T stated:

"A perfect understanding by the public of the management and scope of the Bell Telephone System can have but one effect, and that a most desirable one—a marked betterment of the service."

Over the years, the value of Bell System advertising has become widely accepted by the public shareowners, government officials and others.

By projecting the business accurately as an attractive, vital and progressive organization, advertising helps create a public climate that enhances the business' ability to meet its primary goal—serving in the public interest.

A recent Opinion Research Corporation corporate image study states:

"Research has shown that images help to shape people's behavior toward companies. Thus, whether a person's image of a company is positive or negative, strong or weak, detailed or generalized will influence his predisposition to:

- Buy the company's products.
- Pay attention to and believe its communications.
- Speak favorably of it to others.
- Listen to its point of view in controversies.
- Seek a career in the company.
- Purchase or recommend its stock."

The ORC study also pointed out that a person's familiarity with a company is closely related to his favorability rating of that company.

"The best known industries," ORC said, "are those to which the public is constantly exposed to through advertising, product use or everyday experiences . . . People are generally most favorable to the industries they know best."

ORC further pointed out that AT&T, in general, is most favorably regarded among those segments of the population that know the company best. "This suggests," ORC stated, "that maintaining familiarity with AT&T at a high level will help in maintaining or improving the company's overall public reputation."

Both the ORC and a Louis Harris study showed AT&T and the Bell System enjoyed a reservoir of good will. But ORC pointed out that public favorability toward AT&T had leveled off recently. Research results indicate that people seem to be growing more critical of all established institutions, and that individual companies will have to work even harder to improve their public reputations.

"If companies want to make gains in today's very difficult business climate," ORC stated, "they will need to take imaginative actions that truly set them apart from the crowd."

All of this suggests that AT&T cannot afford *not* to advertise. According to Paul M. Lund, AT&T's vice president in charge of public relations and advertising:

"Informing the public is an accepted responsibility of management . . . and an important factor in shaping a favorable environment for future business progress.

"The basic determinant in how the public perceives us is, of course, the quality of our service.

"Our actions must match our words. But in addition to providing good service, we must also communicate as effectively as we know how on a sustained and adequate level. And informative advertising is more direct, more flexible and more efficient than any other means at our disposal."

And so AT&T has set down its goals and is matching those words with deeds in the "Bell System Information Plan for the Seventies." It is directly responsive to this priority set forth by board chairman Hi Romnes:

"Intangible as it is, our service reputation is the most prized asset of our business and there is no more important priority than that of maintaining it."

"The information objective of first priority entering the 1970's", says assistant vice president Walter Cannon, "is to build and maintain employee and public confidence in Bell System service and in our commitment to its constant improvement—now and in the future."

The bulk of AT&T's advertising conveys that impression.

And it appears to be working, in magazines, in television, and in related public relations activities. Penetration of the message has more than doubled in recent months and, among those who saw the advertising, there has been an appreciable improvement in confidence.

And all of this through careful selection of media and on-going effectiveness testing. For the Bell System, for all of its size, is a small advertising spender. Advertising expense is about one half of one per cent of estimated Bell System revenues, and about 0.80 per cent of estimated expenses this year. And AT&T's corporate advertising expenditure is less than 15 per cent of the total budget. But it's a hard working 15 per cent and an allocation that will probably grow larger, such is its importance to AT&T management.

• *Keep at home.*—Corporate PR and advertising? It may not be the first thing to think about when getting up in the morning but you'd better give it serious consideration if you want serious rapport with the public. A regular re-examination if you're already dialoguing.

It had better say the right thing . . . in the right tone of voice . . . be meaningful . . . understood . . . believable . . . and above all *truthful*. And in just the right dosages at the right time. Insipid, spineless, characterless advertising will make all the sound of a tree falling in an uninhabited forest. Stupid, inflamatory public messages will turn those deaf ears into enraged citizen groups not content merely with ignoring the product but determined to destroy it and its maker.

The public has a right and an obligation to ask questions, demand answers, challenge products and corporation motives and ethics. Corporations have no less a responsibility to respond, even anticipate, in corporate ad programs. Like the ad said, "Meet Someone Halfway. To communicate is the beginning of understanding." And we all know what that promotes. Peace. □

Exhibit 57: "New Imperatives"

corporate advertising

new imperatives for an old device

BY FRANK HEWENS & FRED POPPE

THIS COULD be the year when nobody chooses to stick forth his (or her) vulnerable neck and sooth-say about a "trend" in corporate advertising except to say, as some have said to the authors:

There should be more of it . . . and it should stop holding hat in hand and apologizing all over the place.

Maybe one could find the makings of "trend" in just that—but it remains to be seen in '73 and beyond if corporate enterprise will indeed use corporate advertising when and how it ought to.

Al Ries, president of Ries, Capiello, Colwell feels that corporate advertising is in for basically a new thrust that has to do with positioning. He says, "Companies have to position themselves as companies in addition to positioning themselves as a product. Our conglomerates and semi-conglomerates i.e., Pittsburgh Plate Glass, National Lead, etc. find that their name and concept as a company are no longer up-to-date with their actual marketing target areas. They will have to re-position themselves not only with their customers but their employees, their stockholders and their financial contacts. I don't think you're going to see companies trying to present a human characteristic any more. In the past we have seen campaigns, portraying companies as friendly, dynamic personalities. This is going to phase out. We are gong to see more and more positioning that will say "this company is dedicated to this area."

Another leading marketing writer whose writings are followed closely by both public relations and advertising people—one who sees hundreds of samples of corporate advertising (and publicity re: same) cross his desk—answered the trend-probing query:

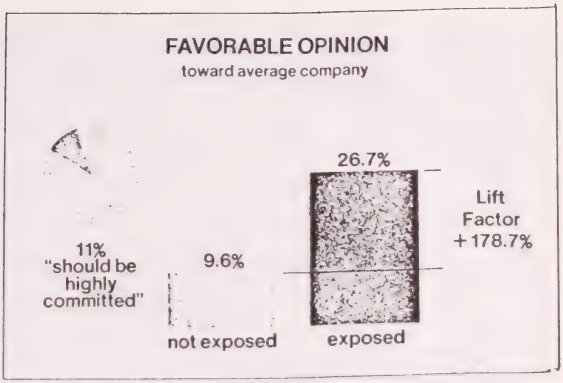
"We see a lot of it, true. I guess for that very reason I wouldn't want to suggest a trend one way or another. There's a whale of a lot being published. But if you take note of company problems and threats and challenges that show up on the news side—that, for one reason or another are not effectively defended . . . if defense is even a fair word . . . then it suggests that more corporate advertising is an answer. But trend? Not really."

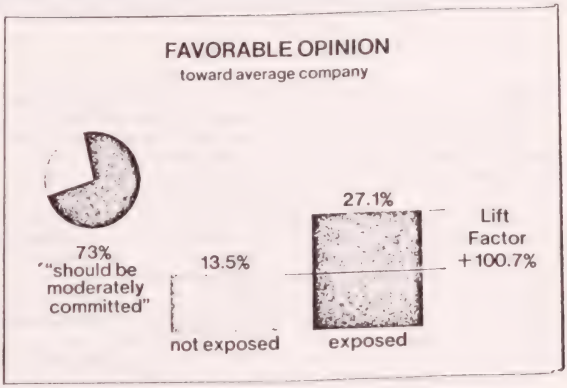
Over recent years, there has indeed been "more of it." But the quantitative curve alone is not significant, certainly not helpful in measuring refinements in the state of the art.

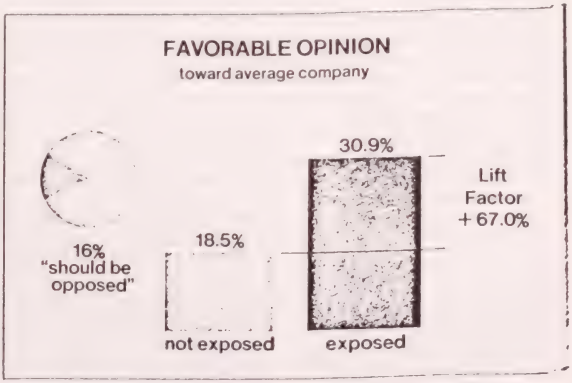
FRANK E. HEWENS *is president, Corporate Public Relations Counsel, Morristown, N.J.*
FRED C. POPPE *is president, Complan Inc., division of de Garmo Inc., New York City.*

In World Wars I and II, many a corporate chest swelled in the ad columns. Awards of "E" flags to defense contractors and sub-contractors and sub-sub-contractors found their way into miles of corporate advertising. "Founding father" ads on company anniversaries are as native as candy apples and covered bridges. Ads have for long been the vehicles for special pleading of corporate issues, from the days of the Molly Maguire riots. Full-page ads in our big city papers have pleaded the case for corporate defenders and corporate raiders on alternate days, and labor and management on similar zigs and zags.

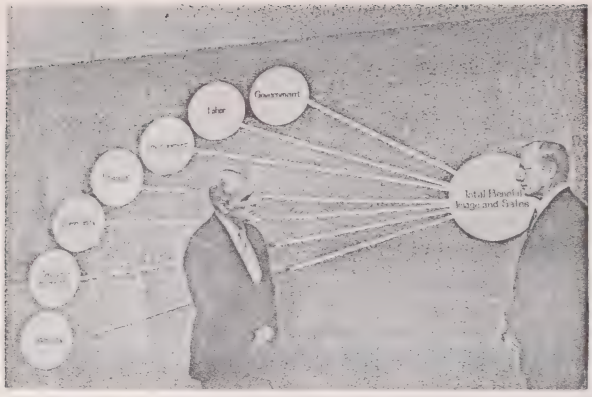
Then there are the familiar "booster" pages and special issues of newspapers and magazines . . . one awaits with interest the day when television will turn to these opportunities for image-building at end-of-the-year, mid-year or special event. Plant openings, expansions, awards of major government contracts, timely dividends and quarterly earnings announcements, happy settlements of labor problems . . . all these and more continue to be quite properly the subject of corporate advertising. But trend-signs, no. These are not the







Regardless of whether an individual feels highly committed, moderately committed or opposed to Corporate Social Commitment, strategic advertising has been found to have measurable influence on his opinion toward a corporation.



Frank Hewens (left) who has his own PR shop, Corporate PR Counsel, and Fred Poppe prexy of the ad agency Complan Inc., check out corporate advertising wall chart which emphasizes strategic targets.

high-flying Mach II aircraft that might give us some trend signs. They are the trucks and commuters' cars down below, with everyday chores to do and ample reason to do them.

• *Device is ancient*—To put things in perspective: corporate advertising, alias public relations advertising, alias strategic advertising, alias corporate conscience advertising, alias social responsibility advertising,. and the very latest alias *corporate positioning* . . . is not new. It's not even old. It's ancient. The Dutch East India Company, Wells-Fargo, Hudson Trading, et al, used to corporate-advertise like mad: a people-minded venture . . . making futures for your family . . . the brave new world . . . make your fortune in India . . . your own home at 2¢ an acre. We're not at all sure if there's even land at the other end of the voyage, but boy, can we write an ad!

Ivy Lee, often called the founding father of public relations, made very full use of the corporate advertising philosophy, though not the device itself, in the first decade of this century. Insisting upon social responsibility—a term that however hadn't entered his consciousness—he preached that companies have a duty to tell the facts, fully and honestly. He argued for the "two-way-street" in corporate/public communications . . . an idea that only now is trickling into the brain centers of some managements and into their corporate advertising.

So the notion of using paid ads to *tell*—as well as sell—comes down to us from the past, not from the bright young space salesman.

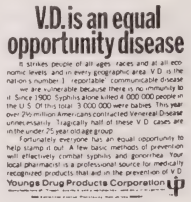
What's new . . . i.e., what was the trend-shape before this present year of no trend-predicting?

Just a year ago in her excellent PUBLIC RELATIONS JOURNAL article Audrey Allen far outstripped these writers on trend-scanning by starting out: "More corporate advertising, more professionally planned and executed, carried by all kinds of media, with the emphasis on social awareness. That's the trend for the coming year, say admen."

In the past twelve months, it would appear that Ms. Allen's appraisal has been borne out.

"Social awareness" has been a proper theme, indeed—though again, no prophets have arisen to say that there will be more or less of same. Social awareness emphasis has dwelled heavily upon such concerns as auto safety, ecology, interpersonal relationships, inflation, consumerism.

Allstate Insurance—a winner last year of a Silver Anvil Award for its public relations program in behalf of tougher auto bumpers, has recently initiated an ad program on the subject. To be sure, the shades-of-gray aspect demarking sell-ads from tell-ads comes in here: these ads (increasingly) make clear Allstate's policy of giving reduced rates for better bumpers.


V.D. is an equal opportunity disease

It strikes people of all ages, races and at all economic levels, and in every geographic area. V.D. is the nation's number 1 "reportable" communicable disease ... we are vulnerable because there is no immunity to it. Since 1900, Syphilis alone killed 4,000,000 people in the U.S. Of this total, 3,000,000 were babies. This year, over 2½ million Americans contracted Venereal Disease unnecessarily. Tragically, half of these V.D. cases are in the under 25 year old age group.

Fortunately, everyone has an equal opportunity to help stamp it out. A few basic methods of prevention well effectively combat syphilis and gonorrhea. Your local pharmacist is a professional source for medically recognized products that aid in the prevention of V.D.

Youngs Drug Products Corporation

Youngs Drug Products Corporation—a leading manufacturer of prophylactics used to prevent both venereal disease and unwanted pregnancy—carries on a very extensive program of public service advertising alerting readers to the dangers of V.D. . . . the manner in which V.D. is transmitted (and not transmitted) . . . the vulnerability of young people

(Continued on page 12)

particularly to V.D. . . . the need for more education . . . the importance of prevention. The enlightened self-interest of the company is by no means obscure. But the ads are corporate, not market oriented. They sell no products per se.

To the uninitiated who think corporate advertising costs may be too rich for their blood . . . relax. It ain't all that expensive! This depends, of course, on just how much has to be accomplished. Sure there are many giants who buy network TV, full page newspaper ads in 50 major U.S. markets, and four color, double page spreads in *Time* (space alone for one shot is . . . (ouch) $70,840.) But there are many, many unheralded low budget campaigns also being waged.



• *The Hole Company*—Take Hendrick Manufacturing Co., a 97 year old perforated metals manufacturer in Carbondale, Pa. Hendrick's business is to make holes in metal. Lots of people buy perforated metal . . . for things like car radio grilles and decorative room dividers. But, a lot of buyers and prospective buyers don't know where to buy holes. So, four years ago, Hendrick started running a corporate campaign to tell people all about Hendrick, its people, its plant, its town . . . its image. The ads never appeared in *Time* . . . *Newsweek* or *Fortune*.

Instead they ran in *Iron Age, Industry Week* and the like. The ad theme said "Meet the Hole Company," "Meet the Hole Man," "Meet the Hole Town," and on and on. Total yearly space and production costs amount to under $50,000. But guess what? Soon after the ads started to appear, requests for perforated metal, plus slews of unsolicited purchase orders from people who never bought holes before, have been coming in to Hendrick marked to the attention of—"The Hole Man," "The Hole Town" *and* "The Hole Company."

Sure Hendrick benefits and is still benefiting from this low cost corporate campaign. But . . . so has Carbondale, and so have Hendrick employees, stockholders, customers, suppliers and everybody else within shooting range of its advertising reach.

Or how about a company who is multinational (also see ITT story on page 33) in scope and is proud of it. Otis Elevator Company has been running a campaign for several years with an objective of presenting itself as a multinational company, in spite of the slurs being cast on this type of operation by the proponents of the Burke-Hartke bill.

Sure they're selling themselves to the financial community, but they're also telling that they're in favor of internationalism.

Good current examples of corporate advertising must include examples from the oil industry—telling of new equipment designed to minimize harmful effects upon ecology . . . examples, also ecology-oriented, from lumber producers. Recent ads signed by The CBS Owned AM Stations talk, for example, about cities that have low rates of motor vehicle deaths . . . this particular ad tapping New York City as lowest among seven. There's much comment about traffic safety . . . but the ad weighs out, finally, as *sell* at least equally with tell. No rebuke intended, more power to them . . . but it leads to a fair question: shouldn't a corporate ad stand on a pedestal and tell, not sell?

• *Tell and Sell*—Nuts to that. If you can't also *sell* in a *tell* ad—sneakily if need be, you're misunderstanding the ultimate purpose of corporate advertising. As the wall chart of circles with this story seeks to suggest, one's arrows aimed at various targets into the granddaddy target: corporate benefit, i.e. Sales, i.e. profit. Without which nothing.

If there's a paucity of trend talk in this trend story, at least one can urge where trends hopefully ought to be appearing: in more audience-oriented copy, more briskly-reading style, more creative slants, more candor and (please forgive) more market orientation.

That first one: audience orientation. Too many special-pleading corporate ads grope aimlessly for a few listeners in a crowded ball park with omnibus appeals. There's nothing wrong with the idea of a full page in The New York *Times* aimed actually at a small portion of *Times'* readership. But that small readership had better discover instantly that they're the ones.

The next: more briskly-reading style. Too many PR people and topside executives, by all the evidence, assume that corporate advertising somehow is management's baby, rather than the proper province for advertising agencies and ad copywriters. The smart PR person is one who knows when to yield to the advertising man . . . and stop regarding him as his natural enemy, like the fox and the dog.

And what about the business press? Isn't this an ideal place for the corporate message to run. Why should only TV, the newsweekly and financial press carry corporate advertising? Edgar M. Buttenheim, President of Buttenheim Publishing Corp., headquartered in Pittsfield, Mass., publishers of *Contractors & Engineers Monthly, Contractor, American City, Engineering Construction World, Mart Magazine, Municipal Index and Industrial Bulletin* says "Sure we pick up a page or two of corporate advertising as a particularly fitting case arises. But we don't have an aggressive campaign going on to seek out this kind of business. We go where the frequency is and that's in the product advertising category. Business publication rates are too low to warrant a special sales

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CORPORATE ADVERTISING

(Continued from page 12)

push in this area."

Is there a trend toward increased corporate advertising? Dave Sawyer N.Y. Advertising Sales Director of *Fortune* says "The truth of the matter is, corporate advertising dollars tend to increase in direct proportion as the economy increases. The same of course can be said when we have a downswing in the economy." Charles Mill, president of the American Business Press which numbers 465 business publication members cautions "a lot depends on the industry, in the middle of our recent recession the medical field was on a tremendous upsurge. Medical books were carrying a lot of real good four-color corporate advertising." So it's safe not to generalize when discussing corporate advertising media expenditures.

How about: more creative slants? A picture of a non-smoking factory chimney can tell more about a company's progress in smoke abatement than 10,000 words. IBM's "Think" once said more about the company's respect for intelligence than would the resumes of all of its engineers. And a long view of a row of trees and a wide lawn on company property may have more to say about community-mindedness than a page of print.

To the public relations practitioner, corporate advertising should be an important supplement to his more familiar tools: publicity releases, visual aids, speeches, reports, special events. Often, however, it may turn out to be his single most useful and most effective tool.

Many public relations people today (still) are ex-editors and reporters. They may be reluctant to make use of corporate advertising because of this . . . and often, too, because of budget.

But the corporate advertising approach may often sift out, in particular circumstances, as the handiest, most "available" and most targetable device of all.

Corporate—"strategic positioning"—rather than "product" advertising—can be used in many areas, to reach scores of the separate "publics" known to the public relations person . . . and reachable through the skills of advertising people.

If, as Audrey Allen accurately noted in the JOURNAL last year, "social awareness" is an emerging focus for corporate advertising, one must recognize that many other fields—many more *objectives*—are proper employments for purchased space.

• *Talking to "Mr. Big"*—Before the ad man or PR man or a combination of the two sits down to write his or their plan (and it necessarily must be a strategic plan) for the perfect corporate campaign he must sit down with the one man who will be guiding that company's growth during the next five years or (even better) ten years! You all know who this man is . . . his title may change, be it president, chairman or executive vice president . . . he's the guy whose box you probably find at the top of the T.O.

This is the most important part of the conceptual stage . . . this is the time when "Mr. Big" tells *you* . . . the corporate carpenter how he wants his company to be "thought of," "positioned," "imaged," or "beholded" by its many publics. Before you can start to build this image you must find out, first and foremost, what *objectives* the boss has for his campaign. Caution though! Objective finding can be fraught with dangers . . . so here you must guide your management man, deftly but positively. At this stage you must combine "seat of the pants" logic with some pure but thorough attitudinal or awareness research (call it *public* research rather than *market* research because that's really what it is). This is the smart way! Find out how management wants the company to be positioned in the minds of its many publics, then conduct a bench mark research study to find out how the company is currently positioned or thought of. Then, write your objectives, write your plan, map your strategy, plan your paid advertising campaign, conduct your campaign (for a minimum of 18 months), then do another research study to find out what the company's image is, after its many publics have been influenced by exposure to your corporate advertising.

Sounds easy. Maybe. But in practice it sure as hell isn't. Remember OBJECTIVES *are the key* and—boy, if they're off base or misguided it can cost you, your management, and your stockholders one heck of a lot of money. So write them carefully, then rewrite them, assign them priorities, get everybody involved to approve them, and you're on your way. □

Target areas for your corporate advertising objectives are:

- Government agencies and legislators
- Employees and prospective employees
- Plant communities
- Customers and prospective customers
- Suppliers
- Stockholders and would-be stockholders
- Acquisition-minded management
- Financial community
- Competitors
- Consumers
- International and multinational investors
- General Public

Exhibit 58: "Solving the Corporate Image Problem"

SOLVING THE CORPORATE IMAGE PROBLEM: AN INTEGRATIVE APPROACH

BY DAVID H. FURSE and DR. CHARLES F. STEILEN

A reader would have difficulty finding recent editions of any public relations or advertising journal without some article extolling the virtue of greater candor in corporate advertising or the coming age of truthfulness in corporate public relations. Invariably this greater truth is supposed to lead to public confidence in these institutions and to all the other accouterments that supposedly go along with a public relations success.

Unfortunately most corporations have such a poor understanding of the fragile nature of these successes, if they achieve them in the first place, that they almost invariably fail to follow them up. They either continue telling the same tired truths until their publics are sick of them (the "we-must-be-doing-something-right" phenomenon), or they stop telling their story at all so that the firm can get back to other more important problems (the "now-that-they're-off-our-backs" phenomenon).

Increasingly, however, businessmen are becoming concerned with—and confused by—the rising clamor among consumers not only for better products, but for their very heads. These businessmen are rightfully asking, "What about the miracles we have accomplished for you?" But the consumer, who is used to miracles by now, is responding, "What have you done for me lately?" Harvard Professor Daniel P. Moynihan pointed out the reason for this in a recent address before the American Association of Advertising Agencies. He explained, "The 15th time a miracle occurs, it becomes commonplace. So you can walk into a supermarket today and look around and it looks normal to you, instead of revealing the most extraordinary abundance of goods and services that mankind can conceive."

All too often, business firms have neglected to devise and implement comprehensive public relations strategies which complement their marketing, financial, and internal management strategies in contributing to the accomplishment of corporate objectives. The importance of linking these strategies cannot be overstressed. The corporate public relations effort itself may be made up of a group of linked substrategies, each with separate goals, messages, audiences, and constraints.

For example, there should certainly be a public relations strategy complementing the marketing strategy of the firm. This is especially true today since public relations has become an increasingly important factor affecting the credibility of marketing communications. During the formulation of the marketing strategy, the public relations man might function as a sort of sensitized consumer ombudsman. On the implementation side, he would be concerned with such problems as how to make the company's advertising more believable, how to improve employee and dealer relations, or how to build a favorable image of the company among specified consumer segments. Company financial and internal management strategies, on the other hand, would introduce different audiences and constraints calling for complementary public relations substrategies. The public relations strategist then must weld all of these substrategies together into a compatible, convincing whole.

• *Professionalism and Honesty*—In a recent survey conducted by a New York public relations executive, public relations practitioners rated their occupation last in terms of stature compared with eight others. The major difficulty cited was that most people don't understand what public relations really is. Undoubtedly, many of the 354 PR practitioners who responded could be counted among the same number. How can there be professionalism in public relations when no one understands about what he is supposed to be professional? Public relations practitioners seem to be filling the void with technical communications proficiency and a flair for honesty.

Audrey Allen, editor of *Media Business*, wrote an excellent article entitled "Corporate Advertising: Its New Look" in the November, 1971 issue of the *Public Relations Journal*. Ms. Allen pointed enthusiastically to the increased professionalism and "painful" honesty of the "new" corporate advertising. There is a tendency after reading such an article, however, to believe that all is well in Camelot -that truth and communications professionalism in public relations are all that are needed to win the day for the corporation and the

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free enterprise system. Such a conclusion would be a dangerous oversimplification.

Professionalism and honesty are certainly two important ingredients in successful public relations, but there is much more. If we may borrow a term from Charles Reich's *Greening of America*, the majority of firms are still at the "Consciousness I" level of public relations awareness. Consciousness I executives see little need for a constant public relations program. If they use public relations at all, it is only on an occasional basis either to put out corporate "brushfires" that mistakenly have come into public view or as a philanthropic gesture of "doing something nice" for society.

A growing minority of firms have recognized the need for a comprehensive, professional public relations program—not a whitewash of the issues, but a legitimate attempt to tell the company's story. These firms have achieved what we might call public relations "Consciousness II." They have seen the danger in current public criticism of business. These companies are diverting the very best talents in the communications business to telling the company's story—and equally important—they are diverting more corporation dollars to building a company story worth the telling.

This is a healthy trend, but there is a glimmer of a third level of consciousness which goes beyond Consciousness II. This public relations "Consciousness III" will be far more sophisticated in its use of the tools of analysis and strategy available to it—many of these from the marketing discipline. Few would deny the spectacular success of businesses in the selling of goods and services. Yet, few firms can point with pride to their ability to sell themselves, although the principals are the same.

• *Beyond Honesty*—Essential to the development of a Consciousness III public relations strategy will be identification of the essential benefit for the consumer of the public relations "product." What does he have to gain from believing the message? The other side of this product analysis is the non-monetary "price" that consumers will have to pay. The most important element of this price for the consumer will generally be the requirement that he rearrange his current attitudes and value structures in order to maintain consistency with the new information. The framework to be presented here contains four major steps necessary to the development of an effective Consciousness III public relations strategy.

• *Definition of Objectives.* In this step the public relations practitioner must isolate particular problems to be solved and broad objectives he intends to accomplish. Throughout the following steps in the formulation of his PR strategy, the practitioner will continually be changing and sharpening his objectives. This step is not new to public relations executives, but the emphasis will be changed whenever possible to the use of measurable objectives accomplished with specific audiences within specified time periods.

• *Audience Research.* As mentioned previously, the public relations audience is dictated for the most part by the particular corporate strategy being served by the public relations effort. Much audience information often can be taken from existing company records or market research. However, the specific information needs of the public relations strategist are different. Before he can begin to build the desired corporate image, he must have a correct benchmark on current audience perceptions. This situation is analogous to that of the medical doctor who needs to know where it hurts before he can prescribe a cure. The most important factor to remember in this step is that the company does not have one amorphus *mass* public. The public relations practitioner, just like the marketing manager, must segment his audience into meaningful subgroups and design a specific communications effort to each segment—or at least to reach the most important of them. Trying to say something to everyone is an almost certain way of communicating nothing to anyone.

• *Pr Product/Price Analysis.* This step has been perhaps the most overlooked phase of an effective public relations strategy, and is undoubtedly the most difficult. The public relations product is not used here to refer to the message itself, but to symbolize the essential benefit (s) that consumers of the message will receive. The public relations price on the other hand is the nonmonetary cost to the consumer if he decides to "buy" the public relations product. Should the price outweigh the benefits for a significant portion of the audience, the whole public relations strategy is destined to fail. If the public relations message puffs up the product or sells benefits that do not exist, consumers will demand a refund which amounts to a hardening of negative attitudes and values, and an erosion of the credibility of the source of the message. Over-selling is worse than a public relations failure because it makes the sale of future public relations products exceedingly difficult.

Corporate misunderstanding of this PR Product/Price relationship accounts for most of the corporate public relations failures. Humble Oil's current corporate advertising campaign selling its efforts to protect the environment is a good example of this product/price relationship. Humble's public relations product is presented as wildlife sanctuaries and unspoiled fishing waters that represent important present benefits to potential consumers, not as some abstract future benefit for yet unborn generations (always a difficult public relations product to sell). The price for buyers of this Humble image is displacement of current attitudes about oil companies as spoilers of the environment—at least, where Humble is concerned. The price relative to the perceived benefits is small because people really *want* to believe that something constructive and tangible is being done in this area. However, the real test for Humble is still ahead when, hopefully, they can capitalize and build on their current suc-

cess. Like any success in the marketplace, public relations successes must be maintained vigilantly or they evaporate in the face of changing competitive and consumer pressures.

• *Communication Mix.* The final step in a public relations strategy is the development of the communication mix. This step is undoubtedly the most extensively developed muscle in the whole body of public relations. Talented message and media strategists are already available in record numbers. The secret to public relations success is directing these creative talents effectively to accomplish public relations objectives. The creative communication is not the product, it's just another tool. Finally it is necessary to develop a feedback loop or system which allows management to determine the effectiveness of its program.

• *PR Strategy and the Real World*—To test the use of this approach we challenged several college classes at Georgia State University to tackle one of the thorniest public relations problems in America today—the low-income housing program of the Office of Housing and Urban Development (HUD). For the students, target neighborhoods for low-income housing projects became the "target audience", and the low-income housing concept became "the product" with physical and psychological price tags attached. A major problem with the low-income housing program is that the seller, the federal government, has not been able to conceptualize its product as benefits to be derived by communities in which the product is placed. In addition, the seller has not defined the monetary and non-monetary prices which must be paid by residents of these neighborhoods. As a result, the failure of the program can be attributed to HUD's underestimation of the price that the buyer, the suburban dweller, has attached to the acceptance of low-income housing. In this case the price can be defined as the social, economic, and physical risks which the suburban resident perceives that he will have to take. The cost of taking these risks significantly outweigh any perceived tangible or psychological benefits—hence the strong opposition to the program in virtually every section of the country.

The housing objectives as stated by the government include the following:

• To adequately house all of the nation's people.

• To increase the supply of housing units numerically.

• To expand the range of housing opportunities for everyone.

Most of the effort by HUD to date seems to focus on the production side of the problem (i.e., concern with the number, availability, and manufacture of housing units). Little emphasis seems to have been placed on the marketing/public relations side (i.e., what changes in the program and communications about the program will be required before suburban neighborhoods can accept low-income housing?).

With this in mind, the students applied their own version of a Consciousness III plan of analysis to the problem. The first step involved setting broad strategic objectives. These fell into two parts. The first was to isolate target neighborhood attitudes which represent the severest barrier to acceptance of low-income housing, and to positively affect those attitudes in a specified time period. The second part was to develop an image of low-income housing among target residents which is compatible with existing attitudes toward home and neighborhood. The accomplishment of this compatible image will be dependent upon changes in the low-income housing program itself and in communications about the program.

The next step called for an analysis of target audience attitudes about their neighborhoods. The objectives of their research were as follows:

• To determine how the target resident perceives his own home and neighborhood as important personal symbols.

• To determine the target neighborhood attitudes toward low-income housing and the factors responsible for such attitudes.

• To determine what conditions must exist to make low-income housing acceptable to the target neighborhood.

Answers to each of these research objectives were prerequisite to the development of communications objectives and an effective strategy. A portion of the market research results are presented in the following paragraphs.

The students' investigation of previous research indicated that a house is far more than a shelter. To the outside world and, more important, to the hidden psyche of the owner, his house serves as the material definition of his status. Furthermore, it helps define the future social position of his children since such status is transferable, particularly in its tendency to provide proximate socially acceptable associates, friends, and marital partners. The social and physical aspects of housing were also found to be tightly linked. A well maintained house and yard were valued for themselves and as signs of the neighborhood's social status. A recent study by the University of Michigan Institute for Social Research concluded that whether a neighborhood is well kept-up is the best single predictor of neighborhood satisfaction. The compatibility of neighborhood residents was the next most important factor[1]

The student's primary field research provided other enlightening information. A significant majority of respondents interviewed indicated they would reject the placement of low-income housing in their neighborhood. This was due to what respondents perceived as the threatening nature posed by the new residents who would be living in such a project. It was determined that property values, quality of local education, security, and neighborhood stabilization were the factors of greatest importance to the suburban dweller. Residents felt that property values would decrease, that crime would increase, that the quality of education and companionships for their chil-

[1] John Lansing, Robert Marans, and Robert Zehner, *Planned Residential Environments*, Institute for Social Research, Braun-Brumfield, Inc., Ann Arbor, Michigan, 1970.

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SOLVING CORPORATE IMAGE . . . *(Continued from page 32)*

dren would decrease substantially, and that the property tax would increase due to the need for additional services. Other major objections to low-income housing focused on the large size and lack of upkeep associated with existing housing projects. It was discovered that first impressions of the upkeep and general appearance of a low-income housing project are very important in developing permanent attitudes toward all low-income housing.

In the product/price analysis students considered the feasibility of producing housing which is better architectually suited to specific target neighborhoods. One possibility might be to involve suburban residents (architects) themselves in the design of such housing. In addition, residents must be reassured of the upkeep of such a project—and the first step might be to improve the upkeep of existing projects. A change in name from low-income housing to something more positive like "Suburban Housing Improvement Developments" may also have a beneficial effect on the negative image immediately associated with the current HUD program. To reduce residents' fears of major changes in the composition of their neighborhoods, housing projects could be dispersed with as few units in them as is economically feasible. It might also be advantageous to place projects in neighborhoods that have predominantly young households in them, since younger respondents had indicated a greater penchant to change their attitudes.

Finally the students investigated the communications mix which would be best able to translate the benefits of the program and to overcome the objections which were uncovered by the research. As in the product/price analysis, no attempt will be made here to present the students' specific plan of action. There were large gaps and shortcomings which are inherent in any student project. Interesting bits of their analysis are presented to show the direction and scope of their thinking.

For example, one communication approach suggested was to show the target audience the similarities between their own neighborhood and home life, and that of the residents of a low-income housing project in order to stimulate empathy. Other message components should include emphasizing the relative smallness of proposed projects with respect to the size of the neighborhoods in which they are to be placed, and providing examples of neighborhoods which have had favorable experiences with low-income housing. Students suggested the use of various media which they felt most effectively reached opinion leaders in the target audience. These ranged from television commercials to films and local seminars.

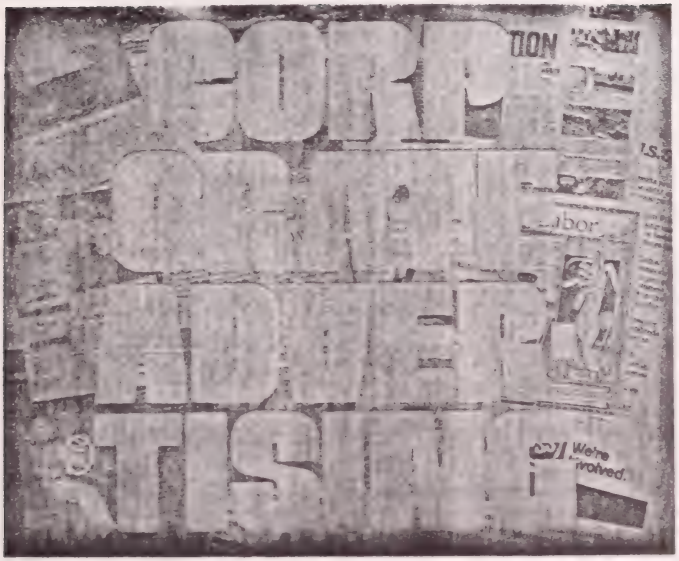
The communications campaign should be started well in advance of the site selection stage. The objective is to induce acceptance of a project before the fact rather than try to sell acceptance after the howls of protest have already started.

In order to determine program effectiveness, it is necessary to carry out a post-analysis of audience attitudes after some specified period of time. A major thrust of this analysis should be to determine whether or not the target audience feels that the advertised benefits actually do exist, or, at least, that the product is not as bad as it was originally thought to be. This might be an opinion survey of residents concerning their attitudes toward the project. Other methods of detecting the reduction of negative attitudes could also be used to locate needs for changes in the strategy.

Another important audience segment for HUD is the low-income consumer himself with his own particular perceptions of the housing program. The same framework of analysis can be applied. The product/price mix will be different, but the key is to make it compatible with the product price mix being sold to current middle-class residents. Doing this will help assure not only the initial acceptance of the HUD program, but should also increase the probability of its long term success. This low-income public is not treated here for reasons of brevity.

The Consciousness III approach to the development of an image building program is not intended to be "the answer." It is intended to illustrate the need for a broader perspective on the development of corporate image communication programs within a systematic framework considering the "consumer" of the image as the focal point and considering the image itself as a "product" which must be purchased by these consumers at some cost. We have found this approach to be more inclusive and effective than traditional approaches in dealing with the elusive nature of public relations problems. As with any new approach, there are undoubtedly numerous methodological problems; but after applying our own analytical framework, it seems that the benefits far outweigh the price. □

Exhibit 59: "Facing the Issues"



Facing the Issues: Corporate Advertising's Greatest Challenge

BY THOMAS A. KINDRE and PHILIP W. CALLANAN

CORPORATE ADVERTISING has big new jobs to do today. Not only has it come a long way from the "institutional" days, but it can no longer be thought of solely in terms of establishing corporate identity or helping to burnish the "corporate image."

What we still have to refer to as "corporate" advertising—because we lack a better, more accurate term that everyone can agree on—is playing an ever-larger role in the total communications programs of businesses and industries. As an element of these programs, it is helping to confront and explain some of the major issues with which business, government and the public are concerned—for example, the energy crisis, increased prices of goods and services, shortages of essential items, environmental problems, consumer issues, government regulation, and others.

Many observers believe that we are going to be living for years in a "shortage economy," in which not only the various forms of energy, but other essentials that we have long taken for granted, will be in short supply.

THOMAS A. KINDRE *and* PHILIP W. CALLANAN *are senior vice presidents of Hill and Knowlton, Inc., where they are in charge of the Advertising Department and the Creative Services Division, respectively.*

"One thing is certain: corporate advertising is going to be more challenging. No matter who does the advertising, it will be tougher to do."

In this changed and changing business climate, many companies, and the trade associations of many industries, are overhauling and repositioning their communications programs. In doing so, they are often discovering that advertising in general, and corporate advertising in particular, needs a new approach and has a new role to play.

One fact becomes increasingly evident, that corporate advertising is an integral element of the total communications program, another voice to be used appropriately along with all the others—booklets, brochures, feature articles, speeches and the rest. It is a useful element, because it provides the opportunity not only to convey an exact message, but to control the timing, placement and exposure the message will receive.

Because corporate advertising is one of several voices in the communications program, some of us are referring to it among ourselves not as corporate advertising, but as "paid-space communications"—one specific kind of element in a larger concept.

To be sure, "paid-space communications" sounds like, and is, just a fancy way of referring to advertising. Nevertheless, it makes one of those semantic distinctions that really help clear the air.

The phrase represents an attempt to put in its proper context the specific thing we are talking about. For the kind of communication under discussion is, we repeat, an integral part of overall corporate or industry communications. To consider it as a separate entity is to risk a misunderstanding of its function, and a consequent loss in its effectiveness.

• *Trends in Corporate Advertising*—No matter what we call the kind of advertising we're talking about, however—and because it's convenient and customary, "corporate" will do—there are some discernible trends, or at least points around which opinion seems to coalesce:

• **There's going to be more of it.** No matter how the short-range budget trends go, corporate advertising is on the ascendancy. Existing budgets increase slightly. New companies join the ranks. Major industry trade associations, caught up suddenly in a welter of public misunderstanding, turn to advertising for the first time.

Television and radio, once thought of as media that had their greatest use in the selling of products, are today being used more and more extensively to convey ideas and to deal with issues—just as they have so successfully been used in political campaigns.

There are two reasons for the growth of corporate advertising that many who are close to the corporate scene see as looming much larger in the next couple of years. First is further likely shrinkage of industry's opportunity to have its story told in the news media as available space either tightens up or gets increasingly filled with coverage of industry critics, whose pronouncements make better copy. Another factor will be the shift of some marketing budgets over into the corporate sphere as shortages and uncertainties in delivery make product advertising less effective. Next year at this time there will be more, if not better, corporate ad programs than there are now.

• **We're on the threshold of a new era.** Everyone seems to be saying something like this, though it's hard to discern what we all mean. The need for a new era of corporate advertising is already upon us. The formula we haven't yet found.

Will the new era bring a new kind of advertising, in the way that TV brought a new medium of communication? Or do we just need to do more professionally what we've been doing?

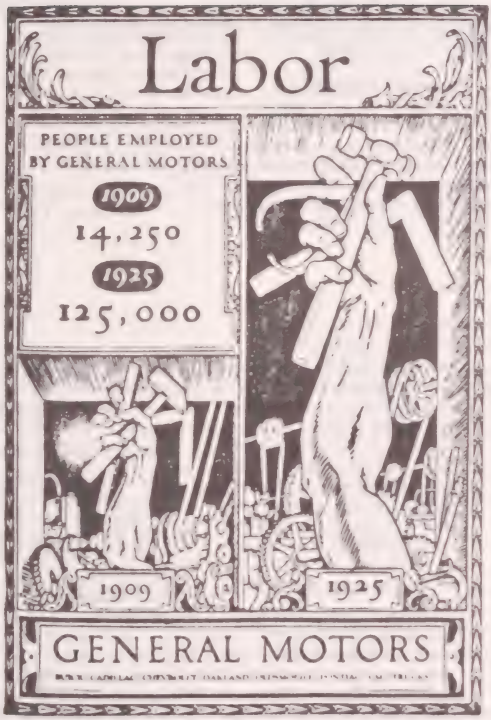
One thing is certain: corporate advertising is going to be more challenging. No matter who does the advertising, it will be tougher to do.

It will demand that we throw out the formulas and indulge in a lot of straight thinking before we begin to fool with words and pictures.

It will upset our traditional organizational lines, knock people out of boxes where they've operated for a long time, break down the insulating barriers of "copy," "graphics," "client contact," "account executive," and the like, in ways that we're only beginning to glimpse.

• **It needs to be better than it is.** More and better corporate advertising is being done today than ever before, and there are many hard-hitting, effective programs. They take the right approach, saying "You have a problem and we can help solve it," or "You'll be interested in some of the things we're doing," or "We all

(Please turn page)



An Earlier Version of Corporate Advertising
Courtesy of Time, Inc.

have some problems, and here are our views on how they might be solved." But some of today's corporate advertising still seems to say, "Look at us because we want you to."

In the best corporate print programs, imaginative headlines engage the reader and dramatically capsule the story. Copy is lively and interesting, design and layout highly sophisticated. Unfortunately, however, there are still some programs that do not meet these high standards.

Print advertising on issues, of which there has been a good deal in the past year, is also of mixed quality. Some is first-rate, but in other programs, large blocks of type, though they tell all the facts, may not necessarily entice people to read those facts.

Part of the problem is a tendency among some of the people who plan and assign corporate advertising—and some who create it as well—to think automatically in terms of "writing" an ad. It's a bad way to start—for one reason, because it frequently results in an essay, not an advertisement.

"Thinking" an ad had better be the first and most important step in the creative process, followed closely by visualizing what it's going to look like to the audience in order to make the kind of impression you want. Then it's time to write.

• **How to handle it.** As the issues fly thicker and faster, and the need to explain them grows—sometimes geometrically, it seems—there has been a good deal of uncertainty about who should be doing what.

Corporate identity programs are one thing; corporate or industry issues are another. When a company has sorted out its strong points, and what combinations of them make the most meaningful portrait, identity advertising is ready to be tackled, and it comes out good or bad depending on (1) how good a story there is to tell and (2) how successfully the advertising catches it.

TIGER BY THE TAIL

Try to tackle an issue, though, and you've latched on to a tiger by the tail. Within a given company, there may be two or three management factions espousing differing viewpoints on an industry issue. And unless the top man is ready to cut through and establish which is the official position, the people who are trying to make an ad will find themselves joining an ongoing fight instead.

Reaching common ground in an industry trade association multiplies the problem by the number of corporate members on the association's roster. Each member of the public relations committee with which communicators must deal not only represents viewpoints different from those of his fellow committee members, but also carries into committee sessions the question of what exactly his own company stands for. Working through a situation like this can be a test of the sturdiest nerves, and some of the people charged with responsibility for articulating an industry's positions in advertising have found it extremely difficult to deal with.

This is particularly true when they lack familiarity with this kind of assignment, when they are not close

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FACING THE ISSUES

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enough to the policy-making machinery, or when they have too specialized a background.

Some evidence can be detected for a couple of developments that may help to solve this problem. One is likely to be a streamlining of approval procedures as management groups and industry committees come to realize that they are being their own greatest road blocks to effective communication.

Another is a growing acceptance of the total communications concept, in which advertising is seen to be another voice in the overall public relations chorus. The same considerations that affect a corporate news release or an industry position paper apply to advertising messages on the same subject. All types of communication need to be created with full knowledge of, and constant access to, the subtle shadings of interpretation as they develop.

If corporate advertising is to fulfill its potential as a communications tool; what are some of the main considerations that will help it succeed? There is no unanimous agreement here, but most who are close to the subject can find some common ground among the following:

- **Objectives That Are Real**
  Easily drawn objectives are often not worth the paper they are put on. Blood, sweat and tears make them real—and it's got to be a little bit of everyone's blood. Top management needs to be part of the process, if it's to be successful. A certain rigorous discipline must be brought to bear, or it won't mean much. A good deal of thrashing about, with spirited give and take, helps to make it solid.
- **A Direct Line to the Top**
  The only way to get an advertising program approved is to get it approved by the top man in the company. Then it is a simple matter to work out technical details at staff and operating levels. If the concepts are not approved at the top, they can be too easily tinkered with down the line under the guise of technical accuracy or protection of corporate secrets.
- **The Need for Continuity**
  Everyone involved in the advertising function is familiar with the studies that have shown, again and again, the recognition values that accrue from continued impressions, and the rapid and hard-to-recover falloff that occurs when impressions are made with less frequency or are discontinued altogether for long periods of time. There is something to be said for credibility, too, in this context. Talking about yourself only when you have something good to say is a message in itself that filters through subliminally to much of your audience. Communications,

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if it is to be worthy of the name, means continuing to speak out, even though the things that must be said are difficult. To stop talking is to run a great risk. There is ample evidence on the national political scene today of how silence in the face of controversy implies guilt, and how continued silence moves growing numbers of the public to a stronger conviction of that guilt.

- **The Right Choice of Media**
  Though no one is ready to admit it, the choice of media for corporate programs has in the past been influenced, perhaps unconsciously, by gut feelings about the content and tone of the media under consideration. It's time for a much more scientific approach to media selection for all corporate programs. They must depend more on precise definitions of audience than many of us have been accustomed to working with in the past. The electronic media are today being increasingly used for corporate advertising, and some excellent campaigns are running. These media will figure more heavily in the years ahead.
- **Don't Overlook Research**
  Any sound PR program is based on thorough research to start with, and if advertising is part of the package it must benefit by that research. But beyond that, corporate advertising needs its own benchmarks, its own pre- and post-testing. Another value, of course, in the unified communications concept, is the economies in time and money that can be effected when research objectives are coordinated.

It's going to be an interesting year ahead for corporate advertising, and an interesting year for those who are involved with it. The only thing of which we can be certain is that next year this time some things will be different. □

Exhibit 60: "Corporate Advertising?"

Corporate Advertising? Up Yours!

BY ANTHONY P. GALLI

Dubious corporate public relations may have earned its share of lumps, but today's social and political climate makes total, effective, accountable PR more imperative than ever.

THAT TITLE UP there isn't a semi-precious piece of profanity. It's a serious recommendation.

Not a blanket recommendation to all corporations everywhere, but a very specific charge to some companies with some very special problems.

I'll get to them in a minute. But first, let me dispose of the rest.

Let's face it, many companies don't need corporate advertising in any formal sense. Sure, they need the sensible, responsible public reputation that sensible, responsible business behavior earns. But they don't need any elaborate program of words and pictures. They may want it for ego reasons, but they don't need it. And if they don't need it, it can often hurt rather than help.

We all know a pompous president or two who wants to brag about family traditions or the neatness of his plant and is willing to pay the price. Only he thinks the price is limited to the cost of space and time. Actually, the major cost is the respect he's likely to lose from his customers, employees and stockholders by revealing himself for what he is.

ANTHONY P. GALLI *is senior vice president and director-public relations services, N. W. Ayer & Son, Inc., New York City.*

NOTHING ACHIEVED

Or in less extreme cases if the corporate communications are inoffensively done—the only loss will indeed be the price of the space or the time or the talent needed to get the job accomplished. But nothing is really achieved because nothing was needed. This is one of the reasons why trial balloons for more corporate advertising so often draw a ribald response. Too many times, "a bunch of PR boys" jump into a ditch to get an ox out what wasn't there

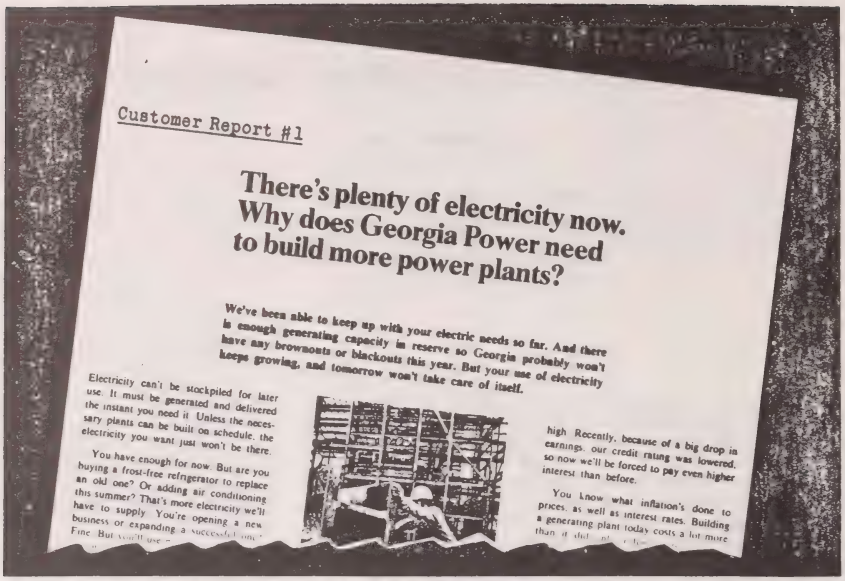
But I started out to talk about the Needers, not the Need-Nots.

• *The "Needers"*—Today those corporations that need a complete program of corporate advertising need it like it's never been needed before. To see how that might feel, put yourself in the pants and shoes of this executive officer:

All of his customers need more of what he sells, but some of them won't let him build a new plant because it may spread a little dirt around. Not a lot; a little. And he's trying his best to eliminate even that.

All of his suppliers are hitting him with tremendously increased prices on what they sell him, but are using every legal device in the book to keep him from raising his price for what he sells them.

A large block of his customers tell him the quality of his service is going to hell, but many of these same customers are doing everything they can to make his business hours miserable —defacing or vandalizing his products or equipment, harassing his em-



One in a series of ads used by GEORGIA POWER COMPANY to answer commonly asked consumer questions.

ployees, cheating on their bills in every way they can, or using consumer affairs and regulatory agencies to whip him at every turn.

You might find this poor guy in an executive office in almost any major industry that faces environmental, energy, financing, or personal service problems. Paper makers, for instance. Glass makers. Steel men. Oil men. Gas men. But just as an example, let's zero in on a character who faces all of these problems and a lot more besides. The chief executive officer of an electric company.

This man needs help. All the help he can get.

He needs all the things any other businessman needs: good equipment, efficient and concerned managers and employees, stockholders who are willing to keep putting money in his business, the cooperation of all the regulatory agencies that legislate his prices and practices. And of course, good customers.

• *Something Special*—But because the current social and political climate affects his business so directly, he needs something else: a high level of awareness of his very special problems on the part of his employees, his stockholders and his consumers. Many of his problems can only be solved if all of these people he must work with and serve will help with their solution.

STATE THE CASE

Joseph C. Swidler, chairman of the New York Public Service Commission, put it this way: "The last seven years have witnessed the emergence of enough new problems and controversies in the energy industries for a lifetime, and the whole orientation of the electric power industry has been revolutionized in this period."

So it's obvious that the head man in an electric company has an urgent need to state his case—before all his publics and in every way he can. Through speeches and contacts. Through publicity. Through direct mail. Through corporate advertising. Through every conceivable public relations channel.

A few years ago, that chief executive officer hadn't yet faced up to all of these problems that were headed his way. He wasn't unique. Very few businessmen had with anything like the attention required.

For example, back in the 1950s, one of the nation's major steel companies undertook some research to anticipate what some of its public relations problems might be in the years ahead. The research made it perfectly clear that the environment, among other things, would become a red-hot topic in the 60s. ". . . we never did anything about it," one of the steel company executives admits. "I'm sure we could have avoided a

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UP YOURS!
(Continued from page 19)

lot of headaches if we had listened to what they were telling us."

That isn't to say better public relations could have saved industry all its lumps on environmental effects. The issue was too big for that. But it might have taken a lot of steam out of the criticism. The steel companies —as well as the electric companies and many others—were working to clean up the environment long before it became a popular cause. But they didn't bother to tell anybody. As a result, industry has been reacting defensively to environmentalists' blasts ever since. And a company's side of the story never sounds as convincing when it's denying someone else's charges.

PRIORITIES VARY

Well, the steel companies are facing up to the challenges now. And so is the chief executive officer of the electric company whom you are in the pants and shoes of. For a number of years now, he and most of his fellow electric company executives around the country have been knocking themselves out to bring their publics around to their side of the desk—and conversely, to put themselves on the other side.

Priorities among the problems the electric companies face vary. A shortage of fuels here. Sky-rocketing costs there. Extreme resistance from environmentalists in still another area. Exaggerated fears of nuclear power plants in still another. So the individual electric company executives are picking the targets of greatest concern in their areas.

• *What They're Saying*—For example, because of consumer resistance and other problems, Con Edison in New York has been unable to build fast enough to keep up to demand. So Con Ed's most urgent concern has been energy conservation. Their "Save a watt" theme has been played in all media. They haven't been able to avoid all of their troubles

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UP YOURS!
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as some homeowners who have been blacked out know to their distress. But public understanding and cooperation has made the pinch almost bearable.

Similarly, Commonwealth Edison in the Chicago area has been urging a greater public awareness of energy problems. In publicity, direct mail and advertising, they have been promoting an excellent booklet entitled "101 ways to conserve electricity at home." They didn't miss a trick. Item #57 is a warning against oven peeking; it wastes heat. Hundreds of thousands of copies have been distributed, and the nation's energy supply is undoubtedly better for it.

The Georgia Power Company, headquartered in Atlanta, has spread the word about their efforts to clean up the water in rivers near their power plants, and they have gone to great lengths to explain how rising costs are forcing rates up.

Northeast Utilities have discussed many of their problems—and the consumers'—in great detail, explaining what they are doing about air pollution, why they need to build nuclear power plants and how safe such plants have proved to be, what they are doing in other ways to help keep the supply of electricity up and the costs down.

Philadelphia Electric has promoted a public dialog with its consumers, encouraging public questions and criticism and attempting to give candid and complete answers in impromptu television commercials.

• *The National Effort*—And because many of the problems of the electric companies are common to almost all, they have also joined forces in cooperative public relations and advertising efforts at the national level.

Their efforts are channeled through three organizations. All of the electric companies are not participants in all of the organizations, but representation is substantial in all three.

A Public Information Program (PIP) concentrates on special story placement and other public relations activities such as speeches and reports. This year, the PIP effort, which is handled by Underwood & Jordan, New York, has been centered on three major subject areas: the need for increased electric rates in many areas to cover increased costs; electric company activities to protect the environment; and the need for nuclear power plant development.

Frequent round-table discussions and story conferences are held with editors and network people to provide background on these issues of wide public interest and concern. These briefings have been a big factor in producing coverage in magazines like the *Reader's Digest* and *U.S. News & World Report* and on various television programs.

A national Electric Companies Advertising Program (ECAP), now in its thirty-second year, attempts through paid advertising in national magazines to provide facts for better consumer understanding of a number of electric company problems that directly affect the consumer's welfare. The need for increased rates, environmental-protection efforts, nuclear power plant development, research and development efforts now underway to find new sources of electric power, and the urgent need for continued construction of all kinds of power plants.

Because of the complexity of the information to be communicated, the current ECAP advertising campaign is editorial in look and lengthy, straightforward and detailed in content.

A number of activities, some of them essentially public relations in nature, are undertaken by the Edison Electric Institute (EEI), the trade association of the electric industry. Headquartered in New York, EEI specialists in different fields provide a variety of materials and assistance on all subjects of current concern to the electric companies—technical as well as general. These include booklets, reports, information exchanges and specialized material on request.

• *A Total Commitment*—The electric companies have been engaged in these local and national public relations activities for a number of years. Participation by the individual companies has been at top-management levels. So it can be said that this is corporate advertising as corporate advertising should be—long-range, consistent, and total. It is not viewed by electric company management, as it is by some managements, as "the work of those clowns who handle the company picnic."

Because of this top-level commitment—and let's face it, because of the magnitude and over-riding importance of the problems facing the industry—every effort is made to insure accountability in terms of results. In this regard, efforts have been rewarding. Periodic research shows steady gains in awareness.

Still the companies are not satisfied. At the present time, they have commissioned a comprehensive evaluation of their total communications efforts. Their objective is to improve and coordinate their corporate advertising activities still further . . . because in today's climate, communications must be effective as never before.

George Bloom of the Pennsylvania Public Service Commission said recently, "Unless the public is given the understanding to which it is entitled and deserves, both industry and regulation will stay black and blue from consumer, political, and media abuse. . . ."

It's undeniably true that in many companies the only sensible retort to a suggestion for more corporate advertising is "Up YOURS!." But it's safe to say that the managers of any company facing even a few of the awesome problems facing the electric companies would shift the emphasis to "UP yours." □

Exhibit 61: "Out of the Ivory Tower"



Corporate Advertising— Out of the Ivory Tower, Into Marketing

BY AUDREY ALLEN

Somewhere out there Ivory Tower corporate ad toilers deep in thought still work at preening and burnishing those "Our Founder," and "Our Factory" ads, while the world passes them by. But consumerism, inflation, rising ad costs, energy problems, and social awareness and an urgent need to communicate, not expound, has left the ego-trip boys and the company-name-in-a-prestigious-frame cats out of the mainstream.

Corporate ads now range from those dwindling "Our Founders," the philosophical quotes and abstract art, the practical financial information, advice-to-consumers, and other informative ads, on to corporate advertising's "toughest" and most urgent ads: those "policy" ads explaining pressing company and social problems and critical situations to unfriendly emotionally or financially involved consumers.

Totally Communicating the Corporate Message

But whatever the purpose of the campaign, the growing trend is not only to see the corporate ad as part of the total marketing strategy but also, to some degree, to infuse all the company's communications with the theme of the corporate message. This is leading the corporate public relations executive, more and more becoming known as the director of communications, public affairs, or similar wide-ranging titles, into greater responsibility in the total marketing picture. Perhaps those who've long had the title, public relations and advertising director, had a head start in integrating the corporate message.

All the members of the marketing team: advertising, public relations, investor relations, sales promotion, sales, etc. must work smoothly together to communicate well corporately. "Good communications means good business" is no longer a platitude, it's a hard line. Unfortunately, that Ole Debil, Ego (or is it that Ole Debil, Insecurity), is preventing some companies from attaining good communications, no matter how essential integrating the corporate message may be. Indicative of serious internal company problems is the advertising director who insists on his department's doing *his* thing, the sales manager who won't give an inch to integrate *his* department's presentations, the promotion brochures and mailers that speak without hint of the corporate theme.

Are You Cloaked In Mystery?

And corporate communicators themselves are not without fault, Joseph Graves Jr., director of advertising and public relations for Trans Union Corp., Chicago, reminds us. "Don't *you* know corporate communicators who sit smugly in a cloak of mystery, so that they can occupy an office on corporate row while their product advertising counterparts sit in a closet? Wouldn't it really be better," he asks, "for the company to have unity, instead of friction?"

An example of how such integration works, adman Jack Trout, president of Ries Capiello Colwell, New York, tells the *PR Journal*, is the way it works at client Western Union. "First, you have to have an enlightened, very strong director of communications—which is what we have at Western Union. Jim Foster is very highly placed in the company, very close to the chairman. Foster has control of everything, so we can *do something*, we can really execute a total program.

AUDREY ALLEN *is a freelance writer who specializes in advertising and marketing subjects.*



Get the Chairman Involved

"We recently wrote a speech, with accompanying slides, for example, for the chairman, on Information Networks, the current corporate message. He delivered it at an important communications meeting. The thing is to get the chief executive officer talking about the corporate message," Trout explains, "get public relations talking about it, advertising dramatizing it, and sales communicating it. When they don't cooperate, things tend to fall apart. A company really should have one guy—like Western Union's Jim Foster—and he doesn't have to have control of everything, because that gets into Ego Country, but he should be there to carry out a mandate from the top that says: 'There shall be cooperation.' "

Is Your Mandate Missing?

Unfortunately, Trout points out, this mandate isn't always there. "The tragedy is that most companies are organized on a profit center basis," he says, "and the department heads are evaluated on the basis of profit. So of course the department head says, 'Well, then I must have control of everything. I want control of *everything*. Don't give me this crap about cooperation.' And the accounting function has a tendency sometimes to stand in the way of what we consider effective communications. So you must have a company with a singular purpose, a message to communicate, and a guy to control it.

"Many years ago we tried to get a diversified company to integrate its corporate message," Trout recalls. "We worked out a plan to allow complete integration, everything, from the top right on down, with the divisions all tying in. It was a dismal failure! Nobody was willing to talk with anybody else! The guys in the business end said, 'Well, if *they* want to do that, than *I* don't. The hell with them—I've got my own problems. Get out of here.' It was unbelievable—the whole thing was a disaster! It wasn't a strongly organized company, there was no central point of authority, no one strong guy with access to a strong controlling top."

John Purser, director of public relations for Jones & Laughlin Steel Corp., Pittsburgh, agrees with the necessity for one authority. He tells us, "A communications program functions best, and achieves maximum success when one individual has the final responsibility, authority, and accountability for the program. That's the way it works here—the 'buck' stops with me."

He adds, "When you're charged with a communications program designed to meet corporate objectives, you must consider yourself a businessman first and a communicator second. As a businessman you know which publications provide objective reporting and integrity, and turn out a valued product. Because the public relations part of a communications program is being implemented every day, the corporate advertising part has to track this effort and complement it." He notes that a point often missed by media departments "in their fuzzy numbers game," is the impact of the editorial part of a publication. Therefore, he says, the direction, selection, and follow-through on a corporate advertising effort has to be formulated by the public relations arm.

Jack Trout stresses that what's

[Please Turn Page]

going to make Western Union win or lose isn't running "the greatest ads in the world, it's how the company performs in the marketplace. Everyone is staring at its marketing successes and failures," he notes. "The success of its corporate message program is really going to be the success of its overall marketing program. So while we integrated Western Union's corporate message this year, we've got to integrate it even more in 1975. We now have to get everyone, telegraph company, and sales people, taking the corporate message to customers. They've got to *utilize* the idea. And I don't think that really happened this year. Next year we hope to make it happen. You've got to get *everybody* in the company selling, and then the public will be impressed. We can't accomplish that through corporate ads that simply say how great the company is, that an old company has become modern and new—even though it's true. People just don't believe that stuff."

Relate to the Consumer!

Corporate advertising is greatly misunderstood today, Trout says. "It's been oversold. It can be very powerful if it's well done, and coordinated and integrated with marketing activities. And if it says something in a dramatic way, either capturing what's happened in terms of sales or events. But it's got to be related to a consumer's everyday world. He has his own problems. You have to show him how your company's product or service can help him solve his problems." Of the old-line, ego corporate advertising, Trout cautions, "Advertising that isn't doing anything is doomed to failure when the going gets rough.

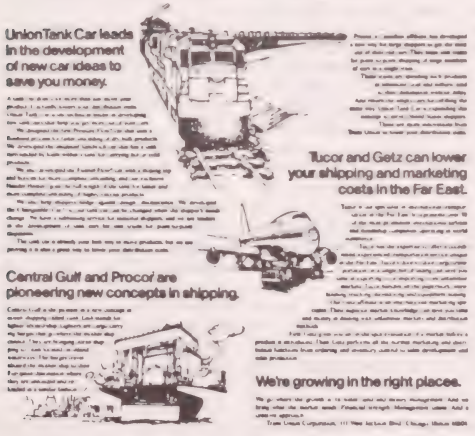
"More and more you'll see companies getting into integrated, total communications." Trout believes that this is very difficult for a multi-faceted company. "You can't do corporate ads for a conglomerate, a schizo," he insists. "Which personality do you talk about today? It's impossible. Trying to do a corporate campaign for a schizo would probably be worse than doing nothing. You really need a company that's perceived as being in one kind of business to do a really strong, totally integrated job. A strong campaign reflects favorably on the corporation, and *sells*, and it can be carefully lined up with the major selling arms of the company so that the marketing people get their share of the benefits.

"Western Union is about to put another satellite—another messenger—into orbit, and its major marketing thrust is to sell that satellite service. We're going to run a corporate ad to announce it. That ad will be carefully structured to look like a selling ad. We'll work with some of the marketing people on the copy. It'll be saying to businessmen, 'Hey, you should be considering satellite communication for your company.' We'll work hard to put these overlappings into it. We'll go to the marketing people and say, 'Okay. We're doing this corporate ad, tell us who you've sold and who you haven't sold, and who you're trying to reach. Then we'll work it out so that the ad will be helpful to the people selling the service.'"

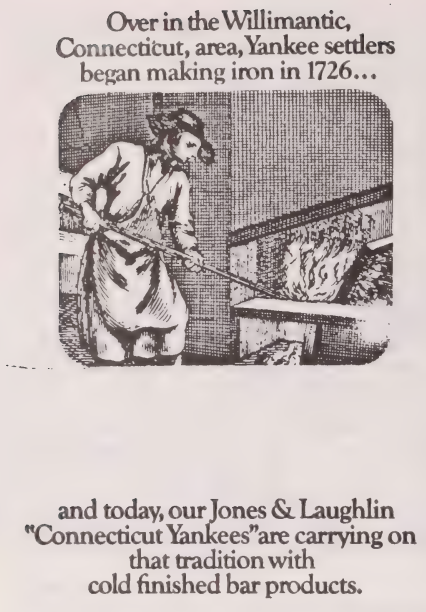
Image "vs" Product

Corporate "image" advertising and product advertising aren't mutually exclusive, and it's wrong to automatically position discussion on corporate advertising by labeling it "corporate *vs* product advertising," emphasizes Charles Mill, president of the American Business Press Inc., the association of audited business

[*continued on page 10*]



Trans Union Corporate Ad



Jones & Laughlin Corporate Ad

publications. He agrees that integration—total communications—is the wisest policy.

"The best product advertising also sells the company as a good source for the product, and the best image advertising recognizes that the company is itself a 'product' over and above its subordinate products," Mill tells the *Public Relations Journal*. "There was a lot of publicity on this subject in the 1960s, and much of it did little good and much harm," he recalls. "Almost automatically the discussion was labeled with that *vs* sign. If you were in favor of one, you felt defensive about the other. Most of the discussion overlooked the 'that depends' factor. This is, which type to use *depends* on marketing objectives, market position, how widespread the use of the product is, how many companies make a similar product, and a host of other situations. Only the marketing management itself, and its agency, can make the decision. There's no inviolate rule to follow."

Good corporate image advertising eschews breast beating, Mill agrees, and must have solid thinking behind it, and clearly defined goals in front of it. It must, he stresses, be directed "at a target audience of people with whom you want to do business. It must tell readers what kind of company yours is in *their* terms. And it must be directed toward direct action on problem areas." In a myriad of industries, Mill says, "solid corporate campaigns can achieve image objectives while making sales—if they are directed where the buying dollars are."

Larry Miller, director of public relations and advertising for Bunker Ramo Corp., Oak Brook, Ill., also sees integration as essential. He tells the *Public Relations Journal*, "Too many companies try to segment advertising, public relations, investor relations, etc. To be effective, all functions must be coordinated, with the same goals and objectives. There must be a total communications operation."

Corporate Ads Can't Do It Alone

Trans Union's Joseph Graves Jr. likens trying to make corporate advertising alone build your image—"a horrendous task," he terms it—about like a hunter using a blue ribbon dog to flush 1,000 pheasants. "The dog is good," he says, "but he cannot do the job alone. Reinforce your corporate advertising with a good base of public relations, investor relations, analysts meetings, and seminars. Tie in your product advertising, and you'll have a beautiful blend."

Graves defines corporate advertising as advertising "devoted primarily to selling the corporate personality. Its first objective goes beyond the direct sale of a single product or service." A corporate ad, he says, must fulfill one or more of the following qualifications:

- It must educate, inform, or

[*continued on page 56*]

CORPORATE ADVERTISING—OUT OF THE IVORY TOWER...

[*continued from page 10*]

impress the public with regard to the company's policies, functions, facilities, objectives, ideals and standards.

- It must build favorable opinion about the company by stressing the competence of its management, its scientific know-how, manufacturing skills, technological progress, product improvements; its contribution to social advancement and public welfare. On the other hand, it must offset unfavorable publicity and negative attitudes.
- It must build up the investment qualities of its securities, or improve the company's financial structure.
- It must sell the company as a good place to work—often directed to college graduates or people of certain skills.

Consider Corporate Needs

What a corporate ad does, what its objectives are, depends on what the corporation needs. Sounds simple enough. But not enough goal-setting was considered in the past, resulting in "Our Founder" ads, which met not the corporation's goals but simply the goal of giving the grand old gentleman who started the business a warm glow.

The Invisible Company

Introducing and positioning the "invisible" company: "It would be foolish for an invisible company to come out talking about what a great company it is," Ries Capiello Colwell's Jack Trout points out. "Such a company should be *positioned* against other companies in the same industry. Perhaps it is relatively smaller, and can play up its ability to move quickly in serving its customers, in contrast to its clumsy giant competitors. Or whatever."

Crum & Whom?

"How We Managed to Hide a Billion Dollar Company" read the

NO MATTER HOW GREAT YOUR CORPORATE ADS ARE, YOUR CORPORATE RELATIONS DON'T DESERVE PASSING GRADES IF YOUR CUSTOMERS CAN'T FIND OUT WHO TO TALK TO AND HOW TO REACH THEM...

One of the curses of bigness is that the left hand has difficulty knowing what the right hand is doing. An executive of Combustion Engineering Inc., explains it in another way: "We produce such a wide variety of products that even our inside people have difficulty keeping up with what we make. To prevent our fellows in Purchasing from going outside for a source of something that one of our own companies makes inside, we use a two-volume Corporate Directory. If we have a problem on the inside, imagine the confusion for our potential customers on the outside!"

The corporate maze poses a serious public relations problem. The reaction of a potential customer who can't locate the company he wants because the name has changed and he doesn't remember the new one; whose letter goes unanswered because it's addressed to a wrong division; or whose phone inquiries get passed from hand to willing hand, can range from mild annoyance through sales-defeating anger. No one likes to be frustrated, and when we have difficulty making a purchase or getting an answer, the result is often lost opportunity, lost sales, and poor public relations.

One way of alleviating this confusion, Combustion Engineering has found, is a multi-page "corporate profile" in Volume Seven, the name-and-address book of Thomas Register of American Manufacturers. The Register is a much referred to source of information on the location of manufacturing companies, and has broad distribution across all types of industries, and is available in many libraries.

Combustion Engineering's profile includes: a cover sheet showing the company name, logo, and identifying slogan [The Energy Systems Co.]. It carries the title "Products and Sales Offices." This is followed by three full-pages of alphabetically indexed products. Each product listing is referenced by number and letter to the specific division or office where the product is manufactured, or where further information can be obtained. The Product Section is followed by five pages of Divisional Contact information, including complete addresses and phone numbers. To complete the information road map, the listings are sub-divided by Divisions, with a brief description of the types of products manufactured at each division.

Robert Fortier, manager of advertising and marketing communications for Combustion Engineering says that during the initial preparation of the profile, two years ago, it was difficult to get the information needed from the various divisional managers. This year when it came time for renewal, he got turn-around service on updated listings, addresses, phone numbers, etc. "When busy people respond with such speed, and without coaxing, to a request that for most people seems miles away from current needs, you just know they like what you're doing, and it's paying off," he tells us.

Combustion Engineering also reprints the profile [50,000 copies] and mails copies to all stockholders, key customers, the press, and key personnel. The profile also is used in reprint form to answer general inquiries to the company, and as a trade show handout.

Other companies utilizing the Corporate Profile Directory insert technique include AMF, Allis-Chalmers, Alcoa, Amerace, Babcock & Wilcox, General Electric, Celanese, Chromalloy, Eaton, Continental, FMC, Goodyear, Ingersoll-Rand, 3-M Co., Union Carbide, St. Regis, Phelps Dodge, and TRW.

One of the Fortune 500 companies employs a full-time staff of 12 simply to redirect mail and phone calls to the proper place within the company's coast-to-coast offices. Making it easier for customers, stockholders, and friends to make proper contact is good manners, and good business. A corporate profile published in a national directory appears to be one economical answer.

headline in the first corporate ad ever run by Crum & Forster. It appeared in *Time, Newsweek, U.S. News & World Report, Sports Illustrated, Business Week, Money, Fortune, Forbes,* the *Wall Street Journal,* and the *New York Times,* a year ago. Lengthy copy in the Benton & Bowles ad explained just how the multi-billion dollar blue chip company—an insurance holding company involved in property and casualty insurance—managed to remain invisible for 75 years. The objective of this ad, and the two that followed, was to make the company name well known, inform the business community, influence independent insurance agents, upgrade its list of agents, and boost the spirits of its 8,000 employees. C&F does not sell directly, but markets its policies through independent agents.

"It worked," Gilbert Faggan, vice-president for communications told those attending a discussion of corporate advertising at Magazine Publishers Assn.'s "Magazine Day in New York" in September. The National Assn. of Independent Agents gave C&F an award for outstanding support of independent agents through advertising. This, even though, says Faggan, it was a bit of a sticky wicket when C&F declined to use the association's "Big Eye" symbol in its ads (because the company considered it "incompatible" with its campaign.

More results: The company has been able to "substantially upgrade its agent list, and is "far over-subscribed." C&F chairman B.P. Russell attributes the company's increase in volume—"while everything else in the insurance industry was going down because of inflation—to the campaign. And security analysts, who in prior years ignored C&F special meetings for them, began showing up after the campaign appeared, admitting that the campaign had gotten them interested in the company.

Now that Crum & Forster is no longer invisible, its ads are concerned with inflation, which, Faggan says, is "racking" the industry, and will make insurance difficult to obtain in certain fields. A current C&F ad, headlined, "If Your Home Is Insured At Yesterday's Prices, Here's Hoping It Doesn't Burn Down Tomorrow," explains the effects of inflation on insurance. C&F ads running into 1975 will suggest ways for consumers and for independent agents to conquer it.

Oh, Yes, Esmark...

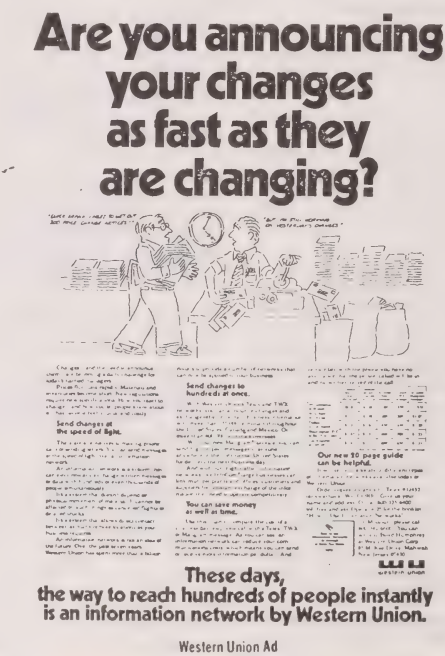
In case you think invisible companies don't come along every day, the MPA people had another at hand: Esmark Inc. of Chicago. This 120-year-old, $4.5 billion secret, one of the Dow Jones 30, takes in $90 million in revenues—*every week.*

Esmark financial relations director Philip Thomas explains that his company, the 27th largest on the Fortune 500 list, was developed from Swift & Co. in April 1973, but is "a completely new organization." It's a holding company, and a management and financial organization that owns a variety of companies, including Swift, and Globe Life Insurance. Its products include Butterball turkeys, Peter Pan peanut butter (20 percent of the market), and fertilizer (5 to 10 percent of the world market).

"When a company changes its name, especially going from a well-known name to a non-name, you can expect a loss of recognition, but this surpassed all of our expectations," Thomas confesses. There were good, basic, solid business reasons for changing the name, he notes. Although at the Esmark level the company had no products to sell, it's the Esmark stock that's publicly held. Research completed at the end of 1973 determined that the essential Esmark audiences—the investing public and security analysts and others in the financial community—didn't know the company name.

Pre-guessing survey results, Esmark

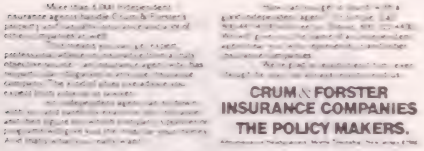
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Western Union Ad



"I'm one of Crum & Forster's 6,300 agents. But I just might recommend their competition."



Crum & Forster Ad

and its agency, Doremus, began a year-long series of full-page ads in "basic business and financial publications and newspapers," before Christmas 1973. The advertising objectives were to explain what the company is, what it does, that its products are good ones; stress its size and quality, that its management is capable of direct action in times of adversity, and that its operating companies are successful in tough markets. Thomas notes that Starch reports indicate that the ads are being well noted and read. Esmark finally developed a total communications program, including advertising, public relations, all printed material and brochures, and meetings with security analysts, he points out. And the company plans to survey its audiences after a year of ads "to see where we are."

The Visible Company

Another broad objective of corporate advertising is to continue the awareness, or to reposition the "visible" company: Bob Booth, Metropolitan Life's vice-president for advertising, tells the *PR Journal* that his company's corporate advertising "tries to build up in the public's mind an impression that Metropolitan Life is a good company to do business with. To us it's presenting the character of the company in a favorable way, so that when our agents call on prospects, these people might be a bit more predisposed to see them, rather than see another company's agents, or to decline to see any agents. We're really not carrying a sales message. We're trying to say that we're a helluva good company because we're people-oriented, aware of people's problems, and we can help them plan for the future."

Metropolitan Life surveys public attitude periodically to find out "whether people think well, or better, of us, or less well than they did a few years ago, and in what categories. We have a lot of faces toward the public—our agents, group insurance, and a million other things—but advertising is one of those faces, and our agency, Young & Rubicam, measures periodically to see if our message is getting across. Right now we're getting very favorable reaction from the public, and from our field force. Our agents tell us that the people they call on are getting our messages. And they're a very volatile bunch of guys who let us know pretty fast if they don't think what we're doing is much good!" Booth notes that Metropolitan Life is utilizing television, and magazines, and will be going into radio again this fall fairly heavily, with an expanded program. It's used radio for the last year and a half.

To Change Image

Corporate advertising can be powerful where you have a lot of awarenesss, but need to reposition a corporation from "an old idea, strongly perceived," to a new idea, as Ries Capiello Colwell is doing with its client, Western Union. "The company's old business is the telegram, and its new business, the business of the future, is the construction of a series of communications networks such as Telex, TWX, satellite communications, and Mailgram (which utilizes the Postal Service)," Jack Trout explains. "Most of our ads for Western Union don't only deliver the corporate message, repositioning the company, but sell all the way—promoting Mailgrams, TWX, Telex. Most corporate advertising has a tendency to drift out the door, and into space and gone. We're driving hard all the time to reposition, but most people looking at these ads think they're just ads from the telegraph company selling its services. To me a

great corporate ad is one that looks as though you're selling something. But at the same time you're driving in the corporate point you're trying to make."

The company that's already successfully "in conversation" with its publics through corporate ads and a total communications program will likely have an easier time explaining a problem situation, or educating the public about whatever is creating a problem for the company. Good reason enough for utilizing corporate advertising. But a corporate campaign can come to the aid of a company that never before had a corporate program, or had an obscure one, but suddenly needs to talk out important problems with its publics.

There appeared, Childs recalls, "to be no pressing reason to adopt another approach. In the early 1960s public attitude toward business was generally favorable." But, he notes, about six years ago public attitude began to shift toward criticism of business.

In 1970 Texaco responded to public concern about air and water pollution with ad messages about steps the company had taken and were about to take to protect the environment. "There was a marked increase in the percentage of our total advertising effort directed toward corporate objectives," Childs says. "We were on our way to an expanded corporate advertising effort. We also placed ads about the energy supply in selected magazines. Then in mid-1973 the energy crisis struck hard, and replaced environmental issues as the prime public concern. Our copy strategy changed from the environment to concentrate on energy supply, and gasoline and fuel conservation. We had two objectives: To develop a greater understanding of key matters affecting Texaco's ability to supply the increasing demand for energy, and to encourage conservation practices to ease the strain of gasoline and fuel shortages caused by the Arab embargo. We had two target groups: leadership groups in and out of government; and motorists and homeowners and the general public.

"Our current objective," Childs says, "is to educate the public about the energy situation, because the

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The Oil Industry—In Hot Water

We're all aware that the oil industry now has such pressing needs. John Childs, general manager of worldwide advertising and sales promotion for Texaco Inc., believes that much of the industry's present lack of credibility with the public stems from the industry's not giving enough emphasis to broadscale communications before 1970. The industry, he told the MPA corporate advertising seminar, failed to tell the public how it works, why it works that way, and about the "genuine problems that the industry was facing." The industry failed to stimulate Congress to take action to remedy the energy situation before the shortage, and failed to stimulate the public to spur Congress, he notes. "We had not done as good a job as we should have in bringing our story to the people and their representatives. We sincerely believe the facts are on our side, but we failed to bring those facts home to the public. We cannot afford to fail again. That's why oil industry corporate advertising has expanded so significantly in the last couple of years."

What corporate advertising there was at Texaco in previous years was related to the financial field, and placed in financial publications; or it concerned industry matters such as the construction of new refineries, and was confined to the business press.



Steel Service Center Ad

public still has many misconceptions. Through research we keep a constant watch on public attitudes. At present almost three-quarters of the public believes the energy shortage is serious. Almost half accept it as a long-term problem. The oil companies are seen as the most responsible for the energy shortage. This attitude is most pronounced among the better educated and higher income segment. Half of the adults surveyed said they were not very satisfied with the efforts of Congress to relieve the energy shortage."

The strategy behind Texaco's corporate campaign is to emphasize "positively communicating the company's ongoing activities to provide needed petroleum supplies. Credibility is an important objective to us," Child stresses, "because credibility toward the oil industry remains very, very low." Besides reaching all adults in the motoring public, Texaco ads aim at thought and opinion leaders, the better educated 25- to 49-year olds with incomes $15,000 and over, because they are most likely to "call for a positive coherent national energy policy." Texaco is running, through the rest of this year, in both print and television. The print campaign consists of four-color spreads in national magazines, financial and trade publications, three-quarter page ads in selected national newspapers, and some local newspapers.

Childs notes that Texaco first pre-tested various subjects to find where the highest degree of public interest was, then talked about these issues in the ads. "After enough time has passed," he says, "we'll have research done to determine how well the ads have done, and the reaction to their believability, and the effects on Texaco's corporate reputation."



ITT Ad

Most Asked Question About Corporate Advertising

The American Assn. of Advertising Agencies' librarian, Marilyn Bockman, tells the *Public Relations Journal* that the question she's asked most by advertisers researching corporate advertising, is, "How do you know what you're getting out of corporate advertising? How do you know if your corporate ads are "paying off"?

Even experienced corporate advertisers can find this a sticky question. Wendell Larsen, vice-president for public relations, Chrysler Corp., Detroit, tells us, "To be quite frank, I find it very difficult to put into a justification for corporate ads. Corporate advertising is as difficult to measure as public relations. We've tried in the past to measure our effectiveness, and other people are still trying to determine the payoff of corporate advertising. But in my judgment, attempting to justify it in that manner is really a futile exercise."

As we've already discussed in describing the experiences of other corporate advertisers, research to measure attitudes and awareness of the target publics is usually the best and only way to measure the effectiveness of corporate advertising. *Objectives and goals must be set.* A benchmark study must be done before a campaign, followed by another study after the campaign has had its chance to influence and inform its audiences. The findings of such studies generally also determine changes in the strategy of the corporate messages.

George Mead, director of advertising and promotion for AMF Inc., White Plains, N.Y., tells the *Public Relations Journal:* "AMF evaluates its corporate advertising performance by measuring how well objectives are accomplished. We do this with continuing consumer and financial community research before and after each campaign. We track these results over a period of years against consistent advertising and audience characteristics.

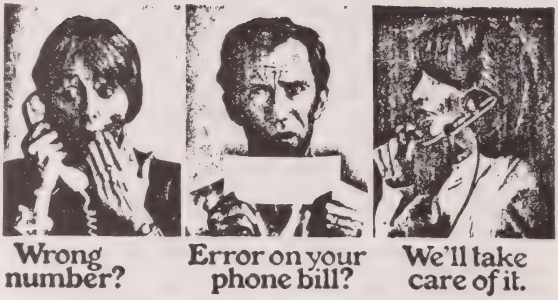
"The justification for our corporate advertising expenditures," Mead says, "is the communication of information about what AMF is, and what it does, in order to build a better and greater awareness of the company. Through this accomplishment we believe our corporate name will add extra value to our many leisure time products.

"We believe that AMF is gaining awareness through corporate advertising, not only for itself, but through association with the brand names which help make up AMF. Names like Ben Hogan, Harley-Davidson, Head and Hatteras. Where five years ago we were thought of primarily as a bowling company, research tells us that we're now recognized as a diverse leisure products and industrial equipment manufacturer and marketer.

"The 1971 name change from American Machine & Foundry Co. to AMF Inc. is beginning to have meaning," Mead reports. "Our ultimate aim, which we believe to be of great value, is to make AMF a household word in the markets where our products are sold. We're sure this will help us gain additional market penetration in those key markets from which will come future growth and profitability.

"Over the past four years, we've used both national print media—business and consumer—and network television, to carry the AMF corporate message to the business and consumer audience we want to reach. On television we've used 'specials' on both NBC and CBS, and sports continuity programming on ABC. In magazines we've used at different times and together in various combinations, *Time, Newsweek, Sports Illustrated, Business Week, Forbes,* and *Fortune.* In newspapers we've used the *Wall Street Journal* primarily, to reach the financial community influences," Mead explains.

"AMF attempts to schedule broadcast and print advertising efficiently to balance continuity with impact. The basic philosophy of our scheduling and media selection is to be important wherever we advertise. We also try to alternate use of television and print for maximum reach and frequency within our budget capability. AMF's approximate corporate advertising budget is over $2.5 million."



ATT Ad

There Ain't No Formula

R.L. Fitzpatrick, senior vice-president, administration, Hilton Hotels Corp., Beverly Hills, Calif., tells the *Public Relations Journal*, "Many have tried to develop a formula to definitely measure a return on advertising investments—I know of none who have succeeded. We, at times, measure readership recognition and retention by Starch reports. We measure true ad productivity by consumer request for a particular service specifically advertised." He notes that justification for Hilton corporate advertising investment takes three forms: 1.) Use of media that market research supports as the best rifle-shot approach to defined markets, 2.) Spot Starch reports, 3.) Consumer request.

Hilton uses national business and trade publications "that research and consumer responses best indicate we are reaching the decision makers and other levels of influence for the use of our service," he notes. "We use spot radio and spot television to establish new service themes or unique service developments for which we desire broad public and consumer awareness."

Future Problems

Some serious problems are developing for corporations, and corporate advertising, "the voice of the corporation." James F. Fox, chairman and chief executive officer, James F. Fox Inc., told a *Financial World* conference on corporate financial communications that most industries and corporations are not being heard from—or are speaking with inaudible voices. And this, he points out, "in the face of some of the greatest crises in credibility and confidence that business has ever experienced." He sees

[*continued on page 66*]

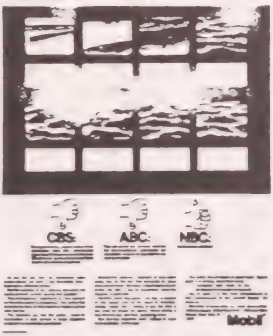
CORPORATE ADVERTISING, OUT...
[continued from page 61]

two trends: 1.) the demand for greater public accountability for business; and 2.) the constant shrinking of opportunities for mass communication of the business story (because "there simply isn't enough newsprint to say all that business has to say.")

This, he notes, has led many companies to see advertising as "the medium of last resort available to business." But of late has come the shock of finding that this "last resort" may be—and is being—restricted. He cites the troubles of Phillips Petroleum Co., which before the energy crisis became front page news, set out to develop an ad campaign to help inform and educate the public to the benefits of the free enterprise system (an objective. Fox points out, jointly endorsed and financially supported by business, labor, and education in the Joint Council on Economic Education). Two television networks rejected Phillips' commercials, and the third approved it with minor revisions. An optimistic note: 103 independent television stations ran the commercial as a spot.

Truth-In-Opinion?

Then Mobil ran into similar problems. After running three television commercials expressing its view of the energy problem, Fox explains, "a small group of liberal senators and Congressmen proposed that the Federal Trade Commission apply 'truth and accuracy' product advertising standards to corporate opinion advertising." Two of the three networks later refused another Mobil commercial that simply suggested that the public express its views on off-shore drilling. Cautions Fox, "Oil companies, food manufacturers, drug companies, and electric utilities may be under fire today—it could just as well be your industry another time."



Mobil Ad

An article by Patrick Maines in the September 2nd *National Review* points up another emerging problem for corporate communications. Says Maines, "On April 16 of this year the United States Court of Appeals for the Third Circuit handed down a decision, which, if upheld, could inhibit corporations from expressing political views during an election campaign—and perhaps at other times as well." The case came about when a speech by Bethlehem Steel chairman Stewart Cort, "Speak Out for Truth," delivered before the Rotary Club in Jacksonville, Fla. in June 1972, pointed out that certain politicians (unnamed but presumably George McGovern, among others) were making reckless and irresponsible charges about the business community. The corporation later prepared an ad summarizing the major points of his address, which appeared in August. In October a Bethlehem Steel shareholder, Richard Ash, moved for a primary injunction—and later for derivative damages—banning the company's sponsorship of the ad, alleging it violated the Federal Corrupt Practices Act's prohibition of corporate contributions to candidates for federal office. That is, Ash charged that the ad was an illegal political contribution to Richard Nixon's campaign.

OUTCOME SERIOUS

There could be serious problems for business if Bethlehem should lose this case, Maines points out. Because the law cited bans corporate contributions to a candidate for federal office or to a political party—*at any time*. "How long would it be, were Bethlehem's directors found guilty, before stockholders sues in areas heretofore unchallenged as public issue based on the Federal Corrupt Practices Act?" Maines asks. And what about institutional ads, published in non-campaign years, that have as their intent the influencing of political attitudes or questions of public policy?

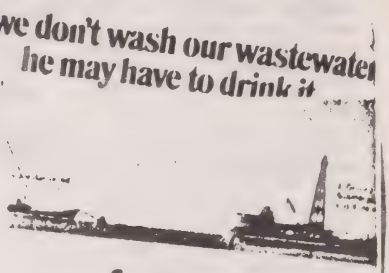
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Exhibit 62: "Advocacy Advertising"

Advocacy advertising shows the flag

by John E. O'Toole





Seafloor oil wells.

Saving energy

American industry offers a tremendous potential for energy savings right now.

A year ago this month, I gave a talk, *"High Dudgeon Replaces Low Profile,"* that brought me a good deal of mail, both sacred and profane; that brought me into a running debate in print with a Chicago columnist and into chastisement on the editorial page of *Ad Age;* that brought me invitations to a number of additional platforms; and that brought me nary a nickel's worth of business.

All of those developments—save, perhaps, the last—convinced me anew that the subject, advocacy advertising, was as fascinating as I had felt it to be.

For it seemed to me that it was almost a new form, while not a new medium, of mass communications; that it filled a vital need exposed by the bourgeoning information requirements of a complex society; and that it offered corporations a means of fulfilling their obligation to, or social contract with, that society.

I use the adjective "new" although several oil companies were already embarked on such programs, and my research showed that advertising had been put to such a use in 1936 by the California chain stores to fight a discriminatory tax.

I'm referring, of course, to the whole subject of "idea advertising," "issue-oriented advertising" or as I called it—with a pathetic proclivity toward alliteration that once led me to write, "There's a Definite Difference in Delsey"—advocacy advertising.

The premise is simply this. There

are two major forces involved in an increasing number of issues affecting all of us: the system and the adversary culture.

The system is made up of industries, businesses, financial institutions that provide people with goods, services, jobs and a unique way of life. It's not perfect. It breaks down in places. But, all in all, it's served us pretty well.

The adversary culture is composed of those in intellectual and academic pursuits, some political activists and "consumer interest" groups who seek basic changes in the system. They aren't perfect, either. But they aren't always wrong.

Both groups are fulfilling legitimate and essential functions. Each seeks to affect public attitudes toward its point-of-view on the theory that governmental decisions reflect the will of the majority. But in these complex and impersonal times, the compaigns are waged, increasingly, in the media.

Enter the press

So the press enters the equation as a third element. And here, I believe, is where a warp occurs.

It is neither surprising nor entirely reprehensible that the voice of the adversary culture is more dominant in the media than that of the system. One role of the press is to question established institutions, directions and processes. The adversary culture provides the questions. They deal in crisis and confrontation, the stuff of which news is made.

The responses of the system are seldom characterized by excitement, immediacy or human interest.

Nor can "objective reporting" be relied upon to balance out the issues. First of all, I never really believed there was such a thing. Any complex event, processed by a human mind into a logical sequence of words, becomes altered. And when those sequences are rejected, shortened and given relative emphasis by a fallible editor, objectivity becomes diluted at least.

Objectivity is an ideal to be pursued but never captured. And, despite the new journalism, there are still many reporters who see their jobs this way. But television news specials seldom even attempt that much. The program has to be held together by some point-of-view or it's like watching paint dry. And the point-of-view is seldom that of the system.

So the press, by and large, is an advocate for the adversary. It seemed to me last March—as it does now—that advertising is the only means available to provide the balance—an advocate for the system and for individual corporations within that system. It is a different kind of advertising than most of us are used to, but it is a legitimate and, for the times, a highly appropriate mutation.

Role of advocacy advertising

Advocacy advertising is not, as some critics responded, an attempt to control information. Quite the opposite. It adds to the supply of fact, opinion and interpretations from which the public shapes its own conclusions. And with issues becoming increasingly complex, more information has to be better than less.

Indeed, the issue of advocacy advertising itself quickly became more complex. First, the fear engendered by the Fairness Doctrine of the Federal Communications Commission caused broadcasters and networks to shy away from commercials that, in their view, treated controversial subjects. So stringently have they applied their interpretation of what is controversial, they've all but ruled out broadcast as a medium for advocacy advertising.

In addition, I have doubts as to whether issues as involved as these often are can be fairly or adequately dealt with in a 60- or 30-second commercial.

Second, and incredible as it may seem, questions have been raised as to whether companies should be allowed to put forth their points-of-view in paid space.

In this regard, the Association of National Advertisers filed an *amicus curiae* brief in a case, unrelated to this issue, against the E.F. Timme Company which revolved around their commercials for imitation furs. The brief was intended less to influence the outcome of the case than to nail down some issues for the future. It posed this question: "Does the fact that an utterance is in the form of a commercial advertisement expel it from First Amendment territory, especially when its subject matter is one to which there is a public interest?"

Third, Senator Philip A. Hart (*D-Mich.*) called for an Internal Revenue Service and Federal Power Commission investigation of oil companies and utilities, claiming that their advocacy advertising is not a legitimate business expense and should be paid for with after-tax dollars. This is on the basis that the advertising sought to influence legislation in favor of the companies.

The American Association of Advertising Agencies has filed a position paper with the Hart subcommittee, pointing out that this kind of advertising is a requisite of corporate social responsibility.

Company efforts so far

So the path is not without its brambles. Still, a number of companies and associations have been engaging in advocacy advertising in the past year.

One of the best single-shot efforts of 1974 was, in my opinion, an ad signed by the employees of Pan Am and seeking public support for their beleaguered employer. It talks of the governmental policies that place Pan Am at a competitive disadvantage against foreign carriers and about the fact that a foreign nation can purchase a U.S.-made jet for substantially less than Pan Am can.

Some of these things we've heard before, but they become more credible, more personally involving, when presented by a group of hard-working people concerned about their jobs.

The American Electric Power Comanies Association launched a campaign early on advocating the exploitation of our coal resources as a partial answer to the oil crisis—or crises.

This series has been characterized by rational, well-documented, persuasive arguments and by that rarest of all virtues in this field, consistency.

However, it is marred by the manner in which it seeks to involve the casual reader. They chose to set up a "villain," the oil-rich, insidious Arab sheik. The tactic reminds me of the fat, grasping American capitalist we used to see caricatured in Russian journals. It's too facile a simplification for today's reader.

By and large, however, advocacy

MR. O'TOOLE *is president, Foote, Cone & Belding [New York]. This article is based on his talk last March before a* Fortune *Corporate Communications Seminar at Tarpon Springs, Fla.*



O'Toole: ". . .there's high risk in a low profile. . ."

advertising has belonged to the oil companies, and the quality has varied considerably.

An ad by Texaco, a response to the rage that greeted oil companies' first-quarter earning statements last year, did little good, I think. It had bar charts and dollar figures too big to have any personal meaning for the reader. He or she has to perceive immediately some pertinence to his or her life and problems or the reader never will plunge into the body copy.

Mobil's leadership

The clear-cut leader in this category was from the beginning, and is today, Mobil. Theirs is a coordinated, well-planned program working on several levels. I don't know if that's the way it started, but good fortune and good direction have caused it to develop that way.

On one level is the company's support of much of the best in public broadcasting. For a company that claims a social conscience, this is visibly putting money where the mouth is.

In addition, Mobil is sponsoring high-quality programmimg on commercial television using their commercial time—often not all they're entitled to—for documentary depictions of their people seeking new sources of petroleum.

More feisty in print, Mobil started a magazine series last year. Interesting, provocative and with a point to make.

Mobil's op-ed newspaper campaign featured, in the beginning, ads like the well-remembered, unassuming entry, "Musings of an Oil Person." These were very direct counter-attacks against the adversary. Many still are, but an increasing number of their op-ed ads treat subjects broader than the energy crisis.

Standards for effectiveness

This has been a very cursory review, but enough on which to conclude that the era of advocacy advertising is here and that it has progressed sufficiently to define some standards for an effective campaign.

1. *The program should clearly communicate,* through subject matter, copy style and graphics, a unique, credible and personal identity for the company. People listen to, and buy from, someone they know and like and can recognize. This holds as true for an idea as for a product.

2. *The dialogue with the public should begin long before the company or industry is under siege.* It's just good business to let your various audiences know who you are and what you stand for, and the acceptance and credibility built up through this kind of long-range program is beyond price should you have to suddenly present that reader with your viewpoint on a highly controversial issue.

Mobil began its corporate dialogue with the public four years ago. A number of our clients, Hallmark being a notable example, have, through their communications programs, created a personal identity and an acceptance that not only helps sell products, but can be of enormous value should they have to enter the lists with an aggressive adversary.

And who can tell, these days, what industry of corporation will be next? Who would have thought, last March, that the sugar companies would soon rank slightly below Adolph Hitler on the housewife's popularity list? Or that AT&T would be hit with a Justice Department suit?

3.*The program should be based on a healthy respect for the reader's intelligence.* Flag-waving, posturing and preaching the virtues of the free enterprise system are not going to work today. Facts and persuasive reasoning will. Herb Schmertz, vice president-public affairs for Mobil, is convinced there's a great hunger for information about the oil crisis on every level. His program is successful because the ads satisfy that hunger.

4. *To be effective, the program must interest, involve and persuade the reader* in terms of his own life and the things that are important to him.

Simply shouting "foul" won't do that. Throwing a bunch of numbers at him in a headline won't do it. Talking about your earnings and your costs won't do it.

But talking to him about *his* costs might. Talking to him about *his* needs and *his* home and *his* family might. And since most public issues are directly related to those things, you can involve him personally in your problems and your programs because, in that sense, they are his as well.

5. *Finally, if it were my program, I'd want some measure of its effectiveness.* This requires a definition of target audiences in both demographic and life-style terms and it requires a clear set of objectives.

Then, before the program began, I'd do a benchmark study to determine levels of awareness among those audiences and attitudes having to do with the stated objectives. A subsequent study every six months would give a pretty good indication of how well the program was doing in attaining its goals and where it could be strengthened to attain them faster.

I realize, though, that even with this kind of measurement, a program of advocacy advertising for a company demands a certain leap of faith, a commitment, a kind of courage from its corporate management.

But I'm convinced that we're going to see more and more corporate managers displaying that kind of courage. Because, as the seven oil company executives who were roughed up in public by Senator Jackson's subcommittee last year discovered, there's high risk in a low profile these days. ☒

Exhibit 63: "Global Look"

A global look at advocacy

A preview of the IAA's current study of "The Use of Advertising in the Public Interest" as practiced around the world

by **Sylvan M. Barnet, Jr.**

Our third book shows promise of having a much broader appeal than anything the International Advertising Association has done before. We have started out by titling it: "Speaking Out: the Use of Advertising in the Public Interest...."

To begin with, the subject is important; it involves large expenditures in some countries. *Media Decisions* in June estimated U.S. corporate advertising expenditures of $6.5 billion, of which *as much as half* involves some aspect of advocacy or point of view. The Association of National Advertisers in a survey of 114 large companies found that 30 percent to 35 percent of corporate advertising was on environmentalism, energy, or concerned explanations of the capitalistic system [*see also page 26*]. In any event, the amount is enormous; the number of media is impressive. And this is only the tip of the iceberg.

We are trying to obtain firm figures on the importance of advocacy advertising in other countries—even though the expression "public interest advertising" has given us some trouble. However, in the U.K., for example, the *Financial Times* devoted a booklet to explaining how you can talk to the government, among others, through ads. The text explains: "Economic and political circumstances being what they are, companies with particularly good results sometimes find it necessary while publicizing their profits to justify them as well. It is part of the responsibility of the company to educate the public on a continuing basis about the relationship between profits and other aspects of the business."

Our second reason for undertaking the project is that the subject is a "matter of concern."

At the risk of crying "wolf," I must underline the great *risk* involved in carrying on such advertising. Advertising that takes a public position may be exposed to merciless—and quite unfair—criticism. It has got to be effective. However, if done correctly, it can be very important also for agencies and media.

This brings us to the third reason why the IAA undertook the project: *responsibility*. Some agencies and media seem unaware of the great power in their hands—to mislead the public, consciously or unconsciously—or unaware of the potential for damaging the fortunes of the advertiser. Thus, questions of *fairness* and *accountability* enter in, which must be discussed in a sober way in the final study.

MR. BARNET *is chairman, IAA Sustaining Member Advisory Council and senior partner, Barnet Associates. This discussion of the IAA's study of advertising in the public interest is based on Mr. Barnet's presentation to Sustaining Members during the IAA symposium on "Multinationals in Confrontation," September 23-26, at Geneva, Switzerland.*

Eight objectives

We set eight objectives for this study of, as a working title, "advocacy" advertising.

- To estimate its current importance and impact.
- To inventory the subjects involved.
- To look at the alternatives of media strategy and creative approach.
- To pin-point *who* takes the decisions that get such campaigns going—and who does the work to make them effective.
- To describe the organization and execution of the campaigns.
- To deal with the entire area of *problems* posed by undertaking, executing, and following up on this enormous new category of advertising.
- To try to get an idea of the results of such advertising, as an entire category, not just in terms of individual campaigns—and thus assess its *value*.
- And to put all the foregoing into a context of *fact*—using country summaries as we did in the Self-Regulation volume, and more detailed case histories to dramatize specific problems and opportunities.

We have employed four stages of research: out to the field for chapter reports, from there to advertiser contacts, then analysis of the material, and finally a check-back before publication with everyone involved.

There was a certain amount of confusion about the title of the project despite elaborate explanation and precise definitions in the instructions. Some confused this kind of advertising with *"public service advertising."*

And, in some countries, Britain, for example, economic developments aggravated the controversy about whether or not such advertising should be used at all—especially by governmental bodies. And our respondents have taken greater pains—inevitably taking greater time—to give us the most accurate possible report of what is going on.

Because some countries report almost *no* advocacy advertising of any kind, the concept of profiles for every country doesn't make sense—so we prefer to integrate the country material in the text.

More precise nomenclature

And, we propose a more precise

nomenclature for *advocacy advertising*—to clear up the confusions which the initial title seems to create.

Our concern at the beginning was over the possibility of mis-translation: "advocacy" has connotations of "advocate"—i.e., *lawyer*, in most languages other than English. We hope we have found satisfactory translations into other major languages—French, German, Spanish, and Italian—and we think we can avoid misunderstanding.

The replies from the field, like our research in New York, underline the need to emphasize the element of *advocacy*—which the expression "public interest" tended to underplay. We are not just talking about corporate advertising which generally agrees with and promotes public policy...but paid advertising which promotes a point of view which the advertiser *presumes to be* in the public interest...but which, by definition, is open to question by people who advocate one or more positions partially or wholly *in opposition*.

That is, this is advertising which does not obtain automatic agreement from its readers; it is advertising which challenges its audiences *to agree, or disagree*, to a point of view.

Findings thus far

Now to tell you just a little about material thus far received and what it indicates. Obviously, with only a little more than half of the questionnaires in—and without returns from such major countries as Italy, the Netherlands and Brazil—it is premature to draw firm conclusions. However, Prof. Stridsberg, who is preparing this study as he did the one on Self-Regulation, has given me this preliminary material.

This so-called advertising in the public interest or advocacy advertising has as its principal subject matter some question of public concern, *not products or services*. It has been *paid for* and *signed* by a firm, an association, a group, or a government.

Now, the first thing we have learned is that there often is no neat dividing line between this type of advertising presenting a position and advertising which sells a product. There are, of course, many " public interest " ads which simply discuss a problem like environment or women's liberation, deliver their message, and sign off with the company name.

Yet, in IBM and Kellogg ads, for instance, the copy—in addition to informing the public in an effective way—also tends to increase product sales. However disinterested the advertisers' intention at the outset, a commercial benefit has been utilized.

Often the position which the advertiser is urging on the public is one which will overcome a sales problem or contribute to sales effectiveness.

So, the first finding concerns *the mixing of product " sell " with information or advocacy* which the advertiser deems to be in the public interest.

This poses a big question. To what extent does "product sell"—openly or implicit in the advertisement—interfere with the *credibility* of the ad?

It would be easy to conclude that the best ads "in the public interest" are those which clearly exclude any product-sell or profit motivation. But (1) we aren't sure this is true, and (2) we're not sure it is even possible. For that matter, are there advertisers willing to spend money in a completely disinterested manner?

Shift in execution

Next point. There has been a pronounced shift in the nature in which these ads are executed.

Formerly, such ads were defensive, meek, if not timid, and coy about the subjects they discussed. They emphasized noble sentiments. They were so respectable that, in large countries, they were generally prepared by associations incorporated as not-for-profit. As for example, campaigns for blood donations, energy saving, sobriety, etc.

More recently, the tone of "public interest" has become more aggressive, less blandly in favor of "Family, Work, and Country"—more militant. While the Advertising Council in the United States was still researching consumer understanding of the U.S. economic system, an organization called The Business Roundtable had already concluded they could be more tough-minded in *paid* advertising and were running ads in Reader's Digest.

By far the most aggressive advertising, discussing controversies like inflation, energy, conservation, environmental protection, nationalism, and balance of trade, has been run by the big oil companies. While Exxon has been using television, with superbly executed color commercials, Mobil has spent large amounts on a continuing "advocacy" campaign. Mobil's headlines have become increasingly aggressive, expecially in bewailing the fact that no one has been listening.

This trend has been so marked that organizations that never advertised at all, or at best ran the blandest of copy, now come galloping into the fray, fighting mad.

The higher level of aggressive-

(Continued on next page)

SPEAKING OUT

"Speaking Out: The Use of Advertising in the Public Interest" is the third international survey of contemporary advertising practices conducted by the Sustaining Members Advisory Council of the International Advertising Association.

The use of advertising to present the points of view of individual business firms, other corporate entities [including government agencies and para-government agencies and para-governmental organizations,] and special interest groups is a growing trend worldwide...a seemingly inevitable product of consumerism, environmentalism, and a host of other public concerns.

Until recently, the business community rarely used advertising media to take position on public issues. But within the past five or six years, the situation has changed. Now, in many countries, individual business firms, other corporate entities, association and trading groups are vigorously, even aggressively, using signed advertising to tell the public where they stand on questions of public concern.

As reported in the press, the advertising community is not unanimously enthusiastic about the use of advertising by private firms to offer their points of view on these questions. Some find it inappropriate, some feel it should be restricted as to media employed, some support stringent regulation of public-interest advertising of any kind, whether from government, consumer, or private sources.

The purpose of the IAA survey is to document, on a multi-country scale, the extent and nature of public interest advertising by the business community to determine its economic and social significance.

The final product will be a book of about 300 pages, available around the end of the year, plus a variety of supporting materials and activities to publicize the IAA findings and stimulate discussion on the subject.

ness—is the second major observation of our study so far.

Is this kind of aggressiveness desirable? Does it risk alienating the audience?

Change in PR techniques

Further, it would appear that, in some countries at least, there has been extraordinary change in "public relations" techniques.

Traditionally, the public relations practitioner talked to government and business circles, journalists, and "influential" people of all kinds to obtain third party endorsements. Advertising was the *last* tool he would turn to. Now, abruptly, advertising appears to be one of the *first tools* to find an adequate and controllable forum. Indeed, the major public relations firms now have multi-million dollar advertising campaigns for their clients. Why?

One general reason given by advertisers is failure or reluctance of some editors to report fully the advertiser's viewpoints. Even the *Financial Times* formally recognizes the need to change the attitudes of journalists and editors, and the possibility of using advertising to do so. There is also the need for *precision* and a need for *repetition* which only signed advertising can guarantee. This is the *third* big discussion area.

Another aspect of this problem is that much of the advocacy advertising is run in media that is already favorable to its cause rather than in opposition media—or in media that is read by directors of boards and stockholders rather than by the general public.

Some major corporate campaigns about energy, oil prices, and even environmental concerns appear in business media, not mass media. And despite complaints about dissident youth and university professors unfamiliar with marketing, corporate endeavor and profit need, most advocacy campaigns hardly ever appear in the so-called radical or intellectual press.

This reluctance to run in the right media to reach the target audience raises some questions about the real objective of such advertising, underlined further when few such advertisers express interest in measuring the impact of "advocacy advertising" through market research, even going so far as to deny that such research is possible.

Next there is the question of whether or not some media will accept advertising of this controversial nature.

In the United States and United Kingdom, this is an enormous problem—particularly because of the legal doctrines, subject to interpretation and negotiation, covering "fairness." The so-called "Fairness Doctrine" in the United States has sharply reduced the amount of public-service advertising which used to fill spare time and un-sold space in U.S. media. The simplest advocacy message may be greeted with a demand for equal time and/or space, which the media are obliged by law to give.

In the United Kingdom, the government is said to be holding back on a L2 million campaign to explain its economic concepts, for fear that the Independent Broadcasting Authority "...armed with its remit to pursue impartiality at any price, should turn down the campaign as too politically explosive."

The media, in fact, are going through a "fairness" crisis of their own—coincident and linked with the crises over consumerism, environment, economics, and general public honesty. There is a tremendous opportunity for them to find abundant new revenues from advertising of people who want to speak out. But they are agonizing over how to fulfill their responsibility to present all points of view to their audience fairly—and how to avoid either being attacked or caught in the cross-fire between warring sides.

A fifth major question area emerges from this *problem of fairness*.

Government campaigns

Not only do private companies and groups feel compelled to turn to paid advertising, but all kinds of government bodies are now doing so.

Questions are raised whether government "advocacy" is an appropriate kind of activity for advertising. Should restraints be placed on it? Are some advertising techniques in themselves "unfair" in getting across messages with direct or implicit political impact? Professor Stridsberg, the project director, reports that the use of advertising by governments to get across their points of view is becoming as important as, or more important than, business use of this advertising technique.

It should be emphasized that, for the most part, we are not talking about the kind of "public-service" advertising on the part of governments, whether free

Multinationals prepar

"Multinationals in Confrontation: How Can Better Communication Help Meet the Crisis?" was the title of the International Advertising Association symposium held September 23-26 in Geneva, Switzerland. Content of the meeting has significance for exclusively domestic as well as international companies.

As the symposium's official program expressed it: "Multinational corporations throughout the world are under attack in parliaments and in the press, on radio and television, in educational institutions, and from public platforms of all kinds."

The program's introduction added, (the symposium) "will deal directly and pragmatically with ways in which multinational corporations may communicate their virtues in positive fashion through public relations, advertising and marketing techniques to all the publics with which they are intimately concerned..."

In his keynote speech, Professor Ronald E. Muller, American University (Washington, D.C.), author of "Global Reach," said, "I support a continuing role for private enterprise in those economies where it is a basic social institution. At the same time, I am equally certain that its role will be modified and changed in terms of government necessities to meet the challenges of instability.

"To this end, your initial task, I suggest, is to start listening *first-hand* to your critics and secondly to engage *first-hand* in dialogue which has a specific purpose: the task of re-orienting the focus of yourselves and your critics away from making forum and platform either an avowedly anti- or pro-business rhetorical stageshow. But rather to develop a new orientation for a mutual social effort to understand—which none of us really do today—the many forces of social change which breed systemic instability. One of these is certainly the systemic impact of your own revolutionary institution, and to this you must either take the lead in giving recognition, or it will be forced upon you."

Democracy—free enterprise team

In his keynote address, Jacques G. Maisonrouge, chairman and chief executive officer, IBM World Trade Europe/Middle East/Africa Corporation (Paris), said in part, "But as a political-economic

or paid for, which was explored in the EAAA study two years ago. We *are* talking about advertising which is not just promoting a generally acceptable idea, but selling a political or economic policy *the value of which is under dispute*.

The question of governmental use of advertising brings us to the sixth big question—the *major trend toward government* campaigns *across national borders*. For example President Perez of Venezuela took a full page in a September 1974 issue of the *New York Times* to warn the American public what he might do to them if their government didn't cooperate on oil policy. South Africa has protested the unfairness of being excluded from the Olympics because of its racial policies. The United Arab Emirates have advertised the beneficence of their economic development efforts. And, perhaps, most controversial of all, Kim Il Sung of North Korea has run ads to openly apply pressure on the U.S. government.

Governmental advertising into foreign countries was not unknown, especially when it was run in conjunction with ads from big companies, airlines, etc. in special sections frequently organized by the big national and international business media.

What is new is the use of such advertising to "buy a voice" where the countries feel they are not being properly covered by some other country's national media—and to use the space for defense of the foreign country's political and economic policies.

Does such border-crossing advertising violate the sovereignty of the receiving country? Does a foreign government have a right, unconstrained, to do this kind of advertising?

Relationship to economics

The final preliminary observation about trends in "advocacy advertising" concerns the way in which such use of advertising is related to attitudes of economic optimism and the drive to expand. As far as can be judged, the amount of "advocacy" ads—like the amount of public debate in general—is low in very poor countries, and in countries which have long been mired in economic difficulties. It appears to emerge during periods of rapid economic expansion, where all population sectors feel they have the right to their voice in political, social, and economic policy. And it appears to become more strident when such economic expansion runs abruptly into difficulties.

The questionnaires received suggest that there is a cultural difference between countries where "advocacy advertising" is tolerated and encouraged, and others where it is regarded as disruptive and wasteful and of little impact. Even in the United States, the spectre of de-marketing—using communications to reduce sales promises and consumer expectations—has been raised in face of serious recession. This point will be adequately studied and fairly discussed in the final study.

We are studying the multiple aspects of a major advertising trend, in order to develop guidelines that will help the advertising world execute "advocacy advertising"—or not execute it, as they choose. We believe that the discussion *will* have a larger function, and will appeal to a larger audience, because of the questions it will raise. We believe therefore that, as a further product, it will contribute to public and policy-makers' understanding of the advertising process. And this, we think, will be a positive achievement.

or crisis of confrontation

team, democracy and free enterprise with local variations, have proved to be a remarkably effective way to operate, at least in advanced societies.

"I have been talking about the adjustments and refinements which need to be made in the system under which multinational corporations operate. But, let me underscore once again my conviction that the system itself should not be changed and that many of the proposals offered in the name of reform would do more harm than good."

Later, Mr. Maisonrouge said, "We all remember Plato's allegory of the cave and how frightening the shadow on the cave's wall could be if the caveman was gullible and his fire was bright.

"I am afraid that today we are dealing with an extreme case of shadow over substance.

"But Socrates, through Plato, taught us to recognize the shadow for what it was and to focus on the substance.

"The substance is made up of businessmen who ply their various trades all over the world and only want to manage their businesses.

"The substance is a great variety of organizations, undertaking a great variety of business activities, and managed by people with very little in common except the fact they do business everywhere, for the most part, well within the law."

Charles J. Hedlund, president, Esso Middle East (New York), told the symposium participants, "The fact is, of course, that a multinational corporation cannot continue for long to operate in confrontation. It must have the acceptance of government and citizens. And in a world where economic and political conditions change rapidly, it must engage in a constant effort to protect and renew that acceptance.

"The communications challenge that the international oil companies face is to focus attention on the real question here: not *whether* the *companies* have too much wealth and power, which they don't, but *how governments* should exercise the power that they, the governments, demonstrably have."

Local communications

Minister Antonio Oviedo, CPC International, Inc. (Bogota, Colombia), said in part, "...affiliates of transnational corporations should increase and jealously care for their good individual or institutional communications with the local community, so that this and the government become fully appreciative of the benefits derived for the economic and social development of the host nation."

Coenraad Johannes van Geel, general advertising director, N.V. Philips Gloeilampenfabrieken (Eindhoven, Holland), pointed out, "The old style institutional drum beating campaigns of the past are gone forever. Multinationals like Philips are today required to prove that they contribute positively to the societies in which they operate....We must meet the demands made by the media, pressure groups and government that we take it upon ourselves to play a greater role in the protection of the environment, and control of pollution, the furthering of education and the broadening of communications, to name just a few.

"We cannot be all things to all people at all times, but we can show that we are aware of our responsibilities."

Exhibit 64: "Breaking the Vicious Cycle"



Breaking the 'vicious circle'

The most effective corporate advertising operates on the same fundamental principle which makes good product advertising—it deals with a problem [or problems] of the audience and demonstrates how the company is helping to solve the problem[s]. From that "basic, basic," Dr. Wachsler draws on the extensive [and often overlooked] attitudinal research which has been done since WW II to illustrate other principles of practical value.

by **Dr. Robert A. Wachsler**

A NUMBER of observers have shown the sad state of attitudes toward American business that currently exist. This process of increasingly negative attitudes toward business has also been one of increasingly *specific* negative attitudes. For in the middle 1960s there were negative attitudes toward business in general, but not toward very many *specific* businesses. In the late 1960s not only were there negative attitudes toward business, but there began to emerge negative attitudes toward many individual businesses.

Today this process has gone one step further. There are negative attitudes toward business in general and there are negative attitudes toward many individual American businesses. And now there are increasingly negative attitudes toward businessmen themselves.

Just how bad this situation is, is illustrated in some information that Dan Yankelovich collected three years ago, and represents the attitude of the American people toward the statement that business puts profit ahead of the public interest. [*See table next page.*]

This and other specific attitudes indicating profound suspicion, skepticism and cynicism on the part of the American people toward business had led to what I call the "Vicious Circle."

This kind of attitude, encouraged and abetted by many parts of our society, will and is already leading to many real and serious problems for business—such as profit control,

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Business Puts Profit Ahead of Public Interest

	Percent	Index
General public	68	100
Institutional investors	27	40
Individual stockholders	59	87
College youth	84	124
Activists	85	125

Source: Yankelovich, 1972

increasing involvement of government in day-to-day business affairs and the increasing punitive role of regulatory agencies in the business sphere. So, the times have changed. In a time not so far past, the 1950s and 1960s, corporate advertisers talked about benefits of bigness.

In The 1950s and 1960s Corporate Advertisers Talked About:

- Benefits of bigness
- Profits
- Diversity of interests
- New products
- Dedication to research and development
- Technological leadership

In those days, corporate advertising featured the corporation as the "hero."

A good company today

But now look at what the American public considers to be the characteristics of a good company today:

Characteristics of a Good Company

Reliable	76%
Fair to employees of all races	74%
Makes quality products	73%
Gives good value for the money	73%
Pays good wages	73%
Honest, forthright advertising	71%
Leader in technology	42%
Good stock to buy or own	42%
Develops many new products	36%
Very profitable	32%
One of largest companies	32%

Source: Yankelovich, 1972

So it is back to basics if we ever left it.

Back to basics

- Reliability
- Quality
- Value

Today, the *consumer* is the hero and he is asking the question, "What are you doing for me?" Telling a cynical, suspicious, disinterested viewer or reader about your diversification effort will neither interest him nor convince him that you are any different than he already thinks you are. So what then can we do to interest and involve our audience, and persuade the American of the 1970s that he is wrong about his feelings toward business?

Dealing with customers

We have found again and again that the most arresting, effective and motivating way of communicating in advertising is to deal with some of the *problems* that our audience is experiencing right now. And corporate advertising can indeed help in that area by showing how business is helping to provide the solutions to important problems Americans are experiencing right now.

For that is how American business grew to the important role it occupied at the height of its popularity—by day in and day out coming up with solution after solution to problem after problem. Major problems and minor problems. Now, business is still solving those problems, but we're not telling very many people about it and many of our efforts to communicate are being drowned out by far louder voices pointing out the problems that business is creating rather than solving.

If we all know this—and most of us do—why have we not been more effective in telling our story to the American public? To help gain some insight in this area I conducted a very small scale, very informal survey among both corporate and product advertising people to have them tell me what they viewed as the major problems of corporate advertising today. These are the five most common answers to that question, reworded for the purposes of this presentation.

Basically, the professional advertising people I talked to were saying to me there seems to be little or no rationale for many corporate advertising campaigns. Little feeling of consistency in strategy behind many campaigns. Great variations from ad to ad or commercial to commercial in the same campaign and little convincing proof that a given campaign has accomplished anything of any tangible value to the advertiser.

The Five Biggest Problems of Corporate Advertising

1. Generalized campaign objectives
2. Vague strategy
3. Imprecise target audience description
4. No pre-testing of advertising copy
5. Unimpressive proof of campaign effectiveness

What this really comes down to is a basic lack of a consistent, generally acceptable view of what we are trying to do with corporate advertising.

The product advertising people have a very simple model of how their kind of advertising works, which goes from awareness through trial through regular usage which generates sales dollars for the corporation. They have worked their data collection and research systems around this very simple model and have collected a great deal of information to document advertising effectiveness and to identify advertising methods and techniques that seem to work well and those which do not.

What we must do is to develop a similar kind of model for corporate advertising which might look something like this.

Corporate Advertising

Awareness of Company

Knowledge of Products, Services and Deeds

Positive Attitudes

Positive Predisposition Toward Company, Its Products and Its Investment Potential

$$

[*Continued on next page*]

"Corporate advertising is the only counter-pressure most businesses have available..."

In order to fill in the spaces on this simple model, we must start to collect information at each step along the way. To do that we must follow rigorously what I call the Basic Basics of Effective Corporate Advertising. In corporations where these basic basics are followed we see consistent, effective and convincing advertising. For corporations where the basics are not followed we see an in and out and up and down pattern resulting in ads and commercials rather than campaigns, and ideas being tossed out rather than strategies being developed.

This is very dangerous, for in today's climate, corporate advertising is like pushing a boulder uphill. The anti-business pressure and widespread anti-business attitudes represent an ever worsening negative trend in public opinion toward business in general and toward individual businesses. In other words, that boulder, given no counter-pressure from the other side, is rolling downhill and will continue to roll, picking up speed as it goes.

Corporate advertising is the only counter-pressure most businesses have available to slow down and eventually stop that boulder and, hopefully, with enough pressure to start moving it back uphill again. But since the hillside is steep, the pressure must be continuously applied or else the boulder will start to roll downhill again. Therefore, while these basic basics look familiar, perhaps even trite, they must be followed with much more than lip service.

Basic Basics of Effective Corporate Advertising

1. Establish precise communications objectives
2. Set specific communications goals
3. Pre-test advertising copy against communications goals
4. Research total campaign with meaningful measurements

For example, communications objectives can be general: To increase awareness of the X company and develop favorable attitudes toward it. Or they can be very specific and precise such as: To reach 90 percent of $15,000 and over U.S. households at least nine times in nine months; to inform about the various key businesses the X company operates in; to develop favorable attitudes toward the X company in terms of providing a good balance between profits and service to the public.

In terms of communications goals, the goal could be a general one such as increasing knowledge of the X company, or it could be precise and specific such as: significantly increase the number of businesses X company is known to operate in; significantly increase percent of target audience who agree with such statements as "X company is interested in the public welfare," or "X company achieves a good balance between profits and service to the public."

Pre-testing copy against communications goals is a vital quality control step that is not very often taken by most corporate advertisers. For product advertisers, pretesting of copy is virtually universal and is regarded as a key step in any campaign development.

Important here in terms of corporate advertising, is to assure yourself that the pre-testing provides information about whether or not the copy will achieve the specific goals that have been set. For example, let us say that one of our communications goals is to significantly increase *unaided awareness* that the X company is a leader in its industry group. The pre-test research then should be designed to provide information on awareness, by testing the commercial (if television) in a clutter situation among a number of other corporate and non-corporate commercials. Or if in print, to test the ad in context of other competing brand ads.

If a goal is to increase a specifically favorable attitude toward a company, the pre-testing should involve an attitudinal questionnaire among matched groups of exposed and non-exposed pre-test audiences to determine whether or not exposure to the ad or commercial will indeed increase favorability on that attitudinal dimension.

Other research perimeters

Finally, while most corporate advertising campaigns now include a research study, few measure the results precisely on the basis of level of exposure to the campaign. The well-known Du Pont Advertising Research Study reported in the December, 1972 issue of *Journal of Advertising Research* shows just how crucially important it is to classify the target audience on the basis of how heavily they have been exposed to our campaign. Many corporate advertising campaigns are abandoned because research shows a small insignificant change in overall attitude toward the company. This small insignificant change may be a result of too low or too imprecise a media schedule, with those few members of the target audience who are heavily exposed responding very favorably, while many other members of the audience are receiving little or no true exposure to the campaign, responding not at all.

Classifying respondents by exposure level to the campaign can not only give a truer, more accurate picture of the campaign's effectiveness, but will also serve as a very precise guide for the future as to what the most effective level of media exposure would be to produce the greatest amount of change per media dollar.

One last area of information while I am dealing with research. Much of the product advertising community has tended to dismiss academic psychological and sociological research as being vague, imprecise and inapplicable to selling goods and services.

In the corporate advertising area, however, where we are dealing with major attitudinal issues, there is a surprising amount of valuable information of a very practical nature that

can be gleaned from academic research and put to immediate use.

As a matter of fact, we at BBDO have commissioned a young professor of psychology to review the literature in the fields of psychology, social-psychology and sociology since the beginning of World War II in the area of attitude change to select principles and findings which he felt could be of value in corporate communications.

I am now in the process of reviewing this information and putting it into practical terms for corporate advertising and corporate communications. From the large amount of information, I have selected four specific principles more or less at random that illustrate that findings from academic research can be put to very practical use.

Specific Principles

1. To a hostile audience, it's more effective to tell *both* sides of the story than just yours,

   But

   A) Make sure your information *follows* the other side's
   B) Make sure your information is *new* while the other side's is already familiar.

2. The two most important determiners of a presenter's effectiveness with his audience are his:
   A) Trustworthiness
   B) Expertise

3. A presenter will be viewed as more *trustworthy* if he:
   A) Presents *both sides* of an argument
   B) Documents a *consensus* in support of his side
   C) Is *identified at the end* of the message if he is not originally viewed as highly trustworthy.

4. A presenter will be viewed as more *expert* if:
   A) He provides factual *evidence* supporting his position
   B) The evidence he provides is *unfamiliar* to the audience
   C) He appears in a *credible advertising vehicle*.

Exhibit 65: "Grant From Mobil Oil"

This Man Was Made Possible by A Grant from Mobil Oil

by Michael Gerrard

Meet Herb Schmertz: Not even the Medicis could match his $21 million yearly public-relations budget

A framed cartoon hangs by Herbert Schmertz's round desk, near the copy of *Variety* and the painted oil drum he now uses as a wastebasket. In the cartoon, a paunchy man enters his living room to find his wife watching a violinist on the tube. "That's Mr. Panasovich, dear," she says. "Mr. Panasovich was made possible by a grant from Mobil Oil."

More precisely, the mythical Mr. Panasovich was made possible by Herb Schmertz, Mobil's vice-president for public affairs. With a budget of $21 million a year—the equivalent of the profits on 1.3 billion gallons of gasoline—Schmertz, forty-seven, has used big oil's hunger for friends to become a major force in our cultural life. Each week he controls nearly three hours of television time and choice space in leading newspapers. He is starting an "occasional" TV network and may buy a major newpaper or magazine. His influence is like that of Joseph Papp or Norman Lear, but while millions of people see his productions, his primary audience numbers only 535. It is the United States Congress, which largely determines how unfettered and prosperous Mobil can become.

Schmertz's ascent did not begin in January, 1971, with the TV debut of Mobil's *Masterpiece Theatre*, nor a year later when Mobil began buying space for its weekly column in The New York *Times*. It began in 1911, when John D. Rockefeller's Standard Oil Trust was broken into thirty-eight splinters. One of the largest was the Standard Oil Company of New York, or Socony, which became Mobil. Mobil developed in liberal, cultured New York City, while nearly all its sister companies evolved in places more roughhewn, less sophisticated. The archetypal oilman—the swaggering Texan with prehistoric goo under his fingernails, who would as likely punch you as wave howdy—comes from the oil-well end of the business, where the location of an oil strike can be as vital a secret as any of the C.I.A.'s. Texas oilmen shut up around outsiders, including the press. Their companies were run by scientists and engineers who got along better with gadgets than with people. Mobil, without much crude of its own, bought its oil from the Texans (and later the Arabs) and concentrated on refining and selling it. The company was led by financiers and lawyers who prized sociability—the calculated sort, at least. Mobil's style emerged from this New York slickness.

From this slickness also emerged Rawleigh Warner Jr., a Princeton-educated financial whiz who became Mobil's president in 1965 and chairman in 1969. He comes off like a diplomat but beneath this exterior seethes a feisty true believer in the oil industry. Warner hoped to enliven Mobil's dull image, but his efforts didn't get far until he became a patron of Herbert Schmertz.

For his first thirty-five years or so, Schmertz seemed destined to become Secretary of Labor, not oil's chief apologist. The son of a jeweler, he was born in Yonkers, New York, attended New Rochelle High School and then Union College in Schenectady, and graduated from Columbia Law School in 1955. The Army drafted him, and he spent two years in Washington doing counterintelligence work. He then went into labor law, like his older brother Eric, who is an innovative and controversial arbitrator. Herb Schmertz worked as a monitor of union elections, an arbitrator, and a teacher of labor relations. He emulated Theodore Kheel, who is both a crack labor lawyer and a prominent public figure.

In the 1960 Presidential campaign of John F. Kennedy, Schmertz aided with voter registration and with special groups, and he helped launch Herman Badillo, now a leading Puerto Rican politician. ("It's interesting to see what has happened to youthful idealism and where it has led both of us," Badillo now reflects.) Schmertz was rewarded for his campaign work with a top job at the Federal Mediation and Conciliation Service. By the time he left in 1964 to reenter private practice, Schmertz was established in the field, and he remained on call to the government. One assignment to Saigon nearly led him to what he now greatly fears for Mobil—dismemberment—when a bomb detonated near his hotel room. He also got to know James J. Healy, a professor at Harvard Business School, who in 1966 recommended Schmertz to become manager of labor relations for Mobil. "I thought it was the best labor-relations job in the country," Schmertz remembers, and he took it.

At first Mobil didn't totally occupy Schmertz's energies, and in 1968, he took time off to be an advance man for Robert Kennedy. When the campaign ended in tragedy, Schmertz helped organize the train trip that

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Painting by Saint-Singe

carried Senator Kennedy's body to Washington. A few days later, Schmertz was back at Mobil. In 1969, he became vice-president for public affairs—overseer of relations with the public, the press, and the government. He did so well there that in 1973, he was put in charge of Mobil's fleet of more than a hundred tankers, a move widely interpreted as putting him in the possible line of succession to the Mobil presidency. Once that would have been heaven for Schmertz. He loves ships; he sails; he specialized in maritime labor law. "I wouldn't be surprised if he plays with little boats in his bathtub," an old friend of his told me. But this interlude was brief. The Arab oil embargo hit in late 1973, energy bounced Watergate off the front page, and Mobil took more heat than a hippie in boot camp. Herb Schmertz was recalled to his old job; he is still there.

Life used to be dull for the P.R. chief of a big oil company. Oil-state congressmen like Sam Rayburn, Lyndon Johnson, and Bob Kerr guarded the industry's tax breaks and warded off trustbusters. Consumers cared only that their tanks got filled. But by 1973, there was a different Congress, the ecology movement had arisen, and fuel prices were up with the ozone. Schmertz had foreseen problems in 1970, and he had sold Rawleigh Warner on a grand strategy: Concentrate on the movers and shakers, particularly those with friends in Congress. Butter them up with grants to quality TV to give Mobil an image of high-minded sensitivity. Then spray this now receptive audience with ads packed with Mobil's dogma on energy and money. Other companies had helped the arts—Texaco has been giving money to New York's Metropolitan Opera since 1940—but few had been so systematic.

> A CBS executive said: "If Mr. Schmertz wants a network [for Mobil Oil], he can form one." And he is.

To usher in this strategy, Mobil put up over $1 million in 1971 for *Masterpiece Theatre*, British-produced serial dramas in the mold of the earlier, highly successful *Forsyte Saga*. Mobil's first presentation was *The First Churchills*. In 1973, Mobil's most celebrated import appeared—*Upstairs, Downstairs*. General manager Michael Rice of Boston's WGBH, which funnels most Mobil public-TV money, says that Schmertz "was willing to put up big bucks at a time when other corporations were not" and that Mobil's success inspired other firms to underwrite their own shows.

Mobil's grants have uplifted the quality of what is aired—*Masterpiece Theatre* alone has won sixteen Emmys—but they have done rather less to spark new productions. Virtually all the TV as well as most of the other art forms that Mobil has supported have already been produced elsewhere, and when Mobil commissions new works, they're seldom by unknowns. That way Schmertz takes little risk, and feeds few starving artists. "We feel," he says, "that the reputation for quality in everything we do is one of our prime business assets," but the quality is in what Schmertz buys, not creates.

Schmertz even buys advice on what to buy. Employees and consultants screen all the available shows for him; he himself only watches about seventy-five percent of what he ends up sponsoring and a much smaller portion of what's produced. He's less a creative talent than a terrific promoter and deal maker. A major example of his prowess came when Schmertz grew unhappy with the constraints and the expense of sponsoring commercial TV specials, like his *Moon for the Misbegotten*. Inspired by the success of Norman Lear in bypassing the networks with *Mary Hartman, Mary Hartman*, Schmertz helped assemble a syndicate of stations to air *Ten Who Dared*, a repackaged British series about great explorers, hosted by Anthony Quinn. The cost was a fraction of commercial TV rates, and Schmertz now plans similar ventures in a major challenge to the networks.

Mobil usually brackets its commercial TV programs with three-minute "profiles of exceptional but unknown Americans." The vignettes share a theme with other Mobil shows and ads, including *Ten Who Dared* itself and a film of Broadway's *The Magic Show*: praise for the individualist who succeeds by raw spirit and skill, and razzing for the inept bureaucracy. Mobil sees itself as a daring creature that provides oil despite formidable obstacles, that needs great profits to finance great risks, and that could do its job best if big government just butted out. It takes some chutzpah to lump together Columbus, Amundsen, and Mobil, especially since Mobil Corporation has more employees than the Departments of State, Labor, Commerce, and Justice, the Environmental Protection Agency, NASA, and the entire federal legislative and judicial branches combined.

Mobil's impact on program content goes beyond these themes. In the days of the Medicis, most patrons unabashedly controlled their artists. But today the ethic is hands off. Like many ethics, it is mostly theoretical. Despite avowals of interest only in quality, Schmertz has let it be known that his tastes count. He told me that what broadcasters "would like is to be given a big bundle of money and have total leeway, without any strings. That's not my idea of public television. We're as much a part of the public as anybody else." Schmertz's strings are not visible but are no less real. Subtle signals are exchanged, as between lovers. Mobil won't support shows that knock business, and therefore not many are produced that do. This influence may even span the Atlantic, for many British shows are produced with an eye toward an American sale. "Public television stations," a source at one told me, "are trying to understand the psychology of why corporations are giving to TV, and trying to manipulate it." Stations are paying much more attention than before to the promotion package that accompanies their broadcasts, and some stations are going after money from companies with conspicuous image problems.

When WGBH was negotiating with Schmertz over his first grant, in 1970, the station was also producing *The Nader Report*. The WGBH brass learned that a show on deceptive advertising *(Continued on page 142)*

This Man Was Made Possible by a Grant from Mobil Oil

(Continued from page 64) was going to dissect a Mobil gas ad, and they went bonkers. Nobody was told to cut the segment, but it was cut; news of that leaked out, and the segment was restored, though with a Mobil rebuttal—and a WGBH re-rebuttal, which Schmertz now says was dirty pool. There is no evidence that Mobil interfered, but WGBH feared it would.

Mobil *has* obtruded, though, in areas other than public TV. Schmertz angrily cut off his support for the Council on Economic Priorities after it released a report unflattering to Mobil's pollution record. Mobil was also a major donor for a program in business reporting at the Columbia School of Journalism until Chris Welles became its director—eight years earlier (Schmertz has a long memory). Welles had exposed the oil industry's dawdling over oil shale. Once again, Schmertz pulled out.

The commercial networks, on the other hand, have refused to take Mobil's money. At first, Mobil hoped network news would broadcast its line, and for free. Rawleigh Warner spent half a day with a CBS crew filming an interview for the Walter Cronkite show and had lunch with Cronkite himself. The eventual broadcast filled Warner with "utter dismay. What we saw and heard struck us as being one-sided and unfair to the industry. For all my own pains, I believe I got about a minute and a half on the air." Schmertz later told me flatly, chomping on his cigar, "Television isn't interested in ideas."

When Schmertz tried to buy the network time he couldn't get for free, he lost small and then won big. He lost in that the networks, which had happily run ordinary gasoline ads like those featuring Mobil's late Mr. Dirt, rejected Schmertz's idea ads as too likely to be met with demands for free equal time. Schmertz announced, "We have discovered that the networks are not only determined to be the arbiter of what we can and cannot say but that they are going to exercise their power in an extremely arbitrary way." To which a CBS executive responded, "Networks have to be the judge of what they want to put on the air. If Mr. Schmertz wants a network, he can form one." And he is. But meanwhile, rather than sulking, he turned the rejection by the networks into an enormous P.R. victory by offering to buy equal time for his adversaries. This destroyed the networks' fairness-doctrine claim, portrayed Mobil as a champion of free speech, and allied it with impoverished citizens' groups. Predictably, the networks refused the offer, so Schmertz never seriously risked buying time for the Sierra Club, and though he threatened to, he never did appeal to the F.C.C. (Schmertz's fervor for "free debate" may be less than all-consuming, for he refused to buy his opponents equal space for *print* ads.)

To make the networks look even more venal (he was already calling them monopolists), Schmertz also said he would "create a TV commercial that would be an all-time, all-weather, year-round, indoor and out champion for blandness." He succeeded with a pallid,

if not completely neutral, film on offshore drilling (far more sedate than the Mobil "public-service" spots some stations had run for free). ABC and CBS rejected the ad; NBC accepted it. Schmertz and Warner proclaimed in speeches, ads, and at every other opportunity that this stifling of Mobil threatened democracy.

Newspapers, which seldom reject idea ads, are Schmertz's main forum. He chose the prestigious op-ed page of The New York *Times* because "a lot of opinion leaders were in the habit of reading [it] religiously," and he has run ads there weekly since 1972; in advertising jargon, "Mobil Oil position" now means the lower right corner of that page. With sheer cash, Mobil has become a *Times* columnist. Schmertz's own staff—with research help from people scattered throughout the corporation—writes the columns, and Mobil's ad agency, Doyle Dane Bernbach, usually does nothing more than place the ads in newspapers. At the height of the energy crisis, the same ads ran in over a hundred papers; now they're down to about half a dozen, which is enough to reach the movers and shakers.

Other companies have used idea ads—A.T.&T. started in 1908—but few have been as sophisticated in doing so as Mobil. When the ads started, Schmertz resolved to "try to be urbane and good-humored but not pompous or bland." He has, for the most part, kept that pledge. As another Mobilite has said, with characteristic humility, the ads "celebrate good works, excoriate ineptitude, wheedle, cajole, josh, admonish. They are extraordinary in American advertising." They have pounded on three themes, which have helped shape the entire energy debate: (1) Big business, big profits, and rapid economic growth made this country great and must continue unabated. (2) People should avoid greed and lower their thermostats, but even so, energy conservation won't amount to much and we really need more fuel. (3) This search is stymied by irrational environmentalists. (Full-disclosure time: I'm an environmentalist myself, though my work has centered on mass transit—which both Schmertz and I favor.)

Another topic of the ads has been the Middle East. Mobil opposes laws that would ban American firms from complying with the Arab boycott on trade with Israel, for Mobil believes that if the Arabs are angered, they will wreck our economy. To that the American Jewish Committee responded in a letter to the editor of The New York *Times*, "It is hard to believe that any American company would argue so blatantly that if morality clashes with potential profits, morality be damned." Schmertz has visited Saudi Arabia and has actively supported Mobil's stand although he is Jewish—a fact that is nonetheless hinted at as a reason why the Arabs may not trust him enough for him ever to reach the top at Mobil. (Ironically, Milton Gwirtzman, who once practiced law with Schmertz, recalls that an aide in the Kennedy White House, boasting about how many different ethnic groups were represented in high posts, listed Schmertz as German.)

The op-ed ads are for the mighty. For the meek, Schmertz in 1975 started "Observations" in Sunday supplements. Says Schmertz's former assistant Gordon Bowman, "It contains a selection of brief, pithy, easy-to-read comments on current affairs. It is more humorous and less exhaustive than the op-ed articles." Schmertz commissioned the ghoulish cartoonist Charles Addams to draw for Observations; in one cartoon, several rotund demons are sitting around in hell when a drill bit pushes through the rocks above. The chief demon says, "I was hoping those dry holes would discourage them, but they don't *ever* give up!" That sort of thing.

Schmertz has used cartoons in another context. He mailed unsigned pro-oil, anti-government cartoons to hundreds of editors, many of whom ran them as their own. Some P.R. people thought Mobil was playing a dirty trick. Ironically, at about the same time, a group called the Committee for Energy Resources bought ads attacking Mobil for investing in non-oil businesses, but the committee was really a front for a Mobil competitor in such a business. Schmertz declared, "The public has a right to know who is behind any advocacy effort." After Mobil's own unsigned cartoons were exposed by a lively little newsletter on P.R. put out by Jack O'Dwyer, those words came home to roost.

If a reporter attacks Mobil, Schmertz reacts as violently as if someone had lynched his dog. Rather than staying aloof from critics, which would be the usual corporate reaction, Schmertz dons his armor and mounts his horse. When WNBC-TV in New York ran stories upbraiding the oil industry, though Schmertz had refused an interview, he charged the station with a hatchet job and placed full-page ads headlined WHATEVER HAPPENED TO FAIR PLAY? with a text punctuated by seventeen little axes. When—before the cartoon exposé—Jack O'Dwyer reproached Schmertz, O'Dwyer was summoned to Mobil's sumptuous executive dining room for a "table-pounding lunch" during which Schmertz made him feel like a mollusk. "The whole lunch was big shot, big shot, big shot," O'Dwyer remembers. "The height of it came when Schmertz roared at me something like, 'We could buy *Time* magazine. Hell, we could buy *you*.'" (Schmertz now denies ever saying that.) O'Dwyer also tells of reporters who, after knocking Mobil, received from Schmertz "letters that are supposed to turn your fingernails white and that threaten to sue you four generations back."

Schmertz systematically monitors the print and broadcast media. No slight escapes his gaze. He even protests when big oil is insulted in comic strips with talking animals. Though he is justifiably outraged by misstatements of fact, he also yelps and howls over uncongenial interpretation or analysis. He blasted an ABC oil documentary partly because "the historical film clips of John D. Rockefeller, the Teapot Dome,

wooden derricks, and oil gushers were fundamentally irrelevant," though Mobil's own ads later celebrated an 1859 gusher and an 1850 whale-oil shortage. One of Schmertz's targets—William V. Shannon, then of The New York *Times*, now ambassador to Ireland—lashed back: "Every word in my article is accurate, as Mr. Schmertz well knows. Readers must bear in mind that the large oil companies have highly paid vice-presidents, such as Mr. Schmertz, whose sole job is to lay down a barrage of verbal fog."

Though Schmertz leads his industry in imagination and creativity, he is typical in his day-to-day remoteness from the press. Instead of frequenting newspapermen's hangouts, he dines at "21" and Lutèce, and he takes his bourbon at the Pierre. He has filed complaints against reporters with the National News Service but then has pled the first amendment and balked when challenged himself.

No wonder Schmertz doesn't want to substantiate his ads, for though he demands scrupulous accuracy in reporters, his own prose is often as solid as a soufflé. The biggest sustained fallacy stems from his plea for huge profits so Mobil can find more oil. One Mobil ad claimed that only 1.7 percent of its wells ever struck oil. But that's only for significant new-field wildcat-discovery wells, a tiny category; of *all* wells, about sixty percent hit oil. In addition, Mobil puts much of the cash it says it needs to find oil into nonenergy businesses. It is spending, according to *Business Week*, about $1.8 billion to buy Montgomery Ward and the Container Corporation. It bid $337 million on a California land company (and lost) and is building a huge housing project in Hong Kong. There are sound business reasons for such diversification, but the ads say Mobil needs greater profits to produce energy, *not* to protect Mobil.

Mobil is so awash with money that Schmertz may buy into yet another field—the media. (This isn't a new impulse for Mobil bigwigs: In 1879, Hiram Everest, founder of one of Mobil's predecessor companies, started a newspaper called *The People's Journal*.) Schmertz almost resurrected the daily *Long Island Press*; that deal collapsed because he "didn't feel that the *Press* would enable us to do the things we wanted to do," but he's still looking. Although Mobil has refuted it, there has been talk of Mobil feelers into starting a syndicated news service, taking over a film company, and buying a magazine.

Many media outlets are owned by big corporations, but none has so aggressively peddled a point of view or been so desperately concerned with its image as Mobil, and few have been so politically entangled. The two best comparisons are therefore not R.C.A. and Time Inc. but Atlantic Richfield and I.T.T. Under the chairmanship of Robert O. Anderson, who rivals Schmertz as an oil-fed culture baron, Atlantic Richfield in 1976 bought the venerable *London Observer* and apparently hasn't changed it much. On the other hand, in the mid-Sixties, when I.T.T. tried to buy ABC, havoc resulted. I.T.T. officials harassed reporters covering F.C.C. hearings on the merger, and though the F.C.C. approved the deal (which later fell through), there was a strong dissent from Commissioners Robert T. Bartley, Kenneth A. Cox, and Nicholas Johnson. It seems to apply to Mobil as well:

"ABC newsmen and their supervisors will know that I.T.T. is the boss, and that I.T.T. has sensitive business relations in various foreign countries and at the highest levels of our government, and that reporting on any number of industries and economic developments will touch the interests of I.T.T. . . . The threat is not so much that documentaries or news stories adversely affecting the interests of I.T.T. will be filmed and then killed or slanted—although that is also a problem. It is that the questionable story idea, or news coverage, will never even be proposed—whether for reasons of fear, insecurity, cynicism, realism, or unconscious avoidance."

The third major area of Schmertz's activity, after public TV and advertising, is the visual arts. His office on East Forty-second Street in Manhattan is becoming as much a symbol of high culture as West Forty-second is a symbol of low. Mobil's money has enriched the cultural life of many communities, particularly those dense with so-called opinion leaders, like Washington, D.C., and those with many Mobil workers, who will be proud to see the Mobil logo at their favorite gallery. (An early Socony chairman, Henry Clay Folger, founded the Folger Shakespeare Library in Washington in the Twenties.) The District of Columbia will no doubt receive even more Mobil largess when the company moves a major division nearer to Washington in a few years' time. Among the projects Mobil has supported in New York City alone are free admission and late hours for the Guggenheim and Whitney museums; preservation of the Custom House, a beaux arts monument; and the operation of Summergarden at the Museum of Modern Art, an oasis of trees and sculpture—a refuge from the rush of automobiles using Mobil gas. All of which has indeed won Mobil some friends.

Schmertz is also captivated by the graphic arts. He commissioned thirteen bicentennial posters and financed a larger traveling poster show that celebrated such unlikely people and themes as Che, Warhol, and *Hair*. He has promoted museums with bus and subway placards, now the media for some fabulous graffiti. Mobil also sponsors art exhibits in and books about places where it has oil interests, like Indonesia and Nigeria; one Mobil coffee-table volume is *The Genius of Arab Civilization*, published by the New York University Press. (More often, Mobil publishes its own books, which are then distributed by academic or trade presses; the M.I.T. Press is a frequent collaborator.) The Mobil posters line the hallways of Schmertz's floor at Mobil headquarters and were featured at the Museum of

Contemporary Crafts.

Despite his current influence on the arts, Schmertz only recently became active in the field. Before joining Mobil, "he wasn't a philistine," recalls an old friend, "but he didn't have an intense interest in the arts." Now that he can afford it—not counting stock options, he earned $206,000 at Mobil in 1976 (still less than one third of chairman Warner's take)—Schmertz collects abstract expressionist paintings and possesses a splendid wardrobe to cover his tall, solid frame.

Schmertz's charm, connections, and clout have made him a significant figure in Washington. His lavish parties there attract many government officials and journalists. He uses his ties to liberal Democrats—a rare commodity among oilmen and something that helped him get his current job—to considerable advantage.

Schmertz's prime connection (at least since the defeat of California's Senator John Tunney) is with the Kennedy family, which he served throughout the Sixties. He enjoys easy access to Edward Kennedy, who just took over the Senate Subcommittee on Anti-Trust and Monopoly. This friendship may look peculiar, but Schmertz seems to admire the Kennedys more for their style and power than their ideology. He (unenthusiastically) supported George McGovern after the 1972 convention, but Schmertz "was never a bleeding-heart liberal," recalls Milton Gwirtzman. "Oil is a world in itself, and when you get that deeply into it, you tend to look at the world that way. He's no longer considered a Democratic political operative. He's now considered an industry person."

As an industry person, Schmertz has reinvigorated Mobil's Washington outpost and greatly expanded the New York P.R. office, so he now has a staff of nearly a hundred. He is admired for making fast, intuitive decisions without having to check them with his superiors. The fuel that runs this P.R. engine is money—about $21 million a year. To avoid hassles, Mobil does not claim its advocacy ads as a tax deduction, but it does deduct most of the rest—more than three quarters of the total P.R. budget—and this part the taxpayers do subsidize. Since this largess tends to benefit the affluent audiences of museums and public TV, Mobil is redistributing income to the already prosperous.

This $21 million budget makes Mobil look generous, until it's compared with Mobil's total 1976 revenues of over $28 billion. After using known financial data to break the code to a survey by the Conference Board, I was astonished to learn that of the fifty companies that give away the most money, Mobil ranks *last* in gifts as a percent of pretax profits. Even if the figures are juggled to put Mobil in the best possible light, it's still in the bottom fifteen percent.

Mobil's reputation for generosity is enhanced by Schmertz's skill in finding projects that are both conspicuous and cheap and then loudly taking credit for them. The F.C.C. only permits one-

sentence credit lines on public TV shows, but since sponsoring public TV costs little compared with the cost for commercial TV, Schmertz can afford to splurge on ads promoting his shows. "Giving money to the arts is a very easy kind of thing," he told me. "We've opted to try to involve ourselves by more than just giving money—we also try to build an audience." That also means trumpeting the Mobil name, even with full-page ads proclaiming THE MOBIL SEASON. Schmertz says with barely concealed glee that "Exxon is driven crazy" by people who think its shows are really Mobil's.

That's an inadvertent plum. Sometimes Mobil actively claims credit where no credit is due. For instance, Schmertz told me several times that he sometimes finds small art groups and sends them a check, out of the blue, in the manner of John Beresford Tipton of *The Millionaire*. For specifics, he sent me to an assistant, who referred me to just one group. I called its head. She was very grateful for the money, and it was more than she had asked for, but she said she had approached Mobil first, not the other way around.

A great sports fan, Schmertz in 1974 sponsored a TV show on sports nostalgia. The closing credits listed him as "creator." That caused a stir, and at least since then he has tried to give Mobil the credit, not himself. I sense in him a disingenuous modesty about his own role when he says that personal publicity is unfair to his staff. I think the real reasons for his reticence are that others near the top at Mobil resent his hogging the attention and that Mobil, if it is to appear as a beneficent, aware company, must conceal its innards—it can't expose the strings it pulls and the levers it pushes. Remember the saying that legislation is like sausage: To respect the product, it's best not to know the ingredients.

Has Mobil achieved this cherished image as friend of both the artist and the common man? Opinions vary. At the 1976 annual meeting, for instance, Warner and Schmertz wondered who had passed out the "Thank you, Rawleigh" stickers many stockholders were wearing. After a stockholder roasted the pro-divestiture Energy Action Committee, one James Flug rose and identified himself as its director and as the source of the stickers. To the sound of paper ripping off lapels, Flug thanked Mobil for running ad after ad opposing divestiture, thereby making it a visible issue, "especially since," Flug said, "there is a reasonable presumption that whatever an oil company says, the opposite is the truth." (Flug is a mongoose to Schmertz's cobra, stalking him and biting morsels out of his arguments. Schmertz alternates between blowing his stack and having fun; Warner has presented Flug with an Energy Action T-shirt and Schmertz gave Flug a parcel of anti-divestiture editorials, suitably gift wrapped.)

Even many in the oil industry have little love for Schmertz, though he says "what hurts or helps one of us hurts or helps all of us." Some were turned off when Mobil favored using Highway Trust Fund money for mass transit and called for phased rather than immediate decontrol of crude-oil prices. Mobil's stridency, a result of its dealing with its antagonists rather than just ignoring them, is also galling. As one oilman told me, "I think Mobil's approach hasn't been very effective. If you look at the whole nest of singing birds that's the oil industry, it's probably useful that one of the companies is singing in a rather raucous voice, like Mobil. But it would be insufferable if all the companies did that."

How should the rest of us feel about Herb Schmertz? I've had occasional pangs of guilt in writing critically about him. After all, he has helped many indisputably worthy causes; he has brought top-quality productions to public TV while shaming the networks into improving their own fare; except when he loses his temper, he is a very likable fellow. But I also think he embodies a pernicious trend. Money has always influenced the media, but usually only through publishers' and station owners' liking for material that increases audiences and therefore income. Sensationalism is usually restrained by journalistic integrity, and where it is not, the competing media still, in the words of E.B. White, "expose each other's follies and peccadilloes, correct each other's mistakes, and cancel out each other's biases. The reader is free to range around in the whole editorial bouillabaisse and explore it for the one clam that matters—the truth." But Schmertz doesn't want to build audiences to make money; he wants to sell a political and economic credo. The more media outlets and even art forms that are reached by his financial tentacles, the less room will remain for the vigorous debate that Schmertz professes to love so deeply. ###

FIRST AMENDMENT STATUS OF "COMMERCIAL SPEECH"

Exhibit 66: *Bigelow* v. *Virginia*, 421 U.S. 809 (1975)

Syllabus

BIGELOW *v.* VIRGINIA

APPEAL FROM THE SUPREME COURT OF VIRGINIA

No. 73–1309. Argued December 18, 1974—Decided June 16, 1975

Appellant, the managing editor of a weekly newspaper published in Virginia, as the result of publishing a New York City organization's advertisement announcing that it would arrange low-cost placements for women with unwanted pregnancies in accredited hospitals and clinics in New York (where abortions were legal and there were no residency requirements), was convicted of violating a Virginia statute making it a misdemeanor, by the sale or circulation of any publication, to encourage or prompt the processing of an abortion. The trial court had rejected appellant's claim that the statute was unconstitutional under the First Amendment as made applicable to the States by the Fourteenth as being facially overbroad and as applied to appellant. The Virginia Supreme Court affirmed the conviction, also rejecting appellant's First Amendment claim and holding that the advertisement was a commercial one which could be constitutionally prohibited under the State's police power, and that because appellant himself lacked a legitimate First Amendment interest inasmuch as his activity "was of a purely commercial nature," he had no standing to challenge the statute as being facially overbroad. *Held:*

1. Though an intervening amendment of the statute as a practical matter moots the overbreadth issue for the future, the Virginia courts erred in denying appellant standing to raise that issue since "pure speech" rather than conduct was involved and no consideration was given to whether or not the alleged overbreadth was substantial. Pp. 815–818.

2. The statute as applied to appellant infringed constitutionally protected speech under the First Amendment. Pp. 818–829.

(a) The Virginia courts erred in assuming that advertising, as such, was entitled to no First Amendment protection and that appellant had no legitimate First Amendment interest, since speech is not stripped of First Amendment protection merely

mercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees. Pp. 818–821.

(b) Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience consisting of not only readers possibly in need of the services offered, but also those concerned with the subject matter or the law of another State, and readers seeking reform in Virginia; and thus appellant's First Amendment interests coincided with the constitutional interests of the general public. Pp. 821–822.

(c) A State does not acquire power or supervision over another State's internal affairs merely because its own citizens' welfare and health may be affected when they travel to the other State, and while a State may seek to disseminate information so as to enable its citizens to make better informed decisions when they leave, it may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State, as the placement services here were at the time they were advertised. Pp. 822–825.

(d) Virginia's asserted interest in regulating what Virginians may *hear* or *read* about the New York services or in shielding its citizens from information about activities outside Virginia's borders (which Virginia's police powers do not reach) is entitled to little, if any, weight under the circumstances. Pp. 826–828.

214 Va. 341, 200 S. E. 2d 680, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, STEWART, MARSHALL, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 829.

Melvin L. Wulf and *John C. Lowe* argued the cause for appellant. With them on the brief were *Joel M. Gora*, *Judith Mears*, and *F. Guthrie Gordon III*.

D. Patrick Lacy, Jr., Assistant Attorney General of Virginia, argued the cause for appellee. With him on the brief were *Andrew P. Miller*, Attorney General,

Anthony F. Troy, Deputy Attorney General, and *Paul L. Gergoudis,* Assistant Attorney General.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

An advertisement carried in appellant's newspaper led to his conviction for a violation of a Virginia statute that made it a misdemeanor, by the sale or circulation of any publication, to encourage or prompt the procuring of an abortion. The issue here is whether the editor-appellant's First Amendment rights were unconstitutionally abridged by the statute. The First Amendment, of course, is applicable to the States through the Fourteenth Amendment. *Schneider* v. *State,* 308 U. S. 147, 160 (1939).

I

The Virginia Weekly was a newspaper published by the Virginia Weekly Associates of Charlottesville. It was issued in that city and circulated in Albemarle County, with particular focus on the campus of the University of Virginia. Appellant, Jeffrey C. Bigelow, was a director and the managing editor and responsible officer of the newspaper.[1]

On February 8, 1971, the Weekly's Vol. V, No. 6, was published and circulated under the direct re-

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**Raymond T. Bonner* and *Alan B. Morrison* filed a brief for Public Citizen et al. as *amici curiae* urging reversal.

Michael M. Kearney filed a brief for Virginia Right to Life, Inc., as *amicus curiae* urging affirmance.

[1] His brief describes the publication as an "underground newspaper." Brief for Appellant 3. The appellee states that there is no evidence in the record to support that description. Brief for Appellee 3 n. 1.

sponsibility of the appellant. On page 2 of that issue was the following advertisement:

"UNWANTED PREGNANCY
LET US HELP YOU
Abortions are now legal in New York.
There are no residency requirements.
FOR IMMEDIATE PLACEMENT IN ACCREDITED
HOSPITALS AND CLINICS AT LOW COST
Contact
WOMEN'S PAVILION
515 Madison Avenue
New York, N. Y. 10022
or call any time
(212) 371-6670 or (212) 371-6650
AVAILABLE 7 DAYS A WEEK
STRICTLY CONFIDENTIAL. We will make
all arrangements for you and help you
with information and counseling."

It is to be observed that the advertisement announced that the Women's Pavilion of New York City would help women with unwanted pregnancies to obtain "immediate placement in accredited hospitals and clinics at low cost" and would "make all arrangements" on a "strictly confidential" basis; that it offered "information and counseling"; that it gave the organization's address and telephone numbers; and that it stated that abortions "are now legal in New York" and there "are no residency requirements." Although the advertisement did not contain the name of any licensed physician, the "placement" to which it referred was to "accredited hospitals and clinics."

On May 13 Bigelow was charged with violating Va. Code Ann. § 18.1-63 (1960). The statute at that time read:

> "If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt

> the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor." [2]

Shortly after the statute was utilized in Bigelow's case, and apparently before it was ever used again, the Virginia Legislature amended it and changed its prior application and scope.[3]

Appellant was first tried and convicted in the County Court of Albemarle County. He appealed to the Circuit Court of that county where he was entitled to a *de novo* trial. Va. Code Ann. §§ 16.1–132 and 16.1–136 (1960). In the Circuit Court he waived a jury and in July 1971

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[2] We were advised by the State at oral argument that the statute dated back to 1878, and that Bigelow's was the first prosecution under the statute "in modern times," and perhaps the only prosecution under it "at any time." Tr. of Oral Arg. 40. The statute appears to have its origin in Va. Acts of Assembly 1877–1878, p. 281, c. 2, § 8.

[3] The statute, as amended by Va. Acts of Assembly 1972, c. 725, now reads:

"18.1–63. If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or through the use of a referral agency for profit, or in any other manner, encourage or promote the processing of an abortion or miscarriage to be performed in this State which is prohibited under this article, he shall be guilty of a misdemeanor."

It is to be observed that the amendment restricts the statute's application, with respect to advertising, to an abortion illegal in Virginia and to be performed there. Since the State's statutes purport to define those abortions that are legal when performed in the State, see Va. Code Ann. §§ 18.1–62.1 and 18.1–62.3 (Supp. 1975), the State at oral argument described the pre-1972 form of § 18.1–63 as "effectively repealed by amendment," and, citing *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Doe* v. *Bolton*, 410 U. S. 179 (1973), the statute, as amended, as limited to an abortion performed by a nonphysician. Tr. of Oral Arg. 38–39. In any event, there is no dispute here that the amended statute would *not* reach appellant's advertisement.

was tried to the judge. The evidence consisted of stipulated facts; an excerpt, containing the advertisement in question, from the Weekly's issue of February 8, 1971; and the June 1971 issue of Redbook magazine, containing abortion information and distributed in Virginia and in Albemarle County. App. 3, 8. The court rejected appellant's claim that the statute was unconstitutional and adjudged him guilty. He was sentenced to pay a fine of $500, with $350 thereof suspended "conditioned upon no further violation" of the statute. *Id.*, at 5.

The Supreme Court of Virginia granted review and, by a 4–2 vote, affirmed Bigelow's conviction. 213 Va. 191, 191 S. E. 2d 173 (1972). The court first rejected the appellant's claim that the advertisement was purely informational and thus was not within the "encourage or prompt" language of the statute. It held, instead, that the advertisement "clearly exceeded an informational status" and "constituted an active offer to perform a service, rather than a passive statement of fact." *Id.*, at 193, 191 S. E. 2d, at 174. It then rejected Bigelow's First Amendment claim. This, the court said, was a "commercial advertisement" and, as such, "may be constitutionally prohibited by the state," particularly "where, as here, the advertising relates to the medical-health field." *Id.*, at 193–195, 191 S. E. 2d, at 174–176. The issue, in the court's view, was whether the statute was a valid exercise of the State's police power. It answered this question in the affirmative, noting that the statute's goal was "to ensure that pregnant women in Virginia who decided to have abortions come to their decisions without the commercial advertising pressure usually incidental to the sale of a box of soap powder." *Id.*, at 196, 191 S. E. 2d, at 176. The court then turned to Bigelow's claim of overbreadth. It held that because the

appellant himself lacked a legitimate First Amendment interest, inasmuch as his activity "was of a purely commercial nature," he had no "standing to rely upon the hypothetical rights of those in the non-commercial zone." *Id.*, at 198, 191 S. E. 2d, at 177–178.

Bigelow took a timely appeal to this Court. During the pendency of his appeal, *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Doe* v. *Bolton*, 410 U. S. 179 (1973), were decided. We subsequently vacated Bigelow's judgment of conviction and remanded the case for further consideration in the light of *Roe* and *Doe*. 413 U. S. 909 (1973).[4]

The Supreme Court of Virginia, on such reconsideration, but without further oral argument, again affirmed appellant's conviction, observing that neither *Roe* nor *Doe* "mentioned the subject of abortion advertising" and finding nothing in those decisions "which in any way affects our earlier view." [5] 214 Va. 341, 342, 200 S. E. 2d 680 (1973). Once again, Bigelow appealed. We noted probable jurisdiction in order to review the important First Amendment issue presented. 418 U. S. 909 (1974).

II

This Court often has recognized that a defendant's standing to challenge a statute on First Amendment grounds as facially overbroad does not depend upon whether his own activity is shown to be constitutionally privileged. The Court consistently has permitted "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own

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[4] See Note, The First Amendment and Commercial Advertising: Bigelow v. Commonwealth, 60 Va. L. Rev. 154 (1974).

[5] Virginia asserts, rightfully we feel, that this is "a First Amendment case" and "not an abortion case." Brief for Appellee 15 n. 6; Tr. of Oral Arg. 26.

conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Dombrowski* v. *Pfister*, 380 U. S. 479, 486 (1965). See also *Grayned* v. *City of Rockford*, 408 U. S. 104, 114 (1972); *Gooding* v. *Wilson*, 405 U. S. 518, 520–521 (1972); *Coates* v. *City of Cincinnati*, 402 U. S. 611, 616 (1971), and *id.*, at 619–620 (WHITE, J., dissenting); *NAACP* v. *Button*, 371 U. S. 415, 432 (1963); *Thornhill* v. *Alabama*, 310 U. S. 88, 97–98 (1940). The Supreme Court of Virginia itself recognized this principle when it recently stated that "persons who engage in non-privileged conduct are not precluded from attacking a statute under which they were convicted." *Owens* v. *Commonwealth*, 211 Va. 633, 638–639, 179 S. E. 2d 477, 481 (1971). "For in appraising a statute's inhibitory effect upon [First Amendment] rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar." *NAACP* v. *Button*, 371 U. S., at 432. See generally Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 847–848 (1970).

This "exception to the usual rules governing standing," *Dombrowski* v. *Pfister*, 380 U. S., at 486, reflects the transcendent value to all society of constitutionally protected expression. We give a defendant standing to challenge a statute on grounds that it is facially overbroad, regardless of whether his own conduct could be regulated by a more narrowly drawn statute, because of the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *NAACP* v. *Button*, 371 U. S., at 433.

Of course, in order to have standing, an individual must present more than "[a]llegations of a subjective 'chill.'" There must be a "claim of specific present ob-

jective harm or a threat of specific future harm." *Laird* v. *Tatum*, 408 U. S. 1, 13–14 (1972). That requirement, however, surely is met under the circumstances of this case, where the threat of prosecution already has blossomed into the reality of a conviction, and where there can be no doubt concerning the appellant's personal stake in the outcome of the controversy. See *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). The injury of which appellant complains is one to him as an editor and publisher of a newspaper; he is not seeking to raise the hypothetical rights of others. See *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 166 (1972); *Breard* v. *Alexandria*, 341 U. S. 622, 641 (1951). Indeed, unlike some cases in which the standing issue similarly has been raised, the facts of this case well illustrate "the statute's potential for sweeping and improper applications." *Gooding* v. *Wilson*, 405 U. S., at 532–533 (BURGER, C. J., dissenting).

Declaring a statute facially unconstitutional because of overbreadth "is, manifestly, strong medicine," and "has been employed by the Court sparingly and only as a last resort." *Broadrick* v. *Oklahoma*, 413 U. S. 601, 613 (1973). But we conclude that the Virginia courts erred in denying Bigelow standing to make this claim, where "pure speech" rather than conduct was involved, without any consideration of whether the alleged overbreadth was or was not substantial. *Id.*, at 615, 616. The Supreme Court of Virginia placed no effective limiting construction on the statute. Indeed, it characterized the rights of doctors, husbands, and lecturers as "hypothetical," and thus seemed to imply that, although these were in the noncommercial zone, the statute might apply to them, too.

In view of the statute's amendment since Bigelow's conviction in such a way as "effectively to repeal" its prior application, there is no possibility now that the

statute's pre-1972 form will be applied again to appellant or will chill the rights of others. As a practical matter, the issue of its overbreadth has become moot for the future. We therefore decline to rest our decision on overbreadth and we pass on to the further inquiry, of greater moment not only for Bigelow but for others, whether the statute as applied to appellant infringed constitutionally protected speech.

III

A. The central assumption made by the Supreme Court of Virginia was that the First Amendment guarantees of speech and press are inapplicable to paid commercial advertisements. Our cases, however, clearly establish that speech is not stripped of First Amendment protection merely because it appears in that form. *Pittsburgh Press Co.* v. *Human Rel. Comm'n,* 413 U. S. 376, 384 (1973); *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 266 (1964).

The fact that the particular advertisement in appellant's newspaper had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees. The State was not free of constitutional restraint merely because the advertisement involved sales or "solicitations," *Murdock* v. *Pennsylvania,* 319 U. S. 105, 110–111 (1943), or because appellant was paid for printing it, *New York Times Co.* v. *Sullivan,* 376 U. S., at 266; *Smith* v. *California,* 361 U. S. 147, 150 (1959), or because appellant's motive or the motive of the advertiser may have involved financial gain, *Thomas* v. *Collins,* 323 U. S. 516, 531 (1945). The existence of "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." *Ginzburg* v. *United States,* 383 U. S. 463, 474 (1966).

Although other categories of speech—such as fighting words, *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572 (1942), or obscenity, *Roth* v. *United States,* 354 U. S. 476, 481–485 (1957), *Miller* v. *California,* 413 U. S. 15, 23 (1973), or libel, *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323 (1974), or incitement, *Brandenburg* v. *Ohio,* 395 U. S. 444 (1969)—have been held unprotected, no contention has been made that the particular speech embraced in the advertisement in question is within any of these categories.

The appellee, as did the Supreme Court of Virginia, relies on *Valentine* v. *Chrestensen,* 316 U. S. 52 (1942), where a unanimous Court, in a brief opinion, sustained an ordinance which had been interpreted to ban the distribution of a handbill advertising the exhibition of a submarine. The handbill solicited customers to tour the ship for a fee. The promoter-advertiser had first attempted to distribute a single-faced handbill consisting only of the advertisement, and was denied permission to do so. He then had printed, on the reverse side of the handbill, a protest against official conduct refusing him the use of wharfage facilities. The Court found that the message of asserted "public interest" was appended solely for the purpose of evading the ordinance and therefore did not constitute an "exercise of the freedom of communicating information and disseminating opinion." *Id.,* at 54. It said:

> "We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising." *Ibid.*

But the holding is distinctly a limited one: the ordinance was upheld as a reasonable regulation of the manner in which commercial advertising could be distributed. The fact that it had the effect of banning a particular handbill does not mean that *Chrestensen* is

authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge. The case obviously does not support any sweeping proposition that advertising is unprotected *per se*.[6]

This Court's cases decided since *Chrestensen* clearly demonstrate as untenable any reading of that case that would give it so broad an effect. In *New York Times Co.* v. *Sullivan*, *supra*, a city official instituted a civil libel action against four clergymen and the New York Times. The suit was based on an advertisement carried in the newspaper criticizing police action against members of the civil rights movement and soliciting contributions for the movement. The Court held that this advertisement, although containing factually erroneous defamatory content, was entitled to the same degree of constitutional protection as ordinary speech. It said:

> "That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold." 376 U. S., at 266.

Chrestensen was distinguished on the ground that the handbill advertisement there did no more than propose

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[6] MR. JUSTICE DOUGLAS, who was a Member of the Court when *Chrestensen* was decided and who joined that opinion, has observed: "The ruling was casual, almost offhand. And it has not survived reflection." *Cammarano* v. *United States*, 358 U. S. 498, 514 (1959) (concurring opinion). MR. JUSTICE BRENNAN, joined by JUSTICES STEWART, MARSHALL, and POWELL, has observed: "There is some doubt concerning whether the 'commercial speech' distinction announced in *Valentine* v. *Chrestensen* . . . retains continuing validity." *Lehman* v. *City of Shaker Heights*, 418 U. S. 298, 314 n. 6 (1974) (dissenting opinion). See also *Pittsburgh Press Co.* v. *Human Rel. Comm'n*, 413 U. S. 376, 393 (1973) (BURGER, C. J., dissenting); *id.*, at 398 (DOUGLAS, J., dissenting); *id.*, at 401 (STEWART, J., dissenting).

a purely commercial transaction, whereas the one in *New York Times*

> "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." *Ibid.*

The principle that commercial advertising enjoys a degree of First Amendment protection was reaffirmed in *Pittsburgh Press Co.* v. *Human Rel. Comm'n,* 413 U. S. 376 (1973). There, the Court, although divided, sustained an ordinance that had been construed to forbid newspapers to carry help-wanted advertisements in sex-designated columns except where based upon a bona fide occupational exemption. The Court did describe the advertisements at issue as "classic examples of commercial speech," for each was "no more than a proposal of possible employment." *Id.,* at 385. But the Court indicated that the advertisements would have received some degree of First Amendment protection if the commercial proposal had been legal. The illegality of the advertised activity was particularly stressed:

> "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *Id.,* at 389.

B. The legitimacy of appellant's First Amendment claim in the present case is demonstrated by the important differences between the advertisement presently at

issue and those involved in *Chrestensen* and in *Pittsburgh Press*. The advertisement published in appellant's newspaper did more than simply propose a commercial transaction. It contained factual material of clear "public interest." Portions of its message, most prominently the lines, "Abortions are now legal in New York. There are no residency requirements," involve the exercise of the freedom of communicating information and disseminating opinion.

Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia. The mere existence of the Women's Pavilion in New York City, with the possibility of its being typical of other organizations there, and the availability of the services offered, were not unnewsworthy. Also, the activity advertised pertained to constitutional interests. See *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Doe* v. *Bolton*, 410 U. S. 179 (1973). Thus, in this case, appellant's First Amendment interests coincided with the constitutional interests of the general public.[7]

Moreover, the placement services advertised in appellant's newspaper were legally provided in New York at that time.[8] The Virginia Legislature could not have

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[7] It was argued, too, that under the circumstances the appearance of the advertisement in the appellant's newspaper was "an implicit editorial endorsement" of its message. Brief for Appellant 29.

[8] Subsequent to Bigelow's publication of the advertisement in February 1971, New York adopted Laws 1971, c. 725, effective July 1, 1971, amended by Laws 1972, c. 17, § 1, now codified as Art.

regulated the advertiser's activity in New York, and obviously could not have proscribed the activity in that State.[9] *Huntington* v. *Attrill*, 146 U. S. 657, 669 (1892).

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45 of the State's Public Health Law (Supp. 1974–1975). Section 4500 contains a legislative finding:

"Medical referral services, organized as profit making enterprises within this state, have been . . . in violation of the standards of ethics and public policy applicable to the practice of medicine and which would be violations of standards of professional conduct if the acts were performed by physicians. . . . It is hereby declared to be the public policy of this state . . . that such profit making medical referral service organizations be declared to be invalid and unlawful in this state."

Section 4501 (1) provides:

"No person, firm, partnership, association or corporation, or agent or employee thereof, shall engage in for profit any business or service which in whole or in part includes the referral or recommendation of persons to a physician, hospital, health related facility, or dispensary for any form of medical care or treatment of any ailment or physical condition. The imposition of a fee or charge for any such referral or recommendation shall create a presumption that the business or service is engaged in for profit."

A violation of the statute is a misdemeanor punishable by imprisonment for not longer than one year or a fine of not more than $5,000 or both. § 4502 (1). Article 45 expressly is made inapplicable to a nonprofit corporation exempt from federal income taxation under § 501 (c) of the Internal Revenue Code of 1954, 26 U. S. C. § 501 (c). § 4503.

The 1971 statute has been upheld against constitutional challenge. *S. P. S. Consultants, Inc.* v. *Lefkowitz*, 333 F. Supp. 1373 (SDNY 1971).

[9] In 1972, after Bigelow's prosecution was begun, Virginia adopted Acts of Assembly 1972, c. 642, now codified as Va. Code Ann. § 18.1–417.2 (Supp. 1975). This statute is similar to the New York statute described in n. 8, *supra*, and is directed at for-profit medical referrals within Virginia. The statute prohibits engaging for profit "in any business which in whole or in part includes the referral or recommendation of persons to a physician, hospital, health related facility, or dispensary for any form of medical care or treatment of any ailment or physical condition." Acceptance of a fee for any

Neither could Virginia prevent its residents from traveling to New York to obtain those services or, as the State conceded, Tr. of Oral Arg. 29, prosecute them for going there. See *United States* v. *Guest*, 383 U. S. 745, 757–759 (1966); *Shapiro* v. *Thompson*, 394 U. S. 618, 629–631 (1969); *Doe* v. *Bolton*, 410 U. S., at 200. Virginia possessed no authority to regulate the services provided in New York—the skills and credentials of the New York physicians and of the New York professionals who assisted them, the standards of the New York hospitals and clinics to which patients were referred, or the practices and charges of the New York referral services.

A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State. It may seek to disseminate information so as to enable its citizens to make better informed decisions when they leave. But it may not, under the guise of exercising internal police powers, bar

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such referral or recommendation "shall create a presumption that the business is engaged in such service for profit." Violation of the statute is a misdemeanor punishable by imprisonment for not longer than one year or a fine of not more than $5,000, or both.

By a 1973 amendment, Acts of Assembly 1973, c. 529, to its statute dealing with unprofessional conduct by a member of the medical or a related profession, Virginia prohibits advertising by a physician. Specifically, Va. Code Ann. § 54–317 (1974) now provides:

"Any practitioner of medicine . . . shall be considered guilty of unprofessional conduct if he:

. . . . . .

"(13) Advertises to the general public directly or indirectly in any manner his professional services, their costs, prices, fees, credit terms or quality."

See also Va. Code Ann. §§ 54–278.1 and 54–317 (4), (5), and (6) (1974).

We, of course, have no occasion to comment here on whatever constitutional issue, if any, may be raised with respect to these statutes.

a citizen of another State from disseminating information about an activity that is legal in that State.

C. We conclude, therefore, that the Virginia courts erred in their assumptions that advertising, as such, was entitled to no First Amendment protection and that appellant Bigelow had no legitimate First Amendment interest. We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit.[10]

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[10] We have no occasion, therefore, to comment on decisions of lower courts concerning regulation of advertising in readily distinguishable fact situations. Wholly apart from the respective rationales that may have been developed by the courts in those cases, their results are not inconsistent with our holding here. In those cases there usually existed a clear relationship between the advertising in question and an activity that the government was legitimately regulating. See, *e. g.*, *United States* v. *Bob Lawrence Realty, Inc.*, 474 F. 2d 115, 121 (CA5), cert. denied, 414 U. S. 826 (1973); *Rockville Reminder, Inc.* v. *United States Postal Service*, 480 F. 2d 4 (CA2 1973); *United States* v. *Hunter*, 459 F. 2d 205 (CA4), cert. denied, 409 U. S. 934 (1972).

Nor need we comment here on the First Amendment ramifications of legislative prohibitions of certain kinds of advertising in the electronic media, where the "unique characteristics" of this form of communication "make it especially subject to regulation in the public interest." *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582, 584 (DC 1971), aff'd, 405 U. S. 1000 (1972). See also *Banzhaf* v. *FCC*, 132 U. S. App. D. C. 14, 405 F. 2d 1082 (1968), cert. denied *sub nom. Tobacco Institute, Inc.* v. *FCC*, 396 U. S. 842 (1969); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94 (1973).

Our decision also is in no way inconsistent with our holdings in the Fourteenth Amendment cases that concern the regulation of professional activity. See *North Dakota Pharmacy Bd.* v. *Snyder's Stores*, 414 U. S. 156 (1973); *Head* v. *New Mexico Board*, 374 U. S. 424 (1963); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955); *Barsky* v. *Board of Regents*, 347 U. S. 442 (1954); *Semler* v. *Dental Examiners*, 294 U. S. 608 (1935).

Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest. See *Pittsburgh Press Co.* v. *Human Rel. Comm'n, supra; Lehman* v. *City of Shaker Heights,* 418 U. S. 298 (1974).[11] To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged. Advertising is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.

The Court has stated that "a State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP* v. *Button,* 371 U. S., at 429. Regardless of the particular label asserted by the State—whether it calls speech "commercial" or "commercial advertising" or "solicitation"—a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation. The diverse motives, means, and messages of advertising may make speech "commercial" in widely varying degrees. We need not decide here the extent to which constitutional protection is afforded commercial advertising under all circumstances and in the face of all kinds of regulation.

IV

The task of balancing the interests at stake here was one that should have been undertaken by the Virginia courts before they reached their decision. We need not

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[11] See also *Adderley* v. *Florida,* 385 U. S. 39, 46–48 (1966); *Cox* v. *Louisiana,* 379 U. S. 536, 554 (1965); *Poulos* v. *New Hampshire,* 345 U. S. 395, 405 (1953); *Kunz* v. *New York,* 340 U. S. 290, 293–294 (1951); *Cox* v. *New Hampshire,* 312 U. S. 569, 575–576 (1941).

remand for that purpose, however, because the outcome is readily apparent from what has been said above.

In support of the statute, the appellee contends that the commercial operations of abortion referral agencies are associated with practices, such as fee splitting, that tend to diminish, or at least adversely affect, the quality of medical care, and that advertising of these operations will lead women to seek services from those who are interested only or mainly in financial gain apart from professional integrity and responsibility.

The State, of course, has a legitimate interest in maintaining the quality of medical care provided within its borders. *Barsky* v. *Board of Regents*, 347 U. S. 442, 451 (1954). No claim has been made, however, that this particular advertisement in any way affected the quality of medical services within Virginia. As applied to Bigelow's case, the statute was directed at the publishing of informative material relating to services offered in another State and was not directed at advertising by a referral agency or a practitioner whose activity Virginia had authority or power to regulate.

To be sure, the agency-advertiser's practices, although not then illegal, may later have proved to be at least "inimical to the public interest" in New York. *S. P. S. Consultants, Inc.* v. *Lefkowitz*, 333 F. Supp. 1373, 1378 (SDNY 1971).[12] But this development would not justify a Virginia statute that forbids Virginians from using in New York the then legal services of a local New York agency. Here, Virginia is really asserting an interest in regulating what Virginians may *hear* or *read* about the New York services. It is, in effect, advancing an interest in shielding its citizens from information about activities

[12] See *State* v. *Abortion Information Agency, Inc.*, 69 Misc. 2d 825, 323 N. Y. S. 2d 597 (1971); see also *Mitchell Family Planning, Inc.* v. *City of Royal Oak*, 335 F. Supp. 738 (ED Mich. 1972).

outside Virginia's borders, activities that Virginia's police powers do not reach. This asserted interest, even if understandable, was entitled to little, if any, weight under the circumstances.

No claim has been made, nor could any be supported on this record, that the advertisement was deceptive or fraudulent,[13] or that it related to a commodity or service that was then illegal in either Virginia or in New York, or that it otherwise furthered a criminal scheme in Virginia.[14] There was no possibility that appellant's activity would invade the privacy of other citizens, *Breard* v. *Alexandria, supra,* or infringe on other rights. Observers would not have the advertiser's message thrust upon them as a captive audience. *Lehman* v. *City of Shaker Heights, supra; Packer Corp.* v. *Utah,* 285 U. S. 105, 110 (1932).

The strength of appellant's interest was augmented by the fact that the statute was applied against him as publisher and editor of a newspaper, not against the advertiser or a referral agency or a practitioner. The prosecution thus incurred more serious First Amendment overtones.

If application of this statute were upheld under these circumstances, Virginia might exert the power sought here over a wide variety of national publications or interstate newspapers carrying advertisements similar to the one that appeared in Bigelow's newspaper or containing articles on the general subject matter to which

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[13] See Note, Freedom of Expression in a Commercial Context, 78 Harv. L. Rev. 1191, 1197–1198 (1965); Developments in the Law—Deceptive Advertising, 80 Harv. L. Rev. 1005, 1010–1015 (1967).

[14] We are not required to decide here what the First Amendment consequences would be if the Virginia advertisement promoted an activity in New York which was then illegal in New York. An example would be an advertisement announcing the availability of narcotics in New York City when the possession and sale of narcotics was proscribed in the State of New York.

the advertisement referred.[15] Other States might do the same. The burdens thereby imposed on publications would impair, perhaps severely, their proper functioning. See *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241, 257–258 (1974). We know from experience that "liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper." 2 Z. Chafee, Government and Mass Communications 633 (1947). The policy of the First Amendment favors dissemination of information and opinion, and "[t]he guarantees of freedom of speech and press were not designed to prevent 'the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential . . . .' 2 Cooley, Constitutional Limitations 886 (8th ed.)." *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130, 150 (1967) (opinion of Harlan, J.).

We conclude that Virginia could not apply Va. Code Ann. § 18.1–63 (1960), as it read in 1971, to appellant's publication of the advertisement in question without unconstitutionally infringing upon his First Amendment rights. The judgment of the Supreme Court of Virginia is therefore reversed.

It is so ordered.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE WHITE joins, dissenting.

The Court's opinion does not confront head-on the question which this case poses, but makes contact with

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[15] The State so indicated at oral argument. Tr. of Oral Arg. 37–38. It, however, was never so applied. In the light of its "effective repeal," as the State's counsel observed during the oral argument, "[w]e will never know" how far, under appellee's theory, it might have reached. *Id.,* at 38.

it only in a series of verbal sideswipes. The result is the fashioning of a doctrine which appears designed to obtain reversal of this judgment, but at the same time to save harmless from the effects of that doctrine the many prior cases of this Court which are inconsistent with it.

I am in agreement with the Court, *ante*, at 817–818, that Virginia's statute cannot properly be invalidated on grounds of overbreadth,[1] given that the sole prosecution which has ever been brought under this now substantially altered statute is that now in issue. "It is the law as applied that we review, not the abstract, academic questions which it might raise in some more doubtful case." *Saia* v. *New York*, 334 U. S. 558, 571 (1948) (Jackson, J., dissenting).

Since the Court concludes, apparently from two lines of the advertisement, *ante*, at 812, that it conveyed information of value to those interested in the "subject matter or the law of another State and its development" and to those "seeking reform in Virginia," *ante*, at 822, and since the ad relates to abortion, elevated to constitutional stature by the Court, it concludes that this advertisement is entitled to something more than the limited constitutional protection traditionally accorded commercial advertising. See *ante*, at 825 n. 10. Although recognizing that "[a]dvertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest," *ante*, at 826, the Court for reasons not entirely clear to me concludes that Virginia's interest is of "little, if any, weight." *Ante*, at 828.

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[1] The Court, *ante*, at 817, states that the Virginia Supreme Court placed no limiting interpretation on its statute and that it implied that the statute might apply to doctors, husbands, and lecturers. The Court is in error: the Virginia Supreme Court stated that it would not interpret the statute to encompass such situations. 213 Va. 191, 198, 191 S. E. 2d 173, 177 (1972).

If the Court's decision does, indeed, turn upon its conclusion that the advertisement here in question was protected by the First and Fourteenth Amendments, the subject of the advertisement ought to make no difference. It will not do to say, as the Court does, that this advertisement conveyed information about the "subject matter or the law of another State and its development" to those "seeking reform in Virginia," and that it related to abortion, as if these factors somehow put it on a different footing from other commercial advertising. This was a proposal to furnish services on a commercial basis, and since we have always refused to distinguish for First Amendment purposes on the basis of content, it is no different from an advertisement for a bucket shop operation or a Ponzi scheme which has its headquarters in New York. If Virginia may not regulate advertising of commercial abortion agencies because of the interest of those seeking to reform Virginia's abortion laws, it is difficult to see why it is not likewise precluded from regulating advertising for an out-of-state bucket shop on the ground that such information might be of interest to those interested in repealing Virginia's "blue sky" laws.

As a threshold matter the advertisement appears to me, as it did to the courts below, to be a classic commercial proposition directed toward the exchange of services rather than the exchange of ideas. It was apparently also so interpreted by the newspaper which published it which stated in apparent apology in its following issue that the "'*Weekly* collective has since learned that this abortion agency . . . as well as a number of other commercial groups are charging women a fee for a service which is done free by Women's Liberation, Planned Parenthood, and others.'" 213 Va. 191, 194, 191 S. E. 2d 173, 175 (1972). Whatever slight factual content the advertisement may contain and

whatever expression of opinion may be laboriously drawn from it does not alter its predominantly commercial content. "If that evasion were successful, every merchant who desires to broadcast . . . need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command." *Valentine* v. *Chrestensen*, 316 U. S. 52, 55 (1942). See, *e. g.*, *Ginzburg* v. *United States*, 383 U. S. 463, 474 n. 17 (1966). I am unable to perceive any relationship between the instant advertisement and that for example in issue in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 292 (1964). Nor am I able to distinguish this commercial proposition from that held to be purely commercial in *Pittsburgh Press Co.* v. *Human Rel. Comm'n*, 413 U. S. 376 (1973). As the Court recognizes, *ante*, at 819–821, a purely commercial proposal is entitled to little constitutional protection.

Assuming *arguendo* that this advertisement is something more than a normal commercial proposal, I am unable to see why Virginia does not have a legitimate public interest in its regulation. The Court apparently concedes, *ante*, at 825 n. 10, and our cases have long held, that the States have a strong interest in the prevention of commercial advertising in the health field—both in order to maintain high ethical standards in the medical profession and to protect the public from unscrupulous practices. See, *e. g.*, *Semler* v. *Dental Examiners*, 294 U. S. 608, 612 (1935); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 490–491 (1955); *North Dakota Pharmacy Bd.* v. *Snyder's Stores*, 414 U. S. 156 (1973). And the interest asserted by the Supreme Court of Virginia in the Virginia statute was the prevention of commercial exploitation of those women who elect to have an abortion:

> "It is clearly within the police power of the state to enact reasonable measures to ensure that pregnant

> women in Virginia who decide to have abortions come to their decisions without the commercial advertising pressure usually incidental to the sale of a box of soap powder. And the state is rightfully interested in seeing, that Virginia women who do decide to have abortions obtain proper medical care and do not fall into the hands of those interested only in financial gain, and not in the welfare of the patient." 213 Va., at 196, 191 S. E. 2d, at 176.

The concern of the Virginia Supreme Court was not a purely hypothetical one. As the majority notes, *ante*, at 822–823, n. 8, although New York at the time of this advertisement allowed profitmaking abortion referral agencies, it soon thereafter passed legislation prohibiting commercial advertisement of the type here in issue. The court in *S. P. S. Consultants, Inc.* v. *Lefkowitz*, 333 F. Supp. 1373, 1378 (SDNY 1971), quoted the author of that legislation on the reasons for its passage:

> " 'Because New York State has the most liberal abortion statute within the Continental United States, thousands of women from all over the country are coming into New York State . . . . [M]ost of these women came here through referral agencies who advertise nationally. These agencies, for a sizeable fee, make all abortion arrangements for a patient. We also learned that certain hospitals give discounts to these lucrative, profit-making organizations. Thus, at the expense of desperate, frightened women these agencies are making a huge profit—some, such a huge profit that our Committee members were actually shocked."

See, *e. g.*, *State* v. *Mitchell*, 66 Misc. 2d 514, 321 N. Y. S. 2d 756 (1971); *State* v. *Abortion Information Agency, Inc.*, 69 Misc. 2d 825, 323 N. Y. S. 2d 597 (1971).

Without denying the power of either New York or Virginia to prohibit advertising such as that in issue where both publication of the advertised activity and the activity itself occur in the same State, the Court instead focuses on the multistate nature of this transaction, concluding that a State "may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State." *Ante*, at 824–825. And the Court goes so far as to suggest that it is an open question whether a State may constitutionally prohibit an advertisement containing an invitation or offer to engage in activity which is criminal both in the State of publication and in the proposed situs of the crime. See *ante*, at 828 n. 14.

The source of this rigid territorial limitation on the power of the States in our federal system to safeguard the health and welfare of their citizens is not revealed. It is surely not to be found in cases from this Court.[2]

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[2] The Court, *ante*, at 822–823, relies on *Huntington* v. *Attrill*, 146 U. S. 657, 669 (1892), for its major premise that Virginia could not regulate the relations of the advertiser with its residents since these occurred in New York. To the extent that the Court reads *Huntington* to impose a rigid and unthinking territorial limitation, whose constitutional source is unspecified, on the power of the States to regulate conduct, it is plainly wrong. The passage referred to by the Court in the *Huntington* opinion is dictum and appears to be a statement of then-prevalent common-law rules rather than a constitutional holding. And the attempt to impose such a rigid limitation on the power of the States was first rejected by Mr. Justice Holmes, writing for the Court in *Strassheim* v. *Daily*, 221 U. S. 280, 285 (1911):

"Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect . . . ."

Mr. Justice McKenna in *Hyde* v. *United States*, 225 U. S. 347, 363 (1912), observed that "this must be so if we would fit the laws

Beginning at least with our decision in *Delamater* v. *South Dakota,* 205 U. S. 93, 100 (1907), we have consistently recognized that irrespective of a State's power to regulate extraterritorial commercial transactions in which its citizens participate it retains an independent power to regulate the business of commercial solicitation and advertising within its borders. Thus, for example, in *Head* v. *New Mexico Board,* 374 U. S. 424 (1963), we upheld the power of New Mexico to prohibit commercial advertising by a New Mexico radio station of optometric services provided in Texas. Mr. JUSTICE BRENNAN, concurring in that opinion, noted that a contrary result might well produce "a 'no-man's land' . . . in which there would be at best selective policing of the various advertising abuses and excesses which are now very extensively regulated by state law." *Id.,* at 446. See, *e. g., Packer Corp.* v. *Utah,* 285 U. S. 105 (1932); *Breard* v. *Alexandria,* 341 U. S. 622 (1951).

Were the Court's statements taken literally, they would presage a standard of the lowest common denominator for commercial ethics and business conduct. Securities issuers could circumvent the established blue-sky laws of States which had carefully drawn such laws for the protection of their citizens by establishing as a situs for transactions those States without such regulations, while spreading offers throughout the country. Loan sharks might well choose States with unregulated small loan industries, luring the unwary with immune

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and their administration to the acts of men and not be led away by mere 'bookish theorick.'" See, *e. g., Skiriotes* v. *Florida,* 313 U. S. 69, 74–75 (1941); *Ford* v. *United States,* 273 U. S. 593, 620–621 (1927). To the extent that the Court's conclusion that Virginia has a negligible interest in its statute proceeds from the assumption that the State was without power to regulate the extraterritorial activities of the advertiser involving Virginia residents, it is quite at war with our prior cases.

commercial advertisements. And imagination would place the only limit on the use of such a "no-man's-land" together with artificially created territorial contacts to bilk the public and circumvent long-established state schemes of regulation.

Since the Court saves harmless from its present opinion our prior cases in this area, *ante*, at 825 n. 10, it may be fairly inferred that it does not intend the results which might otherwise come from a literal reading of its opinion. But solely on the facts before it, I think the Court today simply errs in assessing Virginia's interest in its statute because it does not focus on the impact of the practices in question on the State. Cf. *Young* v. *Masci*, 289 U. S. 253 (1933). Although the commercial referral agency, whose advertisement in Virginia was barred, was physically located outside the State, this physical contact says little about Virginia's concern for the touted practices. Virginia's interest in this statute lies in preventing commercial exploitation of the health needs of its citizens. So long as the statute bans commercial advertising by publications within the State, the extraterritorial location at which the services are actually provided does not diminish that interest.

Since the statute in question is a "reasonable regulation that serves a legitimate public interest," *ante*, at 826, I would affirm the judgment of the Supreme Court of Virginia.

Exhibit 67: *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976)

VIRGINIA STATE BOARD OF PHARMACY ET AL. *v.* VIRGINIA CITIZENS CONSUMER COUNCIL, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

No. 74–895. Argued November 11, 1975—Decided May 24, 1976

Appellees, as consumers of prescription drugs, brought suit against the Virginia State Board of Pharmacy and its individual members, appellants herein, challenging the validity under the First and Fourteenth Amendments of a Virginia statute declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs. A three-judge District Court declared the statute void and enjoined appellants from enforcing it. *Held:*

1. Any First Amendment protection enjoyed by advertisers seeking to disseminate prescription drug price information is also enjoyed, and thus may be asserted, by appellees as recipients of such information. Pp. 756–757.

2. "Commercial speech" is not wholly outside the protection of the First and Fourteenth Amendments, and the Virginia statute is therefore invalid. Pp. 761–773.

(a) That the advertiser's interest in a commercial advertisement is purely economic does not disqualify him from protection under the First and Fourteenth Amendments. Both the individual consumer and society in general may have strong interests in the free flow of commercial information. Pp. 762–765.

(b) The ban on advertising prescription drug prices cannot be justified on the basis of the State's interest in maintaining the professionalism of its licensed pharmacists; the State is free to require whatever professional standards it wishes of its pharmacists, and may subsidize them or protect them from competition in other ways, but it may not do so by keeping the public in ignorance of the lawful terms that competing pharmacists are offering. Pp. 766–770.

(c) Whatever may be the bounds of time, place, and manner restrictions on commercial speech, they are plainly exceeded by

the Virginia statute, which singles out speech of a particular content and seeks to prevent its dissemination completely. Pp. 770–771.

(d) No claim is made that the prohibited prescription drug advertisements are false, misleading, or propose illegal transactions, and a State may not suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Pp. 771–773.

373 F. Supp. 683, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, and POWELL, JJ., joined. BURGER, C. J., *post*, p. 773, and STEWART, J., *post*, p. 775, filed concurring opinions. REHNQUIST, J., filed a dissenting opinion, *post*, p. 781. STEVENS, J., took no part in the consideration or decision of the case.

Anthony F. Troy, Chief Deputy Attorney General of Virginia, argued the cause for appellants. With him on the brief were *Andrew P. Miller*, Attorney General, and *D. Patrick Lacy, Jr.*, Deputy Attorney General.

Alan B. Morrison argued the cause and filed a brief for appellees.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The plaintiff-appellees in this case attack, as violative of the First and Fourteenth Amendments,[1] that portion of § 54–524.35 of Va. Code Ann. (1974), which provides that a pharmacist licensed in Virginia is guilty of unpro-

*Briefs of *amici curiae* urging affirmance were filed by *Alfred Miller* and *Stephen L. Solomon* for the American Association of Retired Persons et al.; by *Gilbert H. Weil, Philip B. Kurland*, and *Alan L. Unikel* for the Association of National Advertisers, Inc.; and by *Harold Rosenwald* for Osco Drug, Inc.

[1] The First Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment. See, *e. g.*, *Bigelow* v. *Virginia*, 421 U. S. 809, 811 (1975); *Schneider* v. *State*, 308 U. S. 147, 160 (1939).

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fessional conduct if he "(3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription." [2] The three-judge District Court declared the quoted portion of the statute "void and of no effect," Jurisdictional Statement, App. 1, and enjoined the defendant-appellants, the Virginia State Board of Pharmacy and the individual members of that Board, from enforcing it. 373 F. Supp. 683 (ED Va. 1974). We noted probable jurisdiction of the appeal. 420 U. S. 971 (1975).

I

Since the challenged restraint is one that peculiarly concerns the licensed pharmacist in Virginia, we begin with a description of that profession as it exists under Virginia law.

The "practice of pharmacy" is statutorily declared to be "a professional practice affecting the public health, safety and welfare," and to be "subject to regulation and control in the public interest." Va. Code Ann. § 54–524.2 (a) (1974).[3] Indeed, the practice is subject to ex-

[2] Section 54–524.35 provides in full:

"Any pharmacist shall be considered guilty of unprofessional conduct who (1) is found guilty of any crime involving grave moral turpitude, or is guilty of fraud or deceit in obtaining a certificate of registration; or (2) issues, publishes, broadcasts by radio, or otherwise, or distributes or uses in any way whatsoever advertising matter in which statements are made about his professional service which have a tendency to deceive or defraud the public, contrary to the public health and welfare; or (3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription."

[3] The parties, also, have stipulated that pharmacy "is a profession." Stipulation of Facts ¶ 11, App. 11.

tensive regulation aimed at preserving high professional standards. The regulatory body is the appellant Virginia State Board of Pharmacy. The Board is broadly charged by statute with various responsibilities, including the "[m]aintenance of the quality, quantity, integrity, safety and efficacy of drugs or devices distributed, dispensed or administered." § 54–524.16 (a). It also is to concern itself with "[m]aintaining the integrity of, and public confidence in, the profession and improving the delivery of quality pharmaceutical services to the citizens of Virginia." § 54–524.16 (d). The Board is empowered to "make such bylaws, rules and regulations . . . as may be necessary for the lawful exercise of its powers." § 54–524.17.

The Board is also the licensing authority. It may issue a license, necessary for the practice of pharmacy in the State, only upon evidence that the applicant is "of good moral character," is a graduate in pharmacy of a school approved by the Board, and has had "a suitable period of experience [the period required not to exceed 12 months] acceptable to the Board." § 54–524.21. The applicant must pass the examination prescribed by the Board. *Ibid.* One approved school is the School of Pharmacy of the Medical College of Virginia, where the curriculum is for three years following two years of college. Prescribed prepharmacy courses, such as biology and chemistry, are to be taken in college, and study requirements at the school itself include courses in organic chemistry, biochemistry, comparative anatomy, physiology, and pharmacology. Students are also trained in the ethics of the profession, and there is some clinical experience in the school's hospital pharmacies and in the medical center operated by the Medical College. This

is "a rigid, demanding curriculum in terms of what the pharmacy student is expected to know about drugs." [4]

Once licensed, a pharmacist is subject to a civil monetary penalty, or to revocation or suspension of his license, if the Board finds that he "is not of good moral character," or has violated any of a number of stated professional standards (among them that he not be "negligent in the practice of pharmacy" or have engaged in "fraud or deceit upon the consumer . . . in connection with the practice of pharmacy"), or is guilty of "unprofessional conduct." § 54–524.22:1. "Unprofessional conduct" is specifically defined in § 54–524.35, n. 2, *supra*, the third numbered phrase of which relates to advertising of the price for any prescription drug, and is the subject of this litigation.

Inasmuch as only a licensed pharmacist may dispense prescription drugs in Virginia, § 54–524.48,[5] advertising or other affirmative dissemination of prescription drug price information is effectively forbidden in the State. Some pharmacies refuse even to quote prescription drug prices over the telephone. The Board's position, however, is that this would not constitute an unprofessional publication.[6] It is clear, nonetheless, that all advertising of such prices, in the normal sense, is forbidden. The prohibition does not extend to nonprescription drugs, but neither is it confined to prescriptions that the pharmacist compounds himself. Indeed, about 95% of all prescriptions now are filled with dosage forms prepared by the pharmaceutical manufacturer.[7]

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[4] *Id.*, ¶ 8, App. 11. See generally *id.*, ¶¶ 6–16, App. 10–12.

[5] Exception is made for "legally qualified" practitioners of medicine, dentistry, osteopathy, chiropody, and veterinary medicine. § 54–524.53.

[6] Stipulation of Facts ¶ 25, App. 15.

[7] *Id.*, ¶ 18, App. 13.

II

This is not the first challenge to the constitutionality of § 54–524.35 and what is now its third-numbered phrase. Shortly after the phrase was added to the statute in 1968,[8] a suit seeking to enjoin its operation was instituted by a drug retailing company and one of its pharmacists. Although the First Amendment was invoked, the challenge appears to have been based primarily on the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In any event, the prohibition on drug price advertising was upheld. *Patterson Drug Co.* v. *Kingery,* 305 F. Supp. 821 (WD Va. 1969). The three-judge court did find that the dispensation of prescription drugs "affects the public health, safety and welfare." *Id.,* at 824–825. No appeal was taken.

The present, and second, attack on the statute is one made not by one directly subject to its prohibition, that is, a pharmacist, but by prescription drug consumers who claim that they would greatly benefit if the prohibition were lifted and advertising freely allowed. The plaintiffs are an individual Virginia resident who suffers from diseases that require her to take prescription drugs on a daily basis,[9] and two nonprofit organizations.[10] Their

[8] Theretofore an administrative regulation to the same effect had been outstanding. The Board, however, in 1967 was advised by the State Attorney General's office that the regulation was unauthorized. The challenged phrase was added to the statute the following year. See *Patterson Drug Co.* v. *Kingery,* 305 F. Supp. 821, 823 n. 1 (WD Va. 1969).

[9] Stipulation of Facts ¶ 3, App. 9.

[10] The organizations are the Virginia Citizens Consumer Council, Inc., and the Virginia State AFL–CIO. Each has a substantial membership (approximately 150,000 and 69,000, respectively) many of whom are users of prescription drugs. *Id.,* ¶¶ 1 and 2, App. 9. The American Association of Retired Persons and the National Retired Teachers Association, also claiming many members who "de-

claim is that the First Amendment entitles the user of prescription drugs to receive information that pharmacists wish to communicate to them through advertising and other promotional means, concerning the prices of such drugs.

Certainly that information may be of value. Drug prices in Virginia, for both prescription and nonprescription items, strikingly vary from outlet to outlet even within the same locality. It is stipulated, for example, that in Richmond "the cost of 40 Achromycin tablets ranges from $2.59 to $6.00, a difference of 140% [*sic*]," and that in the Newport News-Hampton area the cost of tetracycline ranges from $1.20 to $9.00, a difference of 650%.[11]

The District Court seized on the identity of the plaintiff-appellees as consumers as a feature distinguishing the

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pend substantially on prescription drugs for their well-being," Brief 2, are among those who have filed briefs *amici curiae* in support of the appellees.

[11] Stipulation of Facts ¶¶ 22 (b) and (c), App. 14. The phenomenon of widely varying drug prices is apparently national in scope. The American Medical Association conducted a survey in Chicago that showed price differentials in that city of up to 1200% for the same amounts of a specific drug. A study undertaken by the Consumers Union in New York found that prices for the same amount of one drug ranged from 79¢ to $7.45, and for another from $1.25 to $11.50. *Id.*, ¶¶ 22 (d) and (e), App. 14. *Amici* American Association of Retired Persons and National Retired Teachers Association state that in 1974 they participated in a survey of three prescription drug prices at 28 pharmacies in Washington, D. C., and found pharmacy-to-pharmacy variances in the price of identical drugs as great as 245%. Brief as *Amici Curiae* 10. The prevalence of such discrepancies "throughout the United States" is documented in a recent report. Staff Report to the Federal Trade Commission, Prescription Drug Price Disclosures 119 (1975). The same report indicates that 34 States impose significant restrictions on dissemination of drug price information and, thus, make the problem a national one. *Id.*, at 34.

present case from *Patterson Drug Co.* v. *Kingery, supra.* Because the unsuccessful plaintiffs in that earlier case were pharmacists, the court said, "theirs was a prima facie commercial approach," 373 F. Supp., at 686. The present plaintiffs, on the other hand, were asserting an interest in their own health that was "fundamentally deeper than a trade consideration." *Ibid.* In the District Court's view, the expression in *Valentine* v. *Chrestensen,* 316 U. S. 52, 54–55 (1942), to the effect that "purely commercial advertising" is not protected had been tempered, by later decisions of this Court, to the point that First Amendment interests in the free flow of price information could be found to outweigh the countervailing interests of the State. The strength of the interest in the free flow of drug price information was borne out, the court felt, by the fact that three States by court decision had struck down their prohibitions on drug price advertising. *Florida Board of Pharmacy* v. *Webb's City, Inc.,* 219 So. 2d 681 (Fla. 1969); *Maryland Board of Pharmacy* v. *Sav-A-Lot, Inc.,* 270 Md. 103, 311 A. 2d 242 (1973); *Pennsylvania State Board of Pharmacy* v. *Pastor,* 441 Pa. 186, 272 A. 2d 487 (1971).[12] The District Court recognized that this Court had upheld—against federal constitutional challenges other than on First Amendment grounds—state restric-

[12] The Florida and Pennsylvania decisions appear to rest on state constitutional grounds. The Maryland decision was based on the Due Process Clause of the Fourteenth Amendment as well as on provisions of the State Constitution.

Accord: *Terry* v. *California State Board of Pharmacy,* 395 F. Supp. 94 (ND Cal. 1975), appeal docketed, No. 75-336. Contra: *Urowsky* v. *Board of Regents,* 38 N. Y. 2d 364, 342 N. E. 2d 583 (1975); *Supermarkets General Corp.* v. *Sills,* 93 N. J. Super. 326, 225 A. 2d 728 (1966).

See Note: Commercial Speech—An End in Sight to *Chrestensen?* 23 De Paul L. Rev. 1258 (1974); Comment, 37 Brooklyn L. Rev. 617 (1971); Comment, 24 Wash. and Lee L. Rev. 299 (1967).

tions on the advertisement of prices for optometrists' services, *Head* v. *New Mexico Board,* 374 U. S. 424 (1963), for eyeglass frames, *Williamson* v. *Lee Optical Co.,* 348 U. S. 483 (1955), and for dentists' services, *Semler* v. *Dental Examiners,* 294 U. S. 608 (1935).[13] The same dangers of abuse and deception were not thought to be present, however, when the advertised commodity was prescribed by a physician for his individual patient and was dispensed by a licensed pharmacist. The Board failed to justify the statute adequately, and it had to fall. 373 F. Supp., at 686–687.

III

The question first arises whether, even assuming that First Amendment protection attaches to the flow of drug price information, it is a protection enjoyed by the appellees as recipients of the information, and not solely, if at all, by the advertisers themselves who seek to disseminate that information.

Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here,[14] the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases. In *Lamont* v. *Postmaster General,* 381 U. S. 301 (1965), the Court upheld the First Amendment rights of citizens to receive political publications sent from abroad.

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[13] In *Head* v. *New Mexico Board,* the First Amendment issue was raised. This Court refused to consider it, however, because it had not been presented to the state courts, nor reserved in the notice of appeal here. 374 U. S., at 432 n. 12. The Court's action to this effect was noted in *Pittsburgh Press Co.* v. *Human Relations Comm'n,* 413 U. S. 376, 387 n. 10 (1973). The appellants at the oral argument recognized that *Head* was a due process case. Tr. of Oral Arg. 10.

[14] "In the absence of Section 54–524.35 (3), some pharmacies in Virginia would advertise, publish and promote price information regarding prescription drugs." Stipulation of Facts ¶ 26, App. 15.

More recently, in *Kleindienst* v. *Mandel*, 408 U. S. 753, 762–763 (1972), we acknowledged that this Court has referred to a First Amendment right to "receive information and ideas," and that freedom of speech " 'necessarily protects the right to receive.' " And in *Procunier* v. *Martinez*, 416 U. S. 396, 408–409 (1974), where censorship of prison inmates' mail was under examination, we thought it unnecessary to assess the First Amendment rights of the inmates themselves, for it was reasoned that such censorship equally infringed the rights of noninmates to whom the correspondence was addressed. There are numerous other expressions to the same effect in the Court's decisions. See, *e. g.*, *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 390 (1969); *Stanley* v. *Georgia*, 394 U. S. 557, 564 (1969); *Griswold* v. *Connecticut*, 381 U. S. 479, 482 (1965); *Marsh* v. *Alabama*, 326 U. S. 501, 505 (1946); *Thomas* v. *Collins*, 323 U. S. 516, 534 (1945); *Martin* v. *Struthers*, 319 U. S. 141, 143 (1943). If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees.[15]

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[15] The dissent contends that there is no such right to receive the information that another seeks to disseminate, at least not when the person objecting could obtain the information in another way, and could himself disseminate it. Our prior decisions, cited above, are said to have been limited to situations in which the information sought to be received "would not be otherwise reasonably available," see *post*, at 782; emphasis is also placed on the appellees' great need for the information, which need, assertedly, should cause them to take advantage of the alternative of digging it up themselves. We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is. Nor have we recognized any such limitation on the independent right of the listener to receive the information sought to be communicated. Certainly, the recipients of the political publications in *Lamont* could have gone abroad and thereafter disseminated them

IV

The appellants contend that the advertisement of prescription drug prices is outside the protection of the First Amendment because it is "commercial speech." There can be no question that in past decisions the Court has given some indication that commercial speech is unprotected. In *Valentine* v. *Chrestensen, supra,* the Court upheld a New York statute that prohibited the distribution of any "handbill, circular . . . or other advertising matter whatsoever in or upon any street." The Court concluded that, although the First Amendment would forbid the banning of all communication by handbill in the public thoroughfares, it imposed "no such restraint on government as respects purely commercial advertising." 316 U. S., at 54. Further support for a "commercial speech" exception to the First Amendment may perhaps be found in *Breard* v. *Alexandria,* 341 U. S. 622 (1951), where the Court upheld a conviction for violation of an ordinance prohibiting door-to-door solicitation of magazine subscriptions. The Court reasoned: "The selling . . . brings into the transaction a commercial feature," and it distinguished *Martin* v. *Struthers, supra,* where it had reversed a conviction for door-to-door distribution of leaflets publicizing a religious meeting, as a case involving "no element of the commercial." 341 U. S., at 642–643. Moreover, the Court several times has stressed that communications to which First Amendment protection was given were *not* "purely commercial." *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 266

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themselves. Those in *Kleindienst* who organized the lecture tour by a foreign Marxist could have done the same. And the addressees of the inmate correspondence in *Procunier* could have visited the prison themselves. As for the recipients' great need for the information sought to be disseminated, if it distinguishes our prior cases at all, it makes the appellees' First Amendment claim a stronger rather than a weaker one.

(1964); *Thomas* v. *Collins*, 323 U. S., at 533; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 111 (1943); *Jamison* v. *Texas*, 318 U. S. 413, 417 (1943).

Since the decision in *Breard*, however, the Court has never *denied* protection on the ground that the speech in issue was "commercial speech." That simplistic approach, which by then had come under criticism or was regarded as of doubtful validity by Members of the Court,[16] was avoided in *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376 (1973). There the Court upheld an ordinance prohibiting newspapers from listing employment advertisements in columns according to whether male or female employees were sought to be hired. The Court, to be sure, characterized the advertisements as "classic examples of commercial speech," *id.*, at 385, and a newspaper's printing of the advertisements as of the same character. The Court, however, upheld the ordinance on the ground that the restriction it imposed was permissible because the discriminatory hirings proposed by the advertisements, and by their newspaper layout, were themselves illegal.

Last Term, in *Bigelow* v. *Virginia*, 421 U. S. 809 (1975), the notion of unprotected "commercial speech" all but passed from the scene. We reversed a conviction for violation of a Virginia statute that made the circulation of any publication to encourage or promote the

[16] See *Bigelow* v. *Virginia*, 421 U. S., at 820 n. 6, citing Mr. Justice Douglas' observation in *Cammarano* v. *United States*, 358 U. S. 498, 514 (1959) (concurring opinion), that the *Chrestensen* ruling "was casual, almost offhand. And it has not survived reflection"; the similar observation of four Justices in dissent in *Lehman* v. *City of Shaker Heights*, 418 U. S. 298, 314 n. 6 (1974); and expressions of three Justices in separate dissents in *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S., at 393, 398, and 401. See also Mr. Justice Douglas' comment, dissenting from the denial of certiorari in *Dun & Bradstreet, Inc.* v. *Grove*, 404 U. S. 898, 904–906 (1971).

processing of an abortion in Virginia a misdemeanor. The defendant had published in his newspaper the availability of abortions in New York. The advertisement in question, in addition to announcing that abortions were legal in New York, offered the services of a referral agency in that State. We rejected the contention that the publication was unprotected because it was commercial. *Chrestensen*'s continued validity was questioned, and its holding was described as "distinctly a limited one" that merely upheld "a reasonable regulation of the manner in which commercial advertising could be distributed." 421 U. S., at 819. We concluded that "the Virginia courts erred in their assumptions that advertising, as such, was entitled to no First Amendment protection," and we observed that the "relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas." *Id.*, at 825–826.

Some fragment of hope for the continuing validity of a "commercial speech" exception arguably might have persisted because of the subject matter of the advertisement in *Bigelow*. We noted that in announcing the availability of legal abortions in New York, the advertisement "did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.'" *Id.*, at 822. And, of course, the advertisement related to activity with which, at least in some respects, the State could not interfere. See *Roe* v. *Wade*, 410 U. S. 113 (1973); *Doe* v. *Bolton*, 410 U. S. 179 (1973). Indeed, we observed: "We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit." 421 U. S., at 825.

Here, in contrast, the question whether there is a First Amendment exception for "commercial speech" is

squarely before us. Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." Our question, then, is whether this communication is wholly outside the protection of the First Amendment.

V

We begin with several propositions that already are settled or beyond serious dispute. It is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. *Buckley* v. *Valeo*, 424 U. S. 1, 35–59 (1976); *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S., at 384; *New York Times Co.* v. *Sullivan*, 376 U. S., at 266. Speech likewise is protected even though it is carried in a form that is "sold" for profit, *Smith* v. *California*, 361 U. S. 147, 150 (1959) (books); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 501 (1952) (motion pictures); *Murdock* v. *Pennsylvania*, 319 U. S., at 111 (religious literature), and even though it may involve a solicitation to purchase or otherwise pay or contribute money. *New York Times Co.* v. *Sullivan*, *supra*; *NAACP* v. *Button*, 371 U. S. 415, 429 (1963); *Jamison* v. *Texas*, 318 U. S., at 417; *Cantwell* v. *Connecticut*, 310 U. S. 296, 306–307 (1940).

If there is a kind of commercial speech that lacks all First Amendment protection, therefore, it must be distinguished by its content. Yet the speech whose content deprives it of protection cannot simply be speech on a commercial subject. No one would contend that our pharmacist may be prevented from being heard on

the subject of whether, in general, pharmaceutical prices should be regulated, or their advertisement forbidden. Nor can it be dispositive that a commercial advertisement is noneditorial, and merely reports a fact. Purely factual matter of public interest may claim protection. *Bigelow* v. *Virginia*, 421 U. S., at 822; *Thornhill* v. *Alabama*, 310 U. S. 88, 102 (1940).

Our question is whether speech which does "no more than propose a commercial transaction," *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S., at 385, is so removed from any "exposition of ideas," *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942), and from " 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,' " *Roth* v. *United States*, 354 U. S. 476, 484 (1957), that it lacks all protection. Our answer is that it is not.

Focusing first on the individual parties to the transaction that is proposed in the commercial advertisement, we may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment. The interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome. See, *e. g.*, *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 617–618 (1969); *NLRB* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 477 (1941); *AFL* v. *Swing*, 312 U. S. 321, 325–326 (1941); *Thornhill* v. *Alabama*, 310 U. S., at 102. We know of no requirement that, in order to avail themselves of First Amendment protection, the parties to a labor dispute need address themselves to the merits of unionism in general

or to any subject beyond their immediate dispute.[17] It was observed in *Thornhill* that "the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing." *Id.*, at 103. Since the fate of such a "single factory" could as well turn on its ability to advertise its product as on the resolution of its labor difficulties, we see no satisfactory distinction between the two kinds of speech.

As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate. Appellees' case in this respect is a convincing one. Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent.[18] When drug prices

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[17] The speech of labor disputants, of course, is subject to a number of restrictions. The Court stated in *NLRB* v. *Gissel Packing Co.*, 395 U. S., at 618, for example, that an employer's threats of retaliation for the labor actions of his employees are "without the protection of the First Amendment." The constitutionality of restrictions upon speech in the special context of labor disputes is not before us here. We express no views on that complex subject, and advert to cases in the labor field only to note that in some circumstances speech of an entirely private and economic character enjoys the protection of the First Amendment.

[18] The point hardly needs citation, but a few figures are illustrative. It has been estimated, for example, that in 1973 and 1974 per capita drug expenditures of persons age 65 and over were $97.27 and $103.17, respectively, more than twice the figures of $41.18 and $45.14 for all age groups. Cooper & Piro, Age Differences in Medical Care Spending, Fiscal Year 1973, 37 Social Security Bull., No. 5, p. 6 (1974); Mueller & Gibson, Age Differences in Health Care Spending, Fiscal Year 1974, 38 Social Security Bull., No.

vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.

Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial," may be of general public interest. The facts of decided cases furnish illustrations: advertisements stating that referral services for legal abortions are available, *Bigelow* v. *Virginia, supra;* that a manufacturer of artificial furs promotes his product as an alternative to the extinction by his competitors of fur-bearing mammals, see *Fur Information & Fashion Council, Inc.* v. *E. F. Timme & Son,* 364 F. Supp. 16 (SDNY 1973); and that a domestic producer advertises his product as an alternative to imports that tend to deprive American residents of their jobs, cf. *Chicago Joint Board* v. *Chicago Tribune Co.,* 435 F. 2d 470 (CA7 1970), cert. denied, 402 U. S. 973 (1971). Obviously, not all commercial messages contain the same or even a very great public interest element. There are few to which such an element, however, could not be added. Our pharmacist, for example, could cast himself as a commentator on store-to-store dispari-

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6, p. 5 (1975). These figures, of course, reflect the higher rate of illness among the aged. In 1971, 16.9% of all Americans 65 years and over were unable to carry on major activities because of some chronic condition, the figure for all ages being only 2.9%. Statistical Policy Division, Office of Management and Budget, Social Indicators 1973, p. 36. These figures eloquently suggest the diminished capacity of the aged for the kind of active comparison shopping that a ban on advertising makes necessary or desirable. Diminished resources are also the general rule for those 65 and over; their income averages about half that for all age groups. *Id.,* at 176.

The parties have stipulated that a "significant portion of income of elderly persons is spent on medicine." Stipulation of Facts ¶ 27, App. 15.

ties in drug prices, giving his own and those of a competitor as proof. We see little point in requiring him to do so, and little difference if he does not.

Moreover, there is another consideration that suggests that no line between publicly "interesting" or "important" commercial advertising and the opposite kind could ever be drawn. Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. See *Dun & Bradstreet, Inc.* v. *Grove,* 404 U. S. 898, 904–906 (1971) (Douglas, J., dissenting from denial of certiorari). See also *FTC* v. *Procter & Gamble Co.,* 386 U. S. 568, 603–604 (1967) (Harlan, J., concurring). And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy,[19] we could not say that the free flow of information does not serve that goal.[20]

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[19] For the views of a leading exponent of this position, see A. Meiklejohn, Free Speech And Its Relation to Self-Government (1948). This Court likewise has emphasized the role of the First Amendment in guaranteeing our capacity for democratic self-government. See *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 269–270 (1964), and cases cited therein.

[20] Pharmaceuticals themselves provide a not insignificant illustra-

Arrayed against these substantial individual and societal interests are a number of justifications for the advertising ban. These have to do principally with maintaining a high degree of professionalism on the part of licensed pharmacists.[21] Indisputably, the State has a strong interest in maintaining that professionalism. It is exercised in a number of ways for the consumer's benefit. There is the clinical skill involved in the compounding of drugs, although, as has been noted, these now make up only a small percentage of the prescriptions filled. Yet, even with respect to manufacturer-prepared compounds, there is room for the pharmacist

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tion. The parties have stipulated that expenditures for prescription drugs in the United States in 1970 were estimated at $9.14 billion. Stipulation of Facts ¶ 17, App. 12. It has been said that the figure for drugs and drug sundries in 1974 was $9.695 billion, with that amount estimated to be increasing about $700 million per year. Worthington, National Health Expenditures 1929–1974, 38 Social Security Bull., No. 2, p. 9 (1975). The task of predicting the effect that a free flow of drug price information would have on the production and consumption of drugs obviously is a hazardous and speculative one. It was recently undertaken, however, by the staff of the Federal Trade Commission in the course of its report, see n. 11, *supra*, on the merits of a possible Commission rule that would outlaw drug price advertising restrictions. The staff concluded that consumer savings would be "of a very substantial magnitude, amounting to many millions of dollars per year." Staff Report, *supra*, n. 11, at 181.

[21] An argument not advanced by the Board, either in its brief or in the testimony proffered prior to summary judgment, but which on occasion has been made to other courts, see, *e. g.*, *Pennsylvania State Board of Pharmacy* v. *Pastor*, 441 Pa. 186, 272 A. 2d 487 (1971), is that the advertisement of low drug prices will result in overconsumption and in abuse of the advertised drugs. The argument prudently has been omitted. By definition, the drugs at issue here may be sold only on a physician's prescription. We do not assume, as apparently the dissent does, that simply because low prices will be freely advertised, physicians will overprescribe, or that pharmacists will ignore the prescription requirement.

to serve his customer well or badly. Drugs kept too long on the shelf may lose their efficacy or become adulterated. They can be packaged for the user in such a way that the same results occur. The expertise of the pharmacist may supplement that of the prescribing physician, if the latter has not specified the amount to be dispensed or the directions that are to appear on the label. The pharmacist, a specialist in the potencies and dangers of drugs, may even be consulted by the physician as to what to prescribe. He may know of a particular antagonism between the prescribed drug and another that the customer is or might be taking, or with an allergy the customer may suffer. The pharmacist himself may have supplied the other drug or treated the allergy. Some pharmacists, concededly not a large number, "monitor" the health problems and drug consumptions of customers who come to them repeatedly.[22] A pharmacist who has a continuous relationship with his customer is in the best position, of course, to exert professional skill for the customer's protection.

Price advertising, it is argued, will place in jeopardy the pharmacist's expertise and, with it, the customer's health. It is claimed that the aggressive price competition that will result from unlimited advertising will make it impossible for the pharmacist to supply professional services in the compounding, handling, and dispensing

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[22] Monitoring, even if pursued, is not fully effective. It is complicated by the mobility of the patient; by his patronizing more than one pharmacist; by his being treated by more than one prescriber; by the availability of over-the-counter drugs; and by the antagonism of certain foods and drinks. Stipulation of Facts ¶¶ 30–47, App. 16–19. Neither the Code of Ethics of the American Pharmaceutical Association nor that of the Virginia Pharmaceutical Association requires a pharmacist to maintain family prescription records. *Id.*, ¶ 42, App. 18. The appellant Board has never promulgated a regulation requiring such records. *Id.*, ¶ 43, App. 18.

of prescription drugs. Such services are time consuming and expensive; if competitors who economize by eliminating them are permitted to advertise their resulting lower prices, the more painstaking and conscientious pharmacist will be forced either to follow suit or to go out of business. It is also claimed that prices might not necessarily fall as a result of advertising. If one pharmacist advertises, others must, and the resulting expense will inflate the cost of drugs. It is further claimed that advertising will lead people to shop for their prescription drugs among the various pharmacists who offer the lowest prices, and the loss of stable pharmacist-customer relationships will make individual attention—and certainly the practice of monitoring—impossible. Finally, it is argued that damage will be done to the professional image of the pharmacist. This image, that of a skilled and specialized craftsman, attracts talent to the profession and reinforces the better habits of those who are in it. Price advertising, it is said, will reduce the pharmacist's status to that of a mere retailer.[23]

The strength of these proffered justifications is greatly undermined by the fact that high professional standards, to a substantial extent, are guaranteed by the close regulation to which pharmacists in Virginia are subject. And this case concerns the retail sale by the pharmacist more than it does his professional standards. Surely, any pharmacist guilty of professional dereliction that actually endangers his customer will promptly lose his

[23] Descriptions of the pharmacist's expertise, its importance to the consumer, and its alleged jeopardization by price advertising are set forth at length in the numerous summaries of testimony of proposed witnesses for the Board, and objections to testimony of proposed witnesses for the plaintiffs, that the Board filed with the District Court prior to summary judgment, the substance of which appellees did not contest. App. 4, 27–48, 52–53; Brief for Appellants 4–5, and n. 2.

license. At the same time, we cannot discount the Board's justifications entirely. The Court regarded justifications of this type sufficient to sustain the advertising bans challenged on due process and equal protection grounds in *Head* v. *New Mexico Board, supra; Williamson* v. *Lee Optical Co., supra;* and *Semler* v. *Dental Examiners, supra.*

The challenge now made, however, is based on the First Amendment. This casts the Board's justifications in a different light, for on close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information. There is no claim that the advertising ban in any way prevents the cutting of corners by the pharmacist who is so inclined. That pharmacist is likely to cut corners in any event. The only effect the advertising ban has on him is to insulate him from price competition and to open the way for him to make a substantial, and perhaps even excessive, profit in addition to providing an inferior service. The more painstaking pharmacist is also protected but, again, it is a protection based in large part on public ignorance.

It appears to be feared that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers. They will choose the low-cost, low-quality service and drive the "professional" pharmacist out of business. They will respond only to costly and excessive advertising, and end up paying the price. They will go from one pharmacist to another, following the discount, and destroy the pharmacist-customer relationship. They will lose respect for

the profession because it advertises. All this is not in their best interests, and all this can be avoided if they are not permitted to know who is charging what.

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the "professional" pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. Cf. *Parker* v. *Brown*, 317 U. S. 341 (1943). But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is. We so hold.

VI

In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible. We mention a few only to make clear that they are not before us and therefore are not foreclosed by this case.

There is no claim, for example, that the prohibition on prescription drug price advertising is a mere time, place, and manner restriction. We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information. Compare *Grayned* v. *City of Rockford*, 408 U. S. 104, 116 (1972); *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968); and *Kovacs* v. *Cooper*, 336 U. S. 77, 85–87 (1949), with *Buckley* v. *Valeo*, 424 U. S. 1; *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 209 (1975); *Cantwell* v. *Connecticut*, 310 U. S., at 304–308; and *Saia* v. *New York*, 334 U. S. 558, 562 (1948). Whatever may be the proper bounds of time, place, and manner restrictions on commercial speech, they are plainly exceeded by this Virginia statute, which singles out speech of a particular content and seeks to prevent its dissemination completely.

Nor is there any claim that prescription drug price advertisements are forbidden because they are false or misleading in any way. Untruthful speech, commercial or otherwise, has never been protected for its own sake. *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 340 (1974); *Konigsberg* v. *State Bar*, 366 U. S. 36, 49, and n. 10 (1961). Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem.[24] The First Amendment,

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[24] In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does "no more than propose a commercial transaction," *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S., at 385, and other varieties. Even if the differences do not justify the conclusion

as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely. See, for example, Va. Code Ann. § 18.2–216 (1975).

Also, there is no claim that the transactions proposed in the forbidden advertisements are themselves illegal in any way. Cf. *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376 (1973); *United States*

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that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely.

Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. Compare *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), with *Dun & Bradstreet, Inc.* v. *Grove*, 404 U. S. 898 (1971). They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive. Compare *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), with *Banzhaf* v. *FCC*, 132 U. S. App. D. C. 14, 405 F. 2d 1082 (1968), cert. denied *sub nom. Tobacco Institute, Inc.* v. *FCC*, 396 U. S. 842 (1969). Cf. *United States* v. *95 Barrels of Vinegar*, 265 U. S. 438, 443 (1924) ("It is not difficult to choose statements, designs and devices which will not deceive"). They may also make inapplicable the prohibition against prior restraints. Compare *New York Times Co.* v. *United States*, 403 U. S. 713 (1971), with *Donaldson* v. *Read Magazine*, 333 U. S. 178, 189–191 (1948); *FTC* v. *Standard Education Society*, 302 U. S. 112 (1937); *E. F. Drew & Co.* v. *FTC*, 235 F. 2d 735, 739–740 (CA2 1956), cert. denied, 352 U. S. 969 (1957).

v. *Hunter,* 459 F. 2d 205 (CA4), cert. denied, 409 U. S. 934 (1972). Finally, the special problems of the electronic broadcast media are likewise not in this case. Cf. *Capitol Broadcasting Co.* v. *Mitchell,* 333 F. Supp. 582 (DC 1971), aff'd *sub nom. Capitol Broadcasting Co.* v. *Acting Attorney General,* 405 U. S. 1000 (1972).

What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions,[25] we conclude that the answer to this one is in the negative.

The judgment of the District Court is affirmed.

It is so ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. CHIEF JUSTICE BURGER, concurring.

The Court notes that roughly 95% of all prescriptions are filled with dosage units already prepared by the manufacturer and sold to the pharmacy in that form. These are the drugs that have a market large enough to make their preparation profitable to the manufacturer; for the same reason, they are the drugs that it is profitable for the pharmacist to advertise. In dispensing

[25] We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.

these *prepackaged* items, the pharmacist performs largely a packaging rather than a compounding function of former times. Our decision today, therefore, deals largely with the State's power to prohibit pharmacists from advertising the retail price of *prepackaged drugs.* As the Court notes, *ante,* at 773 n. 25, quite different factors would govern were we faced with a law regulating or even prohibiting advertising by the traditional learned professions of medicine or law. "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773, 792 (1975). See also *Cohen* v. *Hurley,* 366 U. S. 117, 123–124 (1961). We have also recognized the State's substantial interest in regulating physicians. See, *e. g., United States* v. *Oregon Medical Society,* 343 U. S. 326, 336 (1952); *Semler* v. *Oregon State Board of Dental Examiners,* 294 U. S. 608, 612 (1935). Attorneys and physicians are engaged *primarily* in providing services in which professional judgment is a large component, a matter very different from the retail *sale* of labeled drugs already prepared by others.

MR. JUSTICE STEWART aptly observes that the "differences between commercial price and product advertising . . . and ideological communication" allow the State a scope in regulating the former that would be unacceptable under the First Amendment with respect to the latter. I think it important to note also that the advertisement of professional services carries with it quite different risks from the advertisement of standard products. The Court took note of this in *Semler, supra,* at 612, in upholding a state statute prohibiting entirely certain types of advertisement by dentists:

"The legislature was not dealing with traders in

> commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous."

I doubt that we know enough about evaluating the quality of medical and legal services to know which claims of superiority are "misleading" and which are justifiable. Nor am I sure that even advertising the price of certain professional services is not inherently misleading, since what the professional must do will vary greatly in individual cases. It is important to note that the Court wisely leaves these issues to another day.

MR. JUSTICE STEWART, concurring.

In *Thornhill* v. *Alabama*, 310 U. S. 88, the Court observed that "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Id.*, at 102. Shortly after the *Thornhill* decision, the Court identified a single category of communications that is constitutionally unprotected: communications "which by their very utterance inflict

injury." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572. Yet only a month after *Chaplinsky*, and without reference to that decision, the Court stated in *Valentine* v. *Chrestensen*, 316 U. S. 52, 54, that "the Constitution imposes no such restraint on government as respects purely commercial advertising." For more than 30 years this "casual, almost offhand" statement in *Chrestensen* has operated to exclude commercial speech from the protection afforded by the First Amendment to other types of communication. *Cammarano* v. *United States*, 358 U. S. 498, 514 (Douglas, J., concurring).[1]

Today the Court ends the anomalous situation created by *Chrestensen* and holds that a communication which does no more than propose a commercial transaction is not "wholly outside the protection of the First Amendment." *Ante*, at 761. But since it is a cardinal principle of the First Amendment that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content," [2] the Court's decision calls into immediate question the constitutional legitimacy of every state and federal law regulating false or deceptive advertising. I write separately to explain why I think today's decision does not preclude such governmental regulation.

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[1] In recent years the soundness of the sweeping language of the *Chrestensen* opinion has been repeatedly questioned. See *Bigelow* v. *Virginia*, 421 U. S. 809, 819–821; *Lehman* v. *City of Shaker Heights*, 418 U. S. 298, 314–315, and n. 6 (BRENNAN, J., dissenting); *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376, 398 (Douglas, J., dissenting); *id.*, at 401, and n. 6 (STEWART, J., dissenting); *Dun & Bradstreet, Inc.* v. *Grove*, 404 U. S. 898, 904–906 (Douglas, J., dissenting from denial of certiorari).

[2] *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95. See, *e. g.*, *Hudgens* v. *NLRB*, 424 U. S. 507, 520; *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 209; *Pell* v. *Procunier*, 417 U. S. 817, 828; *Grayned* v. *City of Rockford*, 408 U. S. 104, 115.

The Court has on several occasions addressed the problem posed by false statements of fact in libel cases. Those cases demonstrate that even with respect to expression at the core of the First Amendment, the Constitution does not provide absolute protection for false factual statements that cause private injury. In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 340, the Court concluded that "there is no constitutional value in false statements of fact." As the Court had previously recognized in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, however, factual errors are inevitable in free debate, and the imposition of liability for erroneous factual assertions can "dampe[n] the vigor and limi[t] the variety of public debate" by inducing "self-censorship." *Id.*, at 279. In order to provide ample "breathing space" for free expression, the Constitution places substantial limitations on the discretion of government to permit recovery for libelous communications. See *Gertz* v. *Robert Welch, Inc.*, *supra*, at 347–349.

The principles recognized in the libel decisions suggest that government may take broader action to protect the public from injury produced by false or deceptive price or product advertising than from harm caused by defamation. In contrast to the press, which must often attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publication deadlines, the commercial advertiser generally knows the product or service he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them. The advertiser's access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression. There

is, therefore, little need to sanction "some falsehood in order to protect speech that matters." *Id.*, at 341.

The scope of constitutional protection of communicative expression is not universally inelastic. In the area of labor relations, for example, the Court has recognized that "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the National Labor Relations Board." *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 617. See *NLRB* v. *Virginia Electric & Power Co.*, 314 U. S. 469. Yet, in that context, the Court has concluded that the employer's freedom to communicate his views to his employees may be restricted by the requirement that any predictions "be carefully phrased on the basis of objective fact." [3] 395 U. S., at 618. In response to the contention that the "line between so-called permitted predictions and proscribed threats is too vague to stand up under traditional First Amendment analysis," the Court relied on the employer's intimate knowledge of the employer-employee relationship and his ability to "avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his em-

[3] Speech by an employer or a labor union organizer that contains material misrepresentations of fact or appeals to racial prejudice may form the basis of an unfair labor practice or warrant the invalidation of a certification election. See, *e. g.*, *Sewell Mfg. Co.*, 138 N. L. R. B. 66; *United States Gypsum Co.*, 130 N. L. R. B. 901; *Gummed Products Co.*, 112 N. L. R. B. 1092. Such restrictions would clearly violate First Amendment guarantees if applied to political expression concerning the election of candidates to public office. See *Vanasco* v. *Schwartz*, 401 F. Supp. 87 (EDNY) (three-judge court), summarily aff'd *sub nom. Schwartz* v. *Postel*, 423 U. S. 1041. Other restrictions designed to promote antiseptic conditions in the labor relations context, such as the prohibition of certain campaigning during the 24-hour period preceding the election, would be constitutionally intolerable if applied in the political arena. Compare *Peerless Plywood Co.*, 107 N. L. R. B. 427, with *Mills* v. *Alabama*, 384 U. S. 214.

ployees." *Id.*, at 620. Cf. *United States* v. *95 Barrels of Vinegar*, 265 U. S. 438, 443 ("It is not difficult to choose statements, designs and devices which will not deceive"). Although speech in the labor relations setting may be distinguished from commercial advertising,[4] the *Gissel Packing Co.* opinion is highly significant in the present context because it underscores the constitutional importance of the speaker's specific and unique knowledge of the relevant facts and establishes that a regulatory scheme monitoring "the impact of utterances" is not invariably inconsistent with the First Amendment.[5] See 395 U. S., at 620.

The Court's determination that commercial advertising of the kind at issue here is not "wholly outside the protection of" the First Amendment indicates by its very phrasing that there are important differences between commercial price and product advertising, on the one hand, and ideological communication on the other. See *ante*, at 771–772, n. 24. Ideological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought—thought that may shape our concepts of the whole universe of man. Although such expression may convey factual information relevant to social and individual decisionmaking, it is protected by

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[4] In the labor relations area, governmental regulation of expression by employers has been justified in part by the competing First Amendment associational interests of employees and by the economic dependence of employees on their employers. See *NLRB* v. *Gissel Packing Co.*, 395 U. S., at 617–618; *NLRB* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 477.

[5] The Court in *Gissel Packing Co.* emphasized the NLRB's expertise in determining whether statements by employers would tend to mislead or coerce employees. 395 U. S., at 620. The NLRB's armamentarium for responding to material misrepresentations and deceptive tactics includes the issuance of cease-and-desist orders and the securing of restraining orders. See 29 U. S. C. §§ 160 (c), (j).

the Constitution, whether or not it contains factual representations and even if it includes inaccurate assertions of fact. Indeed, disregard of the "truth" may be employed to give force to the underlying idea expressed by the speaker.[6] "Under the First Amendment there is no such thing as a false idea," and the only way that ideas can be suppressed is through "the competition of other ideas," *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 339–340.

Commercial price and product advertising differs markedly from ideological expression because it is confined to the promotion of specific goods or services.[7] The First Amendment protects the advertisement because of the "information of potential interest and value" conveyed, *Bigelow* v. *Virginia*, 421 U. S. 809, 822, rather than because of any direct contribution to the interchange of ideas. See *ante*, at 762–765, 770.[8] Since the factual claims contained in commercial price or product advertisements relate to tangible goods or services, they may be tested empirically and corrected to reflect the truth without in any manner jeopardizing the free dis-

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[6] As the Court observed in *Cantwell* v. *Connecticut*, 310 U. S. 296, 310:

"To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

[7] See Developments in the Law—Deceptive Advertising, 80 Harv. L. Rev. 1005, 1030–1031 (1967).

[8] The information about price and product conveyed by commercial advertisements may, of course, stimulate thought and debate about political questions. The drug price information at issue in the present case might well have an impact, for instance, on a person's views concerning price control issues, government subsidy proposals, or special health care, consumer protection, or tax legislation.

semination of thought. Indeed, the elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection—its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking.

MR. JUSTICE REHNQUIST, dissenting.

The logical consequences of the Court's decision in this case, a decision which elevates commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas, are far reaching indeed. Under the Court's opinion the way will be open not only for dissemination of price information but for active promotion of prescription drugs, liquor, cigarettes, and other products the use of which it has previously been thought desirable to discourage. Now, however, such promotion is protected by the First Amendment so long as it is not misleading or does not promote an illegal product or enterprise. In coming to this conclusion, the Court has overruled a legislative determination that such advertising should not be allowed and has done so on behalf of a consumer group which is not directly disadvantaged by the statute in question. This effort to reach a result which the Court obviously considers desirable is a troublesome one, for two reasons. It extends standing to raise First Amendment claims beyond the previous decisions of this Court. It also extends the protection of that Amendment to purely commercial endeavors which its most vigorous champions on this Court had thought to be beyond its pale.

I

I do not find the question of the appellees' standing to urge the claim which the Court decides quite as easy

as the Court does. The Court finds standing on the part of the consumer appellees based upon a "right to 'receive information.' " *Ante,* at 757. Yet it has been stipulated in this case that the challenged statute does not prohibit anyone from receiving this information either in person or by phone. *Ante,* at 752, and n. 6. The statute forbids "only publish[ing], advertis[ing] or promot[ing]" prescription drugs.

While it may be generally true that publication of information by its source is essential to effective communication, it is surely less true, where, as here, the potential recipients of the information have, in the Court's own words, a "keen, if not keener by far," interest in it than "in the day's most urgent political debate." *Ante,* at 763. Appellees who have felt so strongly about their right to receive information as to litigate the issue in this lawsuit must also have enough residual interest in the matter to call their pharmacy and inquire.

The statute, in addition, only forbids *pharmacists* to publish this price information. There is no prohibition against a consumer group, such as appellees, collecting and publishing comparative price information as to various pharmacies in an area. Indeed they have done as much in their briefs in this case. Yet, though appellees could both receive and publish the information in question the Court finds that they have standing to protest that pharmacists are not allowed to advertise. Thus, contrary to the assertion of the Court, appellees are not asserting their "right to receive information" at all but rather the right of some third party to publish. In the cases relied upon by the Court, *ante,* at 756–757, the plaintiffs asserted their right to receive information which would not be otherwise reasonably available to them.* They did not seek to assert the right of a third

*The Court contends, *ante,* at 757–758, n. 15, that this case is indistinguishable from *Procunier, Kleindienst,* and *Lamont,* in that in all

party, not before the Court, to disseminate information. Here, the only group truly restricted by this statute, the pharmacists, have not even troubled to join in this litigation and may well feel that the expense and competition of advertising is not in their interest.

II

Thus the issue on the merits is not, as the Court phrases it, whether "[o]ur pharmacist" may communicate the fact that he "will sell you the X prescription drug at the Y price." No pharmacist is asserting any such claim to so communicate. The issue is rather whether appellee consumers may override the legislative determination that pharmacists should not advertise even though the pharmacists themselves do not object. In deciding that they may do so, the Court necessarily adopts a rule which cannot be limited merely to dissemination of price alone, and which cannot possibly be confined to pharmacists but must likewise extend to lawyers, doctors, and all other professions.

The Court speaks of the consumer's interest in the free flow of commercial information, particularly in the case of the poor, the sick, and the aged. It goes on to observe that "society also may have a strong interest in the free flow of commercial information." *Ante,* at 764. One need not disagree with either of these statements in order to feel that they should presumptively be the concern of the Virginia Legislature, which sits to balance these and other claims in the process of making laws such as the one here under attack. The Court speaks of the

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of those cases it was possible for the parties to obtain the information on their own. In *Procunier* this would have entailed traveling to a state prison; in *Kleindienst* and *Lamont,* traveling abroad. Obviously such measures would limit access to information in a way that the requirement of a phone call or a trip to the corner drugstore would not.

importance in a "predominantly free enterprise economy" of intelligent and well-informed decisions as to allocation of resources. *Ante,* at 765. While there is again much to be said for the Court's observation as a matter of desirable public policy, there is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession. *E. g., Nebbia* v. *New York,* 291 U. S. 502 (1934); *Olsen* v. *Nebraska,* 313 U. S. 236 (1941).

As Mr. Justice Black, writing for the Court, observed in *Ferguson* v. *Skrupa,* 372 U. S. 726, 730 (1963):

> "The doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies who are elected to pass laws."

Similarly in *Williamson* v. *Lee Optical Co.,* 348 U. S. 483 (1955), the Court, in dealing with a state prohibition against the advertisement of eyeglass frames, held: "We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers." *Id.,* at 490.

The Court addresses itself to the valid justifications which may be found for the Virginia statute, and apparently discounts them because it feels they embody a "highly paternalistic approach." *Ante,* at 770. It concludes that the First Amendment requires that channels of advertising communication with respect to prescription drugs must be opened, and that Virginia may not

keep "the public in ignorance of the entirely lawful terms that competing pharmacists are offering." *Ibid.*

The Court concedes that legislatures may prohibit false and misleading advertisements, and may likewise prohibit advertisements seeking to induce transactions which are themselves illegal. In a final footnote the opinion tosses a bone to the traditionalists in the legal and medical professions by suggesting that because they sell services rather than drugs the holding of this case is not automatically applicable to advertising in those professions. But if the sole limitation on permissible state proscription of advertising is that it may not be false or misleading, surely the difference between pharmacists' advertising and lawyers' and doctors' advertising can be only one of degree and not of kind. I cannot distinguish between the public's right to know the price of drugs and its right to know the price of title searches or physical examinations or other professional services for which standardized fees are charged. Nor is it apparent how the pharmacists in this case are less engaged in a regulatable profession than were the opticians in *Williamson, supra.*

Nor will the impact of the Court's decision on existing commercial and industrial practice be limited to allowing advertising by the professions. The Court comments that in labor disputes "it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome." *Ante,* at 762. But the first case cited by the Court in support of this proposition, *NLRB* v. *Gissel Packing Co.,* 395 U. S. 575, 617–618 (1969), falls a good deal short of supporting this general statement. The Court there said that "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the

communications do not contain a 'threat of reprisal or force or promise of benefit.' " *Id.*, at 618. This carefully guarded language is scarcely a ringing endorsement of even the second-class First Amendment rights which the Court has today created in commercial speech.

It is hard to see why an employer's right to publicize a promise of benefit may be prohibited by federal law, so long as the promise is neither false nor deceptive, if pharmacists' price advertising may not be prohibited by the Virginia Legislature. Yet such a result would be wholly inconsistent with established labor law.

Both the Courts of Appeals and the National Labor Relations Board have not hesitated to set aside representation elections in which the employer made statements which were undoubtedly truthful but which were found to be implicitly coercive. For instance, in *NLRB* v. *Realist, Inc.*, 328 F. 2d 840 (CA7 1964), an election was set aside when the employer, in a concededly nonthreatening manner, raised the specter of plant closings which would result from unionism. In *Oak Mfg. Co.*, 141 N. L. R. B. 1323, 1328–1330 (1963), the Board set aside an election where the employer stated "categorically" that the union "cannot and will not obtain any wage increase for you," and with respect to seniority said that it could "assure" the employees that the union's program "will be worse" than the present system. In *Freeman Mfg. Co.*, 148 N. L. R. B. 577 (1964), the employer sent letters to employees in which he urged that unionization might cause customers to cease buying the company's product because of delays and higher prices. The Board found this to be ground for invalidating the election. Presumably all of these holdings will require re-evaluation in the light of today's decision with a view toward allowing the employer's speech because it is now protected by the First Amendment, as expanded by this decision.

There are undoubted difficulties with an effort to draw a bright line between "commercial speech" on the one hand and "protected speech" on the other, and the Court does better to face up to these difficulties than to attempt to hide them under labels. In this case, however, the Court has unfortunately substituted for the wavering line previously thought to exist between commercial speech and protected speech a no more satisfactory line of its own—that between "truthful" commercial speech, on the one hand, and that which is "false and misleading" on the other. The difficulty with this line is not that it wavers, but on the contrary that it is simply too Procrustean to take into account the congeries of factors which I believe could, quite consistently with the First and Fourteenth Amendments, properly influence a legislative decision with respect to commercial advertising.

The Court insists that the rule it lays down is consistent even with the view that the First Amendment is "primarily an instrument to enlighten public decisionmaking in a democracy." *Ante*, at 765. I had understood this view to relate to public decisionmaking as to political, social, and other public issues, rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo. It is undoubtedly arguable that many people in the country regard the choice of shampoo as just as important as who may be elected to local, state, or national political office, but that does not automatically bring information about competing shampoos within the protection of the First Amendment. It is one thing to say that the line between strictly ideological and political commentaries and other kinds of commentary is difficult to draw, and that the mere fact that the former may have in it an element of commercialism does not strip it of First Amendment protection. See *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). But it is another thing to say that because that

line is difficult to draw, we will stand at the other end of the spectrum and reject out of hand the observation of so dedicated a champion of the First Amendment as Mr. Justice Black that the protections of that Amendment do not apply to a " 'merchant' who goes from door to door 'selling pots.' " *Breard* v. *City of Alexandria,* 341 U. S. 622, 650 (1951) (dissenting).

In the case of "our" hypothetical pharmacist, he may now presumably advertise not only the prices of prescription drugs, but may attempt to energetically promote their sale so long as he does so truthfully. Quite consistently with Virginia law requiring prescription drugs to be available only through a physician, "our" pharmacist might run any of the following representative advertisements in a local newspaper:

> "Pain getting you down? Insist that your physician prescribe Demerol. You pay a little more than for aspirin, but you get a lot more relief."
>
> "Can't shake the flu? Get a prescription for Tetracycline from your doctor today."
>
> "Don't spend another sleepless night. Ask your doctor to prescribe Seconal without delay."

Unless the State can show that these advertisements are either actually untruthful or misleading, it presumably is not free to restrict in any way commercial efforts on the part of those who profit from the sale of prescription drugs to put them in the widest possible circulation. But such a line simply makes no allowance whatever for what appears to have been a considered legislative judgment in most States that while prescription drugs are a necessary and vital part of medical care and treatment, there are sufficient dangers attending their widespread use that they simply may not be promoted in the same manner as hair creams, deodorants, and toothpaste. The very real dangers that general advertising for such drugs

might create in terms of encouraging, even though not sanctioning, illicit use of them by individuals for whom they have not been prescribed, or by generating patient pressure upon physicians to prescribe them, are simply not dealt with in the Court's opinion. If prescription drugs may be advertised, they may be advertised on television during family viewing time. Nothing we know about the acquisitive instincts of those who inhabit every business and profession to a greater or lesser extent gives any reason to think that such persons will not do everything they can to generate demand for these products in much the same manner and to much the same degree as demand for other commodities has been generated.

Both Congress and state legislatures have by law sharply limited the permissible dissemination of information about some commodities because of the potential harm resulting from those commodities, even though they were not thought to be sufficiently demonstrably harmful to warrant outright prohibition of their sale. Current prohibitions on television advertising of liquor and cigarettes are prominent in this category, but apparently under the Court's holding so long as the advertisements are not deceptive they may no longer be prohibited.

This case presents a fairly typical First Amendment problem—that of balancing interests in individual free speech against public welfare determinations embodied in a legislative enactment. As the Court noted in *American Communications Assn.* v. *Douds*, 339 U. S. 382, 399 (1950):

> "[L]egitimate attempts to protect the public, not from the remote possible effects of noxious ideologies, but from the present excesses of direct, active conduct, are not presumptively bad because they

interfere with and, in some of its manifestations, restrain the exercise of First Amendment rights."

Here the rights of the appellees seem to me to be marginal at best. There is no ideological content to the information which they seek and it is freely available to them—they may even publish it if they so desire. The only persons directly affected by this statute are not parties to this lawsuit. On the other hand, the societal interest against the promotion of drug use for every ill, real or imaginary, seems to me extremely strong. I do not believe that the First Amendment mandates the Court's "open door policy" toward such commercial advertising.

Exhibit 68: *Linmark Associates* v. *Township of Willingboro*, 431 U.S. 85 (1977)

Syllabus

LINMARK ASSOCIATES, INC., ET AL. *v.* TOWNSHIP OF WILLINGBORO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 76-357. Argued March 2, 1977—Decided May 2, 1977

A township ordinance prohibiting the posting of real estate "For Sale" and "Sold" signs for the purpose of stemming what the township perceived as the flight of white homeowners from a racially integrated community *held* to violate the First Amendment. *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council*, 425 U. S. 748. Pp. 91–98.

(a) The ordinance cannot be sustained on the ground that it restricts only one method of communication while leaving ample alternative communication channels open. The alternatives (primarily newspaper advertising and listing with real estate agents, which involve more cost and less autonomy than signs, are less likely to reach persons not deliberately seeking sales information, and may be less effective) are far from satisfactory. And the ordinance is not genuinely concerned with the place (front lawns) or the manner (signs) of the speech, but rather proscribes particular types of signs based on their content because the township fears their "primary" effect—that they will cause those receiving the information to act upon it. Pp. 93–94.

(b) Moreover, despite the importance of achieving the asserted goal of promoting stable, integrated housing, the ordinance cannot be upheld on the ground that it promotes an important governmental objective, since it does not appear that the ordinance was needed to achieve that objective and, in any event, the First Amendment disables the township from achieving that objective by restricting the free flow of truthful commercial information. Pp. 94–97.

535 F. 2d 786, reversed.

MARSHALL, J., delivered the opinion of the Court, in which all Members joined except REHNQUIST, J., who took no part in the consideration or decision of the case.

John P. Hauch, Jr., argued the cause for petitioners. With him on the brief was *Thomas L. Earp*.

Myron H. Gottlieb argued the cause and filed a brief for respondents.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether the First Amendment permits a municipality to prohibit the posting of "For Sale" or "Sold" signs when the municipality acts to stem what it perceives as the flight of white homeowners from a racially integrated community.

Petitioner Linmark Associates, a New Jersey corporation, owned a piece of realty in the township of Willingboro, N. J. Petitioner decided to sell its property, and on March 26, 1974, listed it with petitioner Mellman, a real estate agent. To attract interest in the property, petitioners desired to place a "For Sale" sign on the lawn. Willingboro, however, narrowly limits the types of signs that can be erected on land in the township. Although prior to March 1974 "For Sale" and "Sold" signs were permitted subject to certain restrictions not at issue here, on March 18, 1974, the Township Council enacted Ordinance 5–1974, repealing the statutory authorization for such signs on all but model homes. Petitioners brought this action against both the township and the building inspector charged with enforcing the ban on "For Sale" signs, seeking declaratory and injunctive relief.[1] The District

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**Joel M. Gora* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Jack Greenberg, Charles Stephen Ralston,* and *Melvyn R. Leventhal* for the N. A. A. C. P. Legal Defense & Educational Fund, Inc.; by *Paul R. Donaldson* and *Donald K. Barclay* for the cities of Shaker Heights and Cleveland Heights, Ohio; by *Burton R. Shifman* for the city of Oak Park, Michigan; and by Housing Advocates, Inc.

[1] Respondents report that according to a deed on file in Burlington County, N. J., petitioner Linmark Associates' property was sold on April 21, 1976, while this case was pending in the Court of Appeals. Brief for Respondents 8 n. 2. This does not moot this case, however, since at

Court granted a declaration of unconstitutionality, but a divided Court of Appeals reversed, 535 F. 2d 786 (CA3 1976). We granted certiorari, 429 U. S. 938 (1976), and reverse the judgment of the Court of Appeals.

I

The township of Willingboro is a residential community located in southern New Jersey near Fort Dix, McGuire Air Force Base, and offices of several national corporations. The township was developed as a middle-income community by Levitt & Sons, beginning in the late 1950's. It is served by over 80 real estate agents.

During the 1960's Willingboro underwent rapid growth. The white population increased by almost 350%, and the nonwhite population rose from 60 to over 5,000, or from .005% of the population to 11.7%. As of the 1970 census, almost 44,000 people resided in Willingboro. In the 1970's, however, the population growth slowed; from 1970 to 1973, the latest year for which figures were available at the time of trial, Willingboro's population rose by only 3%. More significantly, the white population actually declined by almost 2,000 in this interval, a drop of over 5%, while the nonwhite population grew by more than 3,000, an increase of approximately 60%. By 1973, nonwhites constituted 18.2% of the township's population.

At the trial in this case respondents presented testimony from two real estate agents, two members of the Township Council, and three members of the Human Relations Commission, all of whom agreed that a major cause in the decline in

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least as to petitioner Mellman, the real estate agent, there plainly is an "immediate prospect," *Steffel* v. *Thompson*, 415 U. S. 452, 459–460 (1974), that he will desire to place "For Sale" signs on other property in Willingboro, and thus there remains a controversy "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941).

the white population was "panic selling"—that is, selling by whites who feared that the township was becoming all black, and that property values would decline. One real estate agent estimated that the reason 80% of the sellers gave for their decision to sell was that "the whole town was for sale, and they didn't want to be caught in any bind." App. in No. 75–1448 (CA3), pp. 219a–220a. Respondents' witnesses also testified that in their view "For Sale" and "Sold" signs were a major catalyst of these fears.

William Kearns, the Mayor of Willingboro during the year preceding enactment of the ordinance and a member of the Council when the ordinance was enacted, testified concerning the events leading up to its passage. *Id.*, at 183a–186a. According to Kearns, beginning at least in 1973 the community became concerned about the changing population. At a town meeting in February 1973, called to discuss "Willingboro, to sell or not to sell," a member of the community suggested that real estate signs be banned. The suggestion received the overwhelming support of those attending the meeting. Kearns brought the proposal to the Township Council, which requested the Township Solicitor to study it. The Council also contacted National Neighbors, a nationwide organization promoting integrated housing, and obtained the names of other communities that had prohibited "For Sale" signs. After obtaining a favorable report from Shaker Heights, Ohio, on its ordinance, and after receiving an endorsement of the proposed ban from the Willingboro Human Relations Commission, the Council began drafting legislation.

Rather than following its usual procedure of conducting a public hearing only after the proposed law had received preliminary Council approval, the Council scheduled two public meetings on Ordinance 5–1974. The first took place in February 1974, before the initial Council vote, and the second in March 1974, after the vote. At the conclusion of the second hearing, the ordinance was approved unanimously.

The transcripts of the Council hearings were introduced into evidence at trial. They reveal that at the hearings the Council received important information bearing on the need for and likely impact of the ordinance. With respect to the justification for the ordinance, the Council was told (a) that a study of Willingboro home sales in 1973 revealed that the turnover rate was roughly 11%, App. in No. 75–1448 (CA3), p. 89a; [2] (b) that in February 1974—a typical month—230 "For Sale" signs were posted among the 11,000 houses in the community, *id.*, at 94a, 37a; [3] and (c) that the Willingboro Tax Assessor had reported that "by and large the increased value of Willingboro properties was way ahead of . . . comparable communities." *Id.*, at 106a. With respect to the projected effect of the ordinance, several real estate agents reported that 30%–35% of their purchaser-clients came to them because they had seen one of the agent's "For Sale" or "Sold" signs, *id.*, at 33a, 47a, 49a, 57a,[4] and one agent estimated, based on his experience in a neighboring community that had already banned signs, that selling realty without signs takes twice as long as selling with signs, *id.*, at 42a.

The transcripts of the Council hearings also reveal that the hearings provided useful barometers of public sentiment toward the proposed ordinance. The Council was told, for

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[2] At the beginning of the first hearing, the then mayor estimated that 1,100 houses are sold each year, a 10% turnover rate. App. in No. 75–1488 (CA3), p. 37a.

[3] Another real estate agent reported that on January 7, 1974, in the Twin Hills section of Willingboro, 32 signs were posted among the 920 houses. He further stated that during the preceding year, the highest number of signs in Twin Hills at any one time was 62. *Id.*, at 77a–78a.

At trial, one of respondents' real-estate-agent witnesses testified that he had surveyed the number of signs in August 1973 and found more than 230; he did not recall, however, how many signs were standing at that time. *Id.*, at 225a.

[4] At trial, petitioner Mellman corroborated this figure based on his own business. *Id.*, at 135a.

example, that surveys in two areas of the township found overwhelming support for the law, *id.*, at 29a, 84a.[5] In addition, at least at the second meeting, the citizens, who were not real estate agents and who spoke, favored the proposed ordinance by a sizable margin. Interestingly, however, at both meetings those defending the ordinance focused primarily on aesthetic considerations and on the effect of signs—and transiency generally—on property values. Few speakers directly referred to the changing racial composition of Willingboro in supporting the proposed law.

Although the ordinance had been in effect for nine months prior to trial, no statistical data were presented concerning its impact. Respondents' witnesses all agreed, however, that the number of persons selling or considering selling their houses because of racial fears had declined sharply. But several of these witnesses also testified that the number of sales in Willingboro had not declined since the ordinance was enacted. Moreover, respondents' real-estate-agent witnesses both stated that their business had increased by 25% since the ordinance was enacted, *id.*, at 164a, 226a, and one of these agents reported that the racial composition of his clientele remained unchanged, *id.*, at 160a.

The District Court did not make specific findings of fact. In the course of its opinion, however, the court stated that Willingboro "is to a large extent a transient community, partly due to its proximity to the military facility at Fort Dix and in part due to the numerous transfers of real estate." The court also stated that there was "no evidence" that whites were leaving Willingboro en masse as "For Sale" signs appeared, but "merely an indication that its residents are concerned that there may be a large influx of minority groups moving in to the town with the resultant effect being a reduc-

[5] One of the two "surveys" took the form of an effort by citizens in the Rittenhouse Park section of Willingboro to ban "For Sale" signs. That effort attracted the support of 70% of the homeowners in the section.

tion in property values." The Court of Appeals essentially accepted these "findings," although it found that Willingboro was experiencing "incipient" panic selling, 535 F. 2d, at 799, and that a "fear psychology [had] developed," *id.*, at 790.

II

A

The starting point for analysis of petitioners' First Amendment claim must be the two recent decisions in which this Court has eroded the "commercial speech" exception to the First Amendment. In *Bigelow* v. *Virginia*, 421 U. S. 809 (1975), decided less than two years ago, this Court for the first time expressed its dissatisfaction with the then-prevalent approach of resolving a class of First Amendment claims simply by categorizing the speech as "commercial." *Id.*, at 826. "Regardless of the particular label," we stated, "a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Ibid.* After conducting such an analysis in *Bigelow* we concluded that Virginia could not constitutionally punish the publisher of a newspaper for printing an abortion referral agency's paid advertisement which not only promoted the agency's services but also contained information about the availability of abortions.

One year later, in *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council*, 425 U. S. 748 (1976), we went further. Conceding that "[s]ome fragment of hope for the continuing validity of a 'commercial speech' exception arguably might have persisted because of the subject matter of the advertisement in *Bigelow*," *id.*, at 760, we held quite simply, that commercial speech is not "wholly outside the protection of the First Amendment," *id.*, at 761. Although recognizing that "[s]ome forms of commercial speech regulations"—such as regulation of false or misleading speech—"are surely per-

missible," *id.*, at 770, we had little difficulty in finding that Virginia's ban on the advertising of prescription drug prices by pharmacists was unconstitutional.[6]

Respondents contend, as they must, that the "For Sale" signs banned in Willingboro are constitutionally distinguishable from the abortion and drug advertisements we have previously considered. It is to the distinctions respondents advance that we now turn.

B

If the Willingboro law is to be treated differently from those invalidated in *Bigelow* and *Virginia Pharmacy Bd.*, it cannot be because the speakers—or listeners—have a lesser First Amendment interest in the subject matter of the speech that is regulated here. Persons desiring to sell their homes are just as interested in communicating that fact as are sellers of other goods and services. Similarly, would-be purchasers of realty are no less interested in receiving information about available property than are purchasers of other commodities in receiving like information about those commodities. And the societal interest in "the free flow of commercial information," *Virginia Pharmacy Bd., supra,* at 764, is in no way lessened by the fact that the subject of the commercial information here is realty rather than abortions or drugs.

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[6] The Court of Appeals did not have the benefit of *Virginia Pharmacy Bd.* when it issued its decision in this case. To some extent the court anticipated that decision, recognizing that the fact that "a communication is commercial in nature does not *ipso facto* strip the communication of its First Amendment protections." 535 F. 2d 786, 795 (CA3 1976). But the court premised its analysis on a sharp dichotomy between commercial and "pure" or noncommercial speech, *id.*, at 794, and concluded that commercial speech may be restricted if its "impact be found detrimental" by a municipality, and if "the limitation on any pure speech element [is] minimal," *id.*, at 795. After *Virginia Pharmacy Bd.* it is clear that commercial speech cannot be banned because of an unsubstantiated belief that its impact is "detrimental."

Respondents nevertheless argue that First Amendment concerns are less directly implicated by Willingboro's ordinance because it restricts only one method of communication. This distinction is not without significance to First Amendment analysis, since laws regulating the time, place, or manner of speech stand on a different footing from laws prohibiting speech altogether. Cf., *e. g.*, *Kovacs* v. *Cooper*, 336 U. S. 77 (1949); *Adderley* v. *Florida*, 385 U. S. 39 (1966); *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972). Respondents' effort to defend the ordinance on this ground is unpersuasive, however, for two reasons.

First, serious questions exist as to whether the ordinance "leave[s] open ample alternative channels for communication," *Virginia Pharmacy Bd.*, *supra*, at 771. Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like. The options to which sellers realistically are relegated—primarily newspaper advertising and listing with real estate agents—involve more cost and less autonomy than "For Sale" signs; cf. *Martin* v. *City of Struthers*, 319 U. S. 141, 146 (1943); *Kovacs* v. *Cooper*, *supra*, at 102–103 (Black, J., dissenting); are less likely to reach persons not deliberately seeking sales information, cf. *United States* v. *O'Brien*, 391 U. S. 367, 388–389 (1968) (Harlan, J., concurring); and may be less effective media for communicating the message that is conveyed by a "For Sale" sign in front of the house to be sold, cf. *Cohen* v. *California*, 403 U. S. 15, 25–26 (1971). The alternatives, then, are far from satisfactory.

Second, the Willingboro ordinance is not genuinely concerned with the place of the speech—front lawns—or the manner of the speech—signs. The township has not prohibited all lawn signs—or all lawn signs of a particular size or shape—in order to promote aesthetic values or any other value "unrelated to the suppression of free expression," *United*

States v. *O'Brien, supra,* at 377.[7] Nor has it acted to restrict a mode of communication that "intrudes on the privacy of the home, . . . makes it impractical for the unwilling viewer or auditor to avoid exposure," *Erznoznik* v. *City of Jacksonville,* 422 U. S. 205, 209 (1975), or otherwise reaches a group the township has a right to protect.[8] And respondents have not demonstrated that the place or manner of the speech produces a detrimental "secondary effect" on society, *Young* v. *American Mini Theatres,* 427 U. S. 50, 71 n. 34 (1976). Rather, Willingboro has proscribed particular types of signs based on their content because it fears their "primary" effect—that they will cause those receiving the information to act upon it. That the proscription applies only to one mode of communication, therefore, does not transform this into a "time, place, or manner" case. See, *e. g., Erznoznik* v. *City of Jacksonville, supra; Police Department of Chicago* v. *Mosley,* 408 U. S. 92 (1972); *Tinker* v. *Des Moines School Dist.,* 393 U. S. 503, 510 (1969). If the ordinance is to be sustained, it must be on the basis of the township's interest in regulating the content of the communication, and not on any interest in regulating the form.

C

Respondents do seek to distinguish *Bigelow* and *Virginia Pharmacy Bd.* by relying on the vital goal this ordinance serves: namely, promoting stable, racially integrated housing. There can be no question about the importance of achieving this goal. This Court has expressly recognized that substantial benefits flow to both whites and blacks from interracial

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[7] Accordingly, we do not decide whether a ban on signs or a limitation on the number of signs could survive constitutional scrutiny if it were unrelated to the suppression of free expression. See *Baldwin* v. *Redwood City,* 540 F. 2d 1360, 1368–1369 (CA9 1976); cf. *Markham Advertising Co.* v. *State,* 73 Wash. 2d 405, 439 P. 2d 248 (1968), appeal dismissed, 393 U. S. 316 (1969).

[8] Cf. *Capital Broadcasting Co.* v. *Mitchell,* 333 F. Supp. 582, 585–586 (DC 1971), summarily aff'd, 405 U. S. 1000 (1972).

association and that Congress has made a strong national commitment to promote integrated housing. *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205 (1972).

That this ordinance was enacted to achieve an important governmental objective, however, does not distinguish the case from *Virginia Pharmacy Bd.* In that case the State argued that its prohibition on prescription drug price advertising furthered the health and safety of state residents by preventing low cost, low quality pharmacists from driving reputable pharmacists out of business. We expressly recognized the "strong interest" of a State in maintaining "professionalism on the part of licensed pharmacists." 425 U. S., at 766. But we nevertheless found the Virginia law unconstitutional because we were unpersuaded that the law was necessary to achieve this objective, and were convinced that in any event, the First Amendment disabled the State from achieving its goal by restricting the free flow of truthful information. For the same reasons we conclude that the Willingboro ordinance at issue here is also constitutionally infirm.

The record here demonstrates that respondents failed to establish that this ordinance is needed to assure that Willingboro remains an integrated community.[9] As the District Court concluded, the evidence does not support the Council's apparent fears that Willingboro was experiencing a substantial incidence of panic selling by white homeowners. *A fortiori*, the evidence does not establish that "For Sale" signs in front of 2% of Willingboro homes were a major cause of panic selling. And the record does not confirm the town-

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[9] As the District Court itself observed, its finding concerning the lack of panic selling distinguishes this case from *Barrick Realty, Inc.* v. *City of Gary*, 491 F. 2d 161 (CA7 1974), in which Gary, Indiana's, prohibition on "For Sale" signs was upheld on a record indicating that such signs were causing "whites to move *en masse* and blacks to replace them." *Id.*, at 163–164. We express no view as to whether *Barrick Realty* can survive *Bigelow* and *Virginia Pharmacy Bd.*

ship's assumption that proscribing such signs will reduce public awareness of realty sales and thereby decrease public concern over selling.[10]

The constitutional defect in this ordinance, however, is far more basic. The Township Council here, like the Virginia Assembly in *Virginia Pharmacy Bd.*, acted to prevent its residents from obtaining certain information. That information, which pertains to sales activity in Willingboro, is of vital interest to Willingboro residents, since it may bear on one of the most important decisions they have a right to make: where to live and raise their families. The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the township: they will choose to leave town. The Council's concern, then, was not with any commercial aspect of "For Sale" signs—with offerors communicating offers to offerees—but with the substance of the information communicated to Willingboro citizens. If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act "irrationally." *Virginia Pharmacy Bd.* denies government such sweeping

[10] While this assumption is certainly plausible, it is also possible that eliminating signs will cause homeowners to turn to other sources for information, so that their awareness of—and concern over—selling will be unaffected. Indeed, banning signs actually may fuel public anxiety over sales activity by increasing homeowners' dependence on rumor and surmise. See Laska & Hewitt, Are Laws Against "For Sale" Signs Constitutional? Substantive Due Process Revisited, 4 Real Estate L. J. 153, 160–162 (1975) (reporting on a study finding such an adverse effect from a ban on "For Sale" signs).

The fact that sales volume remained unchanged in Willingboro in the first nine months after the ordinance was enacted suggests that it did not affect public concern over selling, if that concern was a significant cause of housing turnover.

powers. As we said there in rejecting Virginia's claim that the only way it could enable its citizens to find their self-interest was to deny them information that is neither false nor misleading:

> "There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." 425 U. S., at 770.

Or as Mr. Justice Brandeis put it: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." *Whitney* v. *California*, 274 U. S. 357, 377 (1927) (concurring).

Since we can find no meaningful distinction between Ordinance 5–1974 and the statute overturned in *Virginia Pharmacy Bd.*, we must conclude that this ordinance violates the First Amendment.

III

In invalidating this law, we by no means leave Willingboro defenseless in its effort to promote integrated housing. The township obviously remains free to continue "the process of education" it has already begun. It can give widespread publicity—through "Not for Sale" signs or other methods—to the number of whites remaining in Willingboro. And it surely can endeavor to create inducements to retain individuals who are considering selling their homes.

Beyond this, we reaffirm our statement in *Virginia Pharmacy Bd.* that the "commonsense differences between speech that does 'no more than propose a commercial transaction,' *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. [376,] 385 [(1973)], and other varieties . . . suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired." 425 U. S., at 771–772, n. 24. Laws dealing with false or misleading signs, and laws requiring such signs to "appear in such a form, or include such additional information . . . as [is] necessary to prevent [their] being deceptive," *ibid.*, therefore, would raise very different constitutional questions. We leave those questions for another day, and simply hold that the ordinance under review here, which impairs "the flow of truthful and legitimate commercial information" is constitutionally infirm.

Reversed.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

Exhibit 69: *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977)

BATES ET AL. *v.* STATE BAR OF ARIZONA

APPEAL FROM THE SUPREME COURT OF ARIZONA

No. 76–316. Argued January 18, 1977—Decided June 27, 1977

Appellants, who are licensed attorneys and members of the Arizona State Bar, were charged in a complaint filed by the State Bar's president with violating the State Supreme Court's disciplinary rule, which prohibits attorneys from advertising in newspapers or other media. The complaint was based upon a newspaper advertisement placed by appellants for their "legal clinic," stating that they were offering "legal services at very reasonable fees," and listing their fees for certain services, namely, uncontested divorces, uncontested adoptions, simple personal bankruptcies, and changes of name. The Arizona Supreme Court upheld the conclusion of a bar committee that appellants had violated the rule, having rejected appellants' claims that the rule violated §§ 1 and 2 of the Sherman Act because of its tendency to limit competition and that it infringed appellants' First Amendment rights. *Held:*

1. The restraint upon attorney advertising imposed by the Supreme Court of Arizona wielding the power of the State over the practice of law is not subject to attack under the Sherman Act. *Parker* v. *Brown*, 317 U. S. 341, followed; *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773; *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579, distinguished. Pp. 359–363.

2. Commercial speech, which serves individual and societal interests in assuring informed and reliable decisionmaking, is entitled to some First Amendment protection, *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S. 748, and the justifications advanced by appellee are inadequate to support the suppression of all advertising by attorneys. Pp. 363–384.

(a) This case does not involve any question concerning in-person solicitation or advertising as to the *quality* of legal services, but only the question whether lawyers may constitutionally advertise the *prices* at which certain routine services will be performed. Pp. 366–367.

(b) The belief that lawyers are somehow above "trade" is an anachronism, and for a lawyer to advertise his fees will not undermine true professionalism. Pp. 368–372.

(c) Advertising legal services is not inherently misleading. Only routine services lend themselves to advertising, and for such services fixed rates can be meaningfully established, as the Arizona State Bar's own Legal Services Program demonstrates. Although a client may not

know the detail involved in a given task, he can identify the service at the level of generality to which advertising lends itself. Though advertising does not provide a complete foundation on which to select an attorney, it would be peculiar to deny the consumer at least some of the relevant information needed for an informed decision on the ground that the information was not complete. Pp. 372–375.

(d) Advertising, the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange, may well benefit the administration of justice. Pp. 375–377.

(e) It is entirely possible that advertising will serve to reduce, not advance, the cost of legal services to the consumer, and may well aid new attorneys in entering the market. Pp. 377–378.

(f) An attorney who is inclined to cut quality will do so regardless of the rule on advertising, the restraints on which are an ineffective deterrent to shoddy work. Pp. 378–379.

(g) Undue enforcement problems need not be anticipated, and it is at least incongruous for the opponents of advertising to extol the virtues of the legal profession while also asserting that through advertising lawyers will mislead their clients. P. 379.

3. The First Amendment overbreadth doctrine, which represents a departure from the traditional rule that a person may not challenge a statute on the ground that it might be applied unconstitutionally in circumstances other than those before the court, is inapplicable to professional advertising, a context where it is not necessary to further its intended objective, cf. *Bigelow* v. *Virginia*, 421 U. S. 809, 817–818, and appellants must therefore demonstrate that their specific conduct was constitutionally protected. Pp. 379–381.

4. On this record, appellants' advertisement (contrary to appellee's contention) is not misleading and falls within the scope of First Amendment protection. Pp. 381–382.

(a) The term "legal clinic" would be understood to refer to an operation like appellants' that is geared to provide standardized and multiple services. Pp. 381–382.

(b) The advertisement's claim that appellants offer services at "very reasonable" prices is not misleading. Appellants' advertised fee for an uncontested divorce, which was specifically cited by appellee, is in line with customary charges in the area. P. 382.

(c) Appellants' failure to disclose that a name change might be accomplished by the client without an attorney's aid was not misleading since the difficulty of performing the task is not revealed and since most

legal services may be performed legally by the citizen for himself. See *Faretta* v. *California*, 422 U. S. 806. P. 382.

113 Ariz. 394, 555 P. 2d 640, affirmed in part and reversed in part.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined, and in Parts I and II of which BURGER, C. J., and STEWART, POWELL, and REHNQUIST, JJ., joined. BURGER, C. J., filed an opinion concurring in part and dissenting in part, *post*, p. 386. POWELL, J., filed an opinion concurring in part and dissenting in part, in which STEWART, J., joined, *post*, p. 389. REHNQUIST, J., filed an opinion dissenting in part, *post*, p. 404.

William C. Canby, Jr., argued the cause for appellants. With him on the briefs was *Melvin L. Wulf*.

John P. Frank argued the cause for appellee. With him on the brief was *Orme Lewis*.

Deputy Solicitor General Friedman argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Bork*, *Assistant Attorney General Baker*, and *Barry Grossman*.*

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*Briefs of *amici curiae* urging reversal were filed by *John R. Schmidt* for the Chicago Council of Lawyers; by *Peter H. Schuck* and *Alan B. Morrison* for the Consumers Union of United States, Inc., et al.; and by *Philip L. Goar* for the Mountain Plains Congress of Senior Organizations et al.

Briefs of *amici curiae* urging affirmance were filed by *Justin A. Stanley* and *H. Blair White* for the American Bar Assn.; by *Peter M. Sfikas* for the American Dental Assn.; by *Ellis Lyons*, *Bennett Boskey*, and *Edward A. Groobert* for the American Optometric Assn.; by *James W. Rankin* and *Donald E. Scott* for the American Veterinary Medical Assn.; by *Alfred L. Scanlan* and *George W. Liebmann* for the Maryland State Bar Assn., Inc., et al.; by *Andrew P. Miller*, Attorney General of Virginia, *Stuart H. Dunn*, Deputy Attorney General, and *John J. Miles*, Assistant Attorney General, for the Virginia State Bar; and by *Roger P. Stokey*, *pro se*.

Briefs of *amici curiae* were filed by the American Medical Assn.; by *John J. Relihan* and *Martin J. Solomon* for the Arizona Credit Union League, Inc.; by *Edward L. Lascher*, *Herbert M. Rosenthal*, and *Stuart A. Forsyth* for the State Bar of California; and by *Rufus L. Edmisten*,

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

As part of its regulation of the Arizona Bar, the Supreme Court of that State has imposed and enforces a disciplinary rule that restricts advertising by attorneys. This case presents two issues: whether §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, forbid such state regulation, and whether the operation of the rule violates the First Amendment, made applicable to the States through the Fourteenth.[1]

I

Appellants John R. Bates and Van O'Steen are attorneys licensed to practice law in the State of Arizona.[2] As such, they are members of the appellee, the State Bar of Arizona.[3]

Attorney General of North Carolina, *Andrew A. Vanore, Jr.*, Senior Deputy Attorney General, *Norma S. Harrell*, Associate Attorney General, and *Harry W. McGalliard* for the State Bar of North Carolina.

[1] See *Bigelow* v. *Virginia*, 421 U. S. 809, 811 (1975); *Schneider* v. *State*, 308 U. S. 147, 160 (1939).

[2] Each appellant is a 1972 graduate of Arizona State University College of Law. Mr. Bates was named by the faculty of that law school as the outstanding student of his class; Mr. O'Steen graduated *cum laude*. App. 220–221.

[3] Rule 27 (a) of the Supreme Court of Arizona, 17A Ariz. Rev. Stat. 84–85 (1973) reads in part:

"1. In order to advance the administration of justice according to law, . . . the Supreme Court of Arizona does hereby perpetuate, create and continue under the direction and control of this Court an organization known as the State Bar of Arizona, and all persons now or hereafter licensed in this state to engage in the practice of law shall be members of the State Bar of Arizona in accordance with the rules of this Court. . . ."

. . . . . .

"3. No person shall practice law in this state or hold himself out as one who may practice law in this state unless he is an active member of the state bar."

See Ariz. Const., Art. 3; Ariz. Rev. Stat. §§ 32-201, 32-237, 32-264 (1976). The Arizona Bar, thus, is an integrated one. See *Lathrop* v. *Donohue*, 367 U. S. 820 (1961).

After admission to the bar in 1972, appellants worked as attorneys with the Maricopa County Legal Aid Society. App. 221.

In March 1974, appellants left the Society and opened a law office, which they call a "legal clinic," in Phoenix. Their aim was to provide legal services at modest fees to persons of moderate income who did not qualify for governmental legal aid. *Id.*, at 75. In order to achieve this end, they would accept only routine matters, such as uncontested divorces, uncontested adoptions, simple personal bankruptcies, and changes of name, for which costs could be kept down by extensive use of paralegals, automatic typewriting equipment, and standardized forms and office procedures. More complicated cases, such as contested divorces, would not be accepted. *Id.*, at 97. Because appellants set their prices so as to have a relatively low return on each case they handled, they depended on substantial volume. *Id.*, at 122–123.

After conducting their practice in this manner for two years, appellants concluded that their practice and clinical concept could not survive unless the availability of legal services at low cost was advertised and, in particular, fees were advertised. *Id.*, at 120–123. Consequently, in order to generate the necessary flow of business, that is, "to attract clients," *id.*, at 121; Tr. of Oral Arg. 4, appellants on February 22, 1976, placed an advertisement (reproduced in the Appendix, *infra*, at 385) in the Arizona Republic, a daily newspaper of general circulation in the Phoenix metropolitan area. As may be seen, the advertisement stated that appellants were offering "legal services at very reasonable fees," and listed their fees for certain services.[4]

[4] The office benefited from an increase in business after the appearance of the advertisement. App. 235–236, 479–480. It is doubtful, however, whether the increase was due solely to the advertisement, for the advertising itself prompted several news stories. *Id.*, at 229. It might be expected, nonetheless, that advertising will increase business. See Hobbs, Lawyer Advertising: A Good Beginning but Not Enough, 62 A. B. A. J. 735,

Appellants concede that the advertisement constituted a clear violation of Disciplinary Rule 2–101 (B), incorporated in Rule 29 (a) of the Supreme Court of Arizona, 17A Ariz. Rev. Stat. (Supp. 1976), p. 26. The disciplinary rule provides in part:

> "(B) A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf." [5]

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736 (1976) (lawyer referral service that advertised referred more than 11 times as many clients as one that did not advertise in another city of comparable size).

[5] The remainder of subdivision (B) states exceptions to the general prohibition:

"However, a lawyer recommended by, paid by, or whose legal services are furnished by, a qualified legal assistance organization may authorize or permit or assist such organization to use means of dignified commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits. This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

"(1) In political advertisements when his professional status is germane to the political campaign or to a political issue.

"(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.

"(3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.

"(4) In and on legal documents prepared by him.

"(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.

"(6) In communications by a qualified legal assistance organization, along with the biographical information permitted under DR 2–102 (A)(6)

Upon the filing of a complaint initiated by the president of the State Bar, App. 350, a hearing was held before a three-member Special Local Administrative Committee, as prescribed by Arizona Supreme Court Rule 33. App. 16. Although the committee took the position that it could not consider an attack on the validity of the rule, it allowed the parties to develop a record on which such a challenge could be based. The committee recommended that each of the appellants be suspended from the practice of law for not less than six months. *Id.*, at 482. Upon further review by the Board of Governors of the State Bar, pursuant to the Supreme Court's Rule 36, the Board recommended only a one-week suspension for each appellant, the weeks to run consecutively. App. 486–487.

Appellants, as permitted by the Supreme Court's Rule 37, then sought review in the Supreme Court of Arizona, arguing, among other things, that the disciplinary rule violated §§ 1 and 2 of the Sherman Act because of its tendency to limit competition, and that the rule infringed their First Amendment rights. The court rejected both claims. *In re Bates*, 113 Ariz. 394, 555 P. 2d 640 (1976). The plurality [6] may have viewed with some skepticism the claim that a restraint on advertising might have an adverse effect on competition.[7] But, even if the rule might otherwise violate the

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[biographical information that may be listed 'in a reputable law list or legal directory'], directed to a member or beneficiary of such organization."

[6] The plurality opinion represented the views of two of the five Justices that compose the Supreme Court of Arizona. Ariz. Const., Art. 6, § 2; Ariz. Rev. Stat. § 12–101 (1956). It is evident, however, that a majority adhered to the plurality's exposition of the law. One opinion, although styled a dissent, stated that the author agreed with the plurality opinion "in all respects" except for the reduction in punishment. One Justice, specially concurring, stated that he agreed "with much of the law and many of the comments expressed by the majority." The opinion of the remaining Justice is discussed in the text.

[7] But see *United States* v. *Gasoline Retailers Assn.*, 285 F. 2d 688, 691

Act, the plurality concluded that the regulation was exempt from Sherman Act attack because the rule "is an activity of the State of Arizona acting as sovereign." *Id.*, at 397, 555 P. 2d, at 643. The regulation thus was held to be shielded from the Sherman Act by the state-action exemption of *Parker* v. *Brown*, 317 U. S. 341 (1943).

Turning to the First Amendment issue, the plurality noted that restrictions on professional advertising have survived constitutional challenge in the past, citing, along with other cases, *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955), and *Semler* v. *Dental Examiners*, 294 U. S. 608 (1935).[8] Although recognizing that *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S. 748 (1976), and *Bigelow* v. *Virginia*, 421 U. S. 809 (1975), held that commercial speech was entitled to certain protection under the First Amendment, the plurality focused on passages in those opinions acknowledging that special considerations might bear on the advertising of professional services by lawyers. See *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S., at 773 n. 25; *id.*, at 773–775 (concurring opinion); *Bigelow* v. *Virginia*, 421 U. S., at 825 n. 10. The plurality apparently was of the view that the older decisions dealing with professional advertising survived these recent cases unscathed, and held that Disciplinary Rule 2–101 (B) passed First Amend-

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(CA7 1961); cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 221–222 (1940); *United States* v. *National Society of Professional Engineers*, — U. S. App. D. C. —, 555 F. 2d 978 (1977) (ethical prohibition on members of society from submitting competitive bids for engineering services violates Sherman Act).

[8] See also *Head* v. *New Mexico Board*, 374 U. S. 424 (1963). The Court did not resolve a First Amendment issue in any of these cases. The advertising restrictions were upheld in the face of challenges based on due process, equal protection, and interference with interstate commerce. Although the First Amendment issue was raised in *Head*, the Court refused to consider it because it had been neither presented to the state courts nor reserved in the notice of appeal. *Id.*, at 432–433, n. 12.

ment muster.[9] Because the court, in agreement with the Board of Governors, felt that appellants' advertising "was done in good faith to test the constitutionality of DR 2–101 (B)," it reduced the sanction to censure only.[10] 113 Ariz., at 400, 555 P. 2d, at 646.

Of particular interest here is the opinion of Mr. Justice Holohan in dissent. In his view, the case should have been framed in terms of "the right of the public as consumers and citizens to know about the activities of the legal profession," *id.*, at 402, 555 P. 2d, at 648, rather than as one involving merely the regulation of a profession. Observed in this light, he felt that the rule performed a substantial disservice to the public:

> "Obviously the information of what lawyers charge is important for private economic decisions by those in need of legal services. Such information is also helpful, perhaps indispensable, to the formation of an intelligent opinion by the public on how well the legal system is working and whether it should be regulated or even altered. . . . The rule at issue prevents access to such information by the public." *Id.*, at 402–403, 555 P. 2d, at 648–649.

Although the dissenter acknowledged that some types of advertising might cause confusion and deception, he felt that the remedy was to ban that form, rather than all advertising. Thus, despite his "personal dislike of the concept of advertising by attorneys," *id.*, at 402, 555 P. 2d, at 648, he found the ban unconstitutional.

We noted probable jurisdiction. 429 U. S. 813 (1976).

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[9] Appellants also unsuccessfully challenged the rule on equal protection and vagueness grounds and asserted that the disciplinary procedures violated due process. These contentions are not made here.

[10] Mr. Justice Rehnquist stayed the order of censure pending final determination of the matter by this Court.

II

The Sherman Act

In *Parker* v. *Brown,* 317 U. S. 341 (1943), this Court held that the Sherman Act was not intended to apply against certain state action. See also *Olsen* v. *Smith,* 195 U. S. 332, 344–345 (1904). In *Parker* a raisin producer-packer brought suit against California officials challenging a state program designed to restrict competition among growers and thereby to maintain prices in the raisin market. The Court held that the State, "as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." 317 U. S., at 352. Appellee argues, and the Arizona Supreme Court held, that the *Parker* exemption also bars the instant Sherman Act claim. We agree.

Of course, *Parker* v. *Brown* has not been the final word on the matter. In two recent cases the Court has considered the state-action exemption to the Sherman Act and found it inapplicable for one reason or another. *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773 (1975); *Cantor* v. *Detroit Edison Co.,* 428 U. S. 579 (1976). *Goldfarb* and *Cantor,* however, are distinguishable, and their reasoning supports our conclusion here.

In *Goldfarb* we held that § 1 of the Sherman Act was violated by the publication of a minimum-fee schedule by a county bar association and by its enforcement by the State Bar. The schedule and its enforcement mechanism operated to create a rigid price floor for services and thus constituted a classic example of price fixing. Both bar associations argued that their activity was shielded by the state-action exemption. This Court concluded that the action was not protected, emphasizing that "we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent." 421 U. S., at 790. In the instant case, by contrast, the chal-

lenged restraint is the affirmative command of the Arizona Supreme Court under its Rules 27 (a) and 29 (a) and its Disciplinary Rule 2–101 (B). That court is the ultimate body wielding the State's power over the practice of law, see Ariz. Const., Art. 3; *In re Bailey*, 30 Ariz. 407, 248 P. 29 (1926), and, thus, the restraint is "compelled by direction of the State acting as a sovereign." 421 U. S., at 791.[11]

Appellants seek to draw solace from *Cantor*. The defendant in that case, an electric utility, distributed light bulbs to its residential customers without additional charge, including the cost in its state-regulated utility rates. The plaintiff, a retailer who sold light bulbs, brought suit, claiming that the utility was using its monopoly power in the distribution of electricity to restrain competition in the sale of bulbs. The Court held that the utility could not immunize itself from Sherman Act attack by embodying its challenged practices in a tariff approved by a state commission. Since the disciplinary rule at issue here is derived from the Code of Professional Responsibility of the American Bar Association,[12] appellants argue by analogy to *Cantor* that no immunity should result from the bar's success in having the Code adopted by the State. They also assert that the interest embodied in the Sherman Act must prevail over the state

[11] We note, moreover, that the Court's opinion in *Goldfarb* concluded with the observation that "[i]n holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions." 421 U. S., at 793. Allowing the instant Sherman Act challenge to the disciplinary rule would have precisely that undesired effect.

[12] Rule 29 (a) of the Supreme Court of Arizona, 17A Ariz. Rev. Stat. (Supp. 1976), provides:

"The duties and obligations of members [of the bar] shall be as prescribed by the Code of Professional Responsibility of the American Bar Association, effective November 1, 1970, as amended by this Court." The challenged rule, DR 2–101 (B), is now identical with the present version of the parallel rule, also numbered DR 2–101 (B), of the ABA Code of Professional Responsibility, as amended to August 1976.

interest in regulating the bar. See 428 U. S., at 595. Particularly is this the case, they claim, because the advertising ban is not tailored so as to intrude upon the federal interest to the minimum extent necessary. See *id.*, at 596 n. 34, and 597.

We believe, however, that the context in which *Cantor* arose is critical. First, and most obviously, *Cantor* would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party.[13] Here, the appellants' claims are against the State. The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process. *In re Wilson,* 106 Ariz. 34, 470 P. 2d 441 (1970). Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the appellee acts as the agent of the court under its continuous supervision.

Second, the Court emphasized in *Cantor* that the State had no independent regulatory interest in the market for light bulbs. 428 U. S., at 584–585; *id.*, at 604–605, 612–614 (concurring opinions). There was no suggestion that the bulb program was justified by flaws in the competitive market or was a response to health or safety concerns. And an exemption for the program was not essential to the State's regulation of electric utilities. In contrast, the regulation of the activities of the bar is at the core of the State's power to protect the public. Indeed, this Court in *Goldfarb* acknowledged that "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the

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[13] Mr. Justice Stevens, in a portion of his opinion in *Cantor* that was joined by Brennan, White, and Marshall, JJ., observed that *Parker* v. *Brown* was a suit against public officials, whereas in *Cantor* the claims were directed against only a private defendant. 428 U. S., at 585–592, 600–601. The dissenters in *Cantor* would have applied the state-action exemption regardless of the identity of the defendants. *Id.*, at 615–617 (Stewart, J., joined by Powell and Rehnquist, JJ.).

primary governmental function of administering justice, and have historically been 'officers of the courts.'" 421 U. S., at 792. See *Cohen* v. *Hurley*, 366 U. S. 117, 123–124 (1961).[14] More specifically, controls over solicitation and advertising by attorneys have long been subject to the State's oversight.[15] Federal interference with a State's traditional regulation of a profession is entirely unlike the intrusion the Court sanctioned in *Cantor*.[16]

Finally, the light-bulb program in *Cantor* was instigated by the utility with only the acquiescence of the state regulatory commission. The State's incorporation of the program into the tariff reflected its conclusion that the utility was authorized to employ the practice if it so desired. See 428 U. S., at 594, and n. 31. The situation now before us is entirely different. The disciplinary rules reflect a clear articulation of the State's policy with regard to professional behavior. Moreover, as the instant case shows, the rules are subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings. Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation; we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active.

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[14] *Cohen* v. *Hurley*, in other respects, has been overruled. *Spevack* v. *Klein*, 385 U. S. 511 (1967).

[15] The limitation on advertising by attorneys in Arizona seems to have commenced in 1919 with the incorporation by reference of the American Bar Association's 1908 Canons of Professional Ethics into Arizona's statutory law. 1919 Ariz. Sess. Laws, c. 158.

[16] Indeed, our decision today on the Sherman Act issue was presaged in *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S. 748, 770 (1976). We noted there: "Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. Cf. *Parker* v. *Brown*, 317 U. S. 341 (1943)."

We conclude that the Arizona Supreme Court's determination that appellants' Sherman Act claim is barred by the *Parker* v. *Brown* exemption must be affirmed.

III

The First Amendment

A

Last Term, in *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S. 748 (1976), the Court considered the validity under the First Amendment of a Virginia statute declaring that a pharmacist was guilty of "unprofessional conduct" if he advertised prescription drug prices. The pharmacist would then be subject to a monetary penalty or the suspension or revocation of his license. The statute thus effectively prevented the advertising of prescription drug price information. We recognized that the pharmacist who desired to advertise did not wish to report any particularly newsworthy fact or to comment on any cultural, philosophical, or political subject; his desired communication was characterized simply: " 'I will sell you the X prescription drug at the Y price.' " *Id.*, at 761. Nonetheless, we held that commercial speech of that kind was entitled to the protection of the First Amendment.

Our analysis began, *ibid.*, with the observation that our cases long have protected speech even though it is in the form of a paid advertisement, *Buckley* v. *Valeo*, 424 U. S. 1 (1976); *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964); in a form that is sold for profit, *Smith* v. *California*, 361 U. S. 147 (1959); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); or in the form of a solicitation to pay or contribute money, *New York Times Co.* v. *Sullivan, supra; Cantwell* v. *Connecticut*, 310 U. S. 296 (1940). If commercial speech is to be distinguished, it "must be distinguished by its content." 425 U. S., at 761. But a consideration of competing interests reinforced our view that such speech should not be with-

drawn from protection merely because it proposed a mundane commercial transaction. Even though the speaker's interest is largely economic, the Court has protected such speech in certain contexts. See, *e. g.*, *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575 (1969); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940). The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. See *Bigelow* v. *Virginia*, 421 U. S. 809 (1975). And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. See *FTC* v. *Procter & Gamble Co.*, 386 U. S. 568, 603–604 (1967) (Harlan, J., concurring). In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking. 425 U. S., at 761–765.

Arrayed against these substantial interests in the free flow of commercial speech were a number of proffered justifications for the advertising ban. Central among them were claims that the ban was essential to the maintenance of professionalism among licensed pharmacists. It was asserted that advertising would create price competition that might cause the pharmacist to economize at the customer's expense. He might reduce or eliminate the truly professional portions of his services: the maintenance and packaging of drugs so as to assure their effectiveness, and the supplementation on occasion of the prescribing physician's advice as to use. Moreover, it was said, advertising would cause consumers to price-shop, thereby undermining the pharmacist's effort to monitor the drug use of a regular customer so as to ensure that the prescribed drug would not provoke an allergic reaction or be incompatible with another substance the customer was

consuming. Finally, it was argued that advertising would reduce the image of the pharmacist as a skilled and specialized craftsman—an image that was said to attract talent to the profession and to reinforce the good habits of those in it—to that of a mere shopkeeper. *Id.*, at 766–768.

Although acknowledging that the State had a strong interest in maintaining professionalism among pharmacists, this Court concluded that the proffered justifications were inadequate to support the advertising ban. High professional standards were assured in large part by the close regulation to which pharmacists in Virginia were subject. *Id.*, at 768. And we observed that "on close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance." *Id.*, at 769. But we noted the presence of a potent alternative to this "highly paternalistic" approach: "That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Id.*, at 770. The choice between the dangers of suppressing information and the dangers arising from its free flow was seen as precisely the choice "that the First Amendment makes for us." *Ibid.* See also *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85, 97 (1977).

We have set out this detailed summary of the *Pharmacy* opinion because the conclusion that Arizona's disciplinary rule is violative of the First Amendment might be said to flow *a fortiori* from it. Like the Virginia statutes, the disciplinary rule serves to inhibit the free flow of commercial information and to keep the public in ignorance. Because of the possibility, however, that the differences among professions might bring different constitutional considerations into play, we specifically reserved judgment as to other professions.[17]

[17] "We stress that we have considered in this case the regulation of

In the instant case we are confronted with the arguments directed explicitly toward the regulation of advertising by licensed attorneys.

B

The issue presently before us is a narrow one. First, we need not address the peculiar problems associated with advertising claims relating to the *quality* of legal services. Such claims probably are not susceptible of precise measurement or verification and, under some circumstances, might well be deceptive or misleading to the public, or even false. Appellee does not suggest, nor do we perceive, that appellants' advertisement contained claims, extravagant or otherwise, as to the quality of services. Accordingly, we leave that issue for another day. Second, we also need not resolve the problems associated with in-person solicitation of clients—at the hospital room or the accident site, or in any other situation that breeds undue influence—by attorneys or their agents or "runners." Activity of that kind might well pose dangers of overreaching and misrepresentation not encountered in newspaper announcement advertising. Hence, this issue also is not before us. Third, we note that appellee's criticism of advertising by attorneys does not apply with much force to some of the basic factual content of advertising: information as to the attorney's name, address, and telephone number, office hours, and the like. The American Bar Association itself has a provision in its current Code of Professional Responsibility that would allow the disclosure of such information, and more,

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commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." 425 U. S., at 773 n. 25 (emphasis in original). See *id.*, at 773–775 (concurring opinion).

in the classified section of the telephone directory. DR 2–102 (A)(6) (1976).[18] We recognize, however, that an advertising diet limited to such spartan fare would provide scant nourishment.

The heart of the dispute before us today is whether lawyers also may constitutionally advertise the *prices* at which

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[18] The disciplinary rule, after referring to a listing in "a reputable law list," legal directory, or classified section of a telephone company directory, states:

"The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates, to the extent not prohibited by the authority having jurisdiction under state law over the subject; a statement that practice is limited to one or more fields of law, to the extent not prohibited by the authority having jurisdiction under state law over the subject of limitation of practice by lawyers; a statement that the lawyer or law firm specializes in a particular field of law or law practice, to the extent permitted by the authority having jurisdiction under state law over the subject of specialization by lawyers and in accordance with rules prescribed by that authority; date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional licenses; memberships in scientific, technical and professional associations and societies; foreign language ability; names and addresses of references, and, with their consent, names of clients regularly represented; whether credit cards or other credit arrangements are accepted; office and other hours of availability; a statement of legal fees for an initial consultation or the availability upon request of a written schedule of fees or an estimate of the fee to be charged for the specific services; provided, all such published data shall be disseminated only to the extent and in such format and language uniformly applicable to all lawyers, as prescribed by the authority having jurisdiction by state law over the subject. This proviso is not applicable in any state unless and until it is implemented by such authority in that state."

certain routine services will be performed. Numerous justifications are proffered for the restriction of such price advertising. We consider each in turn:

1. *The Adverse Effect on Professionalism.* Appellee places particular emphasis on the adverse effects that it feels price advertising will have on the legal profession. The key to professionalism, it is argued, is the sense of pride that involvement in the discipline generates. It is claimed that price advertising will bring about commercialization, which will undermine the attorney's sense of dignity and self-worth. The hustle of the marketplace will adversely affect the profession's service orientation, and irreparably damage the delicate balance between the lawyer's need to earn and his obligation selflessly to serve. Advertising is also said to erode the client's trust in his attorney: Once the client perceives that the lawyer is motivated by profit, his confidence that the attorney is acting out of a commitment to the client's welfare is jeopardized. And advertising is said to tarnish the dignified public image of the profession.

We recognize, of course, and commend the spirit of public service with which the profession of law is practiced and to which it is dedicated. The present Members of this Court, licensed attorneys all, could not feel otherwise. And we would have reason to pause if we felt that our decision today would undercut that spirit. But we find the postulated connection between advertising and the erosion of true professionalism to be severely strained. At its core, the argument presumes that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar. We suspect that few attorneys engage in such self-deception.[19] And rare is the client, moreover,

[19] Counsel for the appellee at oral argument readily stated: "We all know that law offices are big businesses, that they may have billion-dollar or million-dollar clients, they're run with computers, and all the rest. And so the argument may be made that to term them noncommercial is sanctimonious humbug." Tr. of Oral Arg. 64.

even one of modest means, who enlists the aid of an attorney with the expectation that his services will be rendered free of charge. See B. Christensen, Lawyers for People of Moderate Means 152–153 (1970). In fact, the American Bar Association advises that an attorney should reach "a clear agreement with his client as to the basis of the fee charges to be made," and that this is to be done "[a]s soon as feasible after a lawyer has been employed." Code of Professional Responsibility, EC 2–19 (1976). If the commercial basis of the relationship is to be promptly disclosed on ethical grounds, once the client is in the office, it seems inconsistent to condemn the candid revelation of the same information before he arrives at that office.

Moreover, the assertion that advertising will diminish the attorney's reputation in the community is open to question. Bankers and engineers advertise,[20] and yet these professions

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[20] See B. Christensen, Lawyers for People of Moderate Means 151–152 (1970); Note, Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available, 81 Yale L. J. 1181, 1190 (1972). Indeed, it appears that even the medical profession now views the alleged adverse effect of advertising in a somewhat different light from the appellee. A Statement of the Judicial Council of the American Medical Association provides in part:

"Advertising—The *Principles* [*of Medical Ethics*] do not proscribe advertising; they proscribe the solicitation of patients. . . . The public is entitled to know the names of physicians, the type of their practices, the location of their offices, their office hours, and other useful information that will enable people to make a more informed choice of physician.

"The physician may furnish this information through the accepted local media of advertising or communication, which are open to all physicians on like conditions. Office signs, professional cards, dignified announcements, telephone directory listings, and reputable directories are examples of acceptable media for making information available to the public.

"A physician may give biographical and other relevant data for listing in a reputable directory. . . . If the physician, at his option, chooses to supply fee information, the published data may include his charge for a standard office visit or his fee or range of fees for specific types of services, provided disclosure is made of the variable and other pertinent factors

are not regarded as undignified. In fact, it has been suggested that the failure of lawyers to advertise creates public disillusionment with the profession.[21] The absence of advertising may be seen to reflect the profession's failure to reach out and serve the community: Studies reveal that many persons do not obtain counsel even when they perceive a need because of the feared price of services[22] or because of an inability to locate a competent attorney.[23] Indeed, cynicism

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affecting the amount of the fee specified. The published data may include other relevant facts about the physician, but false, misleading, or deceptive statements or claims should be avoided." 235 J. A. M. A. 2328 (1976).

[21] See M. Freedman, Lawyers' Ethics in an Adversary System 115–116 (1975); Branca & Steinberg, Attorney Fee Schedules and Legal Advertising: The Implications of *Goldfarb*, 24 U. C. L. A. L. Rev. 475, 516–517 (1977).

[22] The Report of the Special Committee on the Availability of Legal Services, adopted by the House of Delegates of the American Bar Association, and contained in the ABA's Revised Handbook on Prepaid Legal Services (1972), states, at 26: "We are persuaded that the actual or feared price of such services coupled with a sense of unequal bargaining status is a significant barrier to wider utilization of legal services." See also E. Koos, The Family and The Law 7 (1948) (survey in which 47.6% of working-class families cited cost as the reason for not using a lawyer); P. Murphy & S. Walkowski, Compilation of Reference Materials on Prepaid Legal Services 2–3 (1973) (summarizing study in which 514 of 1,040 respondents gave expected cost as reason for not using a lawyer's services despite a perceived need). There are indications that fear of cost is unrealistic. See Petition of the Board of Governors of the District of Columbia Bar for Amendments to Rule X of the Rules Governing the Bar of the District of Columbia (1976), reprinted in the Brief for United States as *Amicus Curiae* 10a, 24a–25a (reporting study in which middle-class consumers overestimated lawyers' fees by 91% for the drawing of a simple will, 340% for reading and advising on a 2-page installment sales contract, and 123% for 30 minutes of consultation). See also F. Marks, R. Hallauer, R. Clifton, The Shreveport Plan: An Experiment in the Delivery of Legal Services 50–52 (1974).

[23] The preliminary release of some of the results of a survey conducted by the ABA Special Committee to Survey Legal Needs in collaboration

with regard to the profession may be created by the fact that it long has publicly eschewed advertising, while condoning the actions of the attorney who structures his social or civic associations so as to provide contacts with potential clients.

It appears that the ban on advertising originated as a rule of etiquette and not as a rule of ethics. Early lawyers in Great Britain viewed the law as a form of public service, rather than as a means of earning a living, and they looked down on "trade" as unseemly. See H. Drinker, Legal Ethics 5, 210–211 (1953).[24] Eventually, the attitude toward advertising fostered by this view evolved into an aspect of the ethics of the profession. *Id.*, at 211. But habit and tradition are not in themselves an adequate answer to a constitutional challenge. In this day, we do not belittle the person who earns his living by the strength of his arm or the force of his mind. Since the belief that lawyers are somehow "above"

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with the American Bar Foundation reveals that 48.7% strongly agreed and another 30.2% slightly agreed with the statement that people do not go to lawyers because they have no way of knowing which lawyers are competent to handle their particular problems. ABA, Legal Services & the Public, 3 Alternatives 15 (Jan. 1976). See B. Curran & F. Spalding, The Legal Needs of the Public 96 (Preliminary Report 1974) (an earlier report concerning the same survey). Although advertising by itself is not adequate to deal with this problem completely, it can provide some of the information that a consumer needs to make an intelligent selection.

[24] The British view may be changing. An official British Commission recently presented reports to Parliament recommending that solicitors be permitted to advertise. Monopolies and Mergers Commission, Services of Solicitors in England and Wales: A Report on the Supply of Services of Solicitors in England and Wales in Relation to Restrictions on Advertising 39–41 (1976); Monopolies and Mergers Commission; Services of Solicitors in Scotland: A Report on the Supply of Services of Solicitors in Scotland in Relation to Restrictions on Advertising 31–34 (1976). A companion study concerning barristers recommended that no changes be made in the restrictions upon their advertising, chiefly because barristers are not hired directly by laymen. Monopolies and Mergers Commission, Barristers' Services: A Report on the Supply of Barristers' Services in Relation to Restrictions on Advertising 21–24 (1976).

trade has become an anachronism, the historical foundation for the advertising restraint has crumbled.

2. *The Inherently Misleading Nature of Attorney Advertising.* It is argued that advertising of legal services inevitably will be misleading (a) because such services are so individualized with regard to content and quality as to prevent informed comparison on the basis of an advertisement, (b) because the consumer of legal services is unable to determine in advance just what services he needs, and (c) because advertising by attorneys will highlight irrelevant factors and fail to show the relevant factor of skill.

We are not persuaded that restrained professional advertising by lawyers inevitably will be misleading. Although many services performed by attorneys are indeed unique, it is doubtful that any attorney would or could advertise fixed prices for services of that type.[25] The only services that lend themselves to advertising are the routine ones: the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like—the very services advertised by appellants.[26] Although the precise service demanded in each task may vary slightly, and although legal services are not fungible, these facts do not make advertising

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[25] See Morgan, The Evolving Concept of Professional Responsibility, 90 Harv. L. Rev. 702, 741 (1977); Note, Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available, 81 Yale L. J. 1181, 1203 (1972). Economic considerations suggest that advertising is a more significant force in the marketing of inexpensive and frequently used goods and services with mass markets, than in the marketing of unique products or services.

[26] Moreover, we see nothing that is misleading in the advertisement of the cost of an initial half-hour consultation. The American Bar Association's Code of Professional Responsibility, DR 2–102 (A)(6) (1976), permits the disclosure of such fee information in the classified section of a telephone directory. See n. 18, *supra*. If the information is not misleading when published in a telephone directory, it is difficult to see why it becomes misleading when published in a newspaper.

misleading so long as the attorney does the necessary work at the advertised price.[27] The argument that legal services are so unique that fixed rates cannot meaningfully be established is refuted by the record in this case: The appellee State Bar itself sponsors a Legal Services Program in which the participating attorneys agree to perform services like those advertised by the appellants at standardized rates. App. 459–478. Indeed, until the decision of this Court in *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975), the Maricopa County Bar Association apparently had a schedule of suggested minimum fees for standard legal tasks. App. 355. We thus find of little force the assertion that advertising is misleading because of an inherent lack of standardization in legal services.[28]

The second component of the argument—that adver-

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[27] One commentator has observed: "[A] moment's reflection reveals that the same argument can be made for barbers; rarely are two haircuts identical, but that does not mean that barbers cannot quote a standard price. Lawyers perform countless relatively standardized services which vary somewhat in complexity but not so much as to make each job utterly unique." Morgan, *supra*, n. 25, at 714.

[28] THE CHIEF JUSTICE and MR. JUSTICE POWELL argue in dissent that advertising will be misleading because the exact services that are included in an advertised package may not be clearly specified or understood by the prospective client. *Post*, at 386–387 and 392–394. The bar, however, retains the power to define the services that must be included in an advertised package, such as an uncontested divorce, thereby standardizing the "product." We recognize that an occasional client might fail to appreciate the complexity of his legal problem and will visit an attorney in the mistaken belief that his difficulty can be handled at the advertised price. The misunderstanding, however, usually will be exposed at the initial consultation, and an ethical attorney would impose, at the most, a minimal consultation charge or no charge at all for the discussion. If the client decides to have work performed, a fee could be negotiated in the normal manner. The client is thus in largely the same position as he would be if there were no advertising. In light of the benefits of advertising to those whose problem can be resolved at the advertised price, suppression is not warranted on account of the occasional client who misperceives his legal difficulties.

tising ignores the diagnostic role—fares little better.[29] It is unlikely that many people go to an attorney merely to ascertain if they have a clean bill of legal health. Rather, attorneys are likely to be employed to perform specific tasks. Although the client may not know the detail involved in performing the task, he no doubt is able to identify the service he desires at the level of generality to which advertising lends itself.

The third component is not without merit: Advertising does not provide a complete foundation on which to select an attorney. But it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. The alternative—the prohibition of advertising—serves only to restrict the information that flows to consumers.[30] Moreover, the argument assumes that the public

[29] The same argument could be made about the advertising of abortion services. Although the layman may not know all the details of the medical procedure and may not always be able accurately to diagnose pregnancy, such advertising has certain First Amendment protection. *Bigelow* v. *Virginia*, 421 U. S. 809 (1975).

[30] It might be argued that advertising is undesirable because it allows the potential client to substitute advertising for reputational information in selecting an appropriate attorney. See, *e. g.*, Note, Sherman Act Scrutiny of Bar Restraints on Advertising and Solicitation by Attorneys, 62 Va. L. Rev. 1135, 1152–1157 (1976). Since in a referral system relying on reputation an attorney's future business is partially dependent on current performance, such a system has the benefit both of providing a mechanism for disciplining misconduct and of creating an incentive for an attorney to do a better job for his present clients. Although the system may have worked when the typical lawyer practiced in a small, homogeneous community in which ascertaining reputational information was easy for a consumer, commentators have seriously questioned its current efficacy. See, *e. g.*, B. Christensen, Lawyers for People of Moderate Means 128–135 (1970); Note, Bar Restrictions on Dissemination of Information about Legal Services, 22 U. C. L. A. L. Rev. 483, 500 (1974); Note, Sherman Act Scrutiny, *supra*, at 1156–1157. The trends of urbanization and specialization long since have moved the typical practice of law from its

is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefits of public ignorance. See *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S., at 769–770. Although, of course, the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, the preferred remedy is more disclosure, rather than less. If the naiveté of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective.

3. *The Adverse Effect on the Administration of Justice.* Advertising is said to have the undesirable effect of stirring up litigation.[31] The judicial machinery is designed to serve those who feel sufficiently aggrieved to bring forward their claims. Advertising, it is argued, serves to encourage the assertion of legal rights in the courts, thereby undesirably unsettling

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small-town setting. See R. Pound, The Lawyer from Antiquity to Modern Times 242 (1953). Information as to the qualifications of lawyers is not available to many. See n. 23, *supra*. And, if available, it may be inaccurate or biased. See Note, Sherman Act Scrutiny, *supra*, at 1157.

[31] It is argued that advertising also will encourage fraudulent claims. We do not believe, however, that there is an inevitable relationship between advertising and dishonesty. See Monopolies and Mergers Commission, Services of Solicitors in England and Wales, *supra*, n. 24, at 32–33 ("The temptation to depart from the high standards required of the profession no doubt exists, but we do not believe that solicitors would be likely to succumb to it more easily or more frequently merely by reason of the supposed contamination of advertising; the traditions of the profession and the sense of responsibility of its members are in our view too strong for this to happen"). Unethical lawyers and dishonest laymen are likely to meet even though restrictions on advertising exist. The appropriate response to fraud is a sanction addressed to that problem alone, not a sanction that unduly burdens a legitimate activity.

societal repose. There is even a suggestion of barratry. See, *e. g.*, Comment, A Critical Analysis of Rules Against Solicitation by Lawyers, 25 U. Chi. L. Rev. 674, 675–676 (1958).

But advertising by attorneys is not an unmitigated source of harm to the administration of justice. It may offer great benefits. Although advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action.[32] As the bar acknowledges, "the middle 70% of our population is not being reached or served adequately by the legal profession." ABA, Revised Handbook on Prepaid Legal Services 2 (1972).[33] Among the reasons for this underutilization is fear of the cost, and an inability to locate a suitable lawyer. See nn. 22 and 23, *supra*. Advertising can help to solve this acknowledged problem: Advertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange. The disciplinary rule at issue likely has served to burden access to legal services, par-

[32] Decided cases reinforce this view. The Court often has recognized that collective activity undertaken to obtain meaningful access to the courts is protected under the First Amendment. See *United Transportation Union* v. *Michigan Bar*, 401 U. S. 576, 585 (1971); *Mine Workers* v. *Illinois Bar Assn.*, 389 U. S. 217, 222–224 (1967); *Railroad Trainmen* v. *Virginia Bar*, 377 U. S. 1, 7 (1964); *NAACP* v. *Button*, 371 U. S. 415, 438–440 (1963). It would be difficult to understand these cases if a lawsuit were somehow viewed as an evil in itself. Underlying them was the Court's concern that the aggrieved receive information regarding their legal rights and the means of effectuating them. This concern applies with at least as much force to aggrieved individuals as it does to groups.

[33] The ABA survey discussed in n. 23 indicates that 35.8% of the adult population has never visited an attorney and another 27.9% has visited an attorney only once. 3 Alternatives, *supra*, n. 23, at 12. See also P. Murphy & S. Walkowski, Compilation of Reference Materials on Prepaid Legal Services 1 (1973); Meserve, Our Forgotten Client: The Average American, 57 A. B. A. J. 1092 (1971). Appellee concedes the existence of the problem, but argues that advertising offers an unfortunate solution. Brief for Appellee 54–56.

ticularly for the not-quite-poor and the unknowledgeable. A rule allowing restrained advertising would be in accord with the bar's obligation to "facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available." ABA Code of Professional Responsibility EC 2–1 (1976).

4. *The Undesirable Economic Effects of Advertising.* It is claimed that advertising will increase the overhead costs of the profession, and that these costs then will be passed along to consumers in the form of increased fees. Moreover, it is claimed that the additional cost of practice will create a substantial entry barrier, deterring or preventing young attorneys from penetrating the market and entrenching the position of the bar's established members.

These two arguments seem dubious at best. Neither distinguishes lawyers from others, see *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U. S., at 768, and neither appears relevant to the First Amendment. The ban on advertising serves to increase the difficulty of discovering the lowest cost seller of acceptable ability. As a result, to this extent attorneys are isolated from competition, and the incentive to price competitively is reduced. Although it is true that the effect of advertising on the price of services has not been demonstrated, there is revealing evidence with regard to products; where consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising.[34] It is entirely possible that advertising will serve to reduce, not advance, the cost of legal services to the consumer.[35]

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[34] See Benham, The Effect of Advertising on the Price of Eyeglasses, 15 J. Law & Econ. 337 (1972); J. Cady, Restricted Advertising and Competition: The Case of Retail Drugs (1976). See also *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U. S., at 754, and n. 11 (noting variation in drug prices of up to 1200% in one city).

[35] On the one hand, advertising does increase an attorney's overhead costs, and, in light of the underutilization of legal services by the public,

The entry-barrier argument is equally unpersuasive. In the absence of advertising, an attorney must rely on his contacts with the community to generate a flow of business. In view of the time necessary to develop such contacts, the ban in fact serves to perpetuate the market position of established attorneys. Consideration of entry-barrier problems would urge that advertising be allowed so as to aid the new competitor in penetrating the market.

5. *The Adverse Effect of Advertising on the Quality of Service.* It is argued that the attorney may advertise a given "package" of service at a set price, and will be inclined to provide, by indiscriminate use, the standard package regardless of whether it fits the client's needs.

Restraints on advertising, however, are an ineffective way of deterring shoddy work. An attorney who is inclined to cut quality will do so regardless of the rule on advertising. And the advertisement of a standardized fee does not necessarily mean that the services offered are undesirably standardized. Indeed, the assertion that an attorney who advertises a standard fee will cut quality is substantially undermined by the fixed-fee schedule of appellee's own prepaid Legal Services Program. Even if advertising leads to the

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see n. 33, *supra*, it may increase substantially the demand for services. Both these factors will tend to increase the price of legal services. On the other hand, the tendency of advertising to enhance competition might be expected to produce pressures on attorneys to reduce fees. The net effect of these competing influences is hard to estimate. We deem it significant, however, that consumer organizations have filed briefs as *amici* urging that the restriction on advertising be lifted. And we note as well that, despite the fact that advertising on occasion might increase the price the consumer must pay, competition through advertising is ordinarily the desired norm.

Even if advertising causes fees to drop, it is by no means clear that a loss of income to lawyers will result. The increased volume of business generated by advertising might more than compensate for the reduced profit per case. See Frierson, Legal Advertising, Barrister 6, 8 (Winter 1975); Wilson, Madison Avenue, Meet the Bar, 61 A. B. A. J. 586, 588 (1975).

creation of "legal clinics" like that of appellants'—clinics that emphasize standardized procedures for routine problems—it is possible that such clinics will improve service by reducing the likelihood of error.

6. *The Difficulties of Enforcement.* Finally, it is argued that the wholesale restriction is justified by the problems of enforcement if any other course is taken. Because the public lacks sophistication in legal matters, it may be particularly susceptible to misleading or deceptive advertising by lawyers. After-the-fact action by the consumer lured by such advertising may not provide a realistic restraint because of the inability of the layman to assess whether the service he has received meets professional standards. Thus, the vigilance of a regulatory agency will be required. But because of the numerous purveyors of services, the overseeing of advertising will be burdensome.

It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort. We suspect that, with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward. And, of course, it will be in the latter's interest, as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust.

In sum, we are not persuaded that any of the proffered justifications rise to the level of an acceptable reason for the suppression of all advertising by attorneys.

C

In the usual case involving a restraint on speech, a showing that the challenged rule served unconstitutionally to suppress

speech would end our analysis. In the First Amendment context, the Court has permitted attacks on overly broad statutes without requiring that the person making the attack demonstrate that in fact his specific conduct was protected. See, *e. g., Bigelow* v. *Virginia,* 421 U. S., at 815–816; *Gooding* v. *Wilson,* 405 U. S. 518, 521–522 (1972); *Dombrowski* v. *Pfister,* 380 U. S. 479, 486 (1965). Having shown that the disciplinary rule interferes with protected speech, appellants ordinarily could expect to benefit regardless of the nature of their acts.

The First Amendment overbreadth doctrine, however, represents a departure from the traditional rule that a person may not challenge a statute on the ground that it might be applied unconstitutionally in circumstances other than those before the court. See, *e. g., Broadrick* v. *Oklahoma,* 413 U. S. 601, 610 (1973); *United States* v. *Raines,* 362 U. S. 17, 21 (1960); *Ashwander* v. *TVA,* 297 U. S. 288, 347 (1936) (Brandeis, J., concurring). The reason for the special rule in First Amendment cases is apparent: An overbroad statute might serve to chill protected speech. First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the *in terrorem* effect of the statute. See *NAACP* v. *Button,* 371 U. S. 415, 433 (1963). Indeed, such a person might choose not to speak because of uncertainty whether his claim of privilege would prevail if challenged. The use of overbreadth analysis reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted.

But the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context. As was acknowledged in *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U. S., at 771 n. 24, there

are "commonsense differences" between commercial speech and other varieties. See also *id.*, at 775–781 (concurring opinion). Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation. See *id.*, at 771–772, n. 24. Moreover, concerns for uncertainty in determining the scope of protection are reduced; the advertiser seeks to disseminate information about a product or service that he provides, and presumably he can determine more readily than others whether his speech is truthful and protected. *Ibid.* Since overbreadth has been described by this Court as "strong medicine," which "has been employed . . . sparingly and only as a last resort," *Broadrick* v. *Oklahoma*, 413 U. S., at 613, we decline to apply it to professional advertising, a context where it is not necessary to further its intended objective. Cf. *Bigelow* v. *Virginia*, 421 U. S., at 817–818.

Is, then, appellants' advertisement outside the scope of basic First Amendment protection? Aside from general claims as to the undesirability of any advertising by attorneys, a matter considered above, appellee argues that appellants' advertisement is misleading, and hence unprotected, in three particulars: (a) the advertisement makes reference to a "legal clinic," an allegedly undefined term; (b) the advertisement claims that appellants offer services at "very reasonable" prices, and, at least with regard to an uncontested divorce, the advertised price is not a bargain; and (c) the advertisement does not inform the consumer that he may obtain a name change without the services of an attorney. Tr. of Oral Arg. 56–57. On this record, these assertions are unpersuasive. We suspect that the public would readily understand the term "legal clinic"—if, indeed, it focused on the term at all—to refer to an operation like that of appellants' that is geared to provide standardized and multiple services. In fact, in his deposition the president of the State Bar of Arizona observed

that there was a committee of the bar "exploring the ways in which the legal clinic concept can be properly developed." App. 375; see *id.*, at 401. See also *id.*, at 84–85 (testimony of appellants). And the clinical concept in the sister profession of medicine surely by now is publicly acknowledged and understood.

As to the cost of an uncontested divorce, appellee stated at oral argument that this runs from $150 to $300 in the area. Tr. of Oral Arg. 58. Appellants advertised a fee of $175 plus a $20 court filing fee, a rate that seems "very reasonable" in light of the customary charge. Appellee's own Legal Services Program sets the rate for an uncontested divorce at $250. App. 473. Of course, advertising will permit the comparison of rates among competitors, thus revealing if the rates are reasonable.

As to the final argument—the failure to disclose that a name change might be accomplished by the client without the aid of an attorney—we need only note that most legal services may be performed legally by the citizen for himself. See *Faretta* v. *California*, 422 U. S. 806 (1975); ABA, Code of Professional Responsibility EC 3–7 (1976). The record does not unambiguously reveal some of the relevant facts in determining whether the nondisclosure is misleading, such as how complicated the procedure is and whether the State provides assistance for laymen. The deposition of one appellant, however, reflects that when he ascertained that a name change required only the correction of a record or the like, he frequently would send the client to effect the change himself.[36] App. 112.

We conclude that it has not been demonstrated that the advertisement at issue could be suppressed.

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[36] The same appellant, however, stated: "[I]t's not my job to inform a prospective client that he needn't employ a lawyer to handle his work." App. 112–113.

IV

In holding that advertising by attorneys may not be subjected to blanket suppression, and that the advertisement at issue is protected, we, of course, do not hold that advertising by attorneys may not be regulated in any way. We mention some of the clearly permissible limitations on advertising not foreclosed by our holding.

Advertising that is false, deceptive, or misleading of course is subject to restraint. See *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S., at 771–772, and n. 24. Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech. *Id.*, at 771–772, n. 24. And any concern that strict requirements for truthfulness will undesirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated. Indeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena. Compare *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 339–341 (1974), and *Cantwell* v. *Connecticut*, 310 U. S., at 310, with *NLRB* v. *Gissel Packing Co.*, 395 U. S., at 618. In fact, because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising.[37] For example, advertising claims as to the quality of services—a matter we do not address today—are not susceptible of measurement or verification; accordingly, such claims may be so likely to be

[37] The determination whether an advertisement is misleading requires consideration of the legal sophistication of its audience. Cf. *Feil* v. *FTC*, 285 F. 2d 879, 897 (CA9 1960). Thus, different degrees of regulation may be appropriate in different areas.

misleading as to warrant restriction. Similar objections might justify restraints on in-person solicitation. We do not foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled. In sum, we recognize that many of the problems in defining the boundary between deceptive and nondeceptive advertising remain to be resolved, and we expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly.

As with other varieties of speech, it follows as well that there may be reasonable restrictions on the time, place, and manner of advertising. See *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S., at 771. Advertising concerning transactions that are themselves illegal obviously may be suppressed. See *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376, 388 (1973). And the special problems of advertising on the electronic broadcast media will warrant special consideration. Cf. *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582 (DC 1971), aff'd *sub nom. Capital Broadcasting Co.* v. *Acting Attorney General*, 405 U. S. 1000 (1972).

The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services. We rule simply that the flow of such information may not be restrained, and we therefore hold the present application of the disciplinary rule against appellants to be violative of the First Amendment.

The judgment of the Supreme Court of Arizona is therefore affirmed in part and reversed in part.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

ADVERTISEMENT

DO YOU NEED A LAWYER?

LEGAL SERVICES AT VERY REASONABLE FEES



- Divorce or legal separation--uncontested [both spouses sign papers]

  $175.00 plus $20.00 court filing fee

- Preparation of all court papers and instructions on how to do your own simple uncontested divorce

  $100.00

- Adoption--uncontested severance proceeding

  $225.00 plus approximately $10.00 publication cost

- Bankruptcy--non-business, no contested proceedings

  Individual
  $250.00 plus $55.00 court filing fee

  Wife and Husband
  $300.00 plus $110.00 court filing fee

- Change of Name

  $95.00 plus $20.00 court filing fee

Information regarding other types of cases furnished on request

Legal Clinic of Bates & O'Steen

617 North 3rd Street
Phoenix, Arizona 85004
Telephone [602] 252-8888

MR. CHIEF JUSTICE BURGER, concurring in part and dissenting in part.

I am in general agreement with MR. JUSTICE POWELL's analysis and with Part II of the Court's opinion. I particularly agree with MR. JUSTICE POWELL's statement that "today's decision will effect profound changes in the practice of law." *Post,* at 389. Although the exact effect of those changes cannot now be known, I fear that they will be injurious to those whom the ban on legal advertising was designed to protect—the members of the general public in need of legal services.

Some Members of the Court apparently believe that the present case is controlled by our holding one year ago in *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U. S. 748 (1976). However, I had thought that we made most explicit that our holding there rested on the fact that the advertisement of standardized, prepackaged, name-brand drugs was at issue. *Id.,* at 773 n. 25. In that context, the prohibition on price advertising, which had served a useful function in the days of individually compounded medicines, was no longer tied to the conditions which had given it birth. The same cannot be said with respect to legal services which, by necessity, must vary greatly from case to case. Indeed, I find it difficult, if not impossible, to identify categories of legal problems or services which are fungible in nature. For example, MR. JUSTICE POWELL persuasively demonstrates the fallacy of any notion that even an uncontested divorce can be "standard." *Post,* at 392–394. A "reasonable charge" for such a divorce could be $195, as the appellants wish to advertise, or it could reasonably be a great deal more, depending on such variables as child custody, alimony, support, or any property settlement. Because legal services can rarely, if ever, be "standardized" and because potential clients rarely know in advance what services they do in fact need, price advertising can never give the public an accurate picture on which to base its selection of an attorney. Indeed, in the context of legal

services, such incomplete information could be worse than no information at all.[1] It could become a trap for the unwary.

The Court's opinion largely disregards these facts on the unsupported assumptions that attorneys will not advertise anything but "routine" services—which the Court totally fails to identify or define—or, if they do advertise, that the bar and the courts will be able to protect the public from those few practitioners who abuse their trust. The former notion is highly speculative and, of course, does nothing to solve the problems that this decision will create; as to the latter, the existing administrative machinery of both the profession and the courts has proved wholly inadequate to police the profession effectively. See ABA Special Committee On Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement (1970). To impose the enormous new regulatory burdens called for by the Court's decision on the presently deficient machinery of the bar and courts is unrealistic; it is almost predictable that it will create problems of unmanageable proportions. The Court thus takes a "great leap" into an unexplored, sensitive regulatory area where the legal profession and the courts have not yet learned to crawl, let alone stand up or walk. In my view, there is no need for this hasty plunge into a problem where not even the wisest of experts—if such experts exist—can move with sure steps.

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[1] I express no view on MR. JUSTICE POWELL's conclusion that the advertisement of an attorney's initial consultation fee or his hourly rate would not be inherently misleading and thus should be permitted since I cannot understand why an "initial consultation" should have a different charge base from an hourly rate. *Post*, at 399–400. Careful study of the problems of attorney advertising—and none has yet been made—may well reveal that advertisements limited to such matters do not carry with them the potential for abuse that accompanies the advertisement of fees for particular services. However, even such limited advertisements should not be permitted without a disclaimer which informs the public that the fee charged in any particular case will depend on and vary according to the individual circumstances of that case. See ABA Code of Professional Responsibility, DR 2–106 (B) (1976).

To be sure, the public needs information concerning attorneys, their work, and their fees. At the same time, the public needs protection from the unscrupulous or the incompetent practitioner anxious to prey on the uninformed. It seems to me that these twin goals can best be served by permitting the organized bar to experiment with and perfect programs which would announce to the public the probable *range* of fees for specifically defined services and thus give putative clients some idea of potential cost liability when seeking out legal assistance.[2] However, even such programs should be confined to the known and knowable, *e. g.*, the truly "routine" uncontested divorce which is defined to exclude any dispute over alimony, property rights, child custody or support, and should make clear to the public that the actual fee charged in any given case will vary according to the individual circumstances involved, see ABA Code of Professional Responsibility, DR 2–106 (B) (1976), in order to insure that the expectations of clients are not unduly inflated. Accompanying any reform of this nature must be some type of *effective* administrative procedure to hear and resolve the grievances and complaints of disappointed clients.

Unfortunately, the legal profession in the past has approached solutions for the protection of the public with too much caution, and, as a result, too little progress has been made. However, as MR. JUSTICE POWELL points out, *post*, at 398–399, the organized bar has recently made some reforms in this sensitive area and more appear to be in the offing. Rather than allowing these efforts to bear fruit, the Court today opts for a Draconian "solution" which I believe will only breed more problems than it can conceivably resolve.

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[2] The publication of such information by the organized bar would create no conflict with our holding in *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975), so long as attorneys were under no obligation to charge within the range of fees described.

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, concurring in part and dissenting in part.

I agree with the Court that appellants' Sherman Act claim is barred by the *Parker* v. *Brown* exemption, 317 U. S. 341 (1943), and therefore join Part II of the Court's opinion. But I cannot join the Court's holding that under the First Amendment "truthful" newspaper advertising of a lawyer's prices for "routine legal services" may not be restrained. *Ante,* at 384. Although the Court appears to note some reservations (mentioned below), it is clear that within undefined limits today's decision will effect profound changes in the practice of law, viewed for centuries as a learned profession. The supervisory power of the courts over members of the bar, as officers of the courts, and the authority of the respective States to oversee the regulation of the profession have been weakened. Although the Court's opinion professes to be framed narrowly, and its reach is subject to future clarification, the holding is explicit and expansive with respect to the advertising of undefined "routine legal services." In my view, this result is neither required by the First Amendment, nor in the public interest.

I

Appellants, two young members of the Arizona Bar, placed an advertisement in a Phoenix newspaper apparently for the purpose of testing the validity of Arizona's ban on advertising by attorneys. The advertisement, reproduced *ante,* at 385, stated that appellants' "Legal Clinic" provided "legal services at very reasonable fees," and identified the following four legal services, indicating an exact price for each:

> (1) Divorce or legal separation—uncontested (both spouses sign papers): $175 plus $20 court filing fee.
>
> (2) Preparation of all court papers and instructions on how to do your own simple uncontested divorce: $100.

(3) Adoption—uncontested severance proceeding: $225 plus approximately $10 publication cost.

(4) Bankruptcy—non-business, no contested proceedings—individual: $250 plus $55 court filing fee; wife and husband: $300 plus $110 court filing fee.

(5) Change of Name—$95 plus $20 court filing fee.

The advertisement also stated that information regarding other types of cases would be furnished on request. Since it is conceded that this advertisement violated Disciplinary Rule 2–101 (B), incorporated in Rule 29 (a) of the Supreme Court of Arizona,[1] the question before us is whether the application of the disciplinary rule to appellants' advertisement violates the First Amendment.

The Court finds the resolution of that question in our recent decision in *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S. 748 (1976). In that case, we held unconstitutional under the First and Fourteenth Amendments a Virginia statute declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs. We concluded that commercial speech to the effect that "I will sell you the X prescription drug at the Y price" was entitled to certain protection under the First Amendment, and found that the proffered justifications were inadequate to support the ban on price advertising. But we were careful to note that we were dealing in that case with price advertising of a *standardized product*. The Court specifically reserved judgment as to the constitutionality of state regulation of price advertising with respect to *professional services:*

> "We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense

[1] The disciplinary rule is reproduced *ante*, at 355, and n. 5.

standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." *Id.*, at 773 n. 25 (emphasis in original).[2]

This case presents the issue so reserved, and the Court resolves it on the assumption that what it calls "routine" legal services are essentially no different for purposes of First Amendment analysis from prepackaged prescription drugs. In so holding, the Court fails to give appropriate weight to the two fundamental ways in which the advertising of professional services presents a different issue from that before the Court with respect to tangible products: the vastly increased potential for deception and the enhanced difficulty of effective regulation in the public interest.

A

It has long been thought that price advertising of legal services inevitably will be misleading because such services are individualized with respect to content and quality and because the lay consumer of legal services usually does not know in advance the precise nature and scope of the services he requires. *Ante*, at 372. Although the Court finds some force in this reasoning and recognizes that "many services performed by attorneys are indeed unique," its first answer is the optimistic expression of hope that few lawyers "would or could advertise fixed prices for services of that type." *Ibid.* But the Court's basic response in view of the acknowledged potential for deceptive advertising of "unique" services is to divide the immense range of the professional product of

[2] THE CHIEF JUSTICE, concurring in *Virginia Pharmacy*, also emphasized the distinction between tangible products and professional services:

"The Court notes that roughly 95% of all prescriptions are filled with dosage units already prepared by the manufacturer and sold to the pharmacy in that form. . . . In dispensing these *prepackaged* items, the pharmacist performs largely a packaging rather than a compounding function of former times." 425 U. S., at 773–774 (emphasis in original).

lawyers into two categories: "unique" and "routine." The only insight afforded by the opinion as to how one draws this line is the finding that services similar to those in appellants' advertisement are routine: "the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like." *Ibid.* What the phrase "the like" embraces is not indicated. But the advertising of such services must, in the Court's words, flow "both freely and cleanly." *Ante,* at 384.

Even the briefest reflection on the tasks for which lawyers are trained and the variation among the services they perform should caution against facile assumptions that legal services can be classified into the routine and the unique. In most situations it is impossible—both for the client and the lawyer—to identify with reasonable accuracy in advance the nature and scope of problems that may be encountered even when handling a matter that at the outset seems routine. Neither quantitative nor qualitative measurement of the service actually needed is likely to be feasible in advance.[3]

This definitional problem is well illustrated by appellants' advertised willingness to obtain uncontested divorces for $195 each. A potential client can be grievously misled if he

[3] What legal services are "routine" depends on the eye of the beholder. A particular service may be quite routine to a lawyer who has specialized in that area for many years. The marital trust provisions of a will, for example, are routine to the experienced tax and estate lawyer; they may be wholly alien to the negligence litigation lawyer. And what the unsophisticated client may think is routine simply cannot be predicted. Absent even a minimal common understanding as to the service, and given the unpredictability in advance of what actually may be required, the advertising lawyer and prospective client often will have no meeting of the minds. Although widely advertised tangible products customarily vary in many respects, at least in the vast majority of cases prospective purchasers know the product and can make a preliminary comparative judgment based on price. But not even the lawyer doing the advertising can know in advance the nature and extent of services required by the client who responds to the advertisement. Price comparisons of designated services, therefore, are more likely to mislead than to inform.

reads the advertised service as embracing all of his possible needs. A host of problems are implicated by divorce. They include alimony; support and maintenance for children; child custody; visitation rights; interests in life insurance, community property, tax refunds, and tax liabilities; and the disposition of other property rights.[4] The processing of court papers—apparently the only service appellants provide for $195—is usually the most straightforward and least demanding aspect of the lawyer's responsibility in a divorce case. More important from the viewpoint of the client is the diagnostic and advisory function: the pursuit of relevant inquiries of which the client would otherwise be unaware, and advice with respect to alternative arrangements that might prevent irreparable dissolution of the marriage or otherwise resolve the client's problem.[5] Although those profes-

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[4] It may be argued that many of these problems are not applicable for couples of modest means. This is by no means invariably true, even with respect to alimony, support and maintenance, and property questions. And it certainly is not true with respect to the more sensitive problems of child custody and visitation rights.

[5] A high percentage of couples seeking counsel as to divorce desire initially that it be uncontested. They often describe themselves as civilized people who have mutually agreed to separate; they want a quiet, out-of-court divorce without alimony. But experienced counsel knows that the initial spirit of amity often fades quickly when the collateral problems are carefully explored. Indeed, scrupulous counsel—except in the rare case—will insist that the parties have separate counsel to assure that the rights of each, and those of children, are protected adequately. In short, until the lawyer has performed his first duties of diagnosis and advice as to rights, it is usually impossible to know whether there can or will be an uncontested divorce. As President Mark Harrison of the State Bar of Arizona testified:

"I suppose you can get lucky and have three clients come in in response to [appellants' advertisement] who have no children; no real property; no real disagreement, and you can handle such an uncontested divorce, and do a proper job for a [pre]determined, . . . prestated price.

. . . . . .

"[T]he inherent vice [is] that you can't know in advance, what special

sional functions are not included within appellants' packaged routine divorce, they frequently fall within the concept of "advice" with which the lay person properly is concerned when he or she seeks legal counsel. The average lay person simply has no feeling for which services are included in the packaged divorce, and thus no capacity to judge the nature of the advertised product.[6] As a result, the type of advertisement before us inescapably will mislead many who respond to it. In the end, it will promote distrust of lawyers and disrespect for our own system of justice.

The advertising of specified services at a fixed price is not the only infirmity of the advertisement at issue.[7] Appellants also assert that these services are offered at "very reasonable fees." That Court finds this to be an accurate statement since the advertised fee fell at the lower end of the range of customary charges. But the fee customarily charged in the locality for similar services has never been considered the sole determinant of the reasonableness of a fee.[8] This is because reasonableness reflects both the quan-

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problems the client who sees the advertisement will present, and if you are bound to a predetermined price . . . sooner or later you are going to have to inevitably sacrifice the quality of service you are able to render." App. 378–380.

[6] Similar complications surround the uncontested adoption and the simple bankruptcy.

[7] Use of the term "clinic" to describe a law firm of any size is unusual, and possibly ambiguous in view of its generally understood meaning in the medical profession. Appellants defend its use as justified by their plan to provide standardized legal services at low prices through the employment of automatic equipment and paralegals. But there is nothing novel or unusual about the use by law firms of automatic equipment, paralegals, and other modern techniques for serving clients at lower cost. Nor are appellants a public service law firm. They are in private practice, and though their advertising is directed primarily to clients with family incomes of less than $25,000, appellants do not limit their practice to this income level. App. 82.

[8] For example, the American Bar Association's Code of Professional Responsibility specifies the "[f]actors to be considered as guides in deter-

tity and quality of the service. A $195 fee may be reasonable for one divorce and unreasonable for another; and a $195 fee may be reasonable when charged by an experienced divorce lawyer and unreasonable when charged by a recent law school graduate. For reasons that are not readily apparent, the Court today discards the more discriminating approach which the profession long has used to judge the reasonableness of a fee, and substitutes an approach based on market averages. Whether a fee is "very reasonable" is a matter of opinion, and not a matter of verifiable fact as the Court suggests. One unfortunate result of today's decision is that lawyers may feel free to use a wide variety of adjectives—such as "fair," "moderate," "low-cost," or "lowest in town"—to describe the bargain they offer to the public.

B

Even if one were to accept the view that some legal services are sufficiently routine to minimize the possibility of deception, there nonetheless remains a serious enforcement problem. The Court does recognize some problems. It notes that misstatements that may be immaterial in "other adver-

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mining the reasonableness of a fee . . . ." DR 2-106 (B) (1976). These include:

"(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

"(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

"(3) The fee customarily charged in the locality for similar legal services.

"(4) The amount involved and the results obtained.

"(5) The time limitations imposed by the client or by the circumstances.

"(6) The nature and length of the professional relationship with the client.

"(7) The experience, reputation, and ability of the lawyer or lawyers performing the service.

"(8) Whether the fee is fixed or contingent."

tising may be found quite inappropriate in legal advertising" precisely because "the public lacks sophistication concerning legal services." *Ante*, at 383. It also recognizes that "advertising claims as to the quality of services . . . are not susceptible of measurement or verification" and therefore "may be so likely to be misleading as to warrant restriction." *Ante*, at 383–384. After recognizing that problems remain in defining the boundary between deceptive and nondeceptive advertising, the Court then observes that the bar may be expected to have "a special role to play in assuring that advertising by attorneys flows both freely and cleanly." *Ante*, at 384.

The Court seriously understates the difficulties, and overestimates the capabilities of the bar—or indeed of any agency public or private—to assure with a reasonable degree of effectiveness that price advertising can at the same time be both unrestrained and truthful. *Ibid.* There are some 400,000 lawyers in this country. They have been licensed by the States, and the organized bars within the States—operating under codes approved by the highest courts acting pursuant to statutory authority—have had the primary responsibility for assuring compliance with professional ethics and standards. The traditional means have been disciplinary proceedings conducted initially by voluntary bar committees subject to judicial review. In view of the sheer size of the profession, the existence of a multiplicity of jurisdictions, and the problems inherent in the maintenance of ethical standards even of a profession with established traditions, the problem of disciplinary enforcement in this country has proved to be extremely difficult. See generally ABA, Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement (1970).

The Court's almost casual assumption that its authorization of price advertising can be policed effectively by the bar reflects a striking underappreciation of the nature and mag-

nitude of the disciplinary problem. The very reasons that tend to make price advertising of services inherently deceptive make its policing wholly impractical. With respect to commercial advertising, MR. JUSTICE STEWART, concurring in *Virginia Pharmacy,* noted that since "the factual claims contained in commercial price or product advertisements relate to tangible goods or services, they may be tested empirically and corrected to reflect the truth." 425 U. S., at 780. But there simply is no way to test "empirically" the claims made in appellants' advertisement of legal services. There are serious difficulties in determining whether the advertised services fall within the Court's undefined category of "routine services"; whether they are described accurately and understandably; and whether appellants' claim as to reasonableness of the fees is accurate. These are not factual questions for which there are "truthful" answers; in most instances, the answers would turn on relatively subjective judgments as to which there could be wide differences of opinion. These difficulties with appellants' advertisement will inhere in any comparable price advertisement of specific legal services. Even if public agencies were established to oversee professional price advertising, adequate protection of the public from deception, and of ethical lawyers from unfair competition, could prove to be a wholly intractable problem.

II

The Court emphasizes the need for information that will assist persons desiring legal services to choose lawyers. Under our economic system, advertising is the most commonly used and useful means of providing information as to goods and other services, but it generally has not been used with respect to legal and certain other professional services. Until today, controlling weight has been given to the danger that general advertising of such services too often would tend to mislead rather than inform. Moreover, there

has been the further concern that the characteristics of the legal profession thought beneficial to society—a code of professional ethics, an imbued sense of professional and public responsibility, a tradition of self-discipline, and duties as officers of the courts—would suffer if the restraints on advertising were significantly diluted.

Pressures toward some relaxation of the proscription against general advertising have gained force in recent years with the increased recognition of the difficulty that low- and middle-income citizens experience in finding counsel willing to serve at reasonable prices. The seriousness of this problem has not been overlooked by the organized bar. At both the national and state level, the bar has addressed the need for expanding the availability of legal services in a variety of ways, including: (i) group legal service plans, increasingly used by unions, cooperatives, and trade associations; (ii) lawyer referral plans operated by local and state bars; (iii) bar-sponsored legal clinics; (iv) public service law firms; and (v) group insurance or prepaid service plans. Notable progress has been made over the past two decades in providing counsel for indigents charged with crime. Not insignificant progress also has been made through bar-sponsored legal aid and, more recently, the Federal Legal Services Corporation in providing counsel for indigents in civil cases. But the profession recognizes that less success has been achieved in assuring that persons who can afford to pay modest fees have access to lawyers competent and willing to represent them.[9]

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[9] A major step forward was taken in 1965 with the initiation of the legal services program of the Office of Economic Opportunity, a program fully supported by the American Bar Association. The legal services program is now administered by the Federal Legal Services Corporation, created by Congress in 1976. Efforts by the profession to broaden the availability of legal services to persons of low- and middle-income levels also gained momentum in 1965.

Study and experimentation continue. Following a series of hearings in 1975, the American Bar Association amended its Code of Professional Responsibility to broaden the information, when allowed by state law, that a lawyer may provide in approved means of advertising. DR 2–102 (1976). In addition to the customary data published in legal directories, the amended regulation authorizes publication of the lawyer's fee for an initial consultation, the fact that other fee information is available on specific request, and the willingness of the attorney to accept credit cards or other credit arrangements. The regulation approves placement of such advertisements in the classified section of telephone directories, in the customary law lists and legal directories, and also in directories of lawyers prepared by consumer and other groups.

The Court observes, and I agree, that there is nothing inherently misleading in the advertisement of the cost of an initial consultation. Indeed, I would not limit the fee information to the initial conference. Although the skill and experience of lawyers vary so widely as to negate any equivalence between hours of service by different lawyers, variations in quality of service by duly licensed lawyers are inevitable. Lawyers operate, at least for the purpose of internal control and accounting, on the basis of specified hourly rates, and upon request—or in an appropriate case—most lawyers are willing to undertake employment at such rates. The advertisement of these rates, in an appropriate medium, duly designated, would not necessarily be misleading if this fee information also made clear that the total charge for the representation would depend on the number of hours devoted to the client's problem—a variable difficult to predict. Where the price content of the advertisement is limited to the finite item of rate per hour devoted to the client's problem, the likelihood of deceiving or misleading is consider-

ably less than when specific services are advertised at a fixed price.

III

Although I disagree strongly with the Court's holding as to price advertisements of undefined—and I believe undefinable—routine legal services, there are reservations in its opinion worthy of emphasis since they may serve to narrow its ultimate reach. First, the Court notes that it has not addressed "the peculiar problems associated with advertising claims relating to the *quality* of legal services." *Ante*, at 366. There are inherent questions of quality in almost any type of price advertising by lawyers, and I do not view appellants' advertisement as entirely free from quality implications. Nevertheless the Court's reservation in this respect could be a limiting factor.

Second, as in *Virginia Pharmacy*, the Court again notes that there may be reasonable restrictions on the time, place, and manner of commercial price advertising. In my view, such restrictions should have a significantly broader reach with respect to professional services than as to standardized products. This Court long has recognized the important state interests in the regulation of professional advertising. *Head* v. *New Mexico Board*, 374 U. S. 424 (1963); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955); *Semler* v. *Dental Examiners*, 294 U. S. 608 (1935).[10] And as to lawyers, the

[10] Although *Semler* v. *Dental Examiners* involved a due process issue rather than a First Amendment challenge, the distinction drawn in that case between the advertisement of professional services and commodities is highly relevant. Mr. Chief Justice Hughes, writing for the Court, stated:

"We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only com-

Court recently has noted that "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' " [11] *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 792 (1975). Although the opinion today finds these interests insufficient to justify prohibition of all price advertising, the state interests recognized in these cases should be weighed carefully

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petency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards." 294 U. S., at 612.

This distinction, addressed specifically to advertising, has never been questioned by this Court until today. Indeed, *Semler* was recently cited with approval in *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 792–793 (1975).

[11] The Court's opinion is not without an undertone of criticism of lawyers and the legal profession for their opposition to price advertising: *e. g.*, (i) the reference to the profession "condoning the actions of the attorney who structures his social or civic associations so as to provide contacts with potential clients," *ante*, at 371; and (ii) the implication that opposition to advertising derives from the view that lawyers "belittle the person who earns his living by the strength of his arm" and "somehow [are] 'above' trade," *ante*, at 371–372. This indiscriminate criticism is unjustified. Lawyers are not hermits and society would suffer if they were. Members of the legal profession customarily are leaders in the civic, charitable, cultural, and political life of most communities. Indeed, the professional responsibility of lawyers is thought to include the duty of civic and public participation. As a profession, lawyers do differ from other callings. "This is not a fancied conceit, but a cherished tradition, the preservation of which is essential to the lawyer's reverence for his calling." H. Drinker, Legal Ethics 211 (1963) (footnote omitted). There certainly can be pride in one's profession without belittling those who perform other tasks essential to an ongoing society.

in any future consideration of time, place, and manner restrictions.[12]

Finally, the Court's opinion does not "foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled." *Ante*, at 384. I view this as at least some recognition of the potential for deception inherent in fixed-price advertising of specific legal services. This recognition, though ambiguous in light of other statements in the opinion, may be viewed as encouragement to those who believe—as I do—that if we are to have price advertisement of legal services, the public interest will require the most particularized regulation.

IV

The area into which the Court now ventures has, until today, largely been left to self-regulation by the profession within the framework of canons or standards of conduct prescribed by the respective States and enforced where necessary by the courts. The problem of bringing clients and lawyers together on a mutually fair basis, consistent with the public interest, is as old as the profession itself. It is one of considerable complexity, especially in view of the constantly evolving nature of the need for legal services. The problem has not been resolved with complete satisfaction despite diligent and thoughtful efforts by the organized bar and others over a period of many years, and there is no

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[12] The Court speaks specifically only of newspaper advertising, but it is clear that today's decision cannot be confined on a principled basis to price advertisements in newspapers. No distinction can be drawn between newspapers and a rather broad spectrum of other means—for example, magazines, signs in buses and subways, posters, handbills, and mail circulations. But questions remain open as to time, place, and manner restrictions affecting other media, such as radio and television.

reason to believe that today's best answers will be responsive to future needs.

In this context, the Court's imposition of hard and fast constitutional rules as to price advertising is neither required by precedent nor likely to serve the public interest. One of the great virtues of federalism is the opportunity it affords for experimentation and innovation, with freedom to discard or amend that which proves unsuccessful or detrimental to the public good. The constitutionalizing—indeed the affirmative encouraging—of competitive price advertising of specified legal services will substantially inhibit the experimentation that has been underway and also will limit the control heretofore exercised over lawyers by the respective States.

I am apprehensive, despite the Court's expressed intent to proceed cautiously, that today's holding will be viewed by tens of thousands of lawyers as an invitation—by the public-spirited and the selfish lawyers alike—to engage in competitive advertising on an escalating basis. Some lawyers may gain temporary advantages; others will suffer from the economic power of stronger lawyers, or by the subtle deceit of less scrupulous lawyers.[13] Some members of the public may

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[13] It has been suggested that price advertising will benefit younger lawyers and smaller firms, as well as the public, by enabling them to compete more favorably with the larger, established firms. The overtones of this suggestion are antitrust rather than First Amendment in principle. But whatever the origin, there is reason seriously to doubt the validity of the premise. With the increasing complexity of legal practice, perhaps the strongest trend in the profession today is toward specialization. Many small firms will limit their practice to intensely specialized areas; the larger, institutionalized firms are likely to have a variety of departments, each devoted to a special area of the law. The established specialist and the large law firm have advantages that are not inconsiderable if price competition becomes commonplace. They can advertise truthfully the areas in which they practice; they enjoy economies of scale that may justify lower prices; and they often possess the economic power to disadvantage the weaker or more inexperienced firms in any advertising

benefit marginally, but the risk is that many others will be victimized by simplistic price advertising of professional services "almost infinite [in] variety and nature . . . ." *Virginia Pharmacy Board*, 425 U. S., at 773 n. 25. Until today, in the long history of the legal profession, it was not thought that this risk of public deception was required by the marginal First Amendment interests asserted by the Court.

MR. JUSTICE REHNQUIST, dissenting in part.

I join Part II of the Court's opinion holding that appellants' Sherman Act claim is barred by the *Parker* v. *Brown*, 317 U. S. 341 (1943), state-action exemption. Largely for the reasons set forth in my dissent in *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S. 748, 781 (1976), however, I dissent from Part III because I cannot agree that the First Amendment is infringed by Arizona's regulation of the essentially commercial activity of advertising legal services. *Valentine* v. *Chrestensen*, 316 U. S. 52 (1942); *Breard* v. *Alexandria*, 341 U. S. 622 (1951). See *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376 (1973).

I continue to believe that the First Amendment speech provision, long regarded by this Court as a sanctuary for expressions of public importance or intellectual interest, is demeaned by invocation to protect advertisements of goods and services. I would hold quite simply that the appellants' advertisement, however truthful or reasonable it may be, is not the sort of expression that the Amendment was adopted to protect.

I think my Brother POWELL persuasively demonstrates in his opinion that the Court's opinion offers very little guidance as to the extent or nature of permissible state regulation of professions such as law and medicine. I would join

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competition. Whether the potential for increased concentration of law practice in a smaller number of larger firms would be detrimental to the public is not addressed by the Court.

his opinion except for my belief that once the Court took the first step down the "slippery slope" in *Virginia Pharmacy Board, supra,* the possibility of understandable and workable differentiations between protected speech and unprotected speech in the field of advertising largely evaporated. Once the exception of commercial speech from the protection of the First Amendment which had been established by *Valentine* v. *Chrestensen, supra,* was abandoned, the shift to case-by-case adjudication of First Amendment claims of advertisers was a predictable consequence.

While I agree with my Brother POWELL that the effect of today's opinion on the professions is both unfortunate and not required by the First and Fourteenth Amendments, I cannot join the implication in his opinion that some forms of legal advertising may be constitutionally protected. The *Valentine* distinction was constitutionally sound and practically workable, and I am still unwilling to take even one step down the "slippery slope" away from it.

I therefore join Parts I and II of the Court's opinion, but dissent from Part III and from the judgment.

Exhibit 70: *First National Bank of Boston* v. *Bellotti*, Slip Opinion (1978)

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

FIRST NATIONAL BANK OF BOSTON ET AL. *v.* BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 76–1172. Argued November 9, 1977—Decided April 26, 1978

Appellants, national banking associations and business corporations, wanted to spend money to publicize their views opposing a referendum proposal to amend the Massachusetts Constitution to authorize the legislature to enact a graduated personal income tax. They brought this action challenging the constitutionality of a Massachusetts criminal statute that prohibited them and other specified business corporations from making contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." The statute specified that "[n]o question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation." On April 26, 1976, the case was submitted to a single Justice of the Supreme Judicial Court of Massachusetts on an expedited basis and upon agreed facts. Judgment was reserved and the case was referred to the full court. On September 22, 1976, the court directed entry of a judgment for appellee and issued its opinion upholding the constitutionality of the statute after the referendum, at which the proposal was rejected. *Held:*

1. The case is not rendered moot by the fact that the 1976 referendum has been held and the proposal for a constitutional amendment defeated. The 18-month interval between legislative authorization of placement of the proposal on the ballot and its submission to the voters was too short for appellants to obtain complete judicial review, and likely would be too short in any future challenge to the statute; and in view of the number of times that such a proposal has been submitted to the electorate, there is reasonable expectation that appellants again will be

subjected to the threat of prosecution under the statute. *Weinstein* v. *Bradford,* 423 U. S. 147, 149. Pp. 7–9.

2. The portion of the Massachusetts statute at issue violates the First Amendment as made applicable to the States by the Fourteenth. Pp. 9–28.

(a) The expression proposed by appellants, namely, the expression of views on an issue of public importance, is at the heart of the First Amendment's concern. There is no support in the First or Fourteenth Amendment, or in this Court's decisions, for the proposition that such speech loses the protection otherwise afforded it by the First Amendment simply because its source is a corporation that cannot prove, to a court's satisfaction, a material effect on its business. Although appellee suggests that this Court's decisions generally have extended First Amendment rights only to corporations in the business of communications or which foster the self-expression of individuals, those decisions were not based on the rationale that the challenged communication materially affected the company's business. They were based, at least in part, on the Amendment's protection of public discussion and the dissemination of information and ideas. Similarly, commercial speech is accorded some constitutional protection not so much because it pertains to the seller's business as because it furthers the societal interest in the "free flow of commercial information." *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U. S. 748, 764. Pp. 11–16.

(b) The asserted justifications for the challenged statute cannot survive the exacting scrutiny required when the legislative prohibition is directed at speech itself and speech on a public issue. This statute cannot be justified by the State's asserted interest in sustaining the active role of the individual citizen in the electoral process and preventing diminution of his confidence in government. Even if it were permissible to silence one segment of society upon a sufficient showing of imminent danger, there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government. And the risk of corruption perceived in this Court's decisions involving candidate elections is not present in a popular vote on a public issue. Nor can the statute be justified on the asserted ground that it protects the rights of shareholders whose views differ from those expressed by management on behalf of the corporation. The statute is both underinclusive and overinclusive in serving this purpose, and therefore could not be sustained even if the purpose itself were deemed compelling. Pp. 22–28.

—— Mass. ——, 359 N. E. 2d 1262, reversed.

Syllabus

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and STEVENS, JJ., joined. BURGER, C. J., filed a concurring opinion. WHITE, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined. REHNQUIST, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 76–1172

First National Bank of Boston et al., Appellants, *v.* Francis X. Bellotti, Etc., et al. | On Appeal from the Supreme Judicial Court of Massachusetts.

[April 26, 1978]

MR. JUSTICE POWELL delivered the opinion of the Court.

In sustaining a state criminal statute that forbids certain expenditures by banks and business corporations for the purpose of influencing the vote on referendum proposals, the Massachusetts Supreme Judicial Court held that the First Amendment rights of a corporation are limited to issues that materially affect its business, property, or assets. The court rejected appellants' claim that the statute abridges freedom of speech in violation of the First and Fourteenth Amendments. The issue presented in this context is one of first impression in this Court. We postponed the question of jurisdiction to our consideration of the merits. 430 U. S. 964 (1977). We now reverse.

I

The statute at issue, Massachusetts General Laws ch. 55, § 8, prohibits appellants, two national banking associations and three business corporations,[1] from making contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets

[1] Appellants are The First National Bank of Boston, New England Merchants National Bank, The Gillette Company, Digital Equipment Corp., and Wyman-Gordon Company.

of the corporation." The statute further specifies that "[n]o question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation." A corporation that violates § 8 may receive a maximum fine of $50,000; a corporate officer, director, or agent who violates the section may receive a maximum fine of $10,000 or imprisonment for up to one year, or both.[2]

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[2] Mass. Gen. Laws Ann. ch. 55, § 8 (West Supp. 1977–1978), provides (with emphasis supplied):

"*No corporation carrying on the business of a bank,* trust, surety, indemnity, safe deposit, insurance, railroad, street railway, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, or water company, no company having the right to take land by eminent domain or to exercise franchises in public ways, granted by the commonwealth or by any county, city or town, no trustee or trustees owning or holding the majority of the stock of such a corporation, *no business corporation incorporated under the laws of or doing business in the commonwealth* and no officer or agent acting in behalf of any corporation mentioned in this section, *shall directly or indirectly give, pay, expend or contribute,* or promise to give, pay, expend or contribute, *any money or other valuable thing for the purpose of* aiding, promoting or preventing the nomination or election of any person to public office, or aiding, promoting or antagonizing the interests of any political party, or *influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation. No question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation.* No person or persons, no political committee, and no person acting under the authority of a political committee, or in its behalf, shall solicit or receive from such corporation or such holders of stock any gift, payment, expenditure, contribution or promise to give, pay, expend or contribute for any such purpose.

"Any corporation violating any provision of this section shall be punished by a fine of not more than fifty thousand dollars and any officer, director or agent of the corporation violating any provision thereof or authorizing such violation, . . . shall be punished by a fine of not more than ten thousand dollars or by imprisonment for not more than one year, or both."

Appellants wanted to spend money to publicize their views on a proposed constitutional amendment that was to be submitted to the voters as a ballot question at a general election on November 2, 1976. The amendment would have permitted the legislature to impose a graduated tax on the income of individuals. After appellee, the Attorney General of Massachusetts, informed appellants that he intended to enforce § 8 against them, they brought this action seeking to have the statute declared unconstitutional. On April 26, 1976, the case was submitted to a single Justice of the Supreme Judicial Court on an expedited basis and upon agreed facts, in order to settle the question before the upcoming election.[3] Judgment was reserved and the case referred to the full court that same day.

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[3] This was not the first challenge to § 8. The statute's legislative and judicial history has been a troubled one. Its successive re-enactments have been linked to the legislature's repeated submissions to the voters of a constitutional amendment that would allow the enactment of a graduated tax.

The predecessor of § 8, Mass. Gen. L. ch. 55, § 7 (as amended by 1946 Mass. Acts, ch. 537, § 10), was first challenged in *Lustwerk* v. *Lytron, Inc.*, 344 Mass. 647, 183 N. E. 2d 871 (1962). Unlike § 8, § 7 did not dictate that questions concerning the taxation of individuals could not satisfy the "materially affecting" requirement. The Supreme Judicial Court construed § 7 not to prohibit a corporate expenditure urging the voters to reject a proposed constitutional amendment authorizing the legislature to impose a graduated tax on corporate as well as individual income.

After *Lustwerk* the legislature amended § 7 by adding the sentence: "No question submitted to the voters concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation." 1972 Mass. Acts, ch. 458. The statute was challenged in 1972 by four of the present appellants; they wanted to oppose a referendum proposal similar to the one submitted to and rejected by the voters in 1962. Again the expenditure was held to be lawful. *First Nat'l Bank* v. *Attorney General*, 362 Mass. 570, 290 N. E. 2d 526 (1972).

The most recent amendment was enacted on April 28, 1975, when the legislature further refined the second sentence of § 8 to apply only to

Appellants argued that § 8 violates the First Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and similar provisions of the Massachusetts Constitution. They prayed that the statute be declared unconstitutional on its face and as it would be applied to their proposed expenditures. The parties' statement of agreed facts reflected their disagreement as to the effect that the adoption of a personal income tax would have on appellants' business; it noted that "[t]here is a division of opinion among economists as to whether and to what extent a graduated income tax imposed solely on individuals would affect the business and assets of corporations." App. 17. Appellee did not dispute that appellants' management believed that the tax would have a significant effect on their businesses.[4]

On September 22, 1976, the full bench directed the single justice to enter judgment upholding the constitutionality of § 8. An opinion followed on February 1, 1977. In addressing appellants' constitutional contentions,[5] the court acknowledged

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ballot questions "solely" concerning the taxation of individuals. 1975 Mass. Acts, ch. 151, § 1. Following this amendment, the legislature on May 7, 1975, voted to submit to the voters on November 2, 1976, the proposed constitutional amendment authorizing the imposition of a graduated *personal* income tax. It was this proposal that led to the case now before us.

[4] Appellants believe that the adoption of a graduated personal income tax would materially affect their business in a variety of ways, including, in the words of the court below,

"discouraging highly qualified executives and highly skilled professional personnel from settling, working or remaining in Massachusetts; promoting a tax climate which would be considered unfavorable by business corporations, thereby discouraging them from settling in Massachusetts with 'resultant adverse effects' on the plaintiff banks' loans, deposits, and other services; and tending to shrink the disposable income of individuals available for the purchase of the consumer products manufactured by at least one of the plaintiff corporations." — Mass., at —, 359 N. E. 2d, at 1266.

[5] In contrast to its approach in the previous challenges to the predecessor of § 8, see n. 3, *supra*, the court determined that it had to address appellants' constitutional challenge because "[t]he statutory amendment

that § 8 "operate[s] in an area of the most fundamental First Amendment activities," *Buckley* v. *Valeo,* 424 U. S. 1, 14 (1976), and viewed the principal question as "whether business corporations, such as [appellants], have First Amendment rights coextensive with those of natural persons or associations of natural persons." — Mass., at —, 359 N. E. 2d, at 1269. The court found its answer in the contours of a corporation's constitutional right, as a "person" under the Fourteenth Amendment, not to be deprived of property without due process of law. Distinguishing the First Amendment rights of a natural person from the more limited rights of a corporation, the court concluded that "whether its rights are designated 'liberty' rights or 'property' rights, a corporation's property and business interests are entitled to Fourteenth Amendment protection. . . . [A]s an incident of such protection, corporations also possess certain rights of speech and expression under the Fourteenth Amendment." *Id.,* at —, 359 N. E. 2d, at 1270 (citations and footnote omitted). Accordingly, the court held "that only when a general political issue materially affects a corporation's business, property or assets may that corporation claim First Amendment protection for its speech or other activities entitling it to communicate its position on that issue to the general public." Since this limitation is "identical to the legislative command in the first sentence of [§ 8]," the court concluded that the legislature "has clearly identified in the challenged statute the parameters of corporate free speech." *Ibid.*

The court also declined to say that there was "no rational basis for [the] legislative determination," embodied in the second sentence of § 8, that a ballot question concerning the

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to § 8 makes it clear that the Legislature has specifically proscribed corporate expenditures of moneys relative to this proposed amendment." — Mass., at —, 359 N. E. 2d, at 1268. This was clear from the language of the second sentence of § 8 and from the legislature's synchronized amendment of § 8 and approval of the submission of the ballot question to the voters.

taxation of individuals could not materially affect the interests of a corporation. *Id.*, at —, 359 N. E. 2d, at 1271. In rejecting appellants' argument that this second sentence established a conclusive presumption in violation of the Due Process Clause, the court construed § 8 to embody two distinct crimes: The first prohibits a corporation from spending money to influence the vote on a ballot question not materially affecting its business interests; the second, and more specific prohibition, makes it criminal *per se* for a corporation to spend money to influence the vote on a ballot question solely concerning individual taxation. While acknowledging that the second crime is "related to the general crime" stated in the first sentence of § 8, the court intimated that the second sentence was intended to make criminal an expenditure of the type proposed by appellants without regard to specific proof of the materiality of the question to the corporation's business interests.[6] *Id.*, at — n. 19, —, 359 N. E. 2d, at 1276 n. 19, 1273–

[6] For purposes of this decision we need not distinguish between the "two crimes" identified by the Supreme Judicial Court. MR. JUSTICE WHITE, dissenting, conveys an incorrect impression of our decision when he states, *post*, at 1, that we have not disapproved the legislative judgment that the personal income tax issue could not have a material effect on any corporation, including appellants. We simply have no occasion either to approve or to disapprove that judgment. If we were to invalidate the second sentence of § 8, thereby putting a ballot question concerning taxation of individuals on the same plane as any other ballot question, we still would have to decide whether the "materially affecting" limitation in the general prohibition of § 8 could be squared with the First Amendment. The court below already has held that appellants' proposed expenditures would not meet that test and therefore would be proscribed. This is a finding of fact which we have no occasion to review. But cf. n. 21, *infra*.

Conversely, we would have to reach the question of the constitutionality of the "second" and more restrictive crime only if we first concluded that it is permissible under the First Amendment to limit corporate speech to matters materially affecting the corporation's business, property, or assets. Because the "materially affecting" limitation bars appellants from making their proposed expenditures under either the first or second sentence of § 8, we must decide whether that limitation is constitutional.

1274. The court nevertheless seems to have reintroduced the "materially affecting" concept into its interpretation of the second sentence of § 8, as a limitation on the scope of the so-called "second crime" imposed by the Federal Constitution rather than the Massachusetts Legislature. *Id.*, at —, 359 N. E. 2d, at 1271. But because the court thought appellants had not made a sufficient showing of material effect, their challenge to the statutory prohibition as applied to them also failed.

Appellants' other arguments fared no better. Adopting a narrowing construction of the statute,[7] the Supreme Judicial Court rejected the contention that § 8 is overbroad. It also found no merit in appellants' vagueness argument because the specific prohibition against corporate expenditures on a referendum solely concerning individual taxation is "both precise and definite." *Id.*, at —, 359 N. E. 2d, at 1273–1274. Finally, the court held that appellants were not denied the equal protection of the laws.[8]

II

Because the 1976 referendum has been held, and the proposed constitutional amendment defeated, we face at the outset a question of mootness. As the case falls within the class of controversies "capable of repetition, yet evading review,"

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[7] The court stated that § 8 would not prohibit the publication of "in-house" newspapers or communications to stockholders containing the corporation's view on a graduated personal income tax; the participation by corporate employees, at corporate expense, in discussions or legislative hearings on the issue; the participation of corporate officers, directors, stockholders, or employees in public discussion of the issue on radio or television, at news conferences, or through statements to the press or "similar means not involving contributions or expenditure of corporate funds"; or speeches or comments by employees or officers, on working hours, to the press or a chamber of commerce. — Mass., at —, 359 N. E. 2d, at 1272.

[8] Because of our disposition of appellants' First Amendment claim, we need not address any of these arguments.

Southern Pacific Terminal Co. v. *ICC*, 219 U. S. 498, 515 (1911), we conclude that it is not moot. Present here are both elements identified in *Weinstein* v. *Bradford*, 423 U. S. 147, 149 (1975), as precluding a finding of mootness in the absence of a class action: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again."

Under no reasonably foreseeable circumstances could appellants obtain plenary review by this Court of the issue here presented in advance of a referendum on a similar constitutional amendment. In each of the legislature's four attempts to obtain constitutional authorization to enact a graduated income tax, including this most recent one, the period of time between legislative authorization of the proposal and its submission to the voters was approximately 18 months. This proved too short a period of time for appellants to obtain complete judicial review, and there is every reason to believe that any future suit would take at least as long. Furthermore, a decision allowing the desired expenditures would be an empty gesture unless it afforded appellants sufficient opportunity prior to the election date to communicate their views effectively.

Nor can there be any serious doubt that there is a "reasonable expectation," *Weinstein* v. *Bradford, supra,* that appellants again will be subject to the threat of prosecution under § 8. The 1976 election marked the fourth time in recent years that a proposed graduated income tax amendment has been submitted to the Massachusetts voters. Appellee's suggestion that the legislature may abandon its quest for a constitutional amendment is purely speculative.[9] Appellants insist that

[9] Most of the States, and the District of Columbia, impose graduated personal income taxes. U. S. Dept. of Commerce, Bureau of the Census, State Government Tax Collections in 1977, Table 9, at 13 (1977). Several States impose a graduated tax on corporate income. Advisory Comm'n

they will continue to oppose the constitutional amendment, and there is no reason to believe that the Attorney General will refrain from prosecuting violations of § 8.[10] Compare *Nebraska Press Assn.* v. *Stuart,* 427 U. S. 539, 546–547 (1976), with *Spomer* v. *Littleton,* 414 U. S. 514, 521 (1974).

Meanwhile, § 8 remains on the books as a complete prohibition of corporate expenditures related to individual tax referenda, and as a restraining influence on corporate expenditures concerning other ballot questions. The criminal penalties of § 8 discourage challenge by violation, and the effect of the statute on arguably protected speech will persist. *Storer* v. *Brown,* 415 U. S. 724, 737 n. 8 (1974); see *American Party* v. *White,* 415 U. S. 767, 770 n. 1 (1974); *Rosario* v. *Rockefeller,* 410 U. S. 752, 756 n. 5 (1973); *Dunn* v. *Blumstein,* 405 U. S. 300, 333 n. 2 (1972). Accordingly, we conclude that this case is not moot and proceed to address the merits.

III

The court below framed the principal question in this case as whether and to what extent corporations have First Amendment rights. We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether § 8 abridges expression that the First Amendment was meant to protect. We hold that it does.

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on Intergovernmental Relations, Significant Features of Fiscal Federalism, Vol. II, Table 113, at 219–222 (1976–1977 ed.).

[10] We are informed that the Attorney General also has threatened one of the appellants with prosecution under § 8 for an expenditure in support of a local referendum proposal concerning a civic center. Brief for Appellants 22 n. 7, A–1.

A

The speech proposed by appellants is at the heart of the First Amendment's protection.

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama,* 310 U. S. 88, 101–102 (1940).

The referendum issue that appellants wish to address falls squarely within this description. In appellants' view, the enactment of a graduated personal income tax, as proposed to be authorized by constitutional amendment, would have a seriously adverse effect on the economy of the State. See n. 4, *supra.* The importance of the referendum issue to the people and government of Massachusetts is not disputed. Its merits, however, are the subject of sharp disagreement.

As the Court said in *Mills* v. *Alabama,* 384 U. S. 214, 218 (1966), "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy,[11] and this is no less true because the speech comes from a corporation rather than

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[11] Freedom of expression has particular significance with respect to government because "[i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression." T. Emerson, Toward a General Theory of the First Amendment 9 (1966). See also A. Meiklejohn, Free Speech and Its Relation to Self-Government 24–26 (1948).

an individual.[12] The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.

The court below nevertheless held that corporate speech is protected by the First Amendment only when it pertains directly to the corporation's business interests. In deciding whether this novel and restrictive gloss on the First Amendment comports with the Constitution and the precedents of this Court, we need not survey the outer boundaries of the Amendment's protection of corporate speech, or address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment.[13] The question in this case, simply put, is whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection. We turn now to that question.

B

The court below found confirmation of the legislature's definition of the scope of a corporation's First Amendment rights in the language of the Fourteenth Amendment. Noting that the First Amendment is applicable to the States through

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[12] The individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion, although the two often converge. See G. Gunther, Constitutional Law 1044 (9th ed. 1975); T. Emerson, The System of Freedom of Expression 6 (1970). The Court has declared, however, that "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964). And self-government suffers when those in power suppress competing views on public issues "from diverse and antagonistic sources." *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945), quoted in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 266 (1964).

[13] Nor is there any occasion to consider in this case whether, under different circumstances, a justification for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations, unions, or like entities.

the Fourteenth, and seizing upon the observation that corporations "cannot claim for themselves the liberty which the Fourteenth Amendment guarantees," *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535 (1925), the court concluded that a corporation's First Amendment rights must derive from its property rights under the Fourteenth.[14]

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[14] The Massachusetts court did not go so far as to accept appellee's argument that corporations, as creatures of the State, have only those rights granted them by the State. See Brief for Appellee 4, 23–25. Cf. MR. JUSTICE WHITE's dissent, *post,* at 7–8; MR. JUSTICE REHNQUIST's dissent, *post,* at ——. The court below recognized that such an extreme position could not be reconciled either with the many decisions holding state laws invalid under the Fourteenth Amendment when they infringe protected speech by corporate bodies, *e. g., Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U. S. 85 (1977); *Time, Inc.* v. *Firestone,* 424 U. S. 448 (1976); *Doran* v. *Salem Inn, Inc.,* 422 U. S. 922 (1975); *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U. S. 546 (1975); *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469 (1975); *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241 (1974); *New York Times Co.* v. *United States,* 403 U. S. 713 (1971); *Time, Inc.* v. *Hill,* 385 U. S. 374 (1967); *New York Times Co.* v. *Sullivan, supra; Kingsley Int'l Pictures Corp.* v. *Regents,* 360 U. S. 684 (1959); *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495 (1952), or with decisions affording corporations the protection of constitutional guarantees other than the First Amendment. *E. g., United States* v. *Martin Linen Supply Co.,* 430 U. S. 564 (1977) (Fifth Amendment double jeopardy); *G. M. Leasing Corp.* v. *United States,* 429 U. S. 338, 353 (1977) (Fourth Amendment). In any event, appellee's argument is inapplicable to two of the appellants. National banks are creatures of federal law and instrumentalities of the Federal Government, *Easton* v. *Iowa,* 188 U. S. 220, 229–230 (1903); *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819), and their existence is in no way dependent on state law. See 7A Michie, Banks and Banking ch. 15, §§ 1, 5 (1973).

In cases where corporate speech has been denied the shelter of the First Amendment, there is no suggestion that the reason was because a corporation rather than an individual or association was involved. *E. g., Young* v. *American Mini Theatres, Inc.,* 427 U. S. 50 (1976); *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations,* 413 U. S. 376 (1973); *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436 (1957). Corporate identity has been determinative in several decisions denying corporations certain constitutional rights, such as the privilege against compulsory self-

This is an artificial mode of analysis, untenable under decisions of this Court.

> "In a series of decisions beginning with *Gitlow* v. *New York,* 268 U. S. 652 (1925), this Court held that the liberty of speech and of the press which the First Amendment guarantees against abridgment by the federal government is within the *liberty* safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action. That principle has been followed and reaffirmed to the present day." *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 500–501 (1952) (footnote omitted) (emphasis supplied).

Freedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause, see *Gitlow, supra,* at 666 (opinion of the Court), 672 (Holmes, J., dissenting); *NAACP* v. *Alabama,* 357 U. S. 449, 460 (1958); *Stromberg* v. *California,* 283 U. S. 359, 368 (1931); *DeJonge* v. *Oregon,* 299 U. S. 353, 364 (1937); Warren, The New "Liberty" Under the Fourteenth Amendment, 39 Harv. L. Rev. 431 (1926), and the Court has not identified a separate source for the right when it has been

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incrimination, *Wilson* v. *United States,* 221 U. S. 361, 382–386 (1911), or equality with individuals in the enjoyment of a right to privacy, *California Bankers Assn.* v. *Shultz,* 416 U. S. 21, 65–67 (1974); *United States* v. *Morton Salt Co.,* 338 U. S. 632, 651–652 (1950), but this is not because the States are free to define the rights of their creatures without constitutional limit. Otherwise, corporations could be denied the protection of all constitutional guarantees, including due process and the equal protection of the laws. Certain "purely personal" guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the "historic function" of the particular guarantee has been limited to the protection of individuals. *United States* v. *White,* 322 U. S. 694, 698–701 (1944). Whether or not a particular guarantee is "purely personal" or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.

asserted by corporations.[15] See, *e. g., Times Film Corp.* v. *City of Chicago,* 365 U. S. 43, 47 (1961); *Kingsley Int'l Pictures Corp.* v. *Regents,* 360 U. S. 684, 688 (1959); *Joseph Burstyn, supra.* In *Grosjean* v. *American Press Co.,* 297 U. S. 233, 244 (1936), the Court rejected the very reasoning adopted by the Supreme Judicial Court and did not rely on the corporation's property rights under the Fourteenth Amendment in sustaining its freedom of speech.[16]

Yet appellee suggests that First Amendment rights generally have been afforded only to corporations engaged in the communications business or through which individuals express themselves, and the court below apparently accepted the "materially affecting" theory as the conceptual common denominator between appellee's position and the precedents of this Court. It is true that the "materially affecting" require-

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[15] It has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment. *Santa Clara County* v. *Southern Pac. R. R.,* 118 U. S. 394 (1886); see *Covington & Lexington Turnpike Rd. Co.* v. *Sandford,* 164 U. S. 578 (1896).

[16] The appellant in *Grosjean* argued that "[t]he liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of NATURAL not of artificial persons." Brief for Appellant 42; see 297 U. S., at 235. See also *Hague* v. *CIO,* 307 U. S. 496, 518 (1939) (opinion of Stone, J.). But see *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449 (1958); *NAACP* v. *Button,* 371 U. S. 415 (1963).

The semantic reasoning of the court below would lead logically to the conclusion that the protection afforded speech by corporations, or, for that matter, other artificial entities and associations, would differ depending on whether the source of the alleged abridgment was a State or the Federal Government. But the States do not have greater latitude than Congress to abridge freedom of speech. The dissenting opinion of MR. JUSTICE REHNQUIST, *post,* at —, is predicated on the view that the First Amendment has only a "limited application . . . on the States." See also *Buckley* v. *Valeo,* 424 U. S. 1, 291–292 (1976) (opinion of REHNQUIST, J.). Although advanced forcefully by Mr. Justice Jackson in 1952, *Beauharnais* v. *Illinois,* 343 U. S. 250, 287–295 (1952) (Jackson, J., dissenting), and repeated by Mr. Justice Harlan in 1957, *Roth* v. *United States,* 354 U. S. 476, 500–503 (1957) (Harlan, J., dissenting), this view has never been accepted by any majority of this Court.

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ment would have been satisfied in the Court's decisions affording protection to the speech of media corporations and corporations otherwise in the business of communication or entertainment, and to the commercial speech of business corporations. See cases cited n. 14, *supra.* In such cases, the speech would be connected to the corporation's business almost by definition. But the effect on the business of the corporation was not the governing rationale in any of these decisions. None of them mentions, let alone attributes significance to the fact, that the subject of the challenged communication materially affected the corporation's business.

The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate.[17] *Mills* v. *Alabama,* 384 U. S., at 219; see *Saxbe* v. *Washington Post Co.,* 417 U. S. 843, 863–864 (1974) (POWELL, J., dissenting). But the press does not have a monopoly on either the First Amendment or the ability to enlighten.[18] Cf. *Buckley* v. *Valeo,* 424 U. S. 1, 51 n. 56

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[17] By its terms, § 8 would seem to apply to corporate members of the press. The court below noted, however, that no one "has asserted that [§ 8] bars the press, corporate, institutional or otherwise, from engaging in discussion or debate on the referendum question." — Mass., at — n. 13, 359 N. E. 2d, at 1271 n. 13. Because none of the appellants claimed to be part of the institutional press, the court did not "venture an opinion on such matters." *Ibid.*

The observation of MR. JUSTICE WHITE, *post,* at 6 n. 8, that media corporations cannot be "immunize[d]" from restrictions on electoral expenditures, ignores the fact that those corporations need not make separately identifiable expenditures to communicate their views. They accomplish the same objective each day within the framework of their usual protected communications.

[18] If we were to adopt appellee's suggestion that communication by corporate members of the institutional press is entitled to greater constitutional protection than the same communication by appellants, the result would not be responsive to the informational purpose of the First Amendment. Certainly there are voters in Massachusetts, concerned with such economic issues as the tax rate, employment opportunities, and the ability

(1976); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 389–390 (1969); *New York Times Co.* v. *Sullivan*, *supra*, at 266; *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945). Similarly, the Court's decisions involving corporations in the business of communication or entertainment are based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.[19] See *Red Lion Broadcasting Co.* v. *FCC*,

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to attract new business into the State and to prevent established businesses from leaving, who would be as interested in hearing appellants' views on a graduated tax as the views of media corporations that might be less knowledgeable on the subject. "[P]ublic debate must not only be unfettered; it must also be informed." *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 862–863 (1974) (POWELL, J., dissenting).

MR. JUSTICE WHITE's dissenting view would empower a State to restrict corporate speech far more narrowly than would the opinion of the Massachusetts court or the statute under consideration. This case involves speech in connection with a referendum. MR. JUSTICE WHITE's rationale would allow a State to proscribe the expenditure of corporate funds at any time for the purpose of expressing views on "political [or] social questions" or in connection with undefined "ideological crusades," unless the expenditures were shown to be "integrally related to corporate business operations." *Post*, at 1, 3, 4, 17, 19. Thus corporate activities that are widely viewed as educational and socially constructive could be prohibited. Corporations no longer would be able safely to support—by contributions or public service advertising—educational, charitable, cultural, or even human rights causes. Similarly, informational advertising on such subjects of national interest as inflation and the worldwide energy problem could be prohibited. Many of these "causes" and subjects could be viewed as "social," "political," or "ideological." No prudent corporate management would incur the risk of criminal penalties, such as those in the Massachusetts Act, that would follow from a failure to prove the materiality to the corporation's "business, property or assets" of such contributions or advertisements. See n. 21, *infra*.

[19] The suggestion in MR. JUSTICE WHITE's dissent, *post*, at 5, that the First Amendment affords less protection to ideas that are not the product of "individual choice" would seem to apply to newspaper editorials and every other form of speech created under the auspices of a corporate body. No decision of this Court lends support to such a restrictive notion.

supra; Stanley v. *Georgia,* 394 U. S. 557, 564 (1969); *Time, Inc.* v. *Hill, supra,* at 389. Even decisions seemingly based exclusively on the individual's right to express himself acknowledge that the expression may contribute to society's edification. *Winters* v. *New York,* 333 U. S. 507, 510 (1948).

Nor do our recent commercial speech cases lend support to appellee's business interest theory. They illustrate that the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw. A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the "free flow of commercial information." *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U. S. 748, 764 (1976); see *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U. S. 85, 95 (1977).[20]

C

We thus find no support in the First or Fourteenth Amendments, or in the decisions of this Court, for the proposition that

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[20] It is somewhat ironic that appellee seeks to reconcile these decisions with the "materially affecting" concept by noting that the commercial speaker would "have a direct financial interest in the speech," Brief for Appellee 19, and n. 12. Until recently, the "purely commercial" nature of an advertisement was thought to undermine and even negate its entitlement to the sanctuary of the First Amendment. *Valentine* v. *Chrestensen,* 316 U. S. 52 (1942); see *Bigelow* v. *Virginia,* 421 U. S. 809, 822 (1975); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U. S. 748 (1976). Appellee would invert the debate by giving constitutional significance to a corporation's "hawking of wares" while approving criminal sanctions for a bank's expression of opinion on a tax law of general public interest.

In emphasizing the societal interest and the fact that this Court's decisions have not turned on the effect upon the speaker's business interests, we do not say that such interests may not be relevant or important in a different context.

speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property. The "materially affecting" requirement is not an identification of the boundaries of corporate speech etched by the Constitution itself. Rather, it amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication.

Section 8 permits a corporation to communicate to the public its views on certain referendum subjects—those materially affecting its business—but not others. It also singles out one kind of ballot question—individual taxation—as a subject about which corporations may never make their ideas public. The legislature has drawn the line between permissible and impermissible speech according to whether there is a sufficient nexus, as defined by the legislature, between the issue presented to the voters and the business interests of the speaker.

In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972). If a legislature may direct business corporations to "stick to business," it also may limit other corporations—religious, charitable, or civic—to their respective "business" when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment.[21] Especially where, as here, the legisla-

[21] Even assuming that the rationale behind the materially affecting requirement itself were unobjectionable, the limitation in § 8 would have an impermissibly restraining effect on protected speech. Much valuable information which a corporation might be able to provide would remain unpublished because corporate management would not be willing to risk the substantial criminal penalties—personal as well as corporate—provided

ture's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people,[22] the First Amendment is plainly offended. Yet the State contends that its action is necessitated by governmental interests of the highest order. We next consider these asserted interests.

IV

The constitutionality of § 8's prohibition of the "exposition of ideas" by corporations turns on whether it can survive the exacting scrutiny necessitated by a state-imposed restriction of freedom of speech. Especially where, as here, a prohibition is directed at speech itself,[23] and the speech is intimately related

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for in § 8. *New York Times Co.* v. *Sullivan,* 376 U. S., at 279; *Smith* v. *California,* 361 U. S. 147, 151 (1959); *Speiser* v. *Randall,* 357 U. S. 513, 526 (1958). As the facts in this case illustrate, management never could be sure whether a court would disagree with its judgment as to the effect upon the corporation's business of a particular referendum issue. In addition, the burden and expense of litigating the issue—especially when what must be established is a complex and amorphous economic relationship—would unduly impinge on the exercise of the constitutional right. "[T]he free dissemination of ideas [might] be the loser." *Smith* v. *California, supra;* see *Freedman* v. *Maryland,* 380 U. S. 51, 59–60 (1965).

[22] Cf. *City of Madison* v. *Wisconsin Employment Relations Comm'n,* 429 U. S. 167, 175–176 (1976).

Our observation about the apparent purpose of the Massachusetts Legislature is not an endorsement of the legislature's factual assumptions about the views of corporations. We know of no documentation of the notion that corporations are likely to share a monolithic view on an issue such as the adoption of a graduated personal income tax. Corporations, like individuals or groups, are not homogeneous. They range from great multinational enterprises whose stock is publicly held and traded to medium-size public companies and to those that are closely held and controlled by an individual or family. It is arguable that small or medium-size corporations might welcome imposition of a graduated personal income tax that might shift a greater share of the tax burden onto wealthy individuals. See Brief for New England Council as *amicus curiae* 23–24.

[23] It is too late to suggest "that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element

to the process of governing, "the State may prevail only upon showing a subordinating interest which is compelling," *Bates* v. *City of Little Rock*, 361 U. S. 516, 524 (1960); see *NAACP* v. *Button*, 371 U. S. 415, 438–439 (1963); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S., at 463; *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945), "and the burden is on the government to show the existence of such an interest." *Elrod* v. *Burns*, 427 U. S. 347, 362 (1976). Even then, the State must employ means "closely drawn to avoid unnecessary abridgment . . . ." *Buckley* v. *Valeo*, 424 U. S. 1, 25 (1976); see *NAACP* v. *Button, supra*, at 438; *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960).

The Supreme Judicial Court did not subject § 8 to "the critical scrutiny demanded under accepted First Amendment and equal protection principles," *Buckley, supra*, at 11, because of its view that the First Amendment does not apply to appellants' proposed speech.[24] For this reason the court did not even discuss the State's interests in considering appellants' First Amendment argument. The court adverted to the conceivable interests served by § 8 only in rejecting appellants' equal protection claim.[25] Appellee nevertheless advances two

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or to reduce the exacting scrutiny required by the First Amendment." *Buckley* v. *Valeo*, 424 U. S., at 16; see *New York Times Co.* v. *Sullivan*, 376 U. S., at 266. Furthermore, § 8 is an "attempt directly to control speech . . . rather [than] to protect, from an evil shown to be grave, some interest clearly within the sphere of legislative concern." *Speiser* v. *Randall*, 357 U. S., at 527. Compare *United States* v. *O'Brien*, 391 U. S. 367 (1968).

[24] The court justified its deferential standard of review more explicitly in its discussion of appellants' equal protection claim:

"We think that the appropriate standard of review on this issue is not the strict scrutiny that the plaintiffs suggest is apposite but, rather, is the traditional scrutiny involving economic matters. While we agree with the plaintiffs that where free speech is involved strict scrutiny is required . . . , we have already concluded that the plaintiffs do not possess First Amendment rights on matters not shown to affect materially their business, property or assets." — Mass., at —, 359 N. E. 2d, at 1275 (citations omitted).

[25] The court reasoned that the inclusion of business corporations in § 8,

principal justifications for the prohibition of corporate speech. The first is the State's interest in sustaining the active role of the individual citizen in the electoral process and thereby preventing diminution of the citizen's confidence in government. The second is the interest in protecting the rights of shareholders whose views differ from those expressed by management on behalf of the corporation. However weighty these interests may be in the context of partisan candidate elections,[26] they either are not implicated in this case or are not

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but not entities such as unincorporated associations, partnerships, labor unions, or nonprofit corporations, *might* be attributable to the fact that the latter entities do not have shareholders: "Section 8 could represent a legislative desire to protect such shareholders against ultra vires activities . . . ." — Mass., at —, 359 N. E. 2d, at 1275. The court found justification for the noninclusion of other entities that have shareholders, such as business trusts and real estate investment trusts, in the supposition that "the Legislature may justifiably have concluded that such trusts did not present the type of problem in this area presented by general business corporations." *Ibid.* The court did not specify which "type of problem" it meant.

[26] In addition to prohibiting corporate contributions and expenditures for the purpose of influencing the vote on a ballot question submitted to the voters, § 8 also proscribes corporate contributions or expenditures "for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding, promoting, or antagonizing the interests of any political party." See n. 2, *supra.* In this respect, the statute is not unlike many other state and federal laws regulating corporate participation in partisan candidate elections. Appellants do not challenge the constitutionality of laws prohibiting or limiting corporate contributions to political candidates or committees, or other means of influencing candidate elections. Cf. *United States* v. *Pipefitters Local No. 562,* 407 U. S. 385 (1972); *United States* v. *United Auto. Workers,* 352 U. S. 567 (1957); *United States* v. *CIO,* 335 U. S. 106 (1948). About half of these laws, including the Federal Corrupt Practices Act, 2 U. S. C. § 441 (b), by their terms do not apply to referendum votes. Several of the others proscribe or limit spending for "political" purposes, which may or may not cover referenda. See *Schwartz* v. *Romnes,* 495 F. 2d 844 (CA2 1974).

The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. See *United States*

served at all, or in other than a random manner, by the prohibition in § 8.

A

Preserving the integrity of the electoral process, preventing corruption, and "sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government" [27] are interests of the highest importance. *Buckley, supra; United States* v. *United Auto. Workers,* 352 U. S. 567, 570 (1957); *United States* v. *CIO,* 335 U. S. 106, 139 (1948) (Rutledge, J., concurring); *Burroughs* v. *United States,* 290 U. S. 534 (1934). Preservation of the individual citizen's confidence in government is equally important. *Buckley, supra,* at 27; *Civil Service Comm'n* v. *National Assn. of Letter Carriers,* 413 U. S. 548, 565 (1973).

Appellee advances a number of arguments in support of his view that these interests are endangered by corporate participation in discussion of a referendum issue. They hinge upon the assumption that such participation would exert an undue influence on the outcome of a referendum vote, and—in the end—destroy the confidence of the people in the democratic process and the integrity of government. According to appellee, corporations are wealthy and powerful and their views may drown out other points of view. If appellee's arguments were supported by record or legislative findings that

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v. *United Auto. Workers, supra,* at 570–575; *Schwartz* v. *Romnes, supra,* at 849–851. The importance of the governmental interest in preventing this occurrence has never been doubted. The case before us presents no comparable problem, and our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office. Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections. Cf. *Buckley* v. *Valeo,* 424 U. S., at 46; Comment, The Regulation of Union Political Activity: Majority and Minority Rights and Remedies, 126 U. Pa. L. Rev. 386, 408–410 (1977).

[27] *United States* v. *United Auto. Workers,* 352 U. S., at 575.

corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. Cf. *Red Lion Broadcasting Co.* v. *FCC, supra.* But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts,[28] or that there has been any threat to the confidence of the citizenry in government. Cf. *Wood* v. *Georgia,* 370 U. S. 375, 388 (1962).

Nor are appellee's arguments inherently persuasive or supported by the precedents of this Court. Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections, *e. g., United States* v. *United Auto. Workers, supra; United States* v. *CIO, supra,* simply is not present in a popular vote on a public issue.[29] To be sure, corporate advertising may influence

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[28] In his dissenting opinion, MR. JUSTICE WHITE relies on incomplete facts with respect to expenditures in the 1972 referendum election, in support of his perception as to the "domination of the electoral process by corporate wealth." *Post,* at 10; see *id.,* at 8–9. The record shows only the extent of corporate and individual contributions to the two committees that were organized to support and oppose, respectively, the constitutional amendment. It does show that three of the appellants each contributed $3,000 to the "opposition" committee. The dissenting opinion makes no reference to the fact that amounts of money expended independently of organized committees need not be reported under Massachusetts law, and therefore remain unknown.

Even if viewed as material, any inference that corporate contributions "dominated" the electoral process on this issue is refuted by the 1976 election. There the voters again rejected the proposed constitutional amendment even in the absence of any corporate spending, which had been forbidden by the decision below.

[29] See *Schwartz* v. *Romnes,* 495 F. 2d, at 851; *C&C Plywood Corp.* v. *Hanson,* 420 F. Supp. 1254 (Mont. 1976), appeal docketed, No. 76–3118, CA9, Sept. 29, 1976; *Pacific Gas & Elec. Co.* v. *Berkeley,* 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976); Advisory Opinion on Constitutionality of 1975 PA 227, 396 Mich. 465, 491, 493–495, 242 N. W. 2d 3, 10, 14–15 (1976).

Appellee contends that the State's interest in sustaining the active role

the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution "protects expression which is eloquent no less than that which is unconvincing." *Kingsley Int'l Pictures Corp.* v. *Regents,* 360 U. S., at 689. We noted only recently that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ." *Buckley, supra,* at 48–49.[30]

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of the individual citizen is especially great with respect to referenda because they involve the direct participation of the people in the lawmaking process. But far from inviting greater restriction of speech, the direct participation of the people in a referendum, if anything, increases the need for "the widest possible dissemination of information from diverse and antagonistic sources." *New York Times Co.* v. *Sullivan,* 376 U. S., at 266 (quoting *Associated Press* v. *United States,* 326 U. S., at 20).

[30] MR. JUSTICE WHITE argues, without support in the record, that because corporations are given certain privileges by law they are able to "amass wealth" and then to "dominate" debate on an issue. *Post,* at 8, 20. He concludes from this generalization that the State has a subordinating interest in denying corporations access to debate and, correspondingly, in denying the public access to corporate views. The potential impact of this argument, especially on the news media, is unsettling. One might argue with comparable logic that the State may control the volume of expression by the wealthier, more powerful corporate members of the press in order to "enhance the relative voices" of smaller and less influential members.

Except in the special context of limited access to the channels of communication, see *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367 (1969), this concept contradicts basic tenets of First Amendment jurisprudence. We rejected a similar notion in *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241 (1974). There we held that the First Amendment prohibits a State from requiring a newspaper to make space available at no cost for a reply from a candidate whom the newspaper has criticized. The state court had held that "free speech was enhanced and not abridged by the Florida right-of-reply statute, which in that court's view, furthered the 'broad societal interest in the free flow of information to the public.'" *Id.,* at 245. Far more than in the instant case, allegations were there made and substantiated of a concentration in the hands of a few of "the power to

Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.[31] They may consider, in making their judgment, the source and credibility of the advocate.[32] But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment.

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inform the American people and shape public opinion," and that "the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues." *Id.*, at 250.

[31] Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves. See *Thornhill* v. *Alabama*, 310 U. S. 88, 95 (1940); Meiklejohn, The First Amendment is an Absolute, 1961 S. Ct. Rev. 245, 263. The First Amendment rejects the "highly paternalistic" approach of statutes like § 8 which restrict what the people may hear. *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumers Council, Inc.*, 425 U. S., at 770; see *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U. S., at 97; *Whitney* v. *California*, 274 U. S. 357, 377 (1927) (Brandeis, J., concurring); *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting).

The State's paternalism evidenced by this statute is illustrated by the fact that Massachusetts does not prohibit lobbying by corporations, which are free to exert as much influence on the people's representatives as their resources and inclinations permit. Presumably the legislature thought its members competent to resist the pressures and blandishments of lobbying, but had markedly less confidence in the electorate. If the First Amendment protects the right of corporations to petition legislative and administrative bodies, see *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U. S. 508, 510–511 (1972); *Eastern R. R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127, 137–138 (1961), there hardly can be less reason for allowing corporate views to be presented openly to the people when they are to take action in their sovereign capacity.

[32] Corporate advertising, unlike some methods of participation in political campaigns, is likely to be highly visible. Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected. See *Buckley*, 424 U. S., at 66–67; *United States* v. *Harriss*, 347 U. S. 612, 625–626 (1954). In addition, we emphasized in *Buckley* the prophylactic effect of requiring that the source of communication be disclosed. 424 U. S., at 67.

Wood v. *Georgia, supra.* In sum, "[a] restriction so destructive of the right of public discussion [as § 8], without greater or more imminent danger to the public interest than existed in this case, is incompatible with the freedoms secured by the First Amendment." [33]

B

Finally, the State argues that § 8 protects corporate shareholders, an interest that is both legitimate and traditionally within the province of state law. *Cort* v. *Ash,* 422 U. S. 66, 82–84 (1975). The statute is said to serve this interest by preventing the use of corporate resources in furtherance of views with which some shareholders may disagree. This purpose is belied, however, by the provisions of the statute, which are both under- and over-inclusive.

The under-inclusiveness of the statute is self-evident. Corporate expenditures with respect to a referendum are prohibited, while corporate activity with respect to the passage or defeat of legislation is permitted, see n. 31, *supra,* even though corporations may engage in lobbying more often than they take positions on ballot questions submitted to the voters. Nor does § 8 prohibit a corporation from expressing its views, by the expenditure of corporate funds, on any public issue until it becomes the subject of a referendum, though the displeasure of disapproving shareholders is unlikely to be any less.

The fact that a particular kind of ballot question has been singled out for special treatment undermines the likelihood of a genuine state interest in protecting shareholders. It suggests instead that the legislature may have been concerned with silencing corporations on a particular subject. Indeed, appellee has conceded that "the legislative and judicial history of the statute indicates . . . that the second crime was 'tailor-made' to prohibit corporate campaign contributions to oppose a graduated income tax amendment." Brief for Appellee 6.

Nor is the fact that § 8 is limited to banks and business

[33] *Thomas* v. *Collins,* 323 U. S. 516, 537 (1945).

corporations without relevance. Excluded from its provisions and criminal sanctions are entities or organized groups in which numbers of persons may hold an interest or membership, and which often have resources comparable to those of large corporations. Minorities in such groups or entities may have interests with respect to institutional speech quite comparable to those of minority shareholders in a corporation. Thus the exclusion of Massachusetts business trusts, real estate investment trusts, labor unions, and other associations undermines the plausibility of the State's purported concern for the persons who happen to be shareholders in the banks and corporations covered by § 8.

The over-inclusiveness of the statute is demonstrated by the fact that § 8 would prohibit a corporation from supporting or opposing a referendum proposal even if its shareholders unanimously authorized the contribution or expenditure. Ultimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues.[34] Acting through their power to elect

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[34] Appellee does not explain why the dissenting shareholder's wishes are entitled to such greater solicitude in this context than in many others where equally important and controversial corporate decisions are made by management or by a predetermined percentage of the shareholders. MR. JUSTICE WHITE's repeatedly expressed concern for corporate shareholders who may be "coerced" into supporting "causes with which they disagree" apparently is not shared by appellants' shareholders. Not a single shareholder has joined appellee in defending the Massachusetts statute or, so far as the record shows, has interposed any objection to the right asserted by the corporations to make the proscribed expenditures.

The dissent of MR. JUSTICE WHITE relies heavily on *Abood* v. *Detroit Bd. of Educ.*, 431 U. S. 209 (1977), and *International Assn. of Machinists* v. *Street*, 367 U. S. 740 (1961). These decisions involved the First Amendment rights of employees in closed or agency shops not to be compelled, as a condition of employment, to support with financial contributions the political activities of other union members with which the dissenters disagreed.

Street and *Abood* are irrelevant to the question presented in this case. In those cases employees were required, either by state law or by agree-

the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests. In addition to intra-corporate remedies, minority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management.

Assuming, *arguendo,* that protection of shareholders is a "compelling" interest under the circumstances of this case, we find "no substantially relevant correlation between the governmental interest asserted and the State's effort" to prohibit

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ment between the employer and the union, to pay dues or a "service fee" to the exclusive bargaining representative. To the extent that these funds were used by the union in furtherance of political goals, unrelated to collective bargaining, they were held to be unconstitutional because they compelled the dissenting union member "to furnish contributions of money for the propagation of opinions which he disbelieves . . . ." *Abood, supra,* at 235 n. 31 (quoting Thomas Jefferson in I. Brant, James Madison: The Nationalist 354 (1948)).

The critical distinction here is that no shareholder has been "compelled" to contribute anything. Apart from the fact, noted by the dissent, that compulsion by the State is wholly absent, the shareholder invests in a corporation of his own volition and is free to withdraw his investment at any time and for any reason. A more relevant analogy, therefore, is to the situation where an employee voluntarily joins a union, or an individual voluntarily joins an association, and later finds himself in disagreement with its stance on a political issue. The *Street* and *Abood* Courts did not address the question whether, in such a situation, the union or association must refund a portion of the dissenter's dues or, more drastically, refrain from expressing the majority's views. In addition, even apart from the substantive differences between compelled membership in a union and voluntary investment in a corporation or voluntary participation in *any* collective organization, it is by no means an automatic step from the remedy in *Abood,* which honored the interests of the minority without infringing the majority's rights, to the position adopted by the dissent which would completely silence the majority because a hypothetical minority might object.

appellants from speaking. *Shelton* v. *Tucker,* 364 U. S., at 485.

V

Because § 8 prohibits protected speech in a manner unjustified by a compelling state interest, it must be invalidated. The judgment of the Supreme Judicial Court is

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 76–1172

First National Bank of Boston et al., Appellants, *v.* Francis X. Bellotti, Etc., et al. } On Appeal from the Supreme Judicial Court of Massachusetts.

[April 26, 1978]

MR. CHIEF JUSTICE BURGER, concurring.

I join the opinion and judgment of the Court but write separately to raise some questions likely to arise in this area in the future.

A disquieting aspect of Massachusetts' position is that it may carry the risk of impinging on the First Amendment rights of those who employ the corporate form—as most do—to carry on the business of mass communications, particularly the large media conglomerates. This is so because of the difficulty, and perhaps impossibility, of distinguishing, either as a matter of fact or constitutional law, media corporations from corporations such as the appellants in this case.

Making traditional use of the corporate form, some media enterprises have amassed vast wealth and power and conduct many activities, some directly related—and some not—to their publishing and broadcasting activities. See *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 248–254 (1974). Today, a corporation might own the dominant newspaper in one or more large metropolitan centers, television and radio stations in those same centers and others, a newspaper chain, news magazines with nationwide circulation, national or worldwide wire news services, and substantial interests in book publishing and distribution enterprises. Corporate ownership may extend, vertically, to pulp mills and pulp timber lands to insure an adequate, continuing supply of newsprint and to

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trucking and steamship lines for the purpose of transporting the newsprint to the presses. Such activities would be logical economic auxiliaries to a publishing conglomerate. Ownership also may extend beyond to business activities unrelated to the task of publishing newspapers and magazines or broadcasting radio and television programs. Obviously, such far-reaching ownership would not be possible without the state-provided corporate form and its "special rules relating to such matters as limited liability, perpetual life, and the accumulation, distribution, and taxation of assets . . . ." *Post,* at 6 (WHITE, J., dissenting).

In terms of "unfair advantage in the political process" and "corporate domination of the electoral process," *id.,* at 7, it could be argued that such media conglomerates as I describe pose a much more realistic threat to valid interests than do appellants and similar entities not regularly concerned with shaping popular opinion on public issues. See *Miami Herald Publishing Co.* v. *Tornillo, supra; ante,* at 24 n. 29. In *Tornillo,* for example, we noted the serious contentions advanced that a result of the growth of modern media empires "has been to place in a few hands the power to inform the American people and shape public opinion." 418 U. S., at 250.

In terms of Massachusetts' other concern, the interests of minority shareholders, I perceive no basis for saying that the managers and directors of the media conglomerates are more or less sensitive to the views and desires of minority shareholders than are corporate officers generally.[1] Nor can it be said, even if relevant to First Amendment analysis—which it is not—that the former are more virtuous, wise or restrained in

[1] It may be that a nonmedia corporation, because of its nature, is subject to more limitations on political expression than a media corporation whose very existence is aimed at political expression. For example, the charter of a nonmedia corporation may be so framed as to render such activity or expression *ultra vires;* or its shareholders may be much less inclined to permit expenditure for corporate speech. Moreover, a nonmedia corporation may find it more difficult to characterize its expendtures as ordinary and necessary business expenses for tax purposes.

the exercise of corporate power than are the latter. Cf. *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U. S. 94, 124–125 (1973); 14 The Writings of Thomas Jefferson 46 (A. Libscomb ed. 1904) (letter to Walter Jones, Jan. 2, 1814). Thus, no factual distinction has been identified as yet that would justify government restraints on the right of appellants to express their views without, at the same time, opening the door to similar restraints on media conglomerates with their vastly greater influence.

Despite these factual similarities between media and nonmedia corporations, those who view the Press Clause as somehow conferring special and extraordinary privileges or status on the "institutional press"—which are not extended to those who wish to express ideas other than by publishing a newspaper—might perceive no danger to institutional media corporations flowing from the position asserted by Massachusetts. Under this narrow reading of the Press Clause, government could perhaps impose on nonmedia corporations restrictions not permissible with respect to "media" enterprises. Cf. Bezanson, The New Free Press Guarantee, 63 Va. L. Rev. 731, 767–770 (1977).[2] The Court has not yet squarely resolved whether the Press Clause confers upon the "institutional press" any freedom from government restraint not enjoyed by all others.[3]

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[2] It is open to question whether limitations can be placed on the free expression rights of some without undermining the guarantees of all. Experience with statutory limitations on campaign expenditures on behalf of candidates or parties may shed some light on this issue. Cf. *Buckley* v. *Valeo*, 424 U. S. 1 (1976)

[3] Language in some cases perhaps may be read as assuming or suggesting no independent scope to the Press Clause, see *Pell* v. *Procunier*, 417 U. S. 817, 834 (1974), or the contrary, see *Bigelow* v. *Virginia*, 431 U. S. 809, 828 (1975). The Court, however, has not yet focused on the issue. See Lange, The Speech and Press Clauses, 23 U. C. L. A. L. Rev. 77 (1975); Nimmer, Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?, 26 Hastings L. J. 639 (1975); cf. Bezanson, The New Free Press Guarantee, 63 Va. L. Rev. 731 (1977).

I perceive two fundamental difficulties with a narrow reading of the Press Clause. First, although certainty on this point is not possible, the history of the Clause does not suggest that the authors contemplated a "special" or "institutional" privilege. See Lange, The Speech and Press Clauses, 23 U. C. L. A. L. Rev. 77, 88–99 (1975). The common 18th century understanding of freedom of the press is suggested by Andrew Bradford, a colonial American newspaperman. In defining the nature of the liberty, he did not limit it to a particular group:

> "But, by the Freedom of the Press, I mean a Liberty, within the Bounds of Law, for any Man to communicate to the Public, his sentiments on the Important Points of Religion and Government; of proposing any Laws, which he apprehends may be for the Good of his Country, and of applying for the Repeal of such, as he Judges pernicious . . . .
>
> "This is the Liberty of the Press, the great Palladium of all our other Liberties, which I hope the good People of this Province, will forever enjoy . . . ." A. Bradford, Sentiments on the Liberty of the Press, in L. Levy, Freedom of the Press from Zenger to Jefferson 41–42 (1966) (emphasis deleted) (first published in Bradford's The American Weekly Mercury, a Philadelphia newspaper, April 25, 1734).

Indeed most pre-First Amendment commentators "who employed the term 'freedom of speech' with great frequency, used it synonomously with freedom of the press." L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History 174 (1963).

Those interpreting the Press Clause as extending protection only to, or creating a special role for, the "institutional press" must either (a) assert such an intention on the part of the Framers for which no supporting evidence is available, cf. Lange, *supra,* at 89–91; (b) argue that events after 1791

somehow operated to "constitutionalize" this interpretation, see Benzanson, The New Free Press Guarantee, 63 Va. L. Rev. 731, 788 (1977); or (c) candidly acknowledging the absence of historical support, suggest that the intent of the Framers is not important today. See Nimmer, Is Freedom of the Press a Redundancy: What Does It Add To Freedom of Speech?, 26 Hastings L. J. 639, 640–641 (1975).

To conclude that the Framers did not intend to limit the freedom of the press to one select group is not necessarily to suggest that the Press Clause is redundant. The Speech Clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs,[4] while the Press Clause focuses specifically on the liberty to disseminate expression broadly and "comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *Griffin*, 303 U. S. 444, 452 (1938).[5] Yet there is no funda-

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[4] The simplest explanation of the Speech and Press Clauses might be that the former protects oral communications; the latter, written. But the historical evidence does not strongly support this explanation. The first draft of what became the free expression provisions of the First Amendment, one proposed by Madison on May 5, 1789, as an addition to Art. 1, § 9, read:

"The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." I Annals of Cong. 451 (1789) (published as 1 Debates of Congress).

The language was changed to its current form, "freedom of speech, or of the press," by the Committee of Eleven to which Madison's amendments were referred. (There is no explanation for the change and the language was not altered thereafter.) It seems likely that the Committee shortened Madison's language preceding the semi-colon in his draft to "freedom of speech" without intending to diminish the scope of protection contemplated by Madison's phrase; in short, it was a stylistic change.

Cf. *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881); *Doe* v. *McMillan*, 412 U. S. 306 (1973) (Speech or Debate Clause extends to both spoken and written expressions within the legislative function).

[5] It is not strange that "press," the word for what was then the sole

mental distinction between expression and dissemination. The liberty encompassed by the Press Clause, although complementary to and a natural extension of Speech Clause liberty, merited special mention simply because it had been more often the object of official restraints. Soon after the invention of the printing press, English and continental monarchs, fearful of the power implicit in its use and the threat to Establishment thought and order—political and religious—devised restraints, such as licensing, censors, indices of prohibited books, and prosecutions for seditious libel, which generally were unknown in the pre-printing press era. Official restrictions were the official response to the new, disquieting idea that this invention would provide a means for mass communication.

The second fundamental difficulty with interpreting the Press Clause as conferring special status on a limited group is one of definition. See Lange, *supra,* at 100–107. The very task of including some entities within the "institutional press" while excluding others, whether undertaken by legislature, court or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country. *Lovell* v. *Griffin, supra,* at 451–452. Further, the officials undertaking that task would be required to distinguish the protected from the unprotected on the basis of such variables as content of expression, frequency or fervor of expression, or ownership of the technological means of dissemination. Yet nothing in this Court's opinions supports such a confining ap-

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means of broad dissemination of ideas and news, would be used to describe the freedom to communicate with a large, unseen audience.

Changes wrought by 20th century technology, of course, have rendered the printing press as it existed in 1791 as obsolete as Watt's copying or letter press. It is the core meaning of "press" as used in the constitutional text which must govern.

proach to the scope of Press Clause protection.[6] Indeed, the Court has plainly intimated the contrary view:

> "Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' . . . The information function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public . . . ." *Branzburg* v. *Hayes*, 408 U. S. 665, 704–705 (1972), quoting *Lovell* v. *Griffin*, *supra*, at 450, 452.

The meaning of the Press Clause, as a provision separate and apart from the Speech Clause, is implicated only indirectly by this case. Yet Massachusetts' position poses serious questions. The evolution of traditional newspapers into modern corporate conglomerates in which the daily dissemination of news by print is no longer the major part of the whole enterprise suggests the need for caution in limiting the First Amendment rights of corporations as such. Thus, the tentative probings of this brief inquiry are wholly consistent, I think, with the Court's refusal to sustain § 8's serious and potentially dangerous restriction on the freedom of political speech.

Because the First Amendment was meant to guarantee freedom to express and communicate ideas, I can see no difference between the right of those who seek to disseminate ideas

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[6] *Near* v. *Minnesota*, 283 U. S. 697 (1931), which examined the meaning of freedom of the press, did not involve a traditional institutionalized newspaper but rather an occasional publication (nine issues) more nearly approximating the product of a pamphleteer than the traditional newspaper.

by way of a newspaper and those who give lectures or speeches and seek to enlarge the audience by publication and wide dissemination. "[T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. '. . . the liberty of the press is no greater and no less . . .' than the liberty of every citizen of the Republic." *Pennekamp* v. *Florida,* 328 U. S. 331, 364 (1946) (Frankfurter, J., concurring).

In short, the First Amendment does not "belong" to any definable category of persons or entities: it belongs to all who exercise its freedoms.

SUPREME COURT OF THE UNITED STATES

No. 76–1172

First National Bank of Boston et al., Appellants, *v.* Francis X. Bellotti, Etc., et al. } On Appeal from the Supreme Judicial Court of Massachusetts.

[April 26, 1978]

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

The Massachusetts statute challenged here forbids the use of corporate funds to publish views about referenda issues having no material effect on the business, property or assets of the corporation. The legislative judgment that the personal income tax issue, which is the subject of the referendum out of which this case arose, has no such effect was sustained by the Supreme Judicial Court of Massachusetts and is not disapproved by this Court today. Hence, as this case comes to us, the issue is whether a State may prevent corporate management from using the corporate treasury to propagate views having no connection with the corporate business. The Court commendably enough squarely faces the issue but unfortunately errs in deciding it. The Court invalidates the Massachusetts statute and holds that the First Amendment guarantees corporate managers the right to use not only their personal funds, but also those of the corporation, to circulate fact and opinion irrelevant to the business placed in their charge and necessarily representing their own personal or collective views about political and social questions. I do not suggest for a moment that the First Amendment requires a State to forbid such use of corporate funds, but I do strongly disagree that the First Amendment forbids state interference with managerial decisions of this kind.

By holding that Massachusetts may not prohibit corporate expenditures or contributions made in connection with referenda involving issues having no material connection with the corporate business, the Court not only invalidates a statute which has been on the books in one form or another for many years, but also casts considerable doubt upon the constitutionality of legislation passed by some 31 States restricting corporate political activity,[1] as well as upon the Federal Corrupt Practices Act, 2 U. S. C. § 441 (b). The Court's fundamental error is its failure to realize that the state regulatory interests in terms of which the alleged curtailment of First Amendment rights accomplished by the statute must be evaluated are themselves derived from the First Amendment. The question posed by this case, as approached by the Court, is whether the State has struck the best possible balance, *i. e.*, the one which it would have chosen, between competing First Amendment interests. Although in my view the choice made by the State would survive even the most exacting scrutiny, perhaps a rational argument might be made to the contrary. What is inexplicable, is for the Court to substitute its judgment as to the proper balance for that of Massachusetts where the State has passed legislation reasonably designed to further First Amendment interests in the context of the political arena where the expertise of legislators is at its peak and that of judges is at its very lowest.[2] Moreover, the result reached today in critical respects marks a drastic departure from the Court's prior decisions which have protected against governmental infringement the very First Amendment interests which the Court now deems inadequate to justify the Massachusetts statute.

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[1] Library of Congress, Analysis of Federal and State Campaign Finance Laws—Summaries (1977). Some 18 of these States prohibit or limit corporate contributions in respect to ballot questions. Appellants' Reply Brief 9–11, n. 6.

[2] See generally Leventhal, Courts and Political Thickets, 77 Colum. L. Rev. 345 (1977).

I

There is now little doubt that corporate communications come within the scope of the First Amendment. This, however, is merely the starting point of analysis, because an examination of the First Amendment values corporate expression furthers and the threat to the functioning of a free society it is capable of posing reveals that it is not fungible with communications emanating from individuals and is subject to restrictions which individual expression is not. Indeed, what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization and self-fulfillment, is not at all furthered by corporate speech.[3] It is clear that the communications of profitmaking corporations are not "an integral part of the development of ideas, of mental exploration and of the affirmation of self." [4] They do not represent a manifestation of individual freedom or choice. Undoubtedly, as this Court has recognized, see *NAACP* v. *Buttons*, 371 U. S. 415 (1963), there are some corporations formed for the express purpose of advancing certain ideological causes shared by all their members, or, as in the case of the press, of disseminating information and ideas. Under such circumstances, association in a corporate form may be viewed as merely a means of achieving effective self-expression. But this is hardly the case generally with corporations operated for the purpose of making profits. Shareholders in such entities do not share a common set of political or social views, and they certainly have not invested their money for the purpose of advancing political or social causes or in an enterprise engaged in the business of disseminating news and opinion. In fact, as discussed *infra*, the government has a strong interest in assuring that investment

[3] See T. Emerson, Toward a General Theory of the First Amendment 4–7 (1966); *Board of Education* v. *Barnette*, 319 U. S. 624 (1943).

[4] Emerson 5.

decisions are not predicated upon agreement or disagreement with the activities of corporations in the political arena.

Of course, it may be assumed that corporate investors are united by a desire to make money, for the value of their investment to increase. Since even communications which have no purpose other than that of enriching the communicator have some First Amendment protection, activities such as advertising and other communications integrally related to the operation of the corporation's business may be viewed as a means of furthering the desires of individual shareholders.[5] This unanimity of purpose breaks down, however, when corporations make expenditures or undertake activities designed to influence the opinion or votes of the general public on political and social issues that have no material connection with or effect upon their business, property, or assets. Although it is arguable that corporations make such expenditures because their managers believe that it is in the corporations' economic interest to do so, there is no basis whatsoever for concluding that these views are expressive of the heterogeneous beliefs of their shareholders whose convictions on many political issues are undoubtedly shaped by considerations other than a desire to endorse any electoral or ideological cause which would tend to increase the value of a particular corporate investment. This is particularly true where, as in this case, whatever the belief of the corporate managers may be, they have not been able to demonstrate that the issue involved has any material connection with the corporate business. Thus when a profitmaking corporation contributes to a political candidate this does not further the self-expression or self-fulfillment of its shareholders in the way that expenditures from them as individuals would.[6]

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[5] See *United States* v. *CIO,* 335 U. S. 106, 122–123 (1948).

[6] This distinguishes the regulation of corporate speech from the limitations upon individual political campaign expenditures invalidated in *Buckley v. Valeo,* 424 U. S. 1 (1976). The Court there struck down the

The self-expression of the communicator is not the only value encompassed by the First Amendment. One of its functions, often referred to as the right to hear or receive information, is to protect the interchange of ideas. Any communication of ideas, and consequently any expenditure of funds which makes the communication of ideas possible, it can be argued, furthers the purposes of the First Amendment. This proposition does not establish, however, that the right of the general public to receive communications financed by means of corporate expenditures is of the same dimension as that to hear other forms of expression. In the first place, as discussed *supra,* corporate expenditures designed to further political causes lack the connection with individual self-expression which is one of the principal justifications for the constitutional protection of speech provided by the First Amendment. Ideas which are not a product of individual choice are entitled to less First Amendment protection. Secondly, the restriction of corporate speech concerned with political matters impinges much less severely upon the availability of ideas to the general public than do restrictions upon individual speech. Even the complete curtailment of corporate communications concerning political or ideological questions not integral to day-to-day business functions would leave individuals, including corporate shareholders, employees, and customers, free to communicate their thoughts. Moreover, it is unlikely that any significant communication would be lost by such a prohibition. These individuals would remain perfectly free to communicate any ideas which could be con-

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limitations upon individual expenditures because they impermissibly restricted the right of individuals to speak their minds and make their views known. *Id.,* at 48, 52. At the same time, however, the Court sustained limitations upon political contributions on the ground that such provisions entail a much lesser restriction upon the individual's ability to engage in free communication than expenditure restrictions. *Id.,* at 20–23. In the case of corporate political activities, we are not at all concerned with the self-expression of the communicator.

veyed by means of the corporate form. Indeed, such individuals could even form associations for the very purpose of promoting political or ideological causes.[7]

I recognize that there may be certain communications undertaken by corporations which could not be restricted without impinging seriously upon the right to receive information. In the absence of advertising and similar promotional activities, for example, the ability of consumers to obtain information relating to products manufactured by corporations would be significantly impeded. There is also a need for employees, customers, and shareholders of corporations to be able to receive communications about matters relating to the functioning of corporations. Such communications are clearly desired by all investors and may well be viewed as an associational form of self-expression. See *United States* v. *CIO*, 335 U. S. 106, 121–123 (1948). Moreover, it is unlikely that such information would be disseminated by sources other than corporations. It is for such reasons that the Court has extended a certain degree of First Amendment protection to activities of this kind.[8] None of these considera-

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[7] This is in contrast to the limitations upon individual campaign expenditures in *Buckley* v. *Valeo*, *supra*, which the Court viewed as heavily burdening the exchange of ideas between individuals and the forming of associations for that purpose. *Id.*, at 19–20, 47–48.

[8] In addition, newspapers and other forms of literature obviously do not lose their First Amendment protection simply because they are produced or distributed by corporations. It is, of course, impermissible to restrict any communication, corporate or otherwise, because of displeasure with its content. I need not decide whether newspapers have a First Amendment right to operate in a corporate form. It may be that for a State which generally permits businesses to operate as corporations to prohibit those engaged in the dissemination of information and opinion from taking advantage of the corporate form would constitute a departure from neutrality prohibited by the Free Press guarantee of the First Amendment. See Stewart, "Or of the Press," 26 Hastings L. J. 631 (1975); Bezanson, The New Free Press Guarantee, 63 Va. L. Rev. 731 (1977). There can be no doubt, however, that the First Amendment does not immunize

tions, however, are implicated by a prohibition upon corporate expenditures relating to referenda concerning questions of general public concern having no connection with corporate business affairs.

It bears emphasis here that the Massachusetts statute forbids the expenditure of corporate funds in connection with referenda but in no way forbids the board of directors of a corporation from formulating and making public what it represents as the views of the corporation even though the subject addressed has no material effect whatsoever on the business of the corporation. These views could be publicized at the individual expense of the officers, directors, stockholders, or anyone else interested in circulating the corporate view on matters irrelevant to its business.

The governmental interest in regulating corporate political communications, especially those relating to electoral matters, also raises considerations which differ significantly from those governing the regulation of individual speech. Corporations are artificial entities created by law for the purpose of furthering certain economic goals. In order to facilitate the achievement of such ends, special rules relating to such matters as limited liability, perpetual life, and the accumulation, distribution, and taxation of assets are normally applied to them. States have provided corporations with such attributes in order to increase their economic viability and thus strengthen the economy generally. It has long been recognized, however, that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process. Although *Buckley* v. *Valeo*, 424 U. S. 1 (1976), provides support for the position that the desire to equalize the financial resources available to candidates does not justify the limitation

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media corporations any more than other types of corporations from restrictions upon electoral contributions and expenditures.

upon the expression of support which a restriction upon individual contributions entails,[9] the interest of Massachusetts and the many other States which have restricted corporate political activity is quite different. It is not one of equalizing the resources of opposing candidates or opposing positions but rather of preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process, especially where, as here, the issue involved has no material connection with the business of the corporation. The State need not permit its own creation to consume it. Massachusetts could permissibly conclude that not to impose limits upon the political activities of corporations would have placed it in a position of departing from neutrality and indirectly assisting the propagation of corporate views because of the advantages its laws give to the corporate acquisition of funds to finance such activities. Such expenditures may be viewed as seriously threatening the role of the First Amendment as a guarantor of a free marketplace of ideas. Ordinarily, the expenditure of funds to promote political causes may be assumed to bear some relation to the fervency with which they are held. Corporate political expression, however, is not only divorced from the convictions of individual corporate shareholders, but also, because of the ease with which corporations are permitted to accumulate capital, bears no relation to the conviction with which the ideas expressed are held by the communicator.[10]

The Court's opinion appears to recognize at least the possibility that fear of corporate domination of the electoral process

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[9] *Buckley* v. *Valeo, supra,* 424 U. S., at 48–49, 54, 56–57.

[10] Congress long ago recognized that the ability to communicate ideas without cost could create an unfair political advantage. See 54 Cong. Rec. S2039–2041 (1917); Association of the Bar of the City of New York, Conflicts of Interest and Federal Service 54–55 (1960) (franking privilege denied by Congress to part-time employees ("dollar-a-year men") of the Bureau of Education).

would justify restrictions upon corporate expenditures and contributions in connection with referenda but brushes this interest aside by asserting that "there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts," *ante*, at 22–23, and by suggesting that the statute in issue represents an attempt to give an unfair advantage to those who hold views in opposition to positions which would otherwise be financed by corporations. *Ante*, at 18–19. It fails even to allude to the fact, however, that Massachusetts' most recent experience with unrestrained corporate expenditures in connection with ballot questions establishes precisely the contrary. In 1972, a proposed amendment to the Massachusetts Constitution which would have authorized the imposition of a graduated income tax on both individuals and corporations was put to the voters. The Committee for Jobs and Government Economy, an organized political committee, raised and expended approximately $120,000 to oppose the proposed amendment, the bulk of it raised through large corporate contributions. Three of the present appellant corporations each contributed $3,000 to this committee. In contrast, the Coalition for Tax Reform, Inc., the only political committee organized to support the 1972 amendment, was able to raise and expend only approximately $7,000. App. to J. S., at 41; record, 48–84. Perhaps these figures reflect the Court's view of the appropriate role which corporations should play in the Massachusetts electoral process, but it nowhere explains why it is entitled to substitute its judgment for that of Massachusetts and other States,[11] as well as the United States, which

[11] California had the same experience in connection with a 1976 referendum measure which would have required legislative approval of nuclear generating plant sites. 203 corporations contributed approximately $2,530,000 in opposition to the amendment, which was defeated. Supporters of the measure collected all together only approximately $1,600,000. Campaign Contribution and Spending Report—June 8, 1976 Primary

have acted to correct or prevent similar domination of the electoral process by corporate wealth.

This Nation has for many years recognized the need for measures designed to prevent corporate domination of the political process. The Corrupt Practices Act, first enacted in 1907, has consistently barred corporate contributions in connection with federal elections. This Court has repeatedly recognized that one of the principal purposes of this prohibition is "to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital." *United States* v. *Auto Workers,* 352 U. S. 567, 585 (1957). See *Pipefitters Local No. 562* v. *United States,* 407 U. S. 385, 415–416 (1972); *United States* v. *CIO,* 335 U. S. 106, 113 (1948). Although this Court has never adjudicated the constitutionality of the Act, there is no suggestion in its cases construing it, cited *supra,* that this purpose is in any sense illegitimate or deserving of other than the utmost respect; indeed, the thrust of its opinions, until today, has been to the contrary. See *Auto. Workers, supra,* 352 U. S., at 585; *Pipefitters Local No. 562, supra,* 407 U. S., at 415–416.

II

There is an additional overriding interest related to the prevention of corporate domination which is substantially advanced by Massachusetts' restrictions upon corporate contributions: assuring that shareholders are not compelled to support and financially further beliefs with which they disagree where, as is the case here, the issue involved does not materially affect the business, property, or other affairs of the corporation.[12]

Election, 289–298. Later in the same year a similar initiative measure was placed on the ballot in Montana. Corporations contributed approximately $144,000 in opposition to the measure, while its supporters were able to collect only $451. This measure was also defeated. Brief of the State of Montana, *Amicus Curiae* 10.

[12] This, of course, is an interest that was not present in *Buckley* v. *Valeo,*

The State has not interfered with the prerogatives of corporate management to communicate about matters that have material impact on the business affairs entrusted to them, however much individual stockholders may disagree on economic or ideological grounds. Nor has the State forbidden management from formulating and circulating its views at its own expense or at the expense of others, even where the subject at issue is irrelevant to corporate business affairs. But Massachusetts *has* chosen to forbid corporate management from spending corporate funds in referenda elections absent some demonstrable effect of the issue on the economic life of the company. In short, corporate management may not use corporate monies to promote what does not further corporate affairs but in the last analysis are the purely personal views of the management, individually or as a group.

This is not only a policy which a State may adopt consistent with the First Amendment but one which protects the very freedoms that this Court has held to be guaranteed by the First Amendment. In *Board of Education* v. *Barnette*, 319 U. S. 624 (1943), the Court struck down a West Virginia statute which compelled children enrolled in public school to salute the flag and pledge allegiance to it on the ground that the First Amendment prohibits public authorities from requiring an individual to express support for or agreement with a cause with which he disagrees or concerning which he prefers to remain silent. Subsequent cases have applied this principle to prohibit organizations to which individuals are compelled to belong as a condition of employment from using compulsory dues to support candidates, political parties, or other forms of political expression which which members disagree or do not wish to support. In *Machinists* v. *Street*, 367 U. S. 740

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supra, and would not justify limitations upon the activities of associations, corporate or otherwise, formed for the express purpose of advancing a political or social cause.

(1961), the Court was presented with allegations that a union shop authorized by the Railway Labor Act, 45 U. S. C. § 152, Eleventh, had used the union treasury to which all employees were compelled to contribute "to finance the campaigns of candidates for federal and state offices whom [the petitioners] opposed, and to promote the propagation of political and economic doctrines, concepts and ideologies with which [they] disagreed." 367 U. S., at 744. The Court recognized that compelling contributions for such purposes presented constitutional "questions of the utmost gravity" and consequently construed the Act to prohibit the use of compulsory union dues for political purposes. 367 U. S., at 749–750. Last Term, in *Abood* v. *Detroit Board of Education,* 431 U. S. 209 (1977), we confronted these constitutional questions and held that, a State may not, even indirectly, require an individual to contribute to the support of an ideological cause he may oppose as a condition of employment. At issue were political expenditures made by a public employees union. Michigan law provided that unions and local government employers might agree to an agency-shop arrangement pursuant to which every employee—even those not union members—must pay to the union, as a condition of employment, union dues or a service fee equivalent in amount to union dues. The legislation itself was not coercive; it did not command that local governments employ only those workers who were willing to pay union dues but left it to a bargaining representative democratically elected by a majority of the employees to enter or not enter into such a contractual arrangement through collective bargaining. In addition, of course, no one was compelled to work at a job covered by an agency-shop arrangement. Nevertheless, the Court ruled that under such circumstances the use of funds contributed by dissenting employees for political purposes impermissibly infringed their First Amendment right to adhere to their own beliefs and to refuse to defer to or support the beliefs of others.

Presumably, unlike the situations presented by *Street* and *Abood,* the use of funds invested by shareholders with opposing views by Massachusetts corporations in connection with referenda or elections would not constitute state action and, consequently, not violate the First Amendment. Until now, however, the States have always been free to adopt measures designed to further rights protected by the Constitution even when not compelled to do so. It could hardly be plausibly contended that just because Massachusetts' regulation of corporations is less extensive than Michigan's regulation of labor-management relations, Massachusetts may not constitutionally prohibit the very evil which Michigan may not constitutionally permit. Yet this is precisely what the Court today holds. Although the Court places great stress upon the alleged infringement of the right to receive information produced by Massachusetts' ban on corporate expenditures which, for the reasons stated *supra,* I believe to be misconceived, it fails to explain why such an interest was not sufficient to compel a different weighing of First Amendment interests and, consequently, a different result in *Abood.* After all, even contributions for political causes coerced by labor unions would, under the Court's analysis, increase unions' ability to disseminate their views and, consequently, increase the amount of information available to the general public.

The Court assumes that the interest in preventing the use of corporate resources in furtherance of views which are irrelevant to the corporate business and with which some shareholders may disagree is a compelling one, but concludes that the Massachusetts statute is nevertheless invalid because the State has failed to adopt the means best suited, in its opinion, for achieving this end. *Ante,* at 26–28. It proposes that the aggrieved shareholder assert his interest in preventing the expenditure of funds for nonbusiness causes he finds unconscionable through the channels provided by "corporate

democracy" and purports to be mystified as to "why the dissenting shareholder's wishes are entitled to such greater solicitude in this context than in many others where equally important corporate decisions are made by management or by a predetermined percentage of the shareholders." *Ante,* at 27, and n. 34. It should be obvious that the alternative means upon the adequacy of which the majority is willing to predicate a constitutional adjudication is no more able to satisfy the State's interest than a ruling in *Street* and *Abood* leaving aggrieved employees to the remedies provided by union democracy would have satisfied the demands of the First Amendment. The interest which the State wishes to protect here is identical to that which the Court has previously held to be protected by the First Amendment: the right to adhere to one's own beliefs and to refuse to support the dissemination of the personal and political views of others, regardless of how large a majority they may compose. In most contexts, of course, the views of the dissenting shareholder have little, if any First Amendment significance. By purchasing interests in corporations shareholders accept the fact that corporations are going to make decisions concerning matters such as advertising integrally related to their business operations according to the procedures set forth in their charters and bylaws. Otherwise, corporations could not function. First Amendment concerns of stockholders are directly implicated, however, when a corporation chooses to use its privileged status to finance ideological crusades which are unconnected with the corporate business or property and which some shareholders might not wish to support. Once again, we are provided no explanation whatsoever by the Court as to why the State's interest is of less constitutional weight than that of corporations to participate financially in the electoral process and as to why the balance between two First Amendment interests should be struck by this Court. Moreover, the Court offers no reason whatsoever

for constitutionally imposing its choice of means to achieve a legitimate goal and invalidating those chosen by the State.[13]

Abood cannot be distinguished, as the present Court at-

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[13] The Court's additional suggestion that the aggrieved shareholder pursue judicial remedies to challenge corporate referenda disbursements, *ante*, at 28, is untenable in light of its holding precluding Massachusetts from defining the powers of corporations active within its borders so as to prohibit the expenditure of funds in connection with referenda campaigns not material to their business functions.

The Court also asserts that Massachusetts' interest in protecting dissenting shareholders is "belied" by its failure to prohibit corporate activity with respect to the passage or defeat of legislation or to include business trusts, real estate investment trusts, and labor unions in its prohibition upon electoral expenditures. *Ante*, at 26–27. It strongly implies that what it views as "under-inclusiveness" weakens the consideration to which the interest asserted by Massachusetts is entitled by this Court. Such a conclusion, however, is without justification. No basis whatsoever is offered by the Court for rejecting the conclusion reached by the court below in dismissing appellants' equal protection challenge that the State Legislature could permissibly find on the basis of experience, which this Court lacks, that other activities and forms of association do not present problems of the same type or the same dimension. 359 N. E. 2d 1262, 1275 (1977). Indeed, the Court declines to consider appellants' equal protection challenge. *Ante*, at 7 n. 8.

The Court's further claim that "[t]he fact that a particular kind of ballot question has been singled out for special treatment undermines the likelihood of a genuine state interest in protecting shareholders . . . [and] suggests instead that the legislature may have been concerned with silencing corporations on a particular subject," *ante*, at 26, ignores the fact that, as earlier acknowledged by the majority, *ante*, at 3 n. 3, the statutory provision stating that the personal income tax does not materially affect the business of corporations was enacted in response to prior judicial decisions construing the "materially affecting" requirement as not prohibiting corporate expenditures in connection with income tax referenda. To find evidence of hostility toward corporations on the basis of a decision of a legislature to clarify its intent following judicial rulings interpreting the scope of a statute is to elevate corporations to a level of deference which has not been seen at least since the days when substantive due process was regularly used to invalidate regulatory legislation thought to unfairly impinge upon established economic interests.

tempts to do, *ante,* at 27 n. 34, on the ground that the Court there did not constitutionally prohibit expenditures by unions for the election of political candidates or for ideological causes so long as they are financed from assessments paid by employees who are not coerced into doing so against their will. In the first place, the Court did not purport to hold that all political or ideological expenditures not constitutionally prohibited were constitutionally protected. A State might well conclude that the most and perhaps, in its view, the only effective way of preventing unions or corporations from using funds contributed by differing members or shareholders to support political causes having no connection with the business of the organization is to absolutely ban such expenditures. Secondly, unlike the remedies available to the Court in *Street* and *Abood* which required unions to refund the exacted funds in the proportion that union political expenditures with which a member disagreed bore to total union expenditures, no such alternative is readily available which would enable a corporate shareholder to maintain his investment in a corporation without supporting its electoral or political ventures other than prohibiting corporations from participating in such activities. There is no apparent way of segregating one shareholder's ownership interest in a corporation from another's. It is no answer to respond, as the Court does, that the dissenting "shareholder is free to withdraw his investment at any time and for any reason." *Ibid.* The employees in *Street* and *Abood* were also free to seek other jobs where they would not be compelled to finance causes with which they disagreed, but we held in *Abood* that First Amendment rights could not be so burdened. Clearly the State has a strong interest in assuring that its citizens are not forced to choose between supporting the propagation of views with which they disagree and passing up investment opportunities.

Finally, even if corporations developed an effective mechanism for rebating to shareholders that portion of their investment used to finance political activities with which they dis-

agreed, a State may still choose to restrict corporate political activity irrelevant to business functions on the grounds that many investors would be deterred from investing in corporations because of a wish not to associate with corporations propagating certian views. The State has an interest not only in enabling individuals to exercise freedom of conscience without penalty but also in eliminating the danger that investment decisions will be significantly influenced by the ideological views of corporations. While the latter concern may not be of the same constitutional magnitude as the former, it is far from trivial. Corporations, as previously noted, are created by the State as a means of furthering the public welfare. One of their functions is to determine, by their success in obtaining funds, the uses to which society's resources are to be put. A State may legitimately conclude that corporations would not serve as economically efficient vehicles for such decisions if the investment preferences of the public were significantly affected by their ideological or political activities. It has long been recognized that such pursuits are not the proper business of corporations. The common law was generally interpreted as prohibiting corporate political participation.[14] Indeed, the Securities and Exchange Commission's rules permit corporations to refuse to submit for shareholder vote any proposal which concerns a general economic, political, racial, religious, or social cause that is not significantly related to the business of the corporation or is not within its control.[15]

The necessity of prohibiting corporate political expenditures in order to prevent the use of corporate funds for purposes with which shareholders may disagree is not a unique perception of Massachusetts. This Court has repeatedly recognized that one of the purposes of the Corrupt Practices Act was to

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[14] See Note, Corporate Political Affairs Programs, 70 Yale L. J. 821, 852–853 (1961), and cases therein cited.

[15] See Rule 14a–8 (c) of the Securities and Exchange Commission, 17 CFR § 240.14a–8 (c); *SEC* v. *Medical Committee for Human Rights*, 404 U. S. 403 (1972).

prevent the use of corporate or union funds for political purposes without the consent of the shareholders or union members and to protect minority interests from domination by corporate or union leadership.[16] Although the Court has never, as noted *supra,* adjudicated the constitutionality of the Act, it has consistently treated this objective with deference. Indeed, in *United States* v. *CIO,* 335 U. S. 106 (1948), the Court construed a previous version of the Corrupt Practices Act so as to conform its prohibitions to those activities to which the Court believed union members or shareholders might object. After noting that if the statute "were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures, or the election to office of men espousing such measures, the gravest doubt would arise in our minds as to its constitutionality," *id.,* at 121, the Court held that the statute did not prohibit such in-house publications. It was persuaded that the purposes of the Act would not be impeded by such an interpretation, because it "is unduly stretching language to say that the members or stockholders are unwilling participants in such normal organizational activities, including the advocacy thereby of governmental policies affecting their interests, and the support thereby of candidates thought to be favorable to their interests." *Id.,* at 123.

The Court today purports not to foreclose the possibility that the Corrupt Practices Act and state statutes which prohibit corporate expenditures only in the context of elections to public office may survive constitutional scrutiny because of the interest in preventing the corruption of elected representatives through the creation of political debts. *Ante,* at 21 n. 26. It

[16] See *Pipefitters Local Union No. 562* v. *United States,* 407 U. S. 385, 413–414 (1972); *United States* v. *Auto. Workers,* 352 U. S. 567, 572–573 (1957); *United States* v. *CIO,* 335 U. S. 106, 113, 115 (1948).

does not choose to explain or even suggest, however, why the state interests which it so cursorily dismisses are less worthy than the interest in preventing corruption or the appearance of it. More importantly, the analytical framework employed by the Court clearly raises great doubt about the Corrupt Practices Act. The question in the present case, as viewed by the Court, "is whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection." *ante*, at 11, which it answers in the negative. But the Court has previously held in *Buckley* v. *Valeo*, *supra*, that the interest in preventing corruption is insufficient to justify restrictions upon individual expenditures relative to candidates for political office. If the corporate identity of the speaker makes no difference, all the Court has done is to reserve the formal interment of the Corrupt Practices Act and similar state statutes for another day. As I understand the view that has now become part of First Amendment jurisprudence, the use of corporate funds, even for causes irrelevant to the corporation's business, may be no more limited than that of individual funds. Hence, corporate contributions to and expenditures on behalf of political candidates may be no more limited than those of individuals. Individual contributions under federal law are limited but not entirely forbidden, and under *Buckley* v. *Valeo*, expenditures may not constitutionally be limited at all. Most state corrupt practices acts, like the federal Act, forbid *any* contributions or expenditures by corporations to or for a political candidate.

In my view, the interests in protecting a system of freedom of expression, set forth *supra*, are sufficient to justify any incremental curtailment in the volume of expression which the Massachusetts statute might produce. I would hold that apart from corporate activities, such as those discussed in Part I, *supra*, and exempted from regulation in *CIO*, which are integrally related to corporate business operations, a State may prohibit corporate expenditures for political or ideological

purposes. There can be no doubt that corporate expenditures in connection with referenda immaterial to corporate business affairs fall clearly into the category of corporate activities which may be barred. The electoral process, of course, is the essence of our democracy. It is an arena in which the public interest in preventing corporate domination and the coerced support by shareholders of causes with which they disagree is at its strongest and any claim that corporate expenditures are integral to the economic functioning of the corporation is at its weakest.[17]

I would affirm the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts.

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[17] The exemption provided by the Massachusetts statute for contributions and expenditures in connection with any referendum question "materially affecting any of the property, business or assets of the corporation" affords any First Amendment protection to which corporate electoral communications may be entitled. See Massachusetts General Laws ch. 55, § 8.

SUPREME COURT OF THE UNITED STATES

No. 76–1172

First National Bank of Boston et al., Appellants, *v.* Francis X. Bellotti, Etc., et al. | On Appeal from the Supreme Judicial Court of Massachusetts.

[April 26, 1978]

MR. JUSTICE REHNQUIST, dissenting.

This Court decided at an early date, with neither argument nor discussion, that a business corporation is a "person" entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment. *Santa Clara County* v. *Southern Pacific R. Co.*, 118 U. S. 394, 396 (1886). Likewise, it soon became accepted that the property of a corporation was protected under the Due Process Clause of that same amendment. See, *e. g.*, *Smyth* v. *Ames*, 169 U. S. 466, 522 (1898). Nevertheless, we concluded soon thereafter that the liberty protected by that amendment "is the liberty of natural, not artificial persons." *Northwestern Nat'l Life Ins. Co.* v. *Riggs*, 203 U. S. 243, 255 (1906). Before today, our only considered and explicit departures from that holding have been that a corporation engaged in the business of publishing or broadcasting enjoys the same liberty of the press as is enjoyed by natural persons, *Grosjean* v. *American Press Co.*, 297 U. S. 233, 244 (1936), and that a non-profit membership corporation organized for the purpose of "achieving . . . equality of treatment by all government, federal, state and local, for the members of the Negro community" enjoys certain liberties of political expression. *NAACP* v. *Button*, 371 U. S. 415, 429 (1963).

The question presented today, whether business corporations have a constitutionally protected liberty to engage in political activities, has never been squarely addressed by any

previous decision of this Court.[1] However, the General Court of the Commonwealth of Massachusetts, the Congress of the United States, and the legislatures of 30 other States of this Republic have considered the matter, and have concluded that restrictions upon the political activity of business corporations are both politically desirable and constitutionally permissible. The judgment of such a broad consensus of governmental bodies expressed over a period of many decades is entitled to considerable deference from this Court. I think it quite probable that their judgment may properly be reconciled with our controlling precedents, but I am certain that under my views of the limited application of the First Amendment to the States, which I share with the two imediately preceding occupants of my seat on the Court, but not with my present colleagues, the judgment of the Supreme Judicial Court of Massachusetts should be affirmed.

Early in our history, Mr. Chief Justice Marshall described the status of a corporation in the eyes of federal law:

> "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created." *Dartmouth College* v. *Woodward,* 4 Wheat. 518, 636 (1819).

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[1] Our prior cases, mostly of recent vintage, have discussed the boundaries of protected speech without distinguishing between artificial and natural persons. See, *e. g., Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U. S. 85 (1977); *Buckley* v. *Valeo,* 424 U. S. 1 (1976). Nevertheless, the Court today affirms that the failure of those cases to draw distinctions between artificial and natural persons does not mean that no such distinctions may be drawn. The Court explicitly states that corporations may not enjoy all the political liberties of natural persons, although it fails to articulate the basis of its suggested distinction. *Ante,* at 11 n. 13.

The appellants herein either were created by the Commonwealth or were admitted into the Commonwealth only for the limited purposes described in their charters and regulated by state law.[2] Since it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons, *United States* v. *White*, 322 U. S. 694, 698–701 (1944) (corporations do not enjoy the privilege against self-incrimination), our inquiry must seek to determine which constitutional protections are "incidental to its very existence." *Dartmouth College*, *supra*, at 636.

There can be little doubt that when a State creates a corporation with the power to acquire and utilize property, it necessarily and implicitly guarantees that the corporation will not be deprived of that property absent due process of law. Likewise, when a State charters a corporation for the purpose of publishing a newspaper, it necessarily assumes that the corporation is entitled to the liberty of the press essential to the conduct of its business.[3] *Grosjean* so held, and our subse-

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[2] Appellants Wyman-Gordon Company and Digital Equipment Corp. are incorporated in Massachusetts. The Gilette Company is incorporated in Delaware, but does business in Massachusetts. It is absolutely clear that a State may impose the same restrictions upon foreign corporations doing business within its borders as it imposes upon its own corporations. *Northwestern Nat'l Life*, *supra*, at 254–255.

Appellants First National Bank of Boston and New England Merchants National Bank are organized under the laws of the United States. In providing for the chartering of national banks, Congress has not purported to empower them to take part in the political activities of the States in which they do business. Indeed, it has explicitly forbidden them to make any "contribution or expenditure in connection with any election to any political office." 2 U. S. C. § 441b (1976). Thus, there is no occasion to consider whether Congress would have the power to require the States to permit national banks to participate in political affairs. Cf. *M'Culloch* v. *Maryland*, 4 Wheat. 316 (1819).

[3] The Court concedes, *ante*, at 14–15, that, for this reason, this statute poses no threat to the ordinary operations of corporations in the communications business.

quent cases have so assumed. *E. g., Time, Inc.* v. *Firestone,* 424 U. S. 448 (1976); *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964).[4] Until recently, it was not thought that any persons, natural or artificial, had any protected right to engage in commercial speech. See *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U. S. 748, 761–770 (1976). Although the Court has never explicitly recognized a corporation's right of commercial speech, such a right might be considered necessarily incidental to the business of a commercial corporation.

It cannot be so readily concluded that the right of political expression is equally necessary to carry out the functions of a corporation organized for commercial purposes.[5] A State grants to a business corporation the blessings of potentially

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[4] It does not necessarily follow that such a corporation would be entitled to all the rights of free expression enjoyed by natural persons. Although a newspaper corporation must necessarily have the liberty to endorse a political candidate in its editorial columns, it need have no greater right than any other corporation to contribute money to that candidate's campaign. Such a right is no more "incidental to its very existence" than it is to any other business corporation.

[5] However, where a State permits the organization of a corporation for explicitly political purposes, this Court has held that its rights of political expression, which are necessarily incidental to its purposes, are entitled to constitutional protection. *Button, supra,* at 428–429 (1963). The fact that the author of that opinion, my Brother BRENNAN, has joined my Brother WHITE's dissent in this case strengthens my conclusion that nothing in *Button* requires that similar protection be extended to ordinary business corporations.

It should not escape notice that the rule established in *Button* was only an alternative holding, since the Court also ruled that the NAACP had standing to assert the personal rights of its members. *Ibid.,* citing *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 458–460 (1958). The holding, which has never been repeated, was directly contrary to an earlier decision of this Court holding that another political corporation, the American Civil Liberties Union, did not enjoy freedom of speech and assembly. *Hague* v. *CIO,* 307 U. S. 496, 514 (1939) (opinion of Roberts, J.); *id.,* at 527 (opinion of Stone, J.).

perpetual life and limited liability to enhance its efficiency as an economic entity. It might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere. Furthermore, it might be argued that liberties of political expression are not at all necessary to effectuate the purposes for which States permit commercial corporations to exist. So long as the Judicial Branches of the State and Federal Governments remain open to protect the corporation's interest in its property, it has no need, though it may have the desire, to petition the political branches for similar protection. Indeed, the States might reasonably fear that the corporation would use its economic power to obtain further benefits beyond those already bestowed.[6] I would think that any particular form of organi-

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[6] My Brother WHITE raises substantially these same arguments in his dissent, *ante*, at 7–8. However, his heavy emphasis on the need to protect minority shareholders at least suggests that "[t]he governmental interest in regulating corporate political communications," *ante*, at 7, might not prove sufficiently weighty in the absence of such concerns. Because of my conclusion that the Fourteenth Amendment does not require a State to endow a business corporation with the power of political speech, I do not find it necessary to join his assessment of the interests of the Commonwealth supporting this legislation.

The question of whether such restrictions are politically desirable is exclusively for decision by the political branches of the Federal Government and by the States, and may not be reviewed here. My Brother WHITE, in his dissenting opinion, puts the legislative determination in its most appealing light when he says, *ante*, at p. 8:

"[T]he interest of Massachusetts and the many other States which have restricted corporate political activity . . . is not one of equalizing the resources of opposing candidates or opposing positions but rather of preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process . . ."

As I indicate in the text, *supra*, I agree that this is a rational basis for sustaining the legislation here in question. But I cannot agree with my Brother WHITE's intimation that this is *in fact* the reason that the Mas-

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zation upon which the State confers special privileges or immunities different from those of natural persons would be subject to like regulation, whether the organization is a labor union, a partnership, a trade association, or a corporation.

One need not adopt such a restrictive view of the political liberties of business corporations to affirm the judgment of the Supreme Judicial Court in this case. That court reasoned that this Court's decisions entitling the property of a corporation to constitutional protection should be construed as recognizing the liberty of a corporation to express itself on political matters concerning that property. Thus, the Court construed the statute in question not to forbid political expres-

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sachusetts General Court enacted this legislation. If inquiry into legislative motives were to determine the outcome of cases such as this, I think a very persuasive argument could be made that the General Court, desiring to impose a personal income tax but more than once defeated in that desire by the combination of the Commonwealth's referendum provision and corporate expenditures in opposition to such a tax, simply decided to muzzle corporations on this sort of issue so that it could succeed in its desire.

If one believes, as my Brother WHITE apparently does, see *ante*, at 5, that a function of the First Amendment is to protect the interchange of ideas, he cannot readily subscribe to the idea that, if the desire to muzzle corporations played a part in the enactment of this legislation, the General Court was simply engaged in deciding *which* First Amendment values to promote. Thomas Jefferson in his First Inaugural Address made the now familiar observation:

"If there be any among us who would wish to dissolve this Union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." The Writings of Thomas Jefferson (H. A. Washington ed. 1853) VII, 1–5.

One may entertain a healthy skepticism as to whether the General Court left reason free to combat error by their legislation; and it most assuredly did not leave undisturbed corporations which opposed its proposed personal income tax as "monuments to the safety with which error of opinion may be tolerated." But I think the Supreme Judicial Court was correct in concluding that, whatever may have been the motive of the General Court, the law thus challenged did not violate the United States Constitution.

sion by a corporation "when a general political issue materially affects a corporation's business, property or assets." — Mass. —, —, 359 N. E. 2d 1262, 1270 (1977).

I can see no basis for concluding that the liberty of a corporation to engage in political activity with regard to matters having no material effect on its business is necessarily incidental to the purposes for which the Commonwealth permitted these corporations to be organized or admitted within its boundaries. Nor can I disagree with the Supreme Judicial Court's factual finding that no such effect has been shown by these appellants. Because the statute as construed provides at least as much protection as the Fourteenth Amendment requires, I believe it is constitutionally valid.

It is true, as the Court points out, *ante*, at 15–17, that recent decisions of this Court have emphasized the interest of the public in receiving the information offered by the speaker seeking protection. The free flow of information is in no way diminished by the Commonwealth's decision to permit the operation of business corporations with limited rights of political expression. All natural persons, who owe their existence to a higher sovereign than the Commonwealth, remain as free as before to engage in political activity. Cf. *Maher* v. *Roe*, 432 U. S. 464, 474 (1977).

I would affirm the judgment of the Supreme Judicial Court.

PREVIOUS CONGRESSIONAL HEARINGS

Exhibit 71: Excerpts From Senate Commerce Committee Hearings, 1974

ENERGY AND ENVIRONMENTAL OBJECTIVES

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENT

OF THE

COMMITTEE ON COMMERCE

UNITED STATES SENATE

NINETY-THIRD CONGRESS

SECOND SESSION

ON

ENERGY AND ENVIRONMENTAL OBJECTIVES

MAY 6 AND JULY 18, 1974

Part 2

Serial No. 93–68

Printed for the use of the Committee on Commerce

U.S. GOVERNMENT PRINTING OFFICE

42-367 WASHINGTON : 1974

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ENERGY AND ENVIRONMENTAL OBJECTIVES

MONDAY, MAY 6, 1974

U.S. SENATE,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON THE ENVIRONMENT,
Washington, D.C.

The subcommittee met at 9:35 a.m. in room 5110 of the Dirksen Senate Office Building, Hon. Philip A. Hart (chairman of the subcommittee) presiding.

Senator HART. The committee will be in order.

I think it is generally understood the subcommittee earlier this year began a review or an effort better to understand the relationship between the energy crisis and those efforts which are underway to protect the environment. And today, a continuation of that general study brings us to the question of advertising and its relationship and effect.

To help us better understand that, we welcome as our first witness Mr. Harvey Shulman of the Media Access Project of Washington.

Mr. Shulman?

STATEMENT OF HARVEY J. SHULMAN, ATTORNEY, MEDIA ACCESS PROJECT, WASHINGTON, D.C.; ACCOMPANIED BY ROBERT AND CAROLE KUNSTADT

Mr. SHULMAN. Thank you, Senator Hart.

I am assisted today by our student intern, Robert Kunstadt. Carole Kunstadt will handle some of the displays we have for the subcommittee.

I am an attorney with Media Access Project, a Washington, D.C., public interest law firm specializing in representation of citizen groups and individuals who seek access to the electronic and print media in order to present their views on important controversial issues including the environment, the energy crisis, equal employment and various consumer-related matters.

For some months now Media Access Project has been conducting an in-depth study of corporate advertising which addresses environmental and energy issues.

For example, in January 1974, we filed a petition with the FTC on behalf of six Members of Congress requesting that the FTC require substantiation for many of the claims made in corporate image advertisements which favorably portray the advertiser's environmental and energy performance and record.

Staff member assigned to these hearings: Leonard Bickwit, Jr.

We were concerned that the FTC was permitting businesses to win increased profits by making false or misleading image claims.

In March 1974 we served as counsel to, and joined with, 16 Members of Congress and several citizen groups in requesting this country's 6,000 radio and television stations to provide free air time for spot advertisements which would present consumer-oriented solutions to the energy crisis [in contrast with the hundreds of oil and utility company ads now being aired].

We were motivated by fears that on important public issues the broadcast industry was permitting itself unwittingly to be used as a propaganda mouthpiece for the business community.

I am here today at your kind invitation to talk about another aspect of the massive propaganda campaign being conducted by a large number of America's giant businesses.

In short, our investigation and research has revealed that many oil, utility and other energy-related industries have engaged in massive violations of both the tax laws of the United States and accounting principles established by the FPC.

While the exact amount of money involved cannot be stated at this time, it is clear that we are in the midst of a multimillion dollar scandal involving the failure of the Internal Revenue Service and the FPC to enforce laws regarding the proper tax and accounting treatments of enormous sums of money spent for corporate advertising.

Every citizen, as a taxpayer and as a ratepayer, is suffering financially and politically from this scandal.

As part of our investigation of corporate advertising, media access project began to notice the trend away from soft image advertising toward harder hitting ads which discussed matters of legislative concern.

We were particularly interested in determining whether businesses were improperly treating the costs associated with certain political ads as deductible business expenses under section 162 of the Internal Revenue Code; and whether utilities were treating the costs associated with such ads as operating expenses to be passed along in the form of increased rates to consumers.

During our investigation we were contacted by staff members from this subcommittee who explained that in preparation for proposed hearings on "Advertising and the Environmental Movement," they would appreciate any material we had gathered on that subject.

We turned over an enormous amount of material to this subcommittee, including most of the ads which I will discuss today.

Sometime later, when we learned that Senator Hart had written to many corporate advertisers to obtain their views on the tax treatment of certain of these ads, we requested to see the responses.

The staff, as I understand it, made these responses available to ourselves and others for analysis to the extent that the companies did not request nondisclosure.

We and others were then invited to present our evaluation in this forum.

I would like to lodge with the subcommittee—and I have already done so as part of my written statement—exhibit A, a copy of the letter which Senator Hart sent to 35 selected energy-related companies

that conducted advertising campaigns in major newspapers and on the major television networks.

Among the questions asked were (a) how much the company spent on total advertising in 1973 and (b) how that amount was allocated among product/service advertising, goodwill/institutional advertising and political advertising; the latter being defined as that advertising considered to be, for tax purposes, nondeductible as a business expense under IRS Reg. 1.162–20(c) (4).

Additionally, each company was sent one or more of its advertisements and was asked to classify the ad or ads into one of these three categories.

I would like to submit to this subcommittee copies of those ads, marked as exhibits 1 through 99, as well as a list attached as "exhibit B—Description of Ads Attached to Senator Hart's Letter of January 28, 1974 to Various Companies."

The amount of advertising by the selected energy-related industries is staggering. General Motors, for example, spent $243 million in 1973. Amounts spent by oil companies varied from $8.9 million expended by Phillips Petroleum to $27.1 million spent by Texaco.

The total of advertising expenditures for the oil companies to which Senator Hart wrote—Atlantic Richfield, Exxon, Gulf, Mobil, Phillips, Shell, Texaco, and the American Petroleum Institute—is $126.0 million.

Since the figures provided by Gulf were held by the subcommittee as confidential, I have estimated Gulf's expenditure at $15 million, somewhat less than the amount spent by the other companies.

Of this $126 million the companies contend that 45.5 percent should be classified as product/service advertising, 47.1 percent as institutional/goodwill advertising, 6.4 percent as miscellaneous, and 0.7 percent as nondeductible political advertising.

In absolute figures, the dollar amounts assigned by the oil companies to each category, again estimating for Gulf, are $58.3 million for product/service advertising, $59.8 million for goodwill-institutional advertising, $7.1 million for miscellaneous advertising, and $.8 million for nondeductible political advertising.

It is most significant, and I will further this throughout my testimony, that only Mobil Oil Co. considers any of its 1973 advertising to be in the nondeductible political category.

Of course, it must be recognized that these dollar totals ($126 million for the industry companies to which Senator Hart wrote) do not include other major oil companies such as Standard of Indiana, Sun Oil, Standard of California, Getty, Ashland, Hess, Cities Service, and others.

It may be that the oil industry, when considered as a whole, spends a quarter of a billion dollars on advertising in 1973.

The total amount of money spent by utility companies on advertising is more difficult to compute. In 1970 the Nation's utilities spent $88.7 million on promotional and institutional advertising. Not included in that figure are other sales expenses which totaled over $300 million.

Neither of these amounts should be expected to have decreased in 1973—in fact, advertising appears to have increased as more utilities

are taking to the airwaves, and the pages of our newspapers and magazines.

Moreover, there has been an expanded campaign by utility trade groups who do not report their figures to the Federal Power Commission, such as the American Gas Association.

1973 advertising totals for the selected 15 utilities and utility-related companies which responded to Senator Hart's letter are $6.0 million on product/service advertising, and $0.7 million on miscellaneous advertising, for a total of $17.6 million.

With the exception of Florida Power & Light Co., none of these companies categorized any of their ads as nondeductible or political.

A more complete analysis of 1973 utility expenditures can be found by referring to the annual accounting reports filed each year with the FPC. It is an enormous task to aggregate and categorize the forms of the over 200 reporting utilities.

Yet to give some idea of the scope of the current utility ad campaigns, we have examined the forms for the seven members of the not especially large American Electric Power system.

These companies spent $3.6 million on product/service and institutional/good will advertising; stated that only $18,000 was spent on political activities; and they reported no political ads, although many political ads were sponsored by American Electric Power in 1973.

It would not be too far afield to suggest that utility advertising expenditures for 1973 exceed $100 million and may, according to estimates of an FTC Commissioner, run as high as a third of a billion dollars.

There will always be problems in attempting to define the various types of advertising that exist in this Madison Avenue era so that every advertisement can be neatly categorized as being of one type or another.

I would like to describe product/service advertising.

We would probably all agree that product/service advertising consists of direct claims about the product or service sold by the advertiser which are intended to sell that product or service.

Product/service advertising which is an ordinary and necessary business expense may be treated as tax deductible under section 162 of the Internal Revenue Code.

Similar "advertising designed to promote or retain the use of utility service" and which does not specifically refer to any appliances sold by a utility advertiser, must be listed as an operating expense under account No. 913 of the FPC's uniform system of accounts.

This accounting system, under which over 90 percent of the Nation's utilities must report their expenses to the FPC, basically classifies expenses as either operating or nonoperating.

The FPC usually considers operating expenses as legitimate utility costs to be passed along to purchasers of electricity or natural gas in ratemaking proceedings over which the FPC has jurisdiction; and even where rates are set by a State utility commission, rather than the FPC, the FPC's recognition of an item as an operating expense often serves to similarly legitimize the absorption of the costs by the consumer-ratepayer affected by State utility commission ratemaking proceedings.

Nonoperating expenses may not usually be passed along to purchasers in FPC proceedings, and a like result is often achieved, though not required, in State proceedings.

Next I discuss institutional/goodwill and political advertising.

There is a greater disagreement about the definition of institutional/goodwill advertising and its treatment for tax and FPC accounting purposes.

The Publishers Information Bureau and Leading National Advertisers, Inc., refer to such advertising as "image advertising."

They define "image advertising" as including advertising which is "devoted primarily to selling the corporate personality"; its first objective goes beyond the direct sale of a single product or service.

A broader definition was offered in conjunction with a major industrial marketing survey in 1967. It defines "image advertising" as "advertising in media, the prime purpose of which is other than a direct influence on the purchase of a product or products, and the motive behind which is the projection of the corporate image—even though such advertising may be 'product' in nature."

To a large extent, all nonproduct/service advertising may be considered as "image advertising" in that it obviously seeks to portray the corporate advertiser's practices and policies in a favorable light.

Yet for purposes of the internal revenue laws and the FPC's accounting procedures, institutional/goodwill advertising is more strictly defined.

Under Internal Revenue regulations, for institutional/goodwill advertising to be considered as a deductible business expense, not only must it be "ordinary and necessary," but it must also be intended to "keep the taxpayer's name before the public" and be "related to the patronage the taxpayer might reasonably expect in the future."

The Internal Revenue regulations also draw a distinction between two different types of institutional advertisements. I think this is the crux of what we will be getting into in the testimony. The Service says:

> A deduction will ordinarily be allowed for the cost of advertising which keeps the taxpayer's name before the public in connection with encouraging contributions to such organizations as the Red Cross, the purchase of U.S. Savings Bonds, or participating in similar causes. In like fashion, expenditures for advertising which presents views on economic, financial, social, or other subjects of a general nature, but which does not involve any of the activities specified in paragraphs (b) or (c) of this section for which a deduction is not allowable, are deductible if they otherwise meet the requirements of the regulations under section 162.

The other type of institutional advertisement which Senator Hart has chosen to call "political" is treated in paragraphs (b) and (c), as follows:

> Expenditures for lobbying purposes, for the promotion or defeat of legislation * * * for political campaigns (including the support or opposition to any candidate for public office), or for the carrying on of propaganda (including advertising) relating to any of the foregoing purposes are not deductible from gross income.

As an example, the Service gives:

> The cost of advertising to promote or defeat legislation or to influence the public with respect to the desirability or undesirability of proposed legislation is not deductible as a business expense, even though the legislation may directly affect the taxpayer's business.

Expenditures for the promotion or defeat of legislation, in the words of the IRS:

Include but shall not be limited to expenditures for the purpose of attempting to: (1) Influence members of a legislative body directly, or indirectly by urging or encouraging the public to contact such members for the purpose of proposing, supporting, or opposing legislation; or (2) influence the public to approve or reject a measure in a referendum, initiative vote on a constitutional amendment, or similar procedure.

Certain "political expenses" which are "in direct connection with appearances before, submission of statements to, or sending communications to, the committes; or individual members" of legislatures "with respect to legislation of direct interest to the taxpayer" were specifically made deductible by Congress in 1962 in section 162(e) of the Internal Revenue Code; but Congress expressly stated that the 1962 law should not be construed as allowing the deduction of any amount paid "in connection with any attempt to influence the general public or segments thereof, with respect to legislative matters, elections, or referendums."

The 1962 law was intended only to eradicate the anomaly by which taxpayers could deduct for direct communications with the Executive, administrative agencies, and courts, but was prohibited from similarly deducting for direct communications with legislatures.

Again, it was not intended to reverse longstanding Internal Revenue policies, continuously applied since 1918 when the Service's rule stated that:

Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

The 1918 regulation underwent various semantic changes, but its substantive provisions remained the same.

In short, the 1962 law was not a license to corporate advertisers to propagandize to the public on matters of legislative concern, or any other controversial matters, through subsidization from the public coffers.

The FPC also treats political advertising in a way distinct from institutional/goodwill advertising. For FPC accounting purposes, institutional/goodwill advertising is to be listed as an operating expense in account No. 930, miscellaneous general expenses.

Although the FPC has never fully defined what constitutes such advertising, it has recognized its purpose is to foster and maintain public goodwill rather than for any immediate and direct promotion of sales for electricity or appliances.

However, where such advertising is political in nature, it must be listed as a nonoperating expense in subaccount No. 426.4 entitled "Expenditures for Certain Civic, Political and Related Activities."

This account includes all expenditures incurred, and I quote:

For the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation or ordinances); approval, modification or revocation of franchises; and perhaps key in our discussion today, including all expenditures "for the purpose of influencing decisions of public officials."

Expenditures "which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations" are not to be classified in account 426.4. This is similar to the IRS treatment of direct lobbying.

As I have previously indicated, categorization of an expense as operating or nonoperating is often controlling in FPC ratemaking proceedings. It need not be followed by the FPC nor by State regulatory bodies which may permit such costs to be passed along as operating expenses to ratepayers.

Whatever the exact contours of FPC subaccount 426.4, it is obvious that it encompasses a broader definition of "political advertising" than that used by the Internal Revenue Service.

While the cost of advertising which attempts to influence the decisions of public officials in administrative agencies should definitely be classified as a nonoperating expense under FPC rules, that cost might currently be a legitimate business expense under the Internal Revenue regulations to the extent that the advertising does not deal with matters of legislative concern.

What I am going to do now is really get into the crux of the factual presentation, Senator, and discuss our analysis of your letter and the responses which you received.

As I previously stated, with the exception of Mobil Oil Co., none of the companies to which Senator Hart wrote classifies any of its advertising as political—for example, nondeductible under the tax laws. Yet an analysis of the ads enclosed with the Senator's letter reveals that a vast majority of them are clearly nondeductible and, in the case of utilities, should also be listed in a nonoperating expense account.

Although we have examined in detail all of the ads which accompany Senator Hart's inquiry, as well as other ads, it is not feasible to refer to each of over 100 ads in this hearing. Therefore, I will now discuss briefly approximately 36 political ads. And I am submitting with my statement exhibit D, which is a brief written evaluation correlating all of the ads which could be considered political with relevant legislation now pending in Congress.

I would also submit to this subcommittee as exhibit E—attached to this statement—a list summarizing the energy or environmental legislation now or previously pending in Congress to which the political ads in question relate.

For purposes of this presentation only I have divided the ads I will discuss into eight subject matter areas: the Clean Air Act, oil company profits, offshore oil and gas drilling, the Alaska pipeline, natural gas prices, nuclear power, utility rate increases, and general comprehensive schemes for solving the energy crisis.

I will first discuss advertising related to the Clean Air Act. There is no doubt that most oil companies and utilities do not favor the strict controls imposed by the Clean Air Act. Many of these companies have run extended propaganda campaigns urging amendment to that law.

For example, a Phillips Petroleum ad, exhibit 39, which is on the display board; entitled "America's Best Kept Secret: The Cost of Meeting Federal Auto Emission Standards" argues for changing the

Clean Air Act and adopting the less stringent California standards for auto emissions.

The ad ends, and I quote, "Time is running out. If you agree with us that the California standards provide a more practical approach to the auto emission problems, express your viewpoint to your congressional representatives and to the Environmental Protection Agency," end quote.

Most recently, an ad run just last week by the American Electric Power System, which I would like to introduce as exhibit 100, asks, "Are we blind to the real energy crisis?" and argues that, "It is absolutely imperative that the Clean Air Act be amended in regard to sulfur dioxide emission standards applicable to electric utilities."

It is difficult to understand how such advertising could be classified as anything but political for tax purposes in light of the many bills in Congress on this matter, including one that passed the House last week.

Yet, Phillips has stated that it intends to take a tax deduction for its ad.

Significantly, however, Mobil Oil Co. has expressed its intention to treat its Clean Air Act ads, exhibits 30 through 34, as nondeductible. Those are in the record for comparison.

I would next like to get into advertising on oil company profits. We are all familiar with legislation intended to establish an excess profits tax or roll back oil prices because of unprecedented percentage rises in oil company profits.

The industry has been mounting an overwhelming propaganda blitz against this legislation. For example, exhibit 44, a 1974 Shell Oil ad, entitled "How in All Conscience Can Anyone Call These Excess Profits?" states, "There is much talk of an excess profits tax," and presents arguments that any congressional action "should not be a hastily enacted attack on the independent industry which would impose corporate excess profits taxes based on some arbitrarily chosen historical performance."

In its response to Senator Hart's letter, however, Shell remarkably considers this ad to be nonpolitical and therefore deductible.

In sharp contrast, Mobil Oil Co. has indicated that it considers its similar excess profits ads, such as exhibit 22, to be political and therefore nondeductible.

The next subject area of advertising involves offshore oil and gas drilling. Offshore oil drilling has been a controversial issue for many years now, involving environmental questions raised by accidents such as the Santa Barbara Channel oil spill. There have been numerous attempts in Congress to address this matter, including bills to require certain permits for exploring or mining oil and gas underneath the U.S. waters and a bill calling for a moratorium on drilling in the Santa Barbara Channel.

Yet, with the exception of Mobil Oil, which states that it considers such ads addressing this matter to be nondeductible, Mobil Exhibits 19 and 23, all other companies have expressed their intentions to treat similar ads as legitimate business expenses.

For example, and I draw your attention to the display chart, 17 mid-Atlantic utility companies ran a 1973 ad, exhibit 78, entitled, "Energy from the sea. The possibilities are out of sight." The ad urges for rapid development of offshore oil and gas reserves.

All of these companies, including Consolidated Edison and Brooklyn Union Gas of New York, claim the ad to be a deductible business expense. Moreover, the costs for this ad appear to be listed in FPC operating expense accounts rather than in the nonoperating political advertising account, 426.4, with the result that ratepayers may be supporting this political propaganda.

The next subject matter of advertising involves the Alaska Pipeline. I think this subcommittee is probably very familiar with legislation that dealt with the Alaska Pipeline. Ever since the Alaska Pipeline was proposed some years ago, it has been a volatile environmental issue. It finally took an act of Congress amending the Mineral Leasing Act of 1920, and the National Environmental Policy Act of 1969, to authorize construction of the pipeline. And the Senate passed important parts of the pipeline bill by only one vote.

Thus, it seems unbelievable that advertising calling for immediate construction of the pipeline could be classified as anything but political.

Nevertheless, several companies which ran pipeline-related ads have already claimed or plan to claim tax deductions for those ads. For example, several 1971 ads run by Esso Oil, now Exxon, exhibits 9, 10, 11, and 12, have been ruled and this is very significant, in a proceeding before the FCC to have presented the argument for construction of the pipeline.

That same year, in response to legal arguments that a pipeline right-of-way could not be granted by the Federal Government without amending the Mineral Leasing Act, a bill to that effect was introduced in the Senate. Yet despite the FCC ruling and the legislation in Congress, Exxon, in its response to Senator Hart, labels its 1971 pipeline ads as nonpolitical and hence we presume a business expense deduction was taken for those ads.

Similar tax treatment is intended by Atlantic-Richfield for its 1973 Alaska Pipeline ads, exhibits 3– A, B, and C, and 4.

For example, Arco asks, "What stands between our Nation's energy shortage and 10 billion barrels of Alaska oil," and poses the issue in exhibit 3–A, "must it be one pipeline—that is through Canada—or the other?" The ad argues: "Construction of the pipeline is being delayed by a fundamental issue now under consideration by Congress. We need the Alaska Pipeline now. Let's get on with it."

Are we really expected to believe that these ads which ran in the New York Times, the Washington Post, and the Wall Street Journal, are nonpolitical? And who can know what the outcome of the Senate vote would have been if this propaganda blitz had been conducted on a smaller scale for fear that the tax laws would be fully enforced?

The next area of advertising involves natural gas prices. Again, the Senate Commerce Committee is well aware of legislation which has been pending for some time to deregulate the wellhead natural gas prices which are established by the FPC.

The American Gas Association, an industry trade group, has advertised heavily in favor of deregulating so that gas prices will be able to rise.

Exhibit 76, entitled, "The Energy Shortage: What It Means To You," states that, "The Federal Government and its regulatory agencies," must act, "to set prices at a more realistic level so there will be sufficient incentive for producers to risk money in the search for new supplies of gas."

Surprisingly, however, to ourselves and I am sure to Senator Stevenson, who has introduced legislation in this area, the American Gas Association does not classify this ad as political. Thus the portion of dues and contributions to the AGA from member companies which is being used to finance this and similar ads is apparently being treated by each member, relying upon the AGA's evaluation, as a deductible business expense.

In contrast, Mobil Oil's ads calling for deregulation of natural gas prices, exhibits 35 and 36, were properly classified by Mobil as nondeductible.

Another area of advertising which is also extremely controversial involves the use of nuclear power.

The potential hazards and risks associated with the production of electrical energy from nuclear power sources has led to calls for a moratorium on the development of nuclear power plants.

Most recently, Senator Gravel addressed this issue, inserting into the Congressional Record a list of labor, environmental, farmer, and local governmental groups who have called for a moratorium. Senator Gravel stated:

> If the moratorium movement could match the millions of dollars which advocates of nuclear power spend on public education, there is no doubt in my mind that the American public would rapidly reject nuclear power. . . .
> Persuasion is not a problem for moratorium advocates. Their problem is unequal access to the public's mind. In one word, the problem is money.

On the other side, since at least early 1972, bills have been pending in Congress which call for a more accelerated rate of development and Atomic Energy Commission approval of nuclear powerplants. Not unexpectedly, a massive amount of advertising in support of rapid development of nuclear power has been disseminated by utility and oil companies.

Yet, with the exception of Mobil Oil, which recognizes the costs of such advertising to be nondeductible, all other companies responding to Senator Hart's letter classify nuclear power ads as nonpolitical and properly deductible.

Perhaps the greatest offender in this category is the electric companies advertising program, which I will refer to as ECAP, ECAP's ad is present on the display board. In 1973, over 70 investor-owned light and power companies participated in the ECAP program which brought us such ads as exhibit 53 entitled, "Why shouldn't I be concerned about nuclear powerplants?" The ad strongly argues that nuclear powerplants are safe to operate, and that disposal of nuclear wastes is stringently regulated. The ad ends by stating:

> **We need your understanding of this fact. And we ask for your cooperation in helping to see that nuclear power plants are developed and built as promptly as possible wherever they are needed.**

Another favorite ad run a couple years ago by ECAP is exhibit 55 entitled, " 'Mom's Apple Pie Is Radioactive; So Is Mom.' That doesn't make her a dangerous woman. Radiation is just naturally everywhere, in the Earth, in your homes, in your food, in your mom." It shows a picture of mom holding an apple pie which she appears ready to serve to us.

This is the type of nuclear power campaign to which the public is being exposed.

Among the contributors to the ECAP program are the members of the Southern Co. System. Yet reference to the FPC accounting forms filed by some of the System's members—Alabama Power Co., Georgia Power Co., Gulf Power Co., and Mississippi Power Co.—shows that none of these companies listed any political advertising costs.

We are left with the conclusion that ratepayers are supporting this nuclear power campaign through increased rates. Moreover, Georgia Power Co.'s response to Senator Hart's letter indicates that the company did no advertising in 1973 which it considers nondeductible; hence, Georgia Power's view also reflects a clear violation of our tax laws.

Oil companies have also taken up the fight for nuclear power. For example, Exxon states in exhibit 7,

> We'd like you to know—Today nuclear power supplies five percent of America's electricity. Tomorrow, it could supply over 50 percent. We need to reach this goal as soon as possible.

Exxon argues that "environmental objections, labor shortages, technical problems," et cetera, have delayed the construction of new nuclear powerplants, and that nuclear power is needed quickly to help make America self-sufficient.

Yet Exxon claims in its response to Senator Hart's inquiry that it does no political advertising and can legitimately deduct this ad as a business expense.

The next area involved utility rate increases. In a 1973 landmark decision, the Federal Communications Commission said what consumers and environmentalists had long been contending: that utility ads which argue for rate increases present only one side of a controversial issue of public importance. In that case, two Georgia television stations were ordered to present antirate increase views.

One of the ads which gave rise to that controversy is exhibit 69 entitled, "This Is A New Day For Joe," and sponsored by Georgia Power Co. The ad argues for rates increases. Yet on Georgia Power's 1973 FPC accounting form, neither this ad nor any other of the many, many on the rate increase controversy in Georgia are listed as nonoperating political advertising expenses under subaccount 426.4.

Georgia Power's treatment of the ad must be compared with the similar ad, exhibit 71, by Florida Power and Light Co.—that company told Senator Hart that it considered its rate increase ads to be a nonoperating expense, and nondeductible under the tax laws.

Georgia Power is not alone, of course. Our favorite friend, the Electric Companies Advertising Program (ECAP) is sponsoring a nationwide campaign attempting to explain the "combination of circumstances [which] inevitably means increases in electric rates."

Exhibit 51 is entitled, "Ann's job wouldn't exist without electricity; would yours?" It tells consumers that increased plant expansions require increased rates and that, "We ask your understanding of this inescapable fact." Yet, again, none of the members of the Southern System list this ad as a political expense on their FPC accounting forms, though all are members of ECAP.

The correct tax treatment of rate increase ads is more difficult to predict here. In many cases a rate increase controversy often involves a request to the State legislature for loans or grants; that is, Con-

solidated Edison has recently appealed to the New York State Legislature for aid. But if the rate increase controversy seems far removed from a legislative forum and is confined to State utility commissions or courts, a strict reading of the current IRS regulations might seem to permit deductibility.

The last subject matter of the ads which I will discuss involves comprehensive schemes for solving the energy crisis.

Many companies do not focus on any one solution to the energy crisis, but instead offer comprehensive plans which combine most of the aforementioned controversial suggestions plus a few others of similar nature. In such cases, the ads relate to numerous legislative bills on wideranging energy and environmental matters.

Some of these ads are listed on the display chart.

For example, in 1972, the American Electric Power System placed an ad, exhibit 73, entitled, "Mr. President, We Agree With Your Message On The Energy Crisis." The ad calls on the President and the Congress to modify powerplant sulfur dioxide emission standards under the Clean Air Act and permit for strip mining for coal on Federal lands in the Far West.

The ad also endorsed the President's "directive banning the conversion of powerplants from coal to oil" and his "efforts to speed up nuclear powerplant construction and licensing."

It is hard to accept, therefore, that with legislation pending in Congress on all of these areas, American Electric Power classifies this ad as nonpolitical and claims it to be a legitimate business expense.

Gulf, Exxon, Continental Oil, and General Motors have run similar ads which they classify as nonpolitical. Exhibit 14 from Gulf, entitled, "We can't talk our way out of the energy crisis," gives Gulf's proposed solutions to the energy crisis: offshore oil drilling, construction of the Alaska pipeline, deepwater ports for supertankers, increased nuclear energy, and commercial development of Federal energy reserves.

In exhibit 6, Exxon asks, "Why energy is short in the United States" and blames the crisis on a failure to use coal because of tough Clean Air Act standards, delayed construction of nuclear power plants, and delayed offshore oil drilling in the Santa Barbara Channel and elsewhere. The ad concludes, "We need to get on with the job of developing all of the country's energy sources—coal, nuclear power, oil and gas. We've run out of time for debate and delay. Don't you agree?"

In exhibit 5, Continental Oil states that, "America faces serious energy shortages this winter * * *" It calls for "an all-out effort to expand domestic energy resources," including increased strip-mining of coal, relaxed mine safety laws—one wonders how much more relaxed they can be—a reexamination of environmental standards, a temporary freeze on Clean Air Act standards, and mandatory gas and fuel rationing. CONOCO concludes that "it is up to industry to work hand-in-hand with the Government" on these matters. I am sure that is occurring.

In exhibit 93, General Motors advocates—

> As a general national policy: (1) de-regulation of the wellhead price of new natural gas; (2) an immediate increase in imports of crude oil and refined products; (3) construction of pipelines, supertankers, deepwater ports and off-

shore terminals; (4) greater domestic exploration and the prudent drilling for oil and gas offshore and beneath public lands; and (5) rapid development and licensing of nuclear power plants.

None of these ads, none of them, and many, many others like them, were classified as political and nondeductible by the companies responding to Senator Hart's letter, with one exception: Mobil Oil Co.

For example, exhibit 29, entitled, "Is Anybody Listening?"—we have a huge exhibit on the chart here which I think most people have seen in the newspapers—advocates many of the aforementioned solutions to the energy crisis.

This ad was categorized by Mobil as political. Yet even Mobil's approach has some defects—exhibit 27, entitled "The Lady Was Listening," is intended to rebut many of the arguments raised by a woman who wrote Mobil in response to the solutions suggested by Mobil in exhibit 29, "Is Anybody Listening." Yet Mobil did not classify "The Lady Was Listening" as political.

At this point perhaps we might wonder if we have any laws regulating the tax treatment and FPC accounting treatment of political advertising. Fairness dictates, of course, that this subcommittee permit the energy-related companies discussed today to respond and justify their apparently incorrect view of the law.

We are not talking about pennies in these cases—millions of dollars in taxable income and nonoperating expenses of utilities are at stake.

This subcommittee must also ask the Internal Revenue Service and the FPC why violations of Federal laws and regulations are apparently going unnoticed or unchallenged.

More importantly, however, we are left with the sorry conclusion that just as the oil companies tried to buy candidates with illegal political contributions, the energy industry is trying to buy the minds of the American people by dominating the marketplace of ideas with political ads apparently financed by illegal tax and FPC accounting schemes.

What policies underlie the tax and FPC treatment of political advertising? What justifies the current laws, even though they don't seem to be enforced?

In its 1962 *Cammarano* decision, the Supreme Court rejected arguments that prohibiting tax deductions for business-related political ads constituted a violation of the first amendment.

A similar conclusion has been reached in regard to FPC treatment of political ads. Thus, leaving the constitutional issue aside, I would like to address one of the main policy arguments against granting tax deductions for political ads: the inherent inequality of access to the minds of the public between business and nonbusiness interests.

In its brief in *Cammarano*, the United States argued that there has been "a continued congressional concern with the use of large sums of money to finance 'the engineering of consent—' to 'make' public opinions on matters of legislation—particularly where large economic interests are all on one side of the controversy."

I don't think anyone would doubt here that that's the situation with the energy crisis.

Moreover, no one could doubt that consumer, environmental, civil rights or similar groups—in contrast to the business community in general—simply do not have the financial resources to conduct massive

national grassroots advertising campaigns on dozens and dozens of important legislative matters.

Although this inequality exists as well in terms of direct lobbying in the halls of Congress, at least there it is more easily safeguarded against through registration and reporting of lobbyists and their activities, a legislative audience which is likely to be more aware than the general public of the facts surrounding controversial issues, and the normal ability of all sides of an issue to present testimony to congressional committees.

This latter safeguard, I might add, is greatly diminished by the prohibition on appearances—such as my appearance today—by charitable organizations unless invitations are extended.

Section 1962(b) of the Internal Revenue Code and regulations thereunder which prohibit deductions for grassroots lobbying reflect a realistic view "that in the twentieth century legislative results can be seriously distorted by influences operating far from legislative halls."

The effect of massive propaganda campaigns shouldn't be doubted. I was informed by a staff member of Senator Harrison Williams' office that the Senator had received about 12,000 coupons from the bottom of an ad appearing in New York and New Jersey newspapers which called for amendment of the Clean Air Act in regard to auto emissions. So obviously, these ads are at least causing the Postal Service some additional problems and probably are having some influence on congressional decisions.

The desire to alleviate this inequality and its often decisive effect on the legislative process supports the current constitutional tax treatment of political ads sponsored by business interests who engage in debate with nonbusiness interests.

As Justice Douglas, a champion of the first amendment as we all know, said in a recent Supreme Court decision, "A State (or Federal) tax law is not arbitrary although it discriminates in favor of a certain class * * * if the discrimination is founded upon a reasonable distinction, or difference in State (or Federal) policy, not in conflict with the Federal Constitution.

Justice Douglas, by the way, concurred in the *Cammarano* decision that prohibitions on tax deduction for political advertising did not violate the first amendment.

Other Federal laws recognize the inequality between business or other large financial interests, on one hand, and individuals, nonprofit groups, or other less wealthy interests on the other hand. In some instances, these laws attempt to remedy the inequality by an absolute prohibition on an activity, rather than the more moderate approach under the tax laws whereby the activity is merely made more expensive. For example, Federal law prohibits corporations and labor unions from making certain political contributions to candidates in many Federal election campaigns. Mr. Justice Powell from the Supreme Court, whom one would not identify as being necessarily in favor of environmentalists or consumers on one hand, nor in favor of business groups on the other hand, has reflected on a predecessor to this campaign law, and noted that "public and legislative interest has focused on limiting—rather than enlarging—the influence upon the elective process of concentrations of wealth and power." Congress has

also recently been considering legislation to prohibit contributions of more than a definite sum of money to candidates for office in order to equalize participation in the political process. The Federal Communications Commission requires broadcasters to provide free airtime to non-wealthy persons to counterbalance one-sided programming or advertising on controversial issues of public importance. This is popularly termed the "Fairness Doctrine." It seems eminently reasonable that these same concerns should be reflected in regard to the ability of powerful financial interests to affect the legislative machinery through intensive propaganda campaigns.

While the same policy also supports the FPC's accounting treatment of political advertising—that is, that the ability of wealthy, well-organized utilities to sway public opinion on controversial matters should be held in check—other important policies are also at stake in dealing with utility advertising. As the FPC recognized in *In re Alabama Power Company*, political expenses have a doubtful relationship to the actual rendering of utility service. Moreover, it would be improper to classify political ad expenses in operating accounts because in the words of the FPC:

> It might seem to imply that such expenditures must in due course and without further question be paid by the ratepayer. Such an implication would be unwarranted and possibly unfair, in view of the fact that on politically controversial matters, the pinions of management and the ratepayer may differ decidedly.

The unfairness would seem to be generated by the fact that consumers have no choice in regard to utility service—the States and the Federal Government have sanctioned monopolies to provide necessary services. While we can even question whether such monopolies should do any political advertising at all, at a minimum it seems unjust and discriminatory for these monopolies to use consumers' money guaranteed to flow to utilities by set rates of return, in order to propagandize those same consumers. I think the following is a beautiful example of what we are talking about, Senator. The ultimate absurdity is illustrated when we consider that some companies, like Georgia Power, permit the costs associated with utility ads which attempt to persuade ratepayers that a rate increase is needed to be passed along to ratepayers in the form of increased rates. In other words, we are paying to have ourselves told that our rates ought to go up to finance in part the ads for which we are paying. Constitutional, as well as statutory questions, are raised by this abuse.

Next, I would like to discuss administrative procedures which would help achieve enforcement of the current tax laws and FPC accounting rules.

In light of the importance of enforcing current regulations on political advertising, and the poor job of enforcement apparently being done now, we must consider what better enforcement mechanisms might exist. Several possibilities merit serious consideration by the agencies concerned and by this subcommittee.

First, labeling of advertisements and their submission to the IRS and FPC:

Monitoring the thousands of advertisements sponsored each year by major industries is an enormous task. Even assuming that every ad could be gathered from various sources, there is presently no way to know of the tax or FPC accounting treatment of each ad without an

audit. The undesirability of spending already limited agency resources on such audits is a serious deterrent to enforcement of the law.

These problems could be solved, however, by requiring advertisers to label each ad, at its bottom, for example, as "IRS/deductible" or "FPC/#930" to indicate that the ad is considered to be nonpolitical. Labeling requirements are not new, as evidenced by FTC and congressional treatment of cigarette advertising. Moreover, with their tax returns and FPC accounting forms, each advertiser should be required to submit a compendium of all advertising sponsored by it during the year in question, including a list of all costs associated with the production and dissemination of each ad. A second suggestion involves more specific guidelines to determine whether ads are political. In contrast to rather detailed guidelines and examples of hypothetical cases under other legislation, for example, involving the treatment of estate taxes, the IRS and FPC have done little to delineate the type of advertising campaigns which might be considered political. For purposes of the tax laws, the following factors, some suggested by Professors Weaver and Cooper, might give some guidance:

1. Whether there is a reference, explicit or by implication, to some proposal currently pending before a legislative body.
2. Whether the subject matter is fairly discussed with a presentation of pros and cons on disputable matters.
3. Whether the particular action or activity which the advertisement encourages is one which involves a conflict of business and nonbusiness interests on a question of public importance.
4. Whether the problem discussed is suitable for legislative attention, regardless of whether action or inaction ultimately results.
5. Whether the tone of the advertisement and the manner of presentation is polemical.
6. Whether readers or listeners are invited to express their views.
7. Whether the nature of the activity addressed in the ad is such that the disparate financial and organizational resources of business will normally give business excessive power.
8. Whether the advertiser is pursuing the matter discussed in the ad in other forums, such as legislatures, public meetings, opinion polling, courts, agencies, et cetera.
9. Whether a person of average experience and intelligence would interpret the advertisement as an effort to gain support for the advertiser's position on some issue appropriate for legislative attention.

Drawing upon these factors, no one of which should be controlling, and upon prior decisions, the agencies could offer their views on hypothetical cases.

The third suggestion involves modifying the provision allowing deductions for institutional advertising. Currently, IRS regulations provide that expenses incurred for institutional or good will advertising shall be generally deductible provided that such ads are related to patronage the taxpayer might reasonably expect in the future. Both corporate taxpayers and the IRS appear to be interpreting the "patronage" requirement very broadly. First, the regulations define institutional advertising to include presentation of general social and economic views. Secondly, corporate taxpayers appear to take the position that any ad mentioning the taxpayer's name also satisfies the patronage requirement. This interpretation also seems to have been

adopted by the IRS, which has not challenged the deductibility, it seems, of most of the "institutional" ads.

Professor Cooper recommends reducing the availability of the institutional advertising deduction. Specifically, he believes that in any case where the purported good will advertising presents social or economic views, or deals with a matter which might reasonably be expected to become the subject of legislation, it would probably be appropriate to presume that the ad is generally nondeductible. The burden would then be on the taxpayer to demonstrate that the ad had no substantial purpose other than to promote the sale of the taxpayer's goods or services, or to achieve some other ordinary and necessary business goal that properly supports deductions. This regulation would have the effect of in Professor Cooper's words, "restraining propaganda masquerading as goodwill advertising," which seems to be the situation with which we are faced.

Another area would be better control over treatment of dues and contributions to trade associations or similar industry-oriented groups. IRS regulations do not allow a deduction for a pro rata portion of dues paid by a taxpayer to a trade association if a substantial part of the association's activities involves grassroots lobbying. The IRS at one time indicated that a 5-percent test would be used to determine what constitutes a "substantial amount" of impermissible activities. That is if the industry group was expending 5-percent of its money to do lobbying, deductions to that group on a pro rata basis by corporate members would not be deductible.

Professor Cooper points out that the 5-percent rule does not aid in determining whether the test is based on man-hours, dollars of expenditure or some other criterion. He recommends that the substantiality test be based on multiple factors including dollar amount, man-hours, and absolute amount of grassroots lobbying, and so forth.

Moreover, when oil companies contribute to the American Petroleum Institute, or utilities to the American Gas Association or the electric companies advertising program, the members seem to rely upon their trade associations to properly apportion contributions and dues among deductible and nondeductible categories. Thus, a comprehensive audit must include an audit of the trade group, as well as its individual members. The burden on the IRS of the FPC to conduct such investigations could be eliminated by requiring each trade association to label its ads, report all costs associated with each ad, and file a compendium of its ads with each agency, as the individual members would be required to do.

Next, and perhaps this goes without saying, there is simply no excuse for the FPC to have allowed utility companies to fail to properly itemize their political advertising expenditures in subaccount 426.4. One reason for this might be that the companies have been doing this for years. We have examined the FPC forms that show this. The companies probably see little reason to change. Strict penalties on violators would serve as a deterrent to the current sloppy, or perhaps intentionally misleading, approaches.

Lastly, and I think this is most important, we need a system whereby citizens could challenge treatment of political ads. The ultimate beneficiary of the tax and FPC advertising laws and regulations is the public; citizen input into decisions on important controversial issues

should not be diluted by industry propaganda campaigns financed through tax subsidies or utility rates. Hence, it is imperative that those whom the laws seek to protect should be able to enforce those laws.

Moreover, there is a practical reason for allowing formal citizen complaints: Citizen groups which take a position adverse to that taken by an advertiser are often in a better position than the IRS or the FPC to asses an ad on a legislative matter. Groups like environmentalists or consumers are well aware of pending legislative proposals and the full range of corporate activities which are intended to influence those proposals.

The Federal Power Act and FPC regulations recognize the validity of these views and permit citizen complaints which must be answered by utilities and for which there is appellate review of any adverse rulings. I want you to know, Senator, that we intend to take advantage of these provisions, based on the information we now have, in the very near future and will be acting in regard to the FPC.

In sharp contrast, however, the Internal Revenue Code and IRS regulations do not provide a similar procedure. The only formal means of complaining to the IRS about tax treatment of an advertisement is through the regulations providing for rewards for information relating to violations of tax laws. Under that law persons submitting information leading to the detection of violations are given rewards, which is not and should not be our main concern.

While we intend to send our evaluation to the IRS in accordance with this provision, the regulation is nevertheless inadequate. We will never be able to learn whether the IRS finally agrees with our evaluation, and more importantly, even if that information were available, there is no express provision for judicial review if the IRS decides to permit the costs associated with these ads to be deducted. Only if the IRS decides against deductibility, that is against the advertiser, is there appellate review and that is at the instance of the corporate advertiser.

The inadequacy of the present scheme for citizen participation is illustrated by a 1971 occurrence in which former U.S. Senator Fred Harris wrote to IRS Commissioner Walters urging denial of a corporate tax deduction for dues paid by corporations to "Citizens for a New Prosperity"—CNP—a group organized to promote the economic policies of the current administration. CNP's activities included running full-page ads espousing the success of present policies. The IRS Commissioner, Mr. Walters, replied to Senator Harris' letter stating that "a determination as to the deductibility of amounts contributed must be made on the basis of all the facts and circumstances in each case * * *" According to the Senator, the full response "amounted to a flat rejection of my suggestion." Similar treatment was accorded Mr. Richard Lahn, a member of the Sierra Club, who complained about the deductibility of a Washington Gas Light Co. ad. Mr. Lahn never learned of the eventual IRS treatment of that ad.

There would seem to be no reason why the IRS could not adopt an administrative scheme which would provide for more meaningful citizen enforcement of the congressional policy against deductions for political advertising. If the IRS claims that it does not possess the power to set up that scheme, this subcommittee might consider amendments to the Internal Revenue Code in that regard.

Last, since I have just dealt with the procedural changes, I would like to discuss what substantive administrative and statutory changes would more adequately remedy the problems associated with corporate political advertising. The current laws and regulations, even if fully enforced by the IRS and the FPC, do not adequately protect against possible abuses resulting from an inequality in access to the channels of communication. There are many important substantive changes which should be made in the present laws and rules to further safeguard against the effects of massive business propaganda campaigns and their subsidization by taxpayers and ratepayers. I will outline but a few of these changes now, and will submit to the subcommittee at a later date a more comprehensive memorandum which will also form the basis for action we plan to take before the IRS and the FPC in this regard.

First, the IRS should readopt its pre-1965 regulations prohibiting tax deductions for costs associated with the exploitation of propaganda.

As I have previously indicated, pre-1965 IRS regulations appear to have taken a broader view in favor of nondeductibility. Specifically, expenses associated with "the exploitation of propaganda" were not to be deductible. Thus, a utility which advertises in favor of increased rates or a corporation which advertises in favor of the virtues of private enterprise and a laissez-faire economic theory now could arguably deduct the costs of that campaign as a business expense. This would respresent a reversal of the IRS policy which was judicially approved in the *Southwestern Electric Power Co.* case.

In that case, the court ruled that although the advertising in question was not primarily aimed at promoting or defeating legislation, its general arguments in opposition to expanded governmental intrusion into a private utility system constituted "exploitation of propaganda" which was not a legitimate business expense. The 1962 amendment to the Internal Revenue Code did not authorize the IRS to retreat from its rules regarding "exploitation of propaganda," and the IRS must be asked if a retreat has, in fact, occurred; if so, it should justify the change or else reverse itself again.

At a minimum, however, the IRS rules should not permit deductions for ads which attempt to influence the public, or members of administration agencies, on agency matters. While the 1962 amendment passed by Congress was based, in part, on recognition of the then-existing policy that expenses for direct lobbying of agencies were tax-deductible, it left undisturbed IRS treatment of indirect lobbying of these agencies. We cannot doubt that independent agencies and those in the executive branch both exercise and broad legislative-type functions in many areas; even when they act quasi-judicially, their standard is the "public interest," a broad one. The insidious effects of corporate advertising campaigns may be even more pronounced, and less visible, when regulatory agencies are the target than when the target is a more visible decisionmaking body such as Congress.

If the IRS does not agree to amend its regulations to safeguard against these abuses, then Congress should modify section 162(e) of the Code to effectuate these changes.

Next, the FPC's accounting classifications for advertising should be conclusive for ratemaking purposes in Federal and State rate-

making proceedings. Under present FPC accounting rules, an advertising expense listed in a nonoperating account may still be passed along to ratepayers in Federal as well as State ratemaking proceedings. With the advent of national advertising campaigns in newspapers and magazines and on network television, the accounting and ratemaking problems associated with classifying advertising costs have become too difficult for 50 different State agencies to handle. One can only imagine the Idaho Public Utility Commission attempting to audit advertising costs incurred by Idaho Power Co. for ECAP ads which appeared in the New York Times or in Newsweek magazine.

At a minimum, under the present Federal Power Act, as presently constituted, the FPC's ratemaking jurisdiction over interstate transportation or wholesale sales of electricity provides a basis for exercising pendant jurisdiction over the advertising-related costs associated with intrastate consumer sales. If the FPC refuses to so act, Congress can require uniform ratemaking treatment of advertising expenses by States and the FPC according to FPC rules by amending section 205 of the act.

It is quite possible that the FPC already has express jurisdiction to set uniform ratemaking policies which would apply in State as well as Federal proceedings without the need to use the pendant jurisdiction theory. This would be based on a 1972 Supreme Court decision, *Florida Power & Light.* In any event the FPC has not chosen to decide whether it has that jurisdiction. Under uniform rules the FPC could prohibit the cost of all political ads from being passed along to ratepayers and consumers. Rates not reflecting this policy would be classified as unreasonable and discriminatory.

The last suggestion I have for substantive change would require the FPC to require any utility engaging in political advertising to make response time or space available to ratepayers with opposing views at the expense of the utility.

The ability of monopolistic utilities to effectively force ratepayers to subsidize propaganda campaigns with which they do not agree raises serious constitutional questions. As the Supreme Court said in the *Red Lion Broadcasting* case:

> It is the purpose of the first amendment to preserve an uninhibited marketplace of ideas in which truth will utimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself, or a private licensee.

In response to these concerns, the FCC and Congress have required broadcast licensees to provide free response time to opponents of one-sided programing or advertising. The FPC should similarly require all utilities subject to its jurisdiction to subsidize response time or space for ratepayers with views contrasting with those expressed in utility company newspaper, magazine, television or radio advertising, or in utility bill inserts. At a minimum, the fairness doctrine should be applied where the costs of such propaganda are borne by ratepayers as the result of State or Federal ratemaking proceedings. Yet, the fairness doctrine might even be applied where the costs of such advertising are borne totally by shareholders, since the utility would otherwise be neglecting its mandate to protect its ratepayers as well as its stockholders if put its prestige behind the advertising of policies which rewarded its private investors at ultimate public expense.

In conclusion, Senator, I would like to say that I think we have posed many questions which are only answered tentatively in this testimony, and there remain many other questions which I have not even addressed, such as the propriety of permitting tax deductions or FPC operating expense credit for advertising which promotes the use of energy when we are in the midst of an energy crisis.

Perhaps if we have learned anything from your inquiry and this subsequent analysis, it is that there appear to be serious shortcomings in the ability or the desire of two important Federal agencies—the IRS and the FPC—to enforce current laws and regulations regarding political advertising. The resultant effect seems to be continued advertising abuses by many giants of American industry who have already caused us to mortgage our bodies and homes for their gasoline and electricity, and yet who now want us to give them our minds as well.

To a large extent, the tools to prevent these abuses are already here; the members of this subcommitee, as well as all citizens, must ask why they are not being used by the agencies authorized to protect our rights. We, as taxpayers and utility rate payers, have an interest in insuring that millions of our dollars are not spent to subsidize one-sided political propaganda, and a greater interest in insuring that our democratic system does not consequently fall into the hands of those with concentrated power and wealth who profess to bring "power to the people."

I apologize for the length of the statement, Senator, and I thank you for permitting me to present it today.

Senator HART. Mr. Shulman, thank you very much for an analysis of the problem we are considering, an analysis which is, I think, extremely well researched. And comprehensive.

I will unnerve you and our next witness, who I understand is a tax lawyer, by saying that you are talking to a lawyer, who, when the first suggestion of a tax problem surfaced in his practice always ran around the corner to get his partner who was a tax man.

I early understood that I was never going to understand tax law. It would be an utter waste of time for me to try. That's 25 years ago. And I discovered in the passage of time my understanding of it has become even duller.

So while I say that your research is magnificant and you have made a significant contribution to my understanding of the problem, I still identify myself as somebody who, when it comes to tax law, never got bevond, well, 4 or 5 times tables, certainly not up to 9 or 10.

But the things you have discussed are certainly of enormous importance to us as a people as we seek to identify the correct actions to take, both to protect the environment and to avoid disabling ourselves economically by a shortage or wastage of energy.

And you correctly suggest, as I intended that we invite those whose advertising practices have been brought into question here to explain their view of it.

Following that, theoretically, I should have a better understanding, probably I will be more confused than ever in any event. Intelligent readers can then make that kind of judgment.

And I am not suggesting by indicating my desire that we suspend judgment until we have heard from the others any disrespect for your presentation. We welcome and appreciate it.

Before turning to the questions, let me try to clarify a little further for the record some of the responses that have come in to the letter that you have indicated I sent.

Several times you referred to the fact that a company, a given company or group of companies, did not characterize the ad in question as political or nondeductible. While those statements are true, I think it appropriate to add that in a number of situations, the company responding rejected the classifications in my letter.

So in a number of cases while it's true that the company didn't characterize the ad as nondeductible or political, neither did it classify the ad as deductible or political. I just wanted to characterize the ad in fashion—it simply went on to characterize the ad in a fashion.

Also, on a number of occasions, you mentioned that Mobil did not deduct expenses for ads which others characterized as nonpolitical, and again that is a correct, accurate statement. But I would like to have the record include the full text of Mobil's reply to my letter.

Specifically, I would like it to show the following paragraphs of that response. Let me read the several paragraphs which I think are of special significance:

> For your convenience, there is enclosed a complete set of 1973 newspaper and periodic public service advertisements divided into four groups, the first three of which we believe and are advised constitute institutional or goodwill advertising. Group IV contains advertising which we believe to be in the public interest, but which contain sufficient legislative potential to be regarded by ourselves and outside counsel as possibly falling in the non-deductible category, and are therefore treated as non-deductible for tax purposes.
>
> Group IV, the non-deductible category, covers a variety of subjects including a number of advertisements grouped under the general category of "the $66 billion mistake" relating in part to regulatory policies on antipollution control, and general information on the energy shortage.
>
> There are some 23 advertisements or brochures in this group. While none of these, in the opinion of counsel, is clearly non-deductible, no absolute assurance can be given by counsel that a deduction would be upheld and therefore, as noted above, this group of advertisements is treated by the Company as non-deductible.

The letter in full will be presented. I think it will be useful.

Now, I take it that you feel that a large number of the ads which you submit as exhibits are nondeductible. Can you indicate what percentage of the ads, in your judgment should be treated as nondeductible?

Mr. SHULMAN. Senator, your letter of inquiry included questions on the tax treatment of 99 ads. Many of those ads which you have submitted, before they were sent out as I understand it, were felt, I know by ourselves when we gave them to the staff, and I believe by your staff, to be properly deductible. Of the pile we originally dealt with (99 ads) we felt perhaps 15 or 20 of those might be deductible.

Some of these are conservation ads, or Middle South Utilities ads which talk about how the South is expanding economically. Let's say, working from a base of 80 remaining ads, in my opinion—based on this analysis, extensive study of the legislation pending in Congress, extensive research of prior IRS decisions and court decisions on the matter—we have come to the conclusion that over 90 percent of those remaining ads probably should be categorized as political and therefore nondeductible.

So we are talking about an awful lot of money.

Senator HART. I am told, and I have not had opportunity to read more than a very few of those ads, that only a few of them explicitly solicit the reader to write their Congressman to support or oppose specific legislation.

Rather, that the bulk of the ads do not mention the Congress or the fact that legislation is pending here on the subject that is discussed in the ad.

Now, someone who would characterize these ads as deductible, I suspect, will say that an explicit solicitation to the reader to write his Senator or Congressman about identified legislation is needed before the ad becomes nondeductible. What test do you apply, how would you answer that argument?

Mr. SHULMAN. As I suggested in my statement, Senator—and two well-known tax professors, Cooper and Weaker, incorporate some of these suggestions in law review articles they have written—one should not find any one factor to be controlling on the question of deductibility or nondeductibility.

So for example——

Senator HART. Yes, but if I understood your testimony don't they suggest that there should be a number of factors considered?

Mr. SHULMAN. Yes, sir.

Senator HART. Aren't they writing on the assumption that those multiple factors are not included and rather that only the solicitation to write your Congressman and the mention of S. 2927 are the only things considered?

Mr. SHULMAN. It is conceivable, although I can't think of an instance now where people would be asked to write their Representatives or Senators on matters not relating to legislation just to show them their views on, perhaps, supporting the President.

Just because an ad said, write your Senator or Representative and let him or her know how you feel, wouldn't make that ad necessarily relate to legislation. So that what I'm saying is that the tag at the bottom is really not controlling.

On the other hand, I think, I hope we would all agree that ads which fall within some of the other factors—for example, that clearly discuss controversial items even though there isn't a tag at the bottom, "write your Representative or Senator"—those ads should be considered clearly to be nondeductible.

Now, some of the ads which we have submitted are in fact of that sort. The Phillips ad, in particular, is of that sort, but more important, Senator, I think that that limited view of the IRS regulations and the Internal Revenue Code just isn't the law today.

In a 1970 decision, the sixth circuit, in talking about advertising by Consumers Power Co., a Michigan utility, indicated that the current IRS regulations which talk about, "In connection with any attempt to influence——"

Senator HART. Are you reading from——

Mr. SHULMAN. I'm reading from my statement.

This is what the Congress passed in 1962, when it said that the new law in 1962 should not be construed as allowing deductions for any amount paid, quote, "in connection with any attempt to influence

the general public or segments thereof with respect to legislative matters, elections or referendum."

Well, in C(4) now, the definition of—of influencing the general public on legislative matters—is included at the top of page 11. And the definition is that "promotion or defeat of legislation includes, includes but shall not be limited to expenditures for the purpose of attempting to influence members of a legislative body directly or indirectly, by urging or encouraging the public to contact such members."

Mr. KUNSTADT. I might point out in the language that section little "i" is the source of the test, the urging of contact of the Senators. Since that is only given as an example, it's an improper interpretation of the regulations to say that that is a necessary test, and unless you meet that test, the ad is nondeductible.

Senator HART. Does that *Consumer Power Sixth Circuit* case say that the——

Mr. SHULMAN. Well, we have——

Senator HART. That it is not inclusive?

Mr. SHULMAN. We have two cases, Senator.

In the sixth circuit, sir, a 1970 case, there were advertisements in which Consumers Power participated; the ads were sponsored, by ECAP, electric companies advertising program.

I will quote in part from the court opinion:

> An examination of the materials used show that the advertising campaign had a twofold purpose: Explaining how electricity can make for more comfortable living, and pointing out the bad features of publicly owned electric power companies as compared to privately owned companies.

The advertisements for which the district court disallowed deductions were the ones which in some way attacked public power. Many of the disallowed advertisements made a hard-sell attack on public power, calling it creeping socialism, while others simply suggested that private power companies can provide faster service because, unlike the publicly owned power companies, there was no waiting to have funds appropriated for the needed electrical facilities.

Many of the ads were directed toward the Tennessee Valley Authority. And several (this is important, several, but not all of them) admonished the public to let their Congressmen know how they felt about governmental ownership of electric power companies.

The court recognized that in some instances where no legislation was pending, an advertisement which simply conveyed a competitive message should not be considered to be nondeductible.

Nevertheless, in this case, even though there was no legislation pending, and even though not all of the ads told readers to contact their Congressmen, these ads were in fact ruled nondeductible.

A more appropriate case is a 1965 case in the Court of Claims, *Southwestern Electric Power Co.*, in which the ads, as I noted in my testimony, were intended to ward off further Federal Government intrusion into a private utility system; no legislation at all was involved. The ads talked about socialism and Government ownership.

The court says, referring back to the application of the *Cammarano* case, "legislation had already been passed in this case, so we cannot categorically say that the advertisements here were primarily aimed at promoting or defeating legislation. What then remains in the regulation which could deny deductibility? We think the important lan-

guage is this: The exploitation and propaganda including advertising other than trade advertising."

In those ads, there was nothing that asked members of the public to contact their legislators. Again, though that is under the old regulation, it stands for the principle that to be a nondeductible business expense there need not be necessarily a line on the bottom asking that representatives be contacted.

But, more importantly, as a practical matter, if we required that line to be present on all ads before the IRS would rule them to be nondeductible, we might not even need a tax law in that regard, because companies would use the full text of their ads to lobby to their heart's delight, trying to leave this obvious conclusion in the mind of any intelligent person: if things are the way they are stated to be in the ad, the reader should do what is learned in sixth grade, and write his Senator or Representative and tell him or her to do something about it.

Senator HART. I indicated that we ought to reserve judgment on the specific allegations, if that is a fair characterization, that you have made about some of these ads. There is one point, one statement in your testimony on which I don't have to be tentative or reserved at all. It is that, in your judgment, there is a legitimate function of Government to attempt to remedy the imbalance in the viewpoints that we in Congress do carry between the interests that can readily afford to buy an ad, and interests that somedays hasn't the money to buy the newspaper. And I think that it may not be sufficient merely to provide for tax disincentives for lobbying by organizations organized for profit.

We may have to look in the direction of more favorable tax treatment for the lobbying efforts of those not organized for profit. That's a real slow-ball question to throw to you. How do you react to it?

Mr. SHULMAN. I am in agreement, Senator, with your sugestion that charitable and educational organizations who possess vast amounts of expertise on matters pending in Congress should not have to be waiting in the wings somewhere for the golden opportunity that a staff member might find out about who they are and call them up and ask them to submit their comments to a congressional committee on pending legislation. It seems to me that, outside of providing an incentive to such nonprofit groups, it just doesn't make any sense to prohibit people who know an awful lot about matters that Congress is dealing with from being able to express their views.

Outside of that, I do agree that at least as regards direct lobbying, submission of statements to committees or members there of or testimony before committees, the restrictions on charitable organizations are unnecessary and unwise. And in fact, if Congress was concerned about a disequilibrium situation, inequal access, as you suggested, a good way to remedy that problem would be to open up the avenues to Capitol Hill for charitable organizations.

Senator HART. In your testimony you have this paragraph:

> In its brief in *Cammarano*, the United States argued that there has been "a continued Congressional concern with the use of large sums of money to finance the engineering consent to make public opinions on matters of legislation, particularly where large economic interests are all on one side of the controversy."

That is the end of the quote from the case. And you continue—

Moreover, no one could doubt that consumer, environment, civil rights or similar groups, in contrast to the business community, simply do not have the financial resources to conduct massive national and grassroots advertising campaigns on dozens of important legislative matters.

To which anybody around here would say, sure that's true. But you have omitted a group, very large in number, with respect to whom it is dramatically true, and that's the poor. There is the extreme. The elimination of poverty would do more to reduce almost all the problems that confront us in any other one single thing—race relations, health. And that's the one group who, by very definition, never will be able to run an ad to attract a nickel's worth of attention. So surely we should try to figure out a way to get some balance into that imbalance.

Mr. BICKWIT. In your own view, does the media bear any responsibility for the imbalance that exists, and if so, what would you suggest that they do about it?

Mr. SHULMAN. I think we have to distinguish between the electronic media radio and television and the print media. There are different Federal regulations which apply to electronic media, whereas there are virtually no regulations applicable to the print media. I suppose that to a large extent, I believe, the media generally is doing a fair job of reporting both sides of the energy crisis in its news, documentaries, interviews shows, etc. I think the large imbalance results from the infusion of these billions or millions of dollars of commercial advertising by oil and utility companies which are really a different sort of campaign, of information dissemination than the broadcaster-sponsored programs.

You have very, very dramatic ads which are intended to appeal to the emotions, rather than to any necessarily intellectual aspect of the individual. The press, and of course the broadcast media, shy away from presenting in their news similar emotional approaches to the presentation of counterindustry views. I suppose if an environmental group wanted to buy an ad opposed to nuclear power and put it on the television, if it could afford to do so, the station would run it. But the station is doing little to tone down the debate in some of the oil ads which we see on television. And I think it's the same for newspapers.

I suppose the stations could make free advertising time available. This is what we requested in our FCC letter. And out of 6,000 stations we have written to, I think we have gotten responses from about 600, many of whom have agreed to run consumer-oriented spots. But regrettably, two networks, NBC and CBS, I believe, did not find the spots which your fellow colleagues in Congress provided the networks to be appropriate for presenting consumer viewpoints on the energy crisis.

In the print media, as I say, there are no regulations or laws that really apply, although there have been some attempt by environmental groups, such as Environmental Action, to request counter ad space free of charge. A letter was sent from Environmental Action on March 4, to the ombudsman of the Washington Post, requesting that the Post give free space to an environmental group to present views opposed to some of the industry positions that we see on the "op. ed." page or similar places. As far as we know, as recently as last week, the Post hadn't replied affirmatively.

Mr. BICKWIT. I am sorry, I didn't hear that.

Mr. SHULMAN. The Post has not replied affirmatively to this request. We know that some publications such as Playboy, and I believe Time, do devote free advertising space to citizen groups, but they are on generally noncontroversial issues. It's generally not the energy crisis.

There is a vast array of things that could be done. I have just suggested a few that don't involve legislative remedies, but are really voluntary actions that might be taken.

Mr. BICKWIT. If on reflection, some that do involve legislative remedies occur to you, it would be appreciated if you could make those available for the record of this hearing so that the members of this committee could study it.

You have supported tax and FPC accounting disincentives with respect to grassroots lobbying. Presently there is in the Congress committee legislation which would apply the accounting disincentives at least to promotional advertising by utilities in this time of energy shortage. I gathered from a closing remark that you do in fact support that approach. Am I correct in that, and if so, could you elaborate?

Mr. SHULMAN. Yes, most definitely. I can't imagine, I don't see how anyone can imagine, the need for utilities to promote increased use, or any use of natural gas, electricity, or oil in a time when we are having problems keeping people warm in Michigan or Minnesota in the winter because there isn't enough oil to go around. So that an outright prohibition on promotional advertising might even be appropriate. Several State utility commissions have done this. At a minimum, it would seem to me the FPC ought to change the promotional advertising account from operating to nonoperating so that any promotional advertising which does occur would not be subsidized by ratepayers. This could be effectuated by legislation as well. If anyone thinks that utilities are not still promoting gas or electricity, well, one of the ads which the Senator sent out in his inquiry is by the Southern Co., exhibit 98. It's entitled "Misconception." I quote, "Misconception: it doesn't make sense for utilities to promote the use of electricity in the face of an energy crisis. Fact: energy must be available whenever and in whatever quantity needed. Customers require it." I won't read the whole ad, but essentially, what the ad says is that people really ought to use a lot of electricity this winter so that the use won't fluctuate, so that the company could make better use of its existing facilities. This ad was run last September.

Yet as recently as last week, in a far more subtle attempt, the Washington Gas Light Co., ran this ad in the Washington Post. You don't have a copy of it, so I will mark it exhibit 101, and give it to you. The ad is entitled, "Give Up Old Faithful, So You Can Give Up Oven Cleaning with a Modern Gas Range." The general text of the ad encourages people whose old ovens now need replacement to replace them with new gas-powered, self-cleaning ovens. While I don't profess to know very much about self-cleaning ovens, from what I understand, self-cleaning ovens, at least the electric type, require more electricity to do the cleaning in addition to the cooking. I assume it's the same thing with a gas self-cleaning oven. But more importantly, there is masqueraded in the ad a little paragraph at the bottom that says "Eligibility for gas service. In order not to jeoparidze the supply of gas for existing customers, no new applications for gas service are

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presently being accepted. However, if your home uses natural gas for any purpose, you are entitled to replace or add gas appliances."

Obviously, this is an attempt to sell more gas appliances and to increase consumption of gas in individual households which are already using gas for more limited purposes.

So promotional advertising is still going on. I don't know how this ad is classified. It probably is promotional and will be reported in FPC account 913 and will be a legitimate operating expense and probably passed along to rate payers. I don't think there is any rhyme or reason in that treatment.

Mr. BICKWIT. I gathered from the remark the chairman made that he interpreted your analysis of Cooper & Weaver to support the proposition that under present law, the tag, "Write your Congressman," is the only thing that is considered by the service and the courts in deciding whether an ad is deductible. I don't think that was the impression you meant to convey.

Mr. SHULMAN. No, sir, I think by my quoting from Consumer's Power and Southwestern Electric, I meant to indicate that the tag in many cases is, in fact, irrelevant. The absence of a tag is irrelevant.

Mr. BICKWIT. If I understood you correctly, you didn't mean to convey that Cooper & Weaver think that is the only thing that is considered at this point as a relevant matter in deciding a question of deductibility.

Mr. SHULMAN. That is true; they consider several factors.

Mr. BICKWIT. On the *Consumer Power* case, in that case, the court of appeals deferred to the judgment of the district court on a question of fact, did they not?

Mr. SHULMAN. Yes, that is correct.

Mr. BICKWIT. Do you happen to know what the charge to the jury was at the district court level? I would doubt it, in view of the fact that it doesn't appear in the reported case.

Mr. SHULMAN. Well, do you have the district court opinion, or the cite for the district court opinion? In case you don't, it's 299 Federal Supplement, page 1180. I believe this may not be a jury case. I believe it may have been tried before a judge. In that case, there would obviously be no charge to the jury.

Mr. BICKWIT. If it turns out that it was a jury case, it would be very useful for this record to know what the charge of the jury was. If that could be made available, we would appreciate it.

Mr. SHULMAN. OK. However, looking quickly at the district court case, it says the case has been presented to the court on a stipulation of facts, supplemental stipulation of facts, testimony adduced at trial, and exhibits submitted with the stipulations and those introduced at the trial. The court has also had the benefit of a series of briefs submitted by the parties seriatim. Plaintiff requests findings of fact by the court—that is, the judge. In addition to those contained in the stipulation, a copy of the stipulation of facts and supplemental stipulation of facts is appended to this opinion. I will check, but I don't believe that this was a jury case.

Mr. BICKWIT. Your point is, as I gathered from your remarks to the chairman, that if it was a jury case, the charge could not have been

that, unless you see a tag saying "write your Congressman," this ad is deductible. You can reason that from the holding of the case; is that correct?

Mr. SHULMAN. I think that goes without saying. As I said, just from commonsense. Otherwise, every company that wanted to run a political ad would just omit the words, "write your Congressman." They might put in something, "what do you think?" They might say, "that's bad." There would be so many ways to circumvent the law that there wouldn't be any law to enforce.

Mr. BICKWIT. And if it were a case decided by the judge, or a fact-finding of the judge, then his charge to himself could not have been the charge that I just gave you?

Mr. SHULMAN. I think that's correct.

Mr. BICKWIT. I would like to thank the witness. Thank you, Mr. Chairman.

Mr. SHULMAN. Thank you.

Senator HART. There was one suggestion you had that I wanted to make a comment on. The Power Commission and IRS would have an overwhelming problem in auditing or reviewing the massive amounts of advertising, as you imply. But to permit them a better shot at insuring compliance with whatever the law is, why not require the ads to be labeled and identified, like, "not printed at public expense" on our mailing, which I am not sure is always literally true, either, but anyway, some slug line that would alert the reader as well as the Bureau or the Power Commission as to the deductibility of the ad. Then the companies would be required to include a compendium with their tax return or Power Commission filing of the ads. Also, it seems desirable to encourage IRS to set up a number of hypotheticals to make it a more predictable business for the tax counsel.

I see the desirability of it, but the usual uneasiness exists in promoting the proposition that you should be allowed to go into IRS and argue over the taxpayer's return. This is a very difficult thing to resolve. There is a lot of complication.

If life is ideal you could separate the specifics on the appropriate occasions and insure against abuse and go ahead. But I don't know whether we can. But the suggestion certainly should be considered. Thank you.

Mr. SHULMAN. Senator, just one brief comment in that regard. The FPC already permits the rate pairs to come in and challenge treatment of advertising engaged in by utilities. And there hasn't been a great rush to the FPC door to police these things. Therefore, if that were permitted in regard to tax treatment of ads, and perhaps the incentive for reward removed so that the only basis for the challenge would be a belief that the ad was improprely trying to influence the legislative process, I really can't imagine waiting lines at the district court trying to challenge the services, tax treatment of these things. Thank you very much.

Senator HART. Thank you for your interesting and thoughtfully prepared testimony.

Mr. SHULMAN. Thank you.

EXHIBIT C

CHARTS OF CORPORATE RESPONSES

MAJOR OIL COMPANY ADVERTISING, 1973 (AS CHARACTERIZED BY COMPANIES RESPONDING TO SENATOR HART'S INQUIRY)

Company name	Total expenditure	Deductible advertising expenditures: Product/service	Goodwill/institutional	Miscellaneous	Non-deductible
Atlantic Richfield	$9,739,357	$3,386,142	$6,353,215		
Exxon	25,064,936	[1] 12,532,936	[1] 12,532,000		
Gulf (estimates)	(15,000,000)	(7,500,000)	(7,500,000)		
Mobil	16,158,000	9,047,000	6,282,000		$829,000
Phillips	[2] 8,864,474	4,855,469	3,999,005		
Shell	22,389,000	11,349,000	3,962,000	[3] $7,078,000	
Texaco	27,131,000	9,582,000	17,549,000		
Industry trade association: API	1,610,000		1,610,000		

[1] Approximately.
[2] Phillips' aggregate expenditure was listed by that company as being $10,000 higher than the sum of its individual parts.
[3] Production costs.

UTILITIES ADVERTISING, 1973 (AS CHARACTERIZED BY COMPANIES RESPONDING TO SENATOR HART'S INQUIRY)

Company name	Total advertising expenditure	Deductible: Product/service	Goodwill/institutional	Miscellaneous	Non-deductible
American Electric Power Co	$1,411,689	$235,000	$983,000	$194,000	
Brooklyn Union Gas Co	81,400		81,400		
Columbia Gas of New York	31,308	11,940	19,058	310	
Commonwealth Edison	2,639,783	275,373	2,364,410		
Con Ed	1,195,000	1,195,000			
Forida Plower & Light	869,946		869,946		(1)
Georgia Power Co	1,410,069	352,802	814,512	242,755	
Long Island Lighting Co	774,000	380,000	394,000		
Middile So. Utilities, Inc	453,715	453,715			
National Rural Electric Coop. Association	229,670		229,670		
New York State Electric & Gas Co	546,674	77,914	240,751	228,009	
Rochester Gas & Electric	401,480	27,000	374,000		
Southern Co	591,399		591,399		
Vepco	563,402	164,366	399,036		
Industry Trade Association: American Gas Association	6,374,000	2,834,000	3,540,000		

MISCELLANEOIS INDUSTRY ADVERTISING, 1973 (AS CHARACTERIZED BY COMPANIES RESPONDING TO SENATOR HART'S INQUIRY)

Company name	Total advertising expenditure	Deductible: Product/service	Goodwill/institutional	Miscellaneous	Non-deductible
Allegheny Airlines	$4,253,284	$4,092,284	$161,000		
Beech Aircraft	1,785,795	1,785,795	[2] 60,000		
Bethleham Steel	[3]	[4]	[5]		
General Atomic	230,000	230,066			
General Motors	243,000,000	[6] 238,140,000	[6] 4,860,000		
General Electric	[3]				
United Airlines	28,070,000	28,070,000			

[1] FPL did not deduct the "ad" sent, they considered it a below-the-line deduction.
[2] Included in fiscal year 1974 accounting.
[3] Not provided.
[4] Two-thirds of advertising expenditures.
[5] One-third of advertising expenditures.
[6] Estimate.

* * *

Senator HART. The committee welcomes our next witness, Mr. Lester Fant, a partner in Cohen & Uretz, a tax law firm, and tax specialist.

Mr. Fant, if you were here earlier, I have already identified myself as an illiterate when it comes to the Internal Revenue Code. If I don't respond very promptly to your testimony, it will simply be that I never tried to fight the battle of understanding.

STATEMENT OF LESTER G. FANT III, ATTORNEY, COHEN & URETZ, WASHINGTON, D.C.

Mr. FANT. Mr. Chairman, I think that is a very modest disclaimer for you to make, and I am certain matters we are dealing with are completely within your comprehension, so I have no reservations caused by your disclaimer.

Senator HART. All right, try me.

Mr. FANT. Mr. Chairman, since you have already identified me, I will not further identify myself for the record.

I was asked by the subcommittee to make a study of section 162(e) of the Internal Revenue Code and the Treasury regulations issued thereunder, and to arrive at a judgment as to the application of these provisions to certain advertisements which have been introduced into the record as exhibits 1 through 99.

I am grateful to the subcommittee for this opportunity to express my views. I believe that this matter has implications far beyond the tax provision which I will discuss and the dollars involved, even though the dollars involved could be quite substantial. I believe the subject of these hearings has a direct bearing on the health of our domestic society.

There was a time when influence of each man's voice on affairs of state was determined by the rightness of what he said, and the persuasiveness with which he spoke. It was against this background that the

[1] Were not reproducible and are in the committee files.

first amendment to the Constitution of the United States was adopted, guaranteeing each man the freedom to express his views on political, social, and religious questions.

In this age of modern communications, however, a man's influence upon affairs of state is determined not only by the rightness of what he says, and the persuasiveness with which he says it, but also by the amount of money which he is able and willing to spend in order to advance his views.

The preparation and publication of advertisements, and other uses of communications media, are extremely expensive. And yet, a skillful media campaign is one of the most effective means of influencing the affairs of state. The well-financed supporter of a particular idea can make a more effective presentation, and can reach a greater audience, than an individual of average means who might oppose that idea.

Many subjects of governmental concern have a direct and tangible financial impact on business, whereas their impact on the lives of private citizens is diffuse and intangible. For example, the recreational and esthetic value of an unpolluted stream provides enjoyment to a private citizen, but gives him with no funds with which to finance a campaign to keep the stream clear.

The businessman, who can reduce his costs by dumping untreated wastes into the stream, can use a part of his cost savings to engineer governmental approval of the dumping.

Even governmental decisions which directly affect the finances of private citizens do not generate effective opposition to business publicity and advertising campaigns. For example, a change in the regulation of basic commodities, or the price support levels for agricultural products, might cost 20 million Americans an additional $10 per year, which is less than 3 cents per person per day.

The same decision, however, generates an additional $200 million for the producers and suppliers involved. Business might reasonably allocate 10 percent of this amount to a program of public relations and direct lobbying with which to secure the desired decision.

If all business expenditures in such a campaign were deductible for Federal income tax purposes, business would have, in the foregoing example, $40 million to use to influence the American people and the Federal Government. Of this $40 million, $20 million, or 10 percent of the expected return from the decision in question, would come from the treasury of business, and $20 million would come from the Federal Treasury through a reduction in the taxes which business would otherwise pay. With such funds available, business can virtually overwhelm the will of the American people on any particular question.

Notwithstanding the imbalance of power between business interests and private citizens, a substantive law prohibiting business from expressing its views on governmental questions would seem foreign to a society dedicated to free speech.

I am not prepared to suggest a resolution to the tension between the sound public policy favors equalizing the influence of private citizens and businesses on affairs of government, and the constitutional prohibition against limitations on free speech.

I do, however, suggest that this is a problem which affects the health of our democratic institutions, and that it is a problem which merits further consideration.

Short of a direct prohibition on expenditures by businesses for advertising, there are measures which can reduce the imbalance of power I have described. In the example I gave, business spent $40 million on advertising campaigns, of which $20 million came from treasury of business, and $20 million came from the Federal Treasury as a result of tax deductions to business resulting from claimning a $40 million deduction for the amount expended.

Historically, in fact, the expenditures outlined above have been nondeductible for Federal income tax purposes, and consequently, none of the expenditures should come from the Federal Treasury.

In the hypothetical discussed above, this means that if business is only willing to spend $20 million out of pocket, then it could only conduct a campaign which cost $20 million.

Under section 162(e) of the Internal Revenue Code, expenditures for grassroots lobbying are nondeductible.

I would like first to put section 162(e) into the general context of the tax system, and to briefly review its history.

Under the Internal Revenue Code, Federal income tax is computed by first determining the amount of all income from whatever source derived, received by a taxpaying entity, such as an individual or a corporation. From this gross income, deductions specifically enumerated by Congress are allowed for the purpose of arriving at taxable income. The tax rate is then applied aganist taxable income, and the amount of tax produced is paid.

It has often been stated by the courts that deductions are a matter of "legislative grace," and that taxpayers have no inherent claim to deduct from their gross income any amount not specifically allowed by Congress.

Many of the deductions allowed under the Internal Revenue Code are permitted for the purpose of computing an amount roughly equivalent to a taxpayer's net income, or net profit. Additional deductions, such as charitable deduction, the rapid amortization of pollution control facilities, and medical deductions, are permitted by the Internal Revenue Code as an expression of a wide variety of public policies.

Section 162 of the code permits, generally, a deduction from income for all the ordinary and necessary expenses paid or incurred during the taxable year on carrying on any trade or business.

The general purpose of this section is to permit taxpayers to deduct all amounts, whatever they might be, which are spent in earning income, so that the tax will only be applied to the taxpayer's net income.

Some expenditures which are made in earning income, however, are specifically made nondeductible under section 162 of the Code. In these instances a taxpayer's taxable income might exceed its net income, or net profit from business.

One example of an expenditure which is paid in connection with a taxpayer's business, but which is nondeductible for income tax purposes is an expenditure for what is generally referred to as grassroots lobbying. Section 162(e), which disallows deductions for grassroots lobbying is not in the Internal Revenue Code for the purpose of determining the taxpayer's net income. Instead, the purpose of section 162(e) is to reduce the disparity between the ability of businesses and private citizens to engage in grassroots lobbying.

Before analyzing section 162(e) in detail, however, I would like to point out the requirements that must be met before section 162(e) becomes even relevant.

In the first place, an advertisement, to be deductible at all under section 162, must be ordinary and necessary business expense.

An example of an advertisement which is not an expense would be an advertisement which is part of a capital expenditure.

For example, if a business published an advertisement urging that a county board of supervisors grant a necessary permit for the construction of a business facility, the cost of that ad might be considered a part of the cost of the facility when it was constructed.

Under these circumstances, the business would not be entitled to a current deduction for the expenditure, but would be required to capitalize the cost of the ad, along with the other costs of the facility and write them off over the useful life of the facility.

The courts have held that the terms "ordinary" and "necessary" require that an expenditure be "appropriate and helpful." An example of an advertisement which would not be appropriate and helpful would be one which did not bear the business name, or which promoted solely the personal interest of the shareholder of the corporation, or any taxpayer other than the taxpayer claiming a deduction for the cost of the ad.

Treasury regulations hold that, in general, goodwill and institutional advertising, even though it does not directly promote the sales of a business product, is to be considered an ordinary and necessary business expense. Treasury regulations section 1.162–20(a)(2) provides that institutional or goodwill advertising which keeps the taxpayers' name before the public is generally deductible as an ordinary and necessary business expense, provided the expenditures are related to patronage the taxpayer might reasonably expect in the future.

An example given in the regulations of goodwill advertising as advertising which keeps the taxpayer's name before the public in connection with encouraging contributions to the Red Cross, or the purchase of U.S. savings bonds.

In addition, the regulations specifically permit deductions for expenditures for advertising which presents views on economic, financial, social, or other questions of general nature, provided such advertising does not involve the type of "grassroots" lobbying which is prohibited under section 162(e).

The regulations relating to goodwill and institutional advertising had their genesis in wartime, when many corporations sold all their products directly to the Government for the military effort, but sought to publish institutional or goodwill advertising in order to keep their corporate name before the public.

It is easy to conceive of expenses for grassroots lobbying that satisfy the foregoing tests were it not for the specific prohibition in section 162(e). An advertisement designed to influence private citizens and, indirectly, legislators, to take some action which which would increase a business profit, could easily be said to be an ordinary and necessary business expense for that business. Such expenditures would not be allowable as deductions, however, if they satisfied the tests for application of section 162(e) which prohibits deductions for "grassroots" lobbying.

Before leaving the sections of the regulations related to institutional advertising, I would like to point out that the general language that permits deductions for the cost of presenting views on economic, financial, or social questions does not override the prohibition against deductions for grassroots lobbying. It cannot be argued that the costs of advertisements in a lobbying campaign are deductible as goodwill advertising the advertisement also fall within the definition of grassroots lobbying.

The regulations make clear that the denial of deductions for grassroots lobbying supersedes the allowance of deductions for institutional and goodwill advertising.

I would like also to comment briefly upon the history of section 162(e). Regulations issued by the Commissioner of Internal Revenue in 1918, without specific statutory authority, denied deductions for expenditures for "lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda * * *" The Supreme Court, in *Textile Mill Securities Corp.* v. *Commissioner*, which was decided in 1941, held that such regulations, as applied to direct lobbying efforts, were valid interpretations of the statutory requirements that a business expense be "ordinary and necessary" in order to be deductible.

In *Cammarano* v. *U.S.*, which was decided in 1959, the Supreme Court again considered the validity of the regulations which denied deductions for grassroots lobbying. In the *Cammarano* case, the court considered the lobbying efforts of a wholesale beer distributor designed to block enactment of an initiative which would give the State a monopoly on wholesale beer distribution and therefore terminate the taxpayer's business activity.

This was a very clear case in which, from a strictly financial point of view, the expenditures would qualify as ordinary and necessary, because, if the initiative were successful, it would be the end of the taxpayer's business. The Supreme Court, however, held that the amounts for grassroots lobbying spent were nondeductible.

The Supreme Court relied heavily on the regulations. The Court held that since the regulations had been in effect for more than 40 years, and since during that 40-year period the taxing statute had been repeatedly reenacted, the regulations had the force of law. The argument generally was that Congress knew how the Commissioner was interpreting ordinary and necessary, and if Congress disapproved of this interpretation, they would have changed the law in one of the reenactments of section 162.

In *Cammarano* the taxpayer further argued that if the regulation was construed to deny the deduction, the regulation would amount to a limitation upon freedom of speech which would be prohibited by the First Amendment to the Constitution. The taxpayer cited various early cases in which the Supreme Court had held that various types of direct taxes upon the expression of views were unconstitutional.

In response to this argument, however, the Supreme Court held:

> Petitioners [the taxpayers] are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code. Nondiscriminatory denial of deductions from gross income to sums expended to promote or defeat legislation is plainly not "aimed at the suppression of dangerous ideas." Rather, it appears to us to express a determination by Con-

gress that since purchased publicity can influence the fate of legislation which will affect, direct or indirectly, all in the community, everyone in the community should stand on the same footing as regards its purchase so far as the Treasury of the United States is concerned.

Based upon this interpretation, the Supreme Court explicitly held that the denial of deductions for grassroots lobbying was consistent with the Constitution. The tax provisions we are considering do not bear the same constitutional handicaps that a direct prohibition upon business advertising might bear.

Shortly after the Supreme Court's decision in *Cammarano*, the Treasury Department issued new regulations which provided a greater elaboration of the rules disallowing lobbying expenses, and further provided for the pro rata disallowance of deductions for dues paid to labor unions and trade associations and other organizations engaged in lobbying. The Service, at the same time, began a more vigorous program of enforcement of the regulations.

In the Revenue Act of 1962, however, Congress adopted section 162(e) which repudiated the regulation provisions denying deductions for "direct" lobbying, but adopted into the Code the regulations denying deductions for "grassroots" lobbying. The provisions which made these changes originated in the Ways and Means Committee, and were opposed by the administration.

Under section 162(e)(1), deductions are allowed for "direct" lobbying, which is defined as direct appearances, submission of statements, and sending of communications to committees or members of legislative bodies, with respect to legislation or proposed legislation of direct interest to the taxpayer. Dues paid to membership organizations, such as business leagues and labor unions, which are attributable to "direct" lobbying, are likewise deductible. Under section 162(e)(2)(B), however, Congress drew a clear line between expenditures for direct lobbying and expenditures for grassroots lobbying. Section 162(e)(2)(B) states that no amount is deductible which is paid:

In connection with any attempt to influence the general public or segments thereof with respect to legislative matters, elections, or referendums.

The report of the Senate Finance Committee on section 162(e)(1) stated that it was felt that the deduction should be permitted for direct lobbying, which, as I stated earlier, is defined as lobbying expenses involved in direct contacts with members of the legislative bodies or their committees with respect to legislation which has a direct influence on the business of the taxpayer.

The reason advanced by the Senate Finance Committee was that taxpayers could get deductions for communications with the excutive branch of the Government, or litigation before the judicial branch. Section 162(e)(1) equalizes the tax treatment of expenditure for communications with the executive, legislative, and judicial branches, provided they are also ordinary and necessary expenses.

The principal reason for supporting the prohibition of deductions for grassroots lobbying is the desirability, which I discussed earlier, of reducing the disparity between the ability of individual private citizens, and business organizations, to influence the affairs of Government.

The Supreme Court, as pointed out above, described this policy as one of achieving "tax equilibrium." Since the private citizen gets

no deductions for expenditures made in opposition to water pollution, equilibrium is achieved if business organizations, desiring to dump untreated wastes in streams, likewise get no deductions for their publicity campaign designed to achieve that end.

The notion that "tax equilibrium" supports the denial of deductions for grassroots lobbying has been criticized on the grounds that if successful, the private citizen will receive recreational or esthetic enjoyment, but will not have to pay taxes to the Government on these nonfinancial gains. The rewards to business, however, are financial, and the business will pay taxes to the Government if it realizes taxable additional profits as a result of success in influencing the Government. Under this analysis tax equilibrium is achieved by allowing the deductions for grassroots lobbying and taxing the income realized by the business if the lobbying is successful.

The foregoing argument ignores the fact that if private citizens were to receive some financial return, such as a statutory bounty, under the Refuse Act of 1899, this income would be taxable to the private citizen, just as business' financial rewards are taxable.

In other words, the deductibility—the denial of the deduction for these expenditures is across the board and treats private citizens and businesses equally. Likewise, the rewards of such lobbying are treated equally since both business and private citizens pay taxes if they receive financial rewards from their lobbying efforts.

Furthermore, even if it is accepted that the denial of deductions from grassroots lobbying is a deviation from strict tax neutrality, this deviation, as a matter of policy, is appropriate. Since business will receive financial rewards for its success in grassroots lobbying, it has a ready fund for use against private citizens seeking to protect recreational or esthetic interests.

In addition, the rewards to business of favorable governmental action are often direct and measurable whereas the rewards to private individuals are indirect and diffused. For these reasons business has both the far greater motivation, and the far greater ability to conduct effective grassroots lobbying efforts in order to influence governmental actions.

As a matter of public policy it is desirable to reduce business power by denying the deductions for grassroots lobbying, whether such denial results in tax equilibrium or a tax disadvantage to business.

Before ending the discussion of tax equilibrium, I would like to point out the tax treatment of lobbying expenditures by other organizations recognized by the Internal Revenue Code.

As we discussed earlier, a private citizen gets no deductions for either his direct lobbying or his grassroots lobbying. A business, however, is entitled to a deduction for its direct lobbying, but not for his grassroots lobbying.

Tax-exempt organizations are not concerned with the question of whether lobbying expenses are deductible, because they pay no taxes on their income.

The tax treatment of contributions to these organizations is important to the organizations and their donors. Charities and educational and scientific organizations lose their tax-exempt status if they engage in lobbying as more than an insubstantial part of their activity.

Therefore, these organizations are basically precluded from engaging in lobbying.

Action or social welfare organizations can engage in lobbying, but contributions to these organizations are nondeductible.

Labor unions likewise can engage in this type of lobbying. Union dues, if they are ordinary and necessary business expenses, and if the union member itemizes his deductions, are deductible unless the union engages in lobbying as a substantial activity. If so, the union member can still get a deduction for the portion of his dues allocable to direct lobbying, but not for grassroots lobbying.

Business leagues, such as the chamber of commerce, are treated similarly to labor unions. That is, deductions are allowed for dues which are ordinary and necessary business expenses to the member, and bear a direct relationship to the member's business unless a substantial part of the activities of the business league are lobbying.

In that event, the portion of the dues allocable to direct lobbying is deductible, but the portion allocable to grassroots lobbying is nondeductible.

The denial of deductions for grassroots lobbying, as we discussed above, will a marginal impact at best. The funds used for this purpose must come solely from the business organization itself, with no contributions from the Federal Treasury. The significance of grassroots lobbying is such that businesses will freely spend from their own funds, because of the importance to them of the objectives to be obtained.

I believe that as a matter of policy it is desirable to require business to pay for grassroots lobbying solely from its own funds, and that section 162(e)(2) serves an important function by marginally reducing that amount of grassroots lobbying engaged in by business. This function is only served, however, if section 162(e) is regularly enforced.

With this background, I would like to review section 162(e)(2) and the regulations thereunder, and discuss its application to expenditures for advertising which are the subject of this hearing.

As pointed out above, section 162(e)(2) is a limitation and only has application to expenditures which would otherwise qualify as ordinary and necessary business expenses. Section 162(e)(2) denies deductions for expenditures for grassroots lobbying if this expenditure satisfies the three tests set forth below.

These tests I have determined both from the literal wording of the statue and the regulations, and also from my interpretation of congressional intent at the time or enactment of section 162(e).

1. LEGISLATIVE MATTER

Before an advertisement is considered grassroots lobbying, it must concern "legislative matters."

An expenditure for advertisement would be allowable as a deduction if the advertisement relates to something other than "legislative matters."

In my opinion, the term "legislative matter" refers to matters which are appropriately the subject of legislation.

I believe that an advertisement can relate to "legislative matters" even though no legislation is pending with respect to the subject of the advertisement at the time the advertisement is printed.

The regulations do not define "legislative matters." The regulations which allow deductions for direct lobbying do, however, define the terms "legislation or proposed legislation" to include "bills and resolutions introduced by a member of a legislative body, as well as oral or written proposals for legislative action submitted to a legsilative body or to a member of such body."

The term "legislative matters" is literally broader than the terms "legislation or proposed legislation." I believe therefore that "legislative matters" can, under some circumstances, include matters which are not the subject of pending legislation at the time the advertisement is run.

The purpose of the denial of the deduction is to offset businesses' superior financial and organizational strength with respect to legislative matters. The need for this offset is as great when business is preparing the public for anticipated legislation as it is when such legislation is actually pending.

Furthermore, business can, to some extent, control the timing of the introduction of the legislation favorable to the business, and can anticipate the introduction of legislation unfavorable to business.

If section 162(e)(2) were only applicable when legislation was actually pending, it could be avoided by first conducting extensive publicity campaigns to generate interest in the general public in the passage of legislation, and at the conclusion of such campaign introducing the legislation itself.

The fact that legislation is pending, however, is important proof that the subject of an advertisement is a legislative matter.

2. ATTEMPT TO INFLUENCE GENERAL PUBLIC

If an advertisement relates to a legislative matter, the advertisement must be considered in light of the second test, which is found in the statute, "Does the advertisement amount to an attempt to influence the general public?"

Deductions are only disallowed under section 162(e)(2) for expenditures which amount to an "attempt" to influence the general public. The determination of whether an advertisement constitutes such an "attempt" can only be made by analyzing the advertisement itself to determine if, as a whole, a reader of the advertisement might be "influenced" with respect to a legislative matter.

For example, an advertisement relating to a legislative matter could serve a purely educational purpose by fairly presenting all factors which support both sides of an issue, and leaving the public the ability to make up its own mind. An advertisement, however, which presents only one side of an issue, would appear on its face to be an attempt to influence the general public.

The regulations cite attempts to encourage the public to contact members of a legislative body for the purpose of supporting or opposing legislation as examples of grassroots lobbying. The reference to encouraging the public to contact legislators is an example, and I agree with the earlier witness that an advertisement which doesn't directly and literally encourage the public to contact legislators can still be an attempt to influence the general public within the meaning of the statute.

The statute itself refers to attempts to "influence the general public." The general public can be influenced, and the statute can become applicable, even if the public is not directly urged to contact legislators. I feel, however, that an "attempt" can only be found in an advertisement if the advertisement presents only factors which support the selfish interests of business.

For example, exhibit 39 is devoted to costs of clean air. The ad lists a large number of additional expenses which the public bears as a result of the Federal Clean Air Act. No mention whatsoever is made of the benefits which the public derives from the Clean Air Act. As a result, I feel that this ad can be readily classified as an attempt to influence the general public, even though the ad does not directly call for the public to contact the Congressman.

I base this in part upon my confidence in the degree of political education in our society and my belief that if an advertisement encourages an individual to feel great concern about a legislative matter, that individual knows that the way to express this concern is by contacting his legislative representative.

An advertisement which generates such concern has the effect of causing the public to contact its representative even though there is no explicit instruction to do so on the face of the ad. The deductibility of an expenditure for an advertisement should be governed by the overall substance of the advertisement itself and not by the presence or absence of any particular key words such as "contact your legislator."

The fact that an advertisement presents only one point of view and contains a request for the public to contact its legislators would appear to be almost conclusive evidence that these ads are an attempt to influence the general public.

I feel, however, that even absent this evidence, ads can be found to be attempts to influence the general public based on the factors I discussed.

The two tests discussed above are the only ones found in the statute, and the only ones covered by the regulations.

I believe, however, that there is a third factor which can be inferred from congressional purpose, which must be present before section 162(e) is applied to disallow deductions. The tests standing alone, as I have stated them, would deny the Washington Post a deduction for the cost of publishing its editorial page. The editorial page relates often to legislative matters and it is clearly an attempt to influence the general public. Congress did not intend to deny the newspaper the cost of preparing editorials.

For this reason section 162(e)(2) should only be applied to expenditures in connection with matters in which the interests of business and a segment of the public at large conflict, and the advertisement promotes businesses' selfish interests.

An editorial published by a newspaper for the purpose of promoting the newspaper's financial good at the expense of the general public, or of subscribers, could well be subject to disallowance under section 162(e)(2).

On the other hand, an editorial relating to the subject in which a newspaper, as a business entity, has no interest that is distinctly different than any other member of the general public, should not be disallowed.

For example, an editorial urging congressional ratification of an arms limitation treaty would not involve a matter in which the news-

paper, as a business, has an interest different than that of the general public.

A similar example might be an advertisement published by an oil company which urges the enactment of laws relating to automobile safety. In the matter of automobile safety, the oil company has no financial interest which, generally speaking, conflicts with that of the general public.

On the other hand, an advertisement by an automobile manufacturer which opposes such legislation, might well involve a conflict between the financial interest of the business and the general public at large.

It is my belief that the three foregoing tests should be applied to the advertisements published by businesses, and that expenditures for those advertisements which satisfy the three foregoing tests should be disallowed.

There are two procedural points I would like to cover. First, the application of the factors I have outlined is essentially a factfinding process, and I believe that the determination of the initial finder of fact should be given great weight. This was done in the present case of *Consumers Power Company* v. *United States*, which was decided in 1970.

In this case the U.S. Court of Appeals for the Sixth Circuit considered ads published by private power companies which related to publicly operated power companies. Some also attacked public power as "creeping socialism," and others pointed out that private companies provided better service.

Some of the ads admonished the readers to contact their Congressman, but some did not. There was no legislation pending at this time to which the ads were related. The District Court disallowed the deductions for expenditures on the grounds that these expenditures amounted to grassroots lobbying.

The court of appeals expressed some reservations about the application of the regulations, and noted that in the ads concerned, there were some ads which the court of appeals felt were borderline cases, but the court of appeals deferred to the judgement of the district court and sustained the disallowance of all of the deductions. I believe that it is proper for appellate courts to give some weight to the determination of factfinders in cases such as these.

A second procedural point which I would like to mention is illustrated by some of the ads which have been introduced into evidence into this record. In particular, I make reference to exhibit 66, 76, 81, and 88. These are ads in which the three elements that I have discussed above are present, but only in a portion of the advertisement. I feel that in such cases in which the three elements occupy more than a de minimis part of the ad, that portion of the cost of the ad which can be fairly allocated to the grassroots lobbying should be disallowed.

I have reviewed the advertisements which have been admitted into the record as exhibits No. 1 through 99, and applied to each one of them the three foregoing tests. Of the advertisement I reviewed, it is my opinion that 31 are deductible, 4 require some allocation because a portion of the expense should be deductible, and the remainder not, and there are 9 advertisements for which I felt I needed additional information; that is, information in addition to the ad itself, in order to make a judgment. The remaining 51 ads, I felt were non-

deductible for Federal income tax purposes, based solely on application of the factors that I described above to the ads themselves, and without the benefit of any other knowledge of facts and circumstances which might surround the publication of the ad.

The advertisements for which I felt I needed additional information were 10, 11, 12, 15, 21, 22, 48, 91, and 94.

The advertisements which I felt would be deductible under the three tests I have outlined above are exhibits 7, 9, 27, 40, 49, 51, 52, 56, 57, 58, 59, 60, 61, 62, 67, 69, 70, 71, 72, 75, 79, 80, 83, 84, 86, 87, 89, 92, 95, 98, and 99.

The advertisements which I felt could be subject to some allocation were 66, 76, 81, and 88.

I found all other ads to be nondeductible under section 162(e)(2).

In closing, I would like to say that I recognize the sponsors of these and other ads are subject to all the responsibilities, and have all the rights, which are inherent in our self-assessment system of income taxation. Taxpayers are not required to pay amounts of income tax greater than is required by law, nor are taxpayers required to resolve every question of interpretation against themselves.

On the other hand, taxpayers have the responsibility, in the first instance, to make a good faith determination as to the application of the Internal Revenue laws to their business operations, and to complete their returns and pay their taxes accordingly.

Expenditures for advertisements which represent clear attempts to influence the general public with respect to legislative matters are not deductible under section 162(e)(2). Such advertisements should not be misclassified by taxpayers as goodwill advertising and should not be claimed as tax deductions. The taxpayers are not, under the law, entitled to such deductions.

I also feel that the Internal Revenue Service should vigorously enforce the congressional mandate and the Service's own regulations. It is true that consideration of the deductibility of advertisements might involve some questions which are outside the scope of normal auditing techniques. This is so, however, because the policy of section 162(e)(2) is based upon the broad consideration of public policy as I have outlined above. Because of the importance of these public policies, I feel that the IRS and the taxpayers concerned have the duty to see that this section is carried out and vigorously enforced. Even though the policy does not relate to matters which are normally the subject of income tax audits, the matters are more important, in my opinion than simply raising revenue for the Federal Government. They bear upon the quality of the decisions which are made by the legislative body.

Senator HART. You were right, Mr. Fant. You have made the code understandable to me to the extent to which the code can be made understandable. Let me dispose of something that occurred to me as I listened to your suggestion that a third factor be included determining the deductibility of an ad.

It is the public matter, and seeking to influence opinion and decision. You say that the two tests above standing alone would be applied to deny the *Washington Post* a deduction for cost of writing and printing its editorial page since the editorial page relates often to legislative matters and is clearly an attempt to influence the general public.

You did not intend to deny the newspaper the cost of preparing the editorials. I quite agree with that. For this reason, section 162(e)(2) should only be applied to expenditures in connection with matters in which the interests of business and the public at large conflict.

And the advertisement promotes businesses and selfish interests.

And suggestions that an editorial in a newspaper seeking to promote the newspapers financial good at the expense of the general public or its subscribers could well be subject to disallowance.

That suggestion bothers me, because to take a newspaper, they editorialize against increased mail rates. They have a deep conviction that increasing the rates will drive some publications out of business, and lessen the opportunity to have broad public education.

Who is to decide whether that 's an editorial—is in conflict with the public interest or not?

Mr. FANT. Mr. Chairman, I agree with you that this is a tough question. In the example you have given relating to newspaper editorial concerning the cost of mailing, I would first want to determine whether an increase in the cost of mailing would reduce the business' profits, or whether it's the newspaper's view that the increase in the cost of mailing is undesirable because it might, as the chairman pointed out, affect the degree to which the views in the newspaper are disseminated and distributed to the public.

If the latter is the case, I would feel that it would not be subject to disallowance. If the former were the case, that is, that an increase in mail rates could lead the newspaper to earn less profits than they earned before, I think we would have a tough problem, because I think that there would be two elements present, the one element which favors the dissemination of views, broadly, to the people and a second element, that the business is publishing the editorial so that it will make a greater profit. And I feel that it's very hard to say that Exxon cannot deduct the cost of a political advertisement which could increase its profits, whereas a newspaper could get such a deduction simply because the newspaper is a newspaper, and Exxon's an oil company.

I feel that would be a difficult issue to resolve.

Senator HART. There is another kind of ad that presents the same problem, but in a less appealing setting than the newspapers' claim for freedom to discuss ideas. I believe that at least one automobile manufacturer believes it's undesirable for several reasons to permit the law to remain as it is with respect to clean air standards, because the only way they can meet those standards is to add on a device called a catalytic converter.

The ad says that the device is uneconomic, may prove very disappointing because of maintenance problems, and may contribute to an increase in economic concentration in the automobile industry.

It advertises that a change of the law is needed. Now, I'm sure it would be true that if they didn't have to go to the converter, they would make more money or lose less. I think that they also believe that this is an add-on device that we will wish we hadn't hung ourselves with.

This is an example of an ad that would give IRS trouble, isn't it?

Mr. FANT. Mr. Chairman, ads very similar to that are included in the exhibits which are introduced into the record.

I think one of them was published by an automobile manufacturer. My analysis of that situation would be as follows: Although the interests of the business might be something broader than the interest of increasing their profits by doing away with the catalytic converter, doing away with the catalytic converter might well conflict with the interests of the general public.

I am certain that there are some individuals, and there is a viewpoint held which is that the catalytic converter is good.

Senator HART. That's the dominant feeling.

Mr. FANT. And that it is, I think, a pretty good example of the problem which I am discussing which is, I breathe clean air and it's good for my health, but it doesn't put any money in my pocket to try to get a law passed to keep the air that way.

I think that is a case in which the business' selfish interest is advanced.

Now, it's true that the business' selfish interest might coincide with what is perceived by other members of the public as being the broad national interest. But the conflict I think we are talking about is not beween business and everyone else, or at least how everyone else perceives their interest, but between business and some identifiable segment of the public which opposes congressional action, which advances the selfish interests of business.

It's possible that business' selfish interest in some cases will coincide with what is everyone's interests. But still, if this is an identifiable segment of the public which opposes business, I don't believe that business should be allowed to deduct the cost of their ads at the expense of those who oppose them.

Senator HART. Well, I am glad I am not a tax lawyer and I am glad I am not the IRS agent that is examining these things.

Mr. FANT. Well, Mr. Chairman, I am glad also that you are not a tax lawyer, because there is a great deal of competition even now, and also because I think we can all be grateful that you are where you are rather than spending your time with other matters.

Senator HART. Let me have Mr. Bickwit direct some questions that have been developed.

Mr. BICKWIT. Just on that last one, then, as I understand it, you are saying that 162(e)(2) should only be applied to expenditures in connection with matters in which the interests of business and an identifiable segment of the public at large conflict.

Mr. FANT. That's right.

Mr. BICKWIT. It needn't be established that the entire public at large is in conflict with the business interest?

Mr. FANT. Well, I think that the problem is that we don't know what the public's interest is, and it's the legislators who must determine that. There is no such thing as the public interest. It's the competing interests within the public. And I think what I intend to refer to is a subject in which the selfish interest of businesses compete with some interest of an identifiable segment of the public.

Mr. BICKWIT. The test that you have given the subcommittee for what would render these ads nondeductible is a broad one. I suspect some will argue upon hearing it, that it would disqualify for deductibility virtually any statement by an advertiser on any matter since virtually any matter could become the subject of legislation.

How would you respond to that?

Mr. FANT. I think you are referring to my interpretation of the words, "legislative matter," which I interpreted as being broader than "legislation." I agree that that is a broad interpretation. I feel, however, that based on the policies which are involved, a broad interpretation is called for.

I also feel that as our society advances and progresses more matters have become legislative matters than were previously. Some things which Federal and the State legislative bodies consider, would be shocking to 19th-century legislatures.

It's possible that in the 21st century there would be even more questions related to our national life that have considered legislative matters. But I feel that that is the way it should be, that if a matter becomes a legislative matter, advertisements related to that become nondeductible. I also feel that it is perfectly possible for business to publish good will advertisements on legislative matters provided they don't amount to an attempt to influence the general public.

Businesses sometime say that an ad promotes their good will because it keeps their name before the public and it wins the sympathy of the general public.

I feel that business can publish ads which have that purpose which present both sides on an issue. In fact, in my opinion, that the goal of increasing business popularity with the public would be advanced by an ad that fairly presents both sides of a legislative matter and is signed by a business. Such an ad would relate to a legislative matter but could be fully deductible.

It's the advertisements which are exclusively on one side of the legislative matters in which there is a conflict that I feel are nondeductible.

Mr. BICKWIT. Are you aware of any private rulings by the IRS which would either support or contradict the test that you have offered to the subcommittee?

Mr. FANT. Well, of course, the private rulings issued by the IRS are confidential at the present time. I might add that such secrecy is subject to litigation at the present time as to whether the rulings granted taxpayers should be made available to the general public.

I would also point out that as I analyze the question, and not necessarily as the IRS would, the questions that we are dealing with are essentially questions of fact. And as a matter of general policy, the IRS does not give rulings in which they determine to be simply questions of fact.

Most of their rulings are designed to answer questions of law or questions of the application of law to facts. This does not mean that there are no private rulings on the subject, it simply means I am not aware of any.

Mr. BICKWIT. How do you feel about not being able to have access to those rulings?

Mr. FANT. Well, as I say, it is subject to litigation at the present time and I personally hope that the court decides that these matters will be available to the public. I cannot say that under the laws which control the litigation, that would be the correct result, because I honestly have not made a study of the laws involved.

Mr. BICKWIT. The staff has attempted rather hurriedly to review the leading cases on the provision of the code that has been discussed today. While it is difficult for us to determine from those cases exactly

what the judge's tests were for nondeductibility, the only case that we can find where the test would apply to be inconsistent with your own is a memorandum opinion of the tax court in Addressograph-Multigraph Corp., cited for the record as 14 P–H, tax court memorandum paragraph 45,058, 1945.

Do you distinguish that case, or do you simply disagree with its holding?

Mr. FANT. Well, first of all, given the facts that are set forth in the opinion in Addressograph-Multigraph, I can't be absolutely certain whether applying the tests I have outlined, that different results would be reached or not. The opinion does not set forth the body of the ads, but only describes them in a very summary way.

I believe, however, that I would reach a different result.

Now, the importance of the Addressograph case to my analysis is greatly diminished by the fact that the tax court judge in that opinion relied very heavily upon an earlier case, the *Los Angeles & Salt Lake Railroad* case. In fact, the judge relied almost exclusively on the earlier opinion and did not analyze the issues or discuss the factors which should be applied.

The *Los Angeles & Salt Lake Railroad* case was decided in 1929, and permitted deductions for expenditures for grassroots lobbying on the ground that the regulations then in force only applied to unethical or unfair lobbying, and that the advertisements published by the Los Angeles & Salt Lake City Railroad Co. were not unethical or unfair.

That view has been thoroughly discredited by later court cases, by the Supreme Court in *Cammarano* and by Congress in the enactment of section 162. Since the court in *Addressograph* relied upon the earlier case, it's my feeling that *Addressograph itself* must be viewed as somewhat discredited.

Mr. BICKWIT. Do you know of any other cases or published rulings which have adopted a test inconsistent with the one that you have presented to the subcommittee?

Mr. FANT. Well, there are no cases or published rulings of which I am aware which explicitly adopt tests that are inconsistent or contrary to what I have set out today.

I feel that what I have set out today is generally supported by the case law.

I have to say, however, that courts in many instances express their opinion in a conclusionary fashion. It is quite possible that factors other than those I have discussed were applied or that some of the factors I discussed were not applied, so that I can't say with exact certainty, but I am not aware of any case which would allow a deduction which, under the factors as I have outlined them, would be disallowed.

Mr. BICKWIT. Have you read the responses of the companies to Senator Hart's letter asking them to characterize their ads?

Mr. FANT. No, I have not.

Mr. BICKWIT. Well, even if not, if you heard the preceding witness I am sure you are aware that generally speaking their characterizations of those ads differ sharply from your own.

If ultimately the subcommittee comes to accept your analysis rather than theirs, what would you suggest the subcommittee do about it?

Mr. FANT. Well, first of all, I would like to reiterate what the previous witness said, that I don't think such a determination should be made without hearing the other side, and without hearing the analysis which might support the characterizations of the ads by those who sponsored the ads.

I also have to say that my analysis was based solely on the four corners of the ad, and that in some instances there might be facts and circumstances of which I am aware that could lead to a contrary result, even under the factors I have presented.

For example, in the regulations that relate to lobbying by private foundations, there is a provision which says that private foundations can engage in publicity campaigns so long as both sides are fully presented so that the reader of the publicity can make up his own mind.

There is a provision that says that this can be applied to a whole series of ads. For example—under this analysis there can be one ad which says water pollution is very good and sets forth the economic reasons why a certain amount of pollution is necessary and which if I looked at it and applied my factors, I might well determine was nondeductible.

However, if the next week in the same publication there was another ad or the sponsor of the first ad that said that water pollution was bad, I might reach a different result.

I give that as a fairly farfetched example, but I think that there are other facts and circumstances which have to be considered.

If the subcommittee does arrive at the judgment that the sponsors of these ads have claimed deductions for expenditures which, in the subcommittee's judgment, are nondeductible, I believe that the first purpose served by these hearings is to bring this to the attention of the sponsors of the ads.

Ours is a system of self-assessment and, hopefully, if my analysis and that of the previous witness and the other facts presented are persuasive, the sponsors of the ads will not claim deductions for these of future ads or conceivably might, if they were persuaded, file amended tax returns.

I disagree somewhat with the previous witness on the role of citizen participation in IRS proceedings.

I do know, however, that the IRS values any information which is helpful to them in making determinations in tax cases, and I would suggest that the record be made available to the IRS for whatever uses they felt were appropriate.

Mr. BICKWIT. I have one final question. In your statement you say that denial of deductions for grassroots lobbying under section 120 (e) (2) of a marginal impact at best, that it will have a marginal impact on the problem of imbalance.

Mr. FANT. That's correct.

Mr. BICKWIT. Personally I tend to agree with that. Does that lead you to the conclusion that if Congress is determined to remedy that imbalance they will have to take on the other side of the equation, to give more favorable tax treatment to those who are organized not for profit.

I don't want to put words into your mouth, but is that a conclusion that you would support?

Mr. FANT. Well, as I pointed out earlier, the problem is one of imbalance, and section 162(e)(2) does not correct the imbalance. The imbalance still exists and will continue to exist.

I believe you are suggesting that a possible way to further the imbalance would be to provide more favorable tax treatment to either private citizens or to organizations which represent the interests of private citizens.

I would first point out that the most—the greatest imbalance that I find is in the section of direct lobbying, where as a result of the amendments made in the Revenue Act of 1962 businesses can deduct all of their expenses for making presentations to legislative bodies, whereas charitable organizations, educational organizations, cannot do so unless they are specifically invited to do so by legislative bodies or members of committees.

That is the area in which I feel there is the—there is present imbalance.

On the subject of the tax treatment of grassroots lobbying, there shouldn't be any imbalance. Such expenses are not generally deductible by businesses, private individuals, charities, labor unions, nor business leagues.

So that I feel in the first instance that if the law were followed, there would be something approaching tax balance on the subject of grassroots lobbying.

Now, if your suggestion is that possibly charitable organizations or action organizations of citizens be allowed to engage in grassroots lobbying and contributions be deductible, would you allow business a deduction also; to allow charities to engage in grassroots lobbying, but to continue to deny deductions to business would go further to correct the imbalance. But I feel that more immediate and probably more practical result would be to bring equilibrium to the direct lobbying——

Mr. BICKWIT. I don't think I made clear what I mean by imbalance. What I am talking about is the balance in the presentation that Congress is likely to perceive from the various interests involved.

What I read you to be saying, is that even if you enforce the law so that there is balanced treatment of deductions, there will not be balance with respect to the kind of viewpoints that are made available to the Congress.

It is that statement with which I agree and it leads me personally to the conclusion that perhaps other remedial measures from a statutory standpoint ought to be considered in light of the conclusion that the pure endorsement of the law as it exists will not remedy the problem as I see it.

Mr. FANT. Well, that it will not remedy the broad problem, because business, when it is vitally affected, can tap its enormous resources to run all the ads it wants even though such ads are nondeductible. The fact that it will cost business more because the ads are nondeductible will not, in my opinion, deter business from engaging in grassroots lobbying in areas where their interests are at stake.

Mr. BICKWIT. And it probably wouldn't deter them from engaging in direct lobbying even if that were made nondeductible?

Mr. FANT. I believe that is true also.

But what I was saying is that the ability of the tax law to further correct the imbalance, I feel, is somewhat limited. I understood you

to be suggesting that charities or public interest groups be permitted deductions for grassroots lobbying. This suggestion would reduce the imbalance in the ability to influence the general public with respect to legislative matters, but would put the tax law itself into imbalance.

Mr. BICKWIT. Exactly. That is what I am suggesting, that you may need imbalance within the tax code in order to promote a semblance of balance.

Mr. FANT. I think that that would further reduce the imbalance.

Mr. BICKWIT. Thank you very much, Mr. Fant.

Thank you, Mr. Chairman.

Senator HART. Mr. Fant, again, thank you very much for a very helpful explanation.

We like to think we don't operate in a vacuum and I am sure that both the IRS and the FPC should be made aware of some of the comment that has been made today.

But it is my intention that we invite those advertisers whose materials have been identified to make an explanation as to their judgment as to how it should have been treated and any suggestions they may have with respect to the law.

Pending the announcement of that date, the subcommittee is adjourned.

[Whereupon, at 12:55 p.m., the subcommittee hearing was adjourned, subject to the call of the Chair.]

ENERGY AND ENVIRONMENTAL OBJECTIVES

THURSDAY, JULY 18, 1974

U.S. SENATE,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON THE ENVIRONMENT,
Washington, D.C.

The subcommittee met at 10:47 a.m., in room 5110, of the Dirksen Senate Office Building; Hon. Philip A. Hart (chairman of the subcommittee) presiding.

Senator HART. The committee will be in order. I apologize to everyone who was inconvenienced by this delay. It is simply that an unanticipated meeting of the Democratic Conference of Senators was called for this morning, and is still going on. I am sure this is not the only place that has suffered. We resume hearings today on the energy and environmental advertising.

At our last hearings a number of allegations were made with respect to the tax and Power Commission treatment of these ads. The subcommittee invited those against whom the criticisms had been directed to respond. Although most declined, we are grateful to those who have come today to present their side of what is a complicated story.

With an expression of thanks, let me welcome as our first witness Mr. Herb Schmertz, vice president of public affairs of Mobil.

STATEMENT OF HERB SCHMERTZ, VICE PRESIDENT, PUBLIC AFFAIRS, MOBIL OIL CO.; ACCOMPANIED BY DAVID A. LINDSAY

Mr. SCHMERTZ. Thank you, Senator Hart.

My name is Herbert Schmertz. I am vice president for public affairs with Mobil Oil Corp., and I have been extensively involved with my company's efforts to explain its viewpoint on energy problems to the public through advertising in the press, on radio, and on television.

I am accompanied by David Lindsay, our outside tax counsel from the law firm of Davis, Polk & Wardwell.

First, I would like to thank the committee, on behalf of Mobil and myself, for the opportunity to appear before you today. As a company, Mobil takes pride in its communications program, and particularly in the stand for freedom of speech we have taken in the belief that a free marketplace of ideas is essential if the American public is to make informed decisions on major issues. I am therefore grateful for the chance to explain some aspects of this program to you.

I would like to address myself first to some specific tax questions in which you have expressed an interest.

For tax purposes, Mobil divides its institutional advertising into four groups, relying on concepts of public advertising contained in Treasury Regulation 1.162–20. As you are aware, the regulation states that "expenditures for institutional or 'goodwill' advertising" are generally deductible. The regulation provides more specifically that:

> A deduction will ordinarily be allowed for the cost of advertising which keeps the taxpayer's name before the public in connection with encouraging contributions to such organizations as the Red Cross, the purchase of U.S. Savings Bonds, or participation in similar causes.

In addition, the regulation states that advertising expenditures are tax deductible if the advertising "presents views on economic, financial, social or other subjects of a general nature providing they do not include expenditures for lobbying, for promotion or defeat of legislation, or for related propaganda.

Based on these considerations, our ads are grouped as follows:

Group I consists of ads of the so-called "Red Cross" variety. Some of them have promoted Masterpiece Theatre, a series of dramas and other programs underwritten by Mobil and shown over public television. We have also taken space to urge support for New York Public Library, for programs of concerns, opera, and theater in New York City parks, and for the activities of the Interracial Council for Business Opportunity, to name only a few.

Group II deals with fuel conservation and safe driving—noncontroversial topics in which we have some expertise and which we feel it is in the public interest to discuss. Ads in this group have dealt with ways of conserving gasoline, driving safely, conserving fuel in the home, and lighting in general.

Group III covers a broad socio-economic field dealing with such subjects as technology in general, conservation efforts, and similar broad topics.

Group IV covers advertisements which relate in part to regulatory policies on antipollution control, or contain general information on the energy shortage, or discuss other topics with sufficient legislative potential to cast doubt on their deductibility.

Our policy, simply stated, is to regard ads in the first three categories, which conform to the wording and intent of the regulation, as deductible. We do not take deductions, however, for ads in group IV. Moreover, we submit all our ads to outside counsel for their opinion on the ads' tax deductibility, and counsel has instructions to adopt a conservative standard in determining deductibility under the statutes, regulations, and case law on the subject.

This decision to take a conservative view of what constitutes tax deductibility has obviously cost us money. For example, our newspaper advertising expenditures in 1973 were as follows:

Product and service ads $326,000, goodwill advertising $799,000, nondeductible advertising $411,000.

In other words, in 1973, out of a total newspaper advertising budget of $1.5 million, we claimed no tax deduction for a quarter of it. Also, we decided in mid-1973 to discontinue gasoline advertising and redirect our efforts to broad public issues and public information programs. We would therefore expect that our percentage of nondeductible advertising would increase.

Let me explain why we have resorted to institutional advertising on such a scale.

In brief, we believe that we have something important to say, and that we can only get our message across through paid advertising. We came to that decision after it became clear that other more traditional tools were not succeeding. Try to rebut misinformed reporting with a letter to the editor, and you will usually find it appears—if at all—many weeks after the original misstatement. Try to get your view across in a news release, and it may never see the light of day.

Our major point, however, is not that the press is biased but rather that the complexity of the energy issue results in inadequate coverage of it in the news columns.

I would like to reiterate, Senator, we are not saying that the press is biased.

Hence, the decision to advertise, and the corollary decision—that it would be pointless and self-defeating for us to engage in technical discussions of tax deductibility, even if a legitimate case could sometimes be made. As a matter of policy, we prefer to battle on what we consider to be the real issue here—a company's right to be heard in the Nation's marketplace of ideas.

Let me backtrack a little to explain. As you may know, Mobil began a regular program of advertising in the New York Times in January 1972. Our ads, appearing every Thursday, are on the page opposite the editorial page—called the op-ed page. Prior to 1972, we had published an ad in this space in October 1970 in favor of better mass transportation—a highly unusual position, I might say, for an oil company at that time—and had also taken the space to promote Masterpiece Theater, TV's Sesame Street and Electric Co., which we supported, and other public service organizations. But by 1972 we had become sufficiently concerned about the future of U.S. energy supplies to initiate a full-fledged weekly campaign that would be highly visible.

In the light of the present energy situation, I think you will agree that our concern was legitimate. We emphasized the need for increased oil and natural gas production to meet escalating demand. At the same time, we urged restraint in the use of oil products to conserve existing supplies. We drew attention to the roadblocks in the way of establishing a coherent national energy policy. We pointed out that, without such a policy, we as a Nation faced unacceptable dependence on foreign oil.

Nevertheless, for the vast majority, the energy crisis, if it existed at all, was no more than a small cloud on the horizon at that time. Then, of course, the crisis hit home last fall with the virtual quadrupling of oil prices by the major producing countries outside the United States, and the decision by some Arab countries to embargo the export of crude oil to this country.

For the major oil companies, the Arab embargo produced a twofold crisis. First, of course, there was a crisis of supply, which the oil companies surmounted to a large extent by a complex restructuring of logistics patterns on a worldwide scale. Second—and more germane to our present discussion—was a crisis of credibility.

In simple terms, the energy crisis which erupted in late 1973 caught Government, the media, and the public totally unprepared. The growing gap between U.S. energy production and consumption, and the prospect of increased dependence on insecure foreign supplies which might be interdicted at any moment, simply had not been taken seri-

ously. The result was that, when the crisis came and the lines began to form at the service station, the public looked around for a scapegoat. The oil industry was a very visible and very convenient target.

Most people would agree that, during this crisis, the broadcast media deluged their viewers with stories on energy. But how many people could tell you what the answers were to some basic questions that were prominently debated in the media at that time?

For example: Were tankers really waiting offshore for higher prices before unloading their cargoes? Was the energy crisis contrived by the oil companies? Why are oil company profits so high? Why is the United States so reliant on foreign oil? What role did Congress play in creating the oil and gas shortage?

Despite the hours of broadcast time devoted to energy crisis, most people don't have a clear conception of why or whether the energy crisis existed. What they heard or saw didn't help them resolve the issue.

It is my contention that many of the answers or explanations simply didn't make it through the communications networks. In fact, the complexity, scope, and suddenness of the energy crisis combined to overwhelm the media. Television was unprepared to cope with the tremendous volume of information. News on energy broke so fast that nearly each day brought a completely new story on the subject. The problem of keeping up with the news was compounded by the fact that so few reporters, outside the trade and business press, knew anything about energy. Specialists were almost nonexistent.

The result was a breakdown in communications just when communication was critical. In short, the circuits couldn't handle the load.

The basic cause of this failure can be found in the structural limits of television network news. Typically, a television news program has to handle 10–12 stories in the space of half an hour, and for that reason alone was unable to cover the energy crisis adequately.

Again, the networks apparently employ no energy experts to advise on the content of news stories. Finally, television news is at least to some extent entertainment, and broadcast journalists are forced to worry about their ratings in competition with other network journalists.

Against this background, television news failed in its coverage of such recent energy stories as the tanker rumor, the Jackson and Church hearings, the 1973 oil profits reports, why we are so dependent on foreign oil, and the role of Congress. These stories, so important in creating and directing public opinion about energy, in our opinion, were inaccurately and inadequately reported. A medium which stresses topical entertainment and emotion in its news and public affairs programing cannot simultaneously provide in-depth coverage of such complicated and controversial national issues.

Our conclusion is that network news has overdramatized and oversimplified the energy story. The structure of broadcast news is inhibiting rather than promoting full and robust debate on public issues such as energy.

Now it is our belief that the American public deserves more information than this structure allows. We choose to believe that, given the facts, the public will weigh them and make rational decisions. But our own efforts to give the public the facts as we see them,

through television advertising, have run into serious problems. For, while the press has been willing to sell us space, and has hardly ever disagreed with us over the substance or placement of an ad, it soon became apparent that the networks were not only determined to be the arbiter of what we could and could not say, but that they were going to exercise their power in any extremely arbitrary way.

Specifically, we were told that network policy is not to sell time for the discussion of "controversial issues of public importance." One radio station—WTOP here in Washington—said the energy crisis was a controversial issue and therefore they could accept no commercials dealing with the subject. When it became clear to us that the networks might be worried that they might have to provide free time under the law for a rebuttal of Mobil's views, we offered to pay for any rebuttal time the networks were required to provide, as well as for our own message, with the networks having total control over whether a rebuttal is required under the fairness doctrine and the persons or groups doing the rebuttal.

This offer, so far as I know, was unprecedented in the annals of commercial television. But the networks have continued to insist as a general principle that energy issues can best be covered in the news programs, and that journalists should decide what should appear. The final irony, of course, is that the oil industry—not television with its three major networks—is accused of being an oligopoly.

One example will show you what we are up against. In an ad we prepared to run on television, we plan to have the camera focus throughout on a beach and ocean waves while the announcer says:

> According to the U.S. Geological Survey, there may be 60 billion barrels of oil or more beneath our continental shelves.
>
> Some people say we should be drilling for that oil and gas. Others say we shouldn't because of the possible environmental risks. We'd like to know what you think.
>
> Write Mobil Poll, Room 647, 150 East 42nd Street, N.Y. 10017.
>
> We'd like to hear from you.

NBC accepted this ad without change. CBS turned it down in a letter which in part read:

> We regret that the subject matter of this commercial * * * deals with a controversial issue of public importance and does not fall within our "goods and services" limitation for commercial acceptance.

ABC also turned down the ad in a letter which gave no explanation, but merely said:

> This will advise that we have reviewed the above-captioned commercial and are unable to grant an approval for use over our facilities.

We decided that we could not let this capricious behavior go unchallenged. We therefore took out a newspaper ad which gives the proposed visuals and text for our TV spot, together with the three networks' replies.

So far we have received over 2,000 replies to this newspaper ad. While we have not completed a total analysis, a quick spot check indicates that the respondents overwhelmingly favor our right to express our viewpoint on the air.

We feel these letters are the clearest indication yet that the public wants the facts, and support our basic tenet that we as corporate citizens with a special expertise in energy matters should be given the

opportunity to express our views in the marketplace of ideas. This accords with our belief that, in a democracy, one of two things will happen if we are allowed to exercise our rights.

If our views are correct, we will have made a positive contribution to the national debate on energy policy and related issues, and we will have helped the Nation establish the coherent set of priorities and principles it needs in the energy field. If we are wrong, our ideas will be shot down, and we will lose both money and reputation. We are prepared to take our chances.

Indeed, the issue here is one of even greater importance than national energy policy, crucial though that may be. What is at stake here is the principle that debate on national issues be allowed to proceed unshackled by artificial constraints, a principle embodied in the first amendment to the Constitution of the United States.

It is because of our company's commitment to free speech—both for ourselves and our opponents—that we have filed a response with the FTC to the petition submitted by six Members of Congress last January, which would have extended advertising substantiation regulations beyond the realm of product advertising to the fields of energy and environmental ideas.

As we stated in a memorandum filed by our attorneys with the FTC, numerous Supreme Court decisions show that the petition constitutes a serious incursion on first amendment rights of free speech. These precedents show that in the interest of an unencumbered marketplace of ideas, the FTC's regulatory authority should be limited to product advertising and should not extend to corporate statements under public debate.

In fact, we said, the scope of the Congressmen's petition was so broad:

> That many forms of speech which are far removed from product solicitation might possibly be covered. For every potential untruthful claim which will be revealed or discouraged by such a rule, the expression of untold numbers of honestly held beliefs will be discouraged.

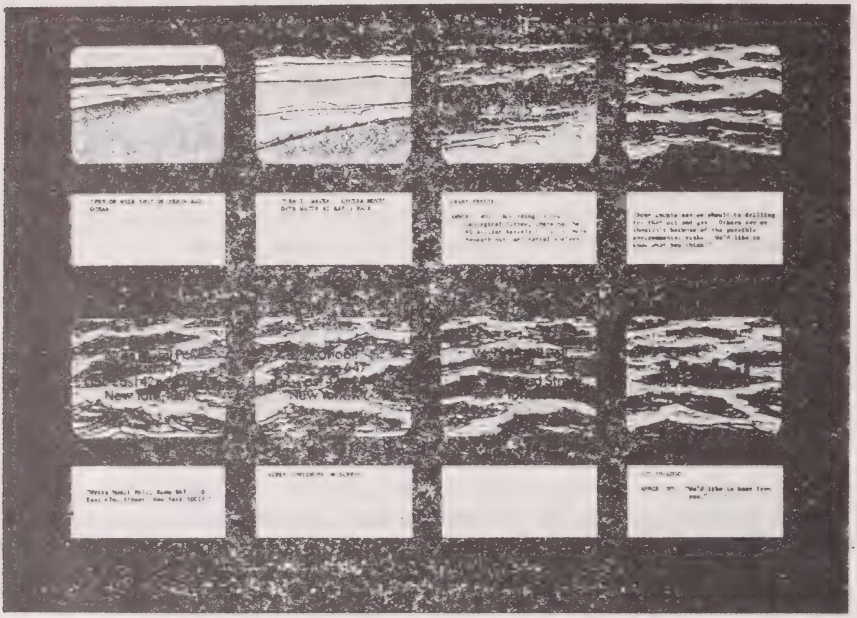
Although Mobil can substantiate all of its advertisements, the company pointed out that the petition is further defective since only oil companies but not their critics would be forced to meet substantiation requirements.

I think I have said enough to shed some light both on the immediate question of tax deductibility for certain types of advertising, and on the underlying policy issues involved. To summarize our position:

We take an extremely conservative view of what constitutes tax deductibility for paid advertising. We take this view in the belief that fundamental issues of national concern are at stake and we feel we would do neither ourselves nor the country a service by losing sight of them. We need a free marketplace of ideas in which those with something to say can say it—untrammeled by redtape, censorship, and petty regulation. And we desperately need the coherent national energy policy which can only come when the public has the facts, and can make a balanced judgment of the issues on their merits.

[The attachment follows:]

Why do two networks refuse to run this commercial?



CBS:

"We regret that the subject matter of this commercial...deals with a controversial issue of public importance and does not fall within our 'goods and services' limitation for commercial acceptance."

ABC:

"This will advise that we have reviewed the above-captioned commercial and are unable to grant an approval for use over our facilities."

NBC:

"Approved as submitted."

As you can see from the storyboard reproduced above, we want to ask the public how it feels about offshore drilling.

But the policies of two national television networks prevent us from asking this question.

This is dangerous, it seems to us. Any restraint on free discussion is dangerous. Any policy that restricts the flow of information or ideas is potentially harmful.

The networks say that the public's need for information is best served in news programs prepared by broadcast journalists.

Behind the networks' rejection of idea advertising may be the fear that demands for equal time will be made. We have a reasonable answer to that. We offer to pay for equal time, when the request is legitimate.

We think *more* discussion, not less, is needed of vital issues such as the issue of America's energy needs. We're willing to buy the time to say what we should be saying. We're willing to buy time so you can hear opposing views.

But two big networks aren't willing to make time available, in this case.

You know the principle at stake here. You've seen it in writing, more than once:

"Congress shall make no law... abridging the freedom of speech."

You've seen it in the First Amendment to the Constitution of the United States. So have we.

We'd like to know what you think about either of these issues. Write Room 647, 150 East 42nd Street, New York, N.Y. 10017.

Mobil®

©1974 Mobil Oil Corporation

This ad will appear in the New York Times on Monday, June 17, 1974.

Mr. SCHMERTZ. Thank you very much.

Senator HART. Thank you very much for your statement that goes far behind the focus of what we thought we were treating when we had that first day of hearing. I confess I have been on the Communications Subcommittee of this Commerce Committee for several years.

Mr. SCHMERTZ. I am aware of that.

Senator HART. And I have to go back to the first chapter every time this question of what is and what is not required under the fairness rule is raised.

I get lost every time the issue is raised. One of the concerns, of course, is that on important public questions there are usually at least two bodies of opinion. One may happen to have a big wad of money, and the other which may or may not have the better idea, may have little or no money.

Mr. SCHMERTZ. That's right.

Senator HART. What suggestions do you have? Now Mobil picks up the bill for the poor guys; we can't very well legislate that, can we?

Mr. SCHMERTZ. Senator, it seems to me that when the Supreme Court talked about this in the BEM case and the CBS case and the Commissioners talked about it, it seems to me that the networks ought to start to try some experimentation to try to develop a structure that increases the spectrum of views and opinion beyond just those of the journalists. Now I don't know what the ultimate right answer is, but at least the first step ought to be some sort of a national debate on the problem of access, not only problems of oil company access, but problems of so-called public interest groups access and all the rest. Out of that debate, and the networks should really take the lead in this, it seems to me, ought to be some attempt at experimentation to develop a structure. Let's say for the sake of discussion that they did set aside 10 percent of their time or something of that sort. And some might pay, some might have free time within that structure.

Let's say that the network news were expanded to a full hour which the networks apparently have wanted, and the affiliates have resisted and if in that full hour some portion were given over to an access situation. I don't know what the right answer is, Senator. I am not in the network news and television business.

I do know that I have not seen any showing by the networks of a desire to experiment, discuss, and try to develop a structure. I think really the burden is on them to come forth. We have made what we think is a contribution, hopefully, to stimulate that with our offer to pay for the equal time. That was rejected.

We had hoped that perhaps that might stimulate some discussion and debate.

Senator HART. A few years ago I remember a group of us here in the Senate sought to purchase television time to present what was then a minority view about Vietnam. And we couldn't buy it.

Mr. SCHMERTZ. That is the specific case that is relied upon by the networks today: the Businessmen Against the War in Vietnam case and the Democratic National Committee case are the two cases that came to the Supreme Court a little over a year ago at the same time. And that is the law of the land today. You prevailed up through the circuit court.

Senator HART. Yes.

Well, having not solved the problem as it relates to television, how do we solve it as it related to newspapers? Does the fellow who can buy the full page get his idea across? What do we do about the opposing point of view that can't buy the page?

Mr. SCHMERTZ. I think newspapers are a very different situation for two fundamental reasons, at least, Senator. First of all, I don't have to get anybody's permission if I want to start a newspaper. I have economic problems, obviously, but if I have a mimeograph machine I can start a newspaper and really the growth of the underground press is a demonstration of the vitality in the area. So I don't have to get permission in that sense.

Second, newspapers, if you take the whole ball of wax of newspapers, I think you are getting a pretty good diversity of opinion in the print press. I think the print press does a pretty good job.

Now from our standpoint, we have felt that at least during a certain period we were not getting enough information in the unpaid part of newspapers and that is why we felt obligated to try to redress that balance through paid advertising.

But by and large, I don't think there is the major problem of access and adequacy in print that you have in television. Television news to a very large extent is a headline service. And as we all know headlines don't tell the story.

Senator HART. Yes, as you put it, the structure of broadcast news inhibits full and robust debate on public issues.

Mr. SCHMERTZ. I think that's correct. And when poles show that 60 or 70 percent of the people say that television news is their primary source of information, that is a distressing situation. We now have the most powerful communications medium ever developed, and it is not acting as a flow of information to the people.

Senator HART. To react to one specific on the narrower subject of tax treatment of institutional advertising, you tell us that your decision with respect to the category four type of advertising—I take it it was broader than that. You decided to submit your proposed ads to outside tax counsel?

Mr. SCHMERTZ. Yes.

Senator HART. That seems to me a costly, though very responsible procedure.

Mr. SCHMERTZ. I would just recommend one thing, sir. We don't submit them before we run them. We submit them after, so it is not proposed ads.

Senator HART. But before, you determine how you shall handle them financially?

Mr. SCHMERTZ. Yes, sir.

Mr. BICKWIT. Just simply what led you to take that procedure?

Mr. SCHMERTZ. We came to the conclusion that we did not want the issue of deductibility or nondeductibility to really cloud the bigger issue of whether we could communicate adequately or not. There was a much bigger issue involved here and that was the adequacy of information and we just didn't want to get involved in what was a narrower issue of deductibility and nondeductibility.

Mr. BICKWIT. Thank you, Mr. Chairman.

Senator HART. I am sure you sense that the feeling with respect to major oil companies is so sharp that many people have reacted harshly to what you describe as a necessary educational program.

Mr. SCHMERTZ. We are well aware of that, Senator, yes.

Senator HART. In that sense, you are sort of damned if you do and damned if you don't.

Mr. SCHMERTZ. That is true. But when we looked at what we thought our obligations were, we decided we would incur that with willingness.

Senator HART. I am reminded of not that particular ad, but something I heard in my own living room, my own family. A very attractive shot was run, and the message was missed at least by one part of the audience in our house, who had a violent reaction to the ad. They are spending more money than——

Mr. SCHMERTZ. That is a legitimate issue of debate, no question about it. We are prepared to face that. And it is a problem.

Senator HART. Well, as you leave, let me express to you and Mobil our appreciation of the fashion in which you have handled your advertising.

Mr. Lindsay, did you have anything you would like to add?

Mr. LINDSAY. Nothing to add, Senator.

Senator HART. Our next witness is vice president and general counsel of the American Electric Power Service Corp., Mr. Joseph Dowd.

Mr. Dowd?

STATEMENT OF JOSEPH DOWD, VICE PRESIDENT AND GENERAL COUNSEL, AMERICAN ELECTRIC POWER SERVICE CORP.; ACCOMPANIED BY A. W. D. GRONNINGSATER, TAX COUNSEL OF THE SERVICE CORP.

Mr. DOWD. Good morning, Mr. Chairman.

Mr. Chairman, my name is A. Joseph Dowd. I am vice president and general counsel of American Electric Power Service Corp.

The Service Corp. provides managerial, professional and technical services to the operating companies of the AEP system.

With me today to assist in answering any questions you may have is Mr. A. W. D. Gronningsater, tax counsel of the American Electric Power Service Corp.

The American Electric Power system presently has a generating capability of almost 14.5 million kilowatts and has, or soon will have, about 8.7 million kilowatts of additional generating capacity under construction.

We serve in parts of seven States. Our service area ranges from the Blue Ridge Mountains of southwestern Virginia to the shores of Lake Michigan, and while we are a large system, we do not serve large urban areas—rather we serve primarily a large number of small communities and rural areas.

More than 5,700,000 people depend upon us for their electricity supply—a responsibility that we take very seriously.

We are located to a large extent atop the eastern coalfields. We are, therefore, a coal-based utility with 93 percent of our generating capacity fired by coal.

We have been invited to appear here today to respond to testimony before this subcommittee which was presented on May 6 by Media Access Project.

We understand that this hearing also involves consideration of S. 2532, which is described in its caption as a bill "to promote conservation, reduce wastage, and attain greater efficiency in the generation of electrical energy."

While we do not propose to comment on the specifics of this bill, I would like to make clear at the outset that the AEP system supports

sensible conservation efforts and has always been opposed and has always done its best to eliminate wastage and inefficient utilization of electric energy.

In fact, one of the ads in our current advertising program is devoted entirely to promoting the concept of energy conservation.

Beyond this, we have distributed booklets and customer bill inserts and radio and TV messages urging our customers not to waste electric power.

Insofar as "efficiency in the generation of electric energy" is concerned, the AEP system ranks first in the Nation, that is, we are able to squeeze more kilowatt hours from a given amount of fuel than any other system.

By way of background to our ad program, I would like to go on in this vein somewhat. While sensible conservation efforts are desirable, we should not be deluded into the belief that such efforts alone can solve our Nation's energy problems.

Total energy has been growing in recent years at a rate of just under 5 percent, and electric power at a rate of 7½ percent.

We must be extremely careful in putting the brakes on, for any attempt to go well beyond eliminating waste in order to curtail energy growth sharply could precipitate a worsening of economic conditions, including widespread unemployment.

Barring mandatory conservation of electric power—either by legislation or by the insufficiency of generating capacity or fuel—we do not foresee any substantial reduction in the historical growth of electric power during the next several years. The reasons for this are as follows:

First, we believe voluntary conservation is at its height in the first flush of enthusiasm and tends to decrease as it results in any real inconvenience or discomfort.

This is merely a reflection of human nature.

Moreover, the elimination of waste is, in large part, a one-shot proposition.

For example, you can replace a 100-watt bulb with a 60-watt bulb only once. Therefore, the effect of voluntary conservation on growth rates after the first year will, we believe, be much less.

Second, putting population growth to one side, the age composition of our existing population alone must inevitably result in new family formations and increased usage of electricity.

Third, there will be demands for an ever-increasing standard of living—particularly by the lower income groups who will insist quite properly upon improving their economic status.

Fourth, there will be new uses for electric power—not the least of which are for environmental controls. A recent survey indicated that such use now represents 7 percent to 10 percent of the electricity demand of large industry.

Fifth, in many cases, electric power is being required to replace other sources of energy which are in short supply, that is, gas and oil.

We can already see this in residential electric space heating which is now growing even faster than in prior years when it was being encouraged by vigorous promotion.

In fact, FEA Administrator Sawhill in a recent speech stated that he expects, and I quote, ". . . the electric power industry to provide

electrical energy in increasing proportions for end-use activities, such as space heating and transportation."

All forecasts for long-range energy requirements suggest that electric power will have a growing responsibility in supplying the energy needs of the future.

Electric power should, and will, replace gas and oil wherever practicable—to conserve these fuels for uses for which there are no substitutes.

Indeed, as I have indicated, this process has already begun in the field of space heating.

The solution—at least for the short term—and midterm—is greatly to increase the production and use of coal to generate electric power. And this is the basic theme of AEP's current advertising program which was referred to by Mr. Shulman of Media Access in his May 6 testimony.

As an electric public utility, we have a legal and a moral responsibility to anticipate the future demand of our customers and to have available for them at the moment of need an adequate and reliable supply of electric energy.

In order to satisfy this responsibility, we must forecast future demand as accurately as we know how, plan and construct the necessary physical facilities in time to meet our customers' requirements, and insure the availability of the necessary fuel to operate in those facilities.

Fuel supply is our most immediate and our most critical problem—currently and for at least the next 10 to 15 years.

Under existing technology, we can generate significant amounts of commercial electric power only by the use of falling water at hydroelectric plants or by the use of gas, oil, nuclear fuel, or coal.

Hydroelectric sites are limited and can make only a relatively minor contribution to our future power supply. As we all know, gas and oil are in short supply.

There is even some question as to the extent of our nuclear fuel reserves—particularly our domestic reserves—and there is a growing question about the adequacy of our nuclear fuel refining capacity.

But, in any event, the delays associated with the design, equipment, construction, and licensing of nuclear plants make it impossible to count on bringing in a nuclear plant in much less than 8 to 10 years.

Nuclear power is important and can provide some help for the short term and midterm. But at best, such help will represent only a minor part of what will be required.

And then there is coal.

Coal is the key element in the solution of our short term and midterm fuel problem. Our domestic reserves represent a greater Btu content than all of the oil in the Middle East, and can provide a fuel supply adequate to generate our electric power requirements for at least several hundred years.

In this context it is indeed anomalous that coal, which constitutes 93 percent of our fossil fuel resources, provides only 17 percent of our gross energy.

Obviously, we must greatly increase the production and use of coal to generate electric power.

This will not only solve most of the problem for electric power supply. It will also make a major contribution to easing the demand for gas and oil by making them more available for those uses for which there are no substitutes.

Under these circumstances, one would have thought that the Government would have adopted policies to encourage the greater production and use of coal.

But the hard fact is that Government policies have, instead, interposed major obstacles and, at the present time, are, in fact, discouraging the production and use of coal.

The use of coal is being discouraged primarily by those who are not satisfied with compliance with ambient air quality standards prescribed to protect health, but who insist that there must be compliance, as well, with rigid emission limitations, under rigid timetables, which at least in the case of sulfur dioxide emissions, are wholly unrealistic and, indeed, unattainable.

These SO_2 limitations will by mid-1975 have the effect of prohibiting the burning of most of our eastern coal—about 225 million tons, or more than one-third of our Nation's current requirements.

And in connection with the very large amount of low sulfur coal in the west owned by the Federal Government—which could be obtained most quickly and which would be most useful in dealing with the SO_2 problem—we have had the equivalent of a domestic embargo for a year or more with the cold comfort of periodic reports that the matter is under study and that perhaps some decisions will be made by the end of 1974.

The basic purpose—the thrust—of our advertising program is to inform the public as to these facts, and to hopefully bring about an increase in the production and the available supply of coal so that we can meet these electric power needs of the 5,700,000 people who are totally dependent upon us for electricity in their homes and in their jobs.

Without a very substantial increase in the supply of burnable coal, AEP and other electric utilities will not be able to meet the electric power needs of our people.

Our responsibility for energy supply to the more than 5.7 million people who are totally dependent upon us has, in our view, made it not merely appropriate, but imperative, that we inform them and the public generally of the facts of life with respect to energy supply.

Coal—particularly low-sulfur coal—is in very tight supply. As a result, its cost has been skyrocketing—more than quadrupling in the last few years.

During that time, coal prices have shot up from about $10 per ton to as much as $40 per ton and more.

In fact, according to a June 7 FPC news release, the price of spot coal jumped by more than 54 percent in just 2 months—from December 1973 to February 1974. And it is still rising.

The AEP system expects to burn about 37 million tons of coal this year—second only to the Tennessee Valley Authority.

To the extent that our advertising program succeeds in bringing about an increase in the available supply of coal, coal prices will be less than they otherwise would be, and this difference would be directly and almost immediately passed on to our customers via the fuel adjustment clauses in our tariffs.

Thus, a saving of $1 per ton would result in a $37 million benefit to our customers; a saving of as little as 25 cents per ton would benefit our ratepayers in an amount in excess of $9 million.

For all of these reasons, it seems clear to us that the cost of these ads are properly chargeable above the line for ratemaking purposes because they are clearly for the benefit of our ratepayers: First, by attempting to assure an adequate and reliable supply of power for them; and second, by attempting to bring about a reduction in the cost to them of that power supply.

With respect to the deductibility of our ads for Federal income tax purposes, such deductibility depends upon the intent and content of the particular ad. This is implicit in much of the testimony at the May 6 hearing.

Prior to 1962, there was no legislation on the subject. It is important to understand that all of the court decisions on the point cited at the May 6 hearing dealt with taxable years governed by the Internal Revenue Code of 1939, and relied on broadly worded regulations. Similar language of broad scope was contained in the original regulations under the Internal Revenue Code of 1954.

Congress legislated on this matter for the first time in 1962 by adding section 162(e) to the Code. The 1962 provision was liberalizing legislation which permitted the deduction of, among other things, costs incurred in connection with legislative appearances—expenses which theretofore were nondeductible.

In 1965, the Treasury Department adopted regulations under new section 162(e). These new regulations do not go so far in the direction of denying deductibility as did the old regulations.

This was admitted by Mr. Shulman, who stated that "* * * pre-1965 IRS regulations appear to have taken a broader view in favor of nondeductibility."

The point is that it is the more liberal 1962 code and the more liberal 1965 regulations that apply to the ads in question.

On the other hand, the court decisions calling for nondeductibility cited at the May 6 hearing were all decided on the basis of regulations which are no longer in force. There have been no court decisions under the liberalizing 1962 legislation which are in point.

Our guidelines, therefore, are limited to the language of the presently applicable statute and the regulations promulgated thereunder. I have attached for the subcommittee's information as an exhibit to my testimony a tax memorandum by Mr. Gronningsater seting forth our position on the application of the statute and regulations to our ad program. I will only attempt briefly to summarize that position here.

The regulations under section 162(e) of the Code focus upon activities which urge or encourage the public to contact members of a legislative body for the purpose of proposing, supporting, or opposing legislation.

A deduction is denied in such cases. However, the regulations also explicitly recognize that "expenditures for advertising which presents views on economic, financial, social, or other subjects of a general nature," but which does not involve any of certain activities specified in other subsections of the regulations, are deductible.

In AEP's current advertising program, 20 ads have been published to date. Only one of these ads specifically urges or encourages the public to contact their legislative Representatives.

We do not propose to deduct the cost of that ad for Federal income tax purposes, even though the ad makes no reference to specific legislation.

Of the remaining 19 ads, 11 make no mention of legislation; and their costs, we submit, clearly are deductible. The "Mr. President" ad referred to by Mr. Shulman at page 30 of the May 6 transcript is in this category.

However, I would note for the record that that ad preceded and is not a part of our current advertising program.

The remaining eight ads, one of which was referred to by Mr. Shulman at page 20 of the hearing transcript, do refer to the necessity for amending the Clean Air Act if we and other electric utilities are to continue to be able to furnish an adequate and reliable supply of electric energy to our customers.

However, these ads also refer to a number of other things, and the readers are not urged to contact their legislators or, in fact, to take any action whatsoever.

While the matter may not be free from doubt, it is the considered opinion of our tax counsel that the applicable statute and regulations, which undeniably are more liberal than the old regulations, do permit the deduction of the cost of these eight ads.

I would like to conclude, Mr. Chairman, by saying that it has been our experience that those who oppose the deductibility of advertising costs of their chargeability above the line are generally also opposed to the substance of those ads.

At least in our minds, this gives rise to the inference that those who disagree with what we say, by urging reinterpretation or changes in the tax or regulatory laws, may in fact be attempting to inhibit us from speaking out on issues which we believe are of vital concern to those we serve.

In the case of our current advertising program, tax and ratemaking factors applicable to this advertising were not a consideration.

Presumably, these questions will be decided at the appropriate time by the tax and regulatory authorities.

However, in order to emphasize, in order to bring home the point that these factors really were not a consideration in our ad program, and in order to prevent this very peripheral issue from detracting from the important message that we are trying to convey, we propose, for accounting purposes, to charge the costs of our current advertising program to FPC account No. 426.4—a below-the-line account—even though, as I indicated earlier, we believe that they could properly be accounted for above the line.

Our objective has been to lay the facts regarding energy supply problems before our customers and the American public generally, just as effectively as possible. This, we believe, we are doing—and in the context of our current energy problems, this we believe we have an obligation to do.

Thank you.

Senator HART. Thank you very much.

Mr. Dowd, I confess after reading your statement and listening to your testimony, making some notes, what I had earlier described was a narrow focus, 1-day hearing on an issue I thought I completely understood, raises a whole series of very basic policy questions.

I will ask Mr. Bickwit to sharpen up some of your comments about the specific ads. I think that although it was inadvertent, all of us will be better here in Congress for having opened the broader hearing.

Mr. BICKWIT. Thank you, Mr. Chairman. In your statement you say that the solution to our energy problems, at least for the short and mid-term, is greatly to increase the production and use of coal to generate electric power. What, precisely, in your view should Congress do to achieve that objective?

Mr. DOWD. Basically, it should, in our view, amend the Clean Air Act to make it absolutely clear that it was the intention of Congress to protect the public health and welfare by maintaining the ambient standards and that the owner of an emission source, if he is able to meet the ambient standards, should be permitted to employ whatever method he feels to be most appropriate.

Now, by that I mean the so-called intermittent control strategy should be regarded as a full fledged alternative to emission limitations. On the AEP system, we feel that we can avoid contributing to violations of the ambient standards in our areas through the use of tall stacks which we already have. Through a very sophisticated monitoring system which has already been installed throughout system and through a commitment to reduce emissions when atmospheric conditions create problems.

Now, emissions can be reduced in one of two ways. Either by burning a limited supply of low sulfur coal kept on-site for use during such times or by diverting generation to a plant outside of the area where the atmospheric problems exist.

This is one principal method. Under this program, low sulfur eastern coal continues to be burned. Now, the other major factor and this does not necessarily require congressional action, is to lift the moratorium on the leasing of the coal lands in the West.

There are vast quantities of very low sulfur coal that would meet existing requirements. This can be mined quickly, it can be mined safely.

Mr. BICKWIT. Are you saying that in your view the action you have specified as legislative is essential for the purposes you seek?

Mr. DOWD. Yes; this is our view. I might mention one other thing that is presently before the Congress. And that is the surface-mining legislation. Again it is my understanding that the Udall bill would, in effect, rule out the use of additional large quantities of the Nation's coal. And this is a factor that the Congress ought to look very carefully at in this period of energy crisis.

Mr. BICKWIT. In your statement you say:

> The basic purpose, or thrust, of our advertising program is to inform the public as to these facts and hopefully bring about an increase in the production and available supply of coal so that we can meet these electric power needs.

It is your testimony then, as I understand it, that the basic purpose of your ad campaign is to achieve goals which you have also said really cannot be achieved without legislation.

Mr. DOWD. Well, there are two—we have said clearly in a number of our ads that the Federal—that the Clean Air Act must be amended to permit intermittent controls. Insofar as the western coal is concerned, that actually can be done by administrative action. We are

telling the public that unless actions similar to these are taken, we are going to have a very, very difficult situation this time next year.

Mr. BICKWIT. On the coal mining as I understood your testimony you are also saying that if legislation like the Udall bill passes, then your goals cannot be achieved.

Mr. DOWD. That our goals cannot be achieved?

Mr. BICKWIT. Yes.

Mr. DOWD. I would say that a bill such as the Udall bill would compound the situation and make unavailable to us very, very substantial additional quantities of coal that are presently available.

So, it would compound our problem, certainly.

Mr. BICKWIT. Given that the basic purpose of your and campaign was to achieve goals for which legislation is needed or for which the opposition—certain opposition to legislation is desirable, is it also your testimony that the ads dealt with in the hearings of this subcommittee were aimed at influencing legislation?

Mr. DOWD. The basic purpose was to inform the public particularly in our service areas as to what we regard the facts of life as to energy supply and the problems we are facing with respect to energy supply. To the extent that we refer to amendments of the Clean Air Act, yes; we were advising them that unless the act were amended to permit intermittent controls, it would be very difficult if not impossible to meet the power requirements next year.

Mr. BICKWIT. So, your testimony is that your ads were aimed at informing the public and that it was the end of those ads to promote the result of expanding the supply of coal for the production of electric power.

Mr. DOWD. This was the hoped for ultimate end of the ad. There was another purpose. We are aware of the situation; we are in the front line so to speak.

We have to think in terms of the future. Where will we get the coal? And in that sense we have an obligation to advise, we feel, our customers of the situation whether they do anything about it or not. Our concern in part is that in 1 year or 2 years from now, they will come back and say why didn't you tell us these things. We will have fulfilled that obligation.

Mr. BICKWIT. But your basic purpose as you say was to bring about an increase in the production and available supply of coal.

Mr. DOWD. I would say yes to that question.

Mr. BICKWIT. In that you were informing the public and that you regarded that as an objective of your ads, and given that the basic purpose of those ads was to expand the supply of coal for electric power, how did you expect that informing the public would lead to the basic purpose being accomplished?

Mr. DOWD. Well, it seemed to us that one method would be to, through administrative action, to release the moratorium, to lift the moratorium on western coal. In one of our ads we specifically asked the public to contact their Congressman.

In the other ads we did not do so, as I say, we lay the facts before the public. We tell them what problem there are. We tell them what we believe the solution to the problem is, and then it seems to me we just have fulfilled our obligation in that sense.

This was what we were trying to achieve.

Mr. BICKWIT. Yes.

Mr. DOWD. Now, they can contact their Congressman and seek amendments to the Clean Air Act, they may not, but at least we have told them what the problem is and we have told them how we think the problem can be resolved.

Mr. BICKWIT. But you have said that it was your intention that by informing the public as to these facts, you would hopefully bring about an increase in the production and available supply of coal.

Mr. DOWD. Yes.

Mr. BICKWIT. My question to you is, How did you expect that to happen?

Mr. DOWD. Well, in two ways. We would hope that the ads would stimulate interest on the part of the public and that they would exert pressure, that they would contact their representatives in terms of the Clean Air Act.

This was a hope and on the other side with respect to the western coal moratorium, this as I indicated is something that can be done without legislative action, that if they would contact the appropriate administrative officials, the ultimate goal really being not so much to increase the supply of coal as to be able to generate electricity to supply their needs in the future.

Again, the increased availability and usage of coal is an essential step to the ultimate goal which is to continue to supply these people with electric power.

Mr. BICKWIT. Well, if you were informing the public to this end, the end that you have just mentioned and you hoped through the informing of them that they would be spurred into contacting their Congressman, the obvious question is why was this not an attempt to influence the public with respect to legislative matters?

Mr. DOWD. Are you talking now on the tax side or the accounting side?

Mr. BICKWIT. Yes.

Mr. DOWD. I will pass this to Mr. Gronningsater but we are operating under specific language statute and specific language in specific regulations.

Mr. GRONNINGSATER. In the first place as Mr. Dowd has pointed out, there are two things involved here. Insofar as releasing western coal for mining is concerned, that is not a legislative matter.

The 1962 legislation refers only to legislative matters in the context of these ads.

On May 6, there was testimony by Mr. Lester Fant who stated they had been requested by this subcommittee to look into these matters, section 162(e). He made an analysis of the present requirements of nondeductibility under the new regulations those were operating under.

First, is that there must be a reference to legislative matters. That does not include, I do not think the administrative action.

The second was that there must be an attempt to influence the general public and that I think, is the point that you are speaking of, Mr. Bickwit.

Then he said, now, these are the only two specific legislative requirements. But I think—he said that he thought that it could inferred from the congressional purpose that there was really a third test, and that was—unless the advertising, unless there was a conflict of interest

in the advertising, between the business of the advertiser and what he called the selfish business of the advertiser and the interest of the public, the cost of the ad should be deductible.

Now, our opinion is and maybe other people will differ with it, these ads are not against the interest of the general public. We think they are in the interest of the general public.

Mr. BICKWIT. Under questioning, Mr. Fant, as I understood him, amended his testimony to say that all that would be required would be some conflict of interest between the business and some identifiable segment of the general public. Now it seems clear from testimony we have received that an identifiable segment of the general public regards it as a conflict of interest.

Mr. GRONNINGSATER. What an identifiable segment of the general public would be. You have an interest contrary to the purpose of our ads. We are of course, primarily concerned with our own service territory.

Mr. BICKWIT. Excuse me, I missed that.

Mr. GRONNINGSATER. We are primarily concerned with our own service territory and our own customers but we are also, in a sense, speaking of the problems of our industry as a whole.

Mr. BICKWIT. Well, the identical segment of the general public I am speaking of are those who do not want to see the Clean Air Act repealed.

Mr. GRONNINGSATER. Well, there is no definition of so many of these terms. I wouldn't have thought that that was a segment of the public. Because here you have, you are speaking of the Nation as a whole. And you have a person here who believes that so and so, and his next-door neighbor believes something else. I would not have thought that that was a segment, an identifiable segment of the general public.

Mr. Fant also, to give an illustration of selfish business interest, spoke of trying to make more profit or, well, one way or another trying to make more profit I think was the thrust of his example.

That is not what we are trying to do here. We are trying to be able to continue to furnish adequate and reliable service. One of the thrusts of our ads is to try to get the cost of coal down. Being a regulated company, if the cost of coal goes down, our rates go down.

Mr. BICKWIT. Is it your testimony that if the cost of coal goes down your rates go down, you make no increase in profit?

Mr. DOWD. That's correct because we have automatic fuel clauses in our tariffs. As the cost of coal goes up, these increases are automatically passed on to the public in the form of higher charges for electricity. Should those costs either go down or not go up as rapidly as they otherwise would as a result of increasing the available supply of coal, then this benefit would almost automatically and immediately inure to the benefit of the ratepayers without the power company itself making a profit.

Mr. BICKWIT. If you sell more electricity, do you make more profit?

Mr. DOWD. I think our rates are subject to regulation, and the answer to that is yes, we get an allowed return. So, the more electricity that is sold, the greater the net income of the company would be under normal circumstances.

Mr. BICKWIT. Wouldn't a lowering of rates bring about an increase in sales?

Mr. Dowd. Well, there is a big, big debate as to the elasticity of demand for electricity. We feel that there probably is some elasticity when you are in the area of pure wastage or when you are in an area where there are substitutes available. But even in the field of space heating we are in a query whether there are substitutes available with coal and natural gas being in such short supply. That is a very difficult question to answer. If the rates were to go down—really what we are talking about is that they would not go up as rapidly as they have been going up; I think as a practical matter that would be the net effect of this.

Mr. Gronningsater. If I might add a word to that, we have testified before, years ago, in other connections, about elasticity of demand. But that was in a period, speaking about making more profit, of relatively stable costs. In fact, all we had was decreases.

We are not in a posture where everything has gone up so, capital costs, the cost of money, the cost of fuel, that may be suspended for awhile.

What we are really looking at is to be able to continue to supply our customers.

Mr. Bickwit. Are you subscribing to Mr. Fant's analysis in saying that under that analysis your ads are deductible?

Mr. Gronningsater. I am saying under his analysis, I am not saying he is 100 percent right in every respect, but this was his analysis.

Mr. Bickwit. And under his analysis you believe those ads are deductible.

Mr. Gronningsater. Yes. Of course, there is one ad where we suggested to the reader that if he agreed with us that he get in touch with his Congressman.

As Mr. Dowd testified, we do not propose to deduct the cost of that ad.

Mr. Bickwit. Why is that? Isn't that motivated by the public interest also?

Mr. Gronningsater. Well, simply because there is so much emphasis in the new regulations on urging the reader to get in touch with his Congressman.

As Mr. Dowd testified, tax was not an important consideration here at all anyhow. But with that emphasis in the regulations on contacting your legislator, we don't want to argue about that.

Mr. Bickwit. Is it your view that the urging of the public to contact one's Congressman is what makes an ad nondeductible?

Mr. Gronningsater. Well, what the word should be, I don't know. That is something else.

As you say, this whole program of ads, broadly speaking, has the same thrust. This was brought out in the May 6 testimony by Media Access Project. There is an emphasis on that in the new regulations that there was not in the old regulations.

Mr. Bickwit. Do you feel it is controlling? I guess the better way to put the question is, are you saying that if you don't urge the public to contact a Congressman, that it is deductible?

Mr. Gronningsater. Well, that would depend to some extent on the purpose of the advertising, perhaps. But in the context of our ads, I would say yes. It should be deductible.

Now, the matter of course is not free from doubt. There has been, as Mr. Dowd testified, there has been no case under the—involving

taxable years covered by the new legislation and regulations that really is closely enough in point to cite.

Mr. BICKWIT. Now, why isn't the *Consumer's Power* case covered by the new regulations?

Mr. GRONNINGSATER. It involved the years 1954 to 1957.

Mr. BICKWIT. That 's right.

Mr. GRONNINGSATER. It came down in 1970, but involved the years 1954 to 1957.

Mr. BICKWIT. That's right, but which regulations did the court apply in that case?

Mr. GRONNINGSATER. Well, what the court in effect applied was perhaps the old regulations that were promulgated over and over again under the 1939 and earlier years, because the specific language in this field, well, for these years, were not promulgated until 1959.

Now, it is true, let me retract that, because by the time this case was decided those regulations had been promulgated. Even though they were promulgated after the end of the taxable years involved.

As Mr. Shulman emphasized, in the old regulations there was language about propaganda that had no tie-in to do anything else, no tie-in to legislate matters. And that is not so under the present regulations.

Mr. BICKWIT. In the regulations, as I read them, there is—that were applicable to the *Consumer's Power* case—a reference to promoting or defeating the legislation. And there is a definition of promoting or defeating legislation which as I read the regulations is the same definition as applicable to ads run today.

Do you disagree with that?

Mr. GRONNINGSATER. Which language is that?

Mr. BICKWIT. Well, I am looking at 1.162–20B, 1 and 2.

Mr. GRONNINGSATER. That is the present regulations, yes.

Mr. BICKWIT. That is the regulation that was applied in the *Consumer's Power* case.

Mr. GRONNINGSATER. Well, I don't know that I would agree with that. But this——

Mr. BICKWIT. I can read it.

Mr. GRONNINGSATER. Yes, I have it right in front of me.

Mr. BICKWIT. No, but I can read the reference of the court to that regulation which means to me that that was the regulation they applied.

Mr. GRONNINGSATER. OK, if this is B2, and regulation 20, it refers to influence, says, "Expenditures for the promotion or defeat of legislation included but shall not be limited to expenditures for the purpose of attempting to influence members of a legislative body directly, which is not involved here, or indirectly by urging or encouraging the public to contact such members for the purpose of proposing supporting or opposing legislation." There is part of your emphasis on contacting your legislator.

Mr. BICKWIT. Yes, but that obviously is a nonexclusive example. The words, "but shall not be limited to," are there as plain as can be.

Mr. GRONNINGSATER. Yes. But all the examples given in these regulations involve contacting your legislator.

Mr. BICKWIT. That's right, but every example is qualified by the words, "but shall not be limited to."

Mr. GRONNINGSATER. Well, reasonable men can differ.

Mr. BICKWIT. On the meaning of the words, "but shall not be limited to"?

Mr. GRONNINGSATER. No, not on that. On the thrust of the present regulations.

Mr. BICKWIT. Well, the only point that the staff would want to make is that the *Consumer's Power Company* case which applied this regulation, in the view of the staff, stands for the proposition that you needn't contact your legislator, you needn't urge that legislators be contacted in order for the ad to be declared nondeductible, in that under the facts of that case, many of the ads disallowed did not so urge the readers.

And I would agree with you that reasonable men might differ on the meaning of the statute and the regulations. But I have difficulty agreeing with your proposition that after the *Consumer's Power Company* case that reasonable men might differ on this.

Mr. GRONNINGSATER. Well, we are dealing now with a set of regulations which covers both years before 1963 and years after 1962. And when you look at years after 1962, I think you have to look at the regulations as a whole.

Obviously——

Mr. BICKWIT. Excuse me.

Mr. GRONNINGSATER. Those who testified in the May 6 hearing also felt in doubt about the situation. Most of the thrust of what they said was that rules should be changed, the Treasury should go back to its old regulations. And there might be come question whether they could under the new legislation. But they talked a great deal about what they thought the rules should be and not what they are.

Mr. BICKWIT. But in their testimony as to what they were, it was the conclusion of the witnesses that your ads should be classified as nondeductible. And as I understood their testimony they based it in large part on the *Consumer's Power* case which in the opinion of the staff does appear to be applicable to situations such as yours.

Mr. GRONNINGSATER. Well, I don't know how important this is. But one of the factors in the *Consumer's Power* case was that the court, and this was a sixth circuit opinion, was that the—that there had been a factfinding by the lower court and the circuit court felt that it didn't want to disturb, it indicated some doubt in the matter, but did not want to overrule the finder of the facts.

Mr. BICKWIT. That's right, but the finder of fact must have said, "You don't have to say, 'Write your Congressman,' in order for this ad to be declared nondeductible." And I have heard no cases on the other side for the proposition that you do have to say, "Write your Congressman," in order for an ad to be declared nondeductible.

Perhaps we ought to leave it at that.

Mr. GRONNINGSATER. OK.

Mr. BICKWIT. You mention that you have reconsidered the matter of the ads in question for FPC accounting purposes.

Can you tell us what factors account for your not having reconsidered their tax treatment, also?

Mr. DOWD. Well, I think—first let me explain the basic factor with respect to the accounting treatment that we propose to report to these expenditures. It is basically to avoid an element of controversy that we think is very peripheral. We don't want them to cloud the basic message that we are trying to convey here.

Now, it was our feeling that the language under the Internal Revenue Code and the applicable regulations was more liberal than the language in the FPC's, the Uniform System of Accounts. This also is a factor.

I might mention one other thing. As I say, neither accounting for these expenditures nor their deductibility for tax purposes was really a factor or a consideration in the program. If they are all charged below the line, if they are all nondeductible, we would have gone forward with this program in any event.

I might mention one factor. Maybe Mr. Gronningsater could clarify it a little bit. But as far as a nondeductibility for tax purposes for these ads is concerned, whether they are deductible or not, it is almost a moot question.

Last year the American Electric Power system did not pay Federal income taxes, and that particular situation is at least a possibility or a probability this year.

And Mr. Gronningsater could elaborate on the reasons for that.

But whether we deduct them or not is really small potatoes in the whole context here of what we are trying to accomplish.

Mr. BICKWIT. Did Mr. Gronningsater want to elaborate?

Mr. GRONNINGSATER. Only to the extent of emphasizing once again that tax deductibility was not a consideration in this program at all. The first time it was brought to my attention was after the—the first time I heard of it was after the May 6 hearing when we received a telephone call from a magazine about this matter. I then investigated around the company and found that this subject hadn't been raised with anybody concerning the taxes.

Mr. BICKWIT. I would like to close with one final observation. That is your view that the ad was in the public interest or conceived by the company running it to be in the public interest, then under all circumstances, unless you urge your Congressman, it will be deductible, it does strike the staff that there would be very little left of the tax law in question given that, as I read the companies in question, virtually all of them regard that their ads are in fact in the public interest.

Do you react at all to that? Do you have a reaction to that?

Mr. GRONNINGSATER. Yes, I would have a reaction. I have read these ads—I haven't read all the hundred ads mentioned in the testimony, but I have read some of them and personally have the feeling that those involved were trying to carry out their duties and responsibilities. Those, the various advertisers, were trying to lay facts before the public and trying to carry out their duties and responsibilities. And if Mr. Fant is correct, that the cost is deductible, if there isn't a conflict of interest between the advertiser and the public, why, then, and I don't say that he is necessarily, but if these ads are all in the interest of the public and Mr. Fant is correct, then the cost should be deductible.

Mr. BICKWIT. Again for the record, as I understood Mr. Fant, he referred to an identifiable segment of the public. He was not explicit on how you identify a segment of the public, but as I understood him, his view was that if there were a number of interests that reacted adversely to the advertisement, that there would be the needed conflict of interest.

Mr. GRONNINGSATER. Well, I believe—I would suppose Mr. Fant got into that in connection with the statutory language, any attempt to influence the general public or segments thereof.

Now, I don't believe there is any definition of segments thereof. I don't recall Mr. Fant——

Mr. BICKWIT. There is no definition of selfish interest, et cetera.

Mr. GRONNINGSATER. Well, you get into a question of fact as you do on so many tax things.

Mr. BICKWIT. That is true. The one case we have that resolves those facts based on the regulations applicable to your situation seems in my view to have been resolved in contrary to your interest.

Thank you, very much.

Mr. DOWD. Mr. Bickwit, I would only point out one further thing. That is as to 11 of our ads they made no reference to legislation. Not only did they not ask the public to take any specific action, but they made no reference whatsoever to legislation. And our position with respect to those ads is that they are clearly deductible for action purposes.

The area that is muddy in our view is the one where we do make reference to specific legislation, but we do not ask the public to take any action whatsoever.

We feel there is a difference of opinion as to that one under the regulations and under the law. You may disagree, and Mr. Fant may disagree. And the IRS may very well disagree, but that remains to be seen if the issue is actually put to them.

Mr. BICKWIT. And I should add that this disagreement comes from someone who is not a tax attorney and has had very little experience with the tax court.

Senator HART. How or under what procedures does the IRS undertake to audit an issue such as this? Is there any, perhaps I should know, is there some established method?

Mr. GRONNINGSATER. This is true of most large corporations; we are under continual audit, in effect. And the audit is very thorough, and well, let me say that I am in the legal department of our company. We have a separate tax department. And the audit is carried on with the tax department and the head of the tax department. But I have spoken to him about this, and he told me that our advertising all the time, apart from this new program, is very carefully scrutinized.

Senator HART. Scrutinized by the tax department of the company——

Mr. GRONNINGSATER. No, scrutinized by the Internal Revenue Service on audit. In the audit of any one group of years, taxable years, it takes years, it is a very thorough, lengthy audit.

Senator HART. Gentlemen, thank you very much.

Mr. DOWD. Thank you, Senator.

[The exhibit follows:]

EXHIBIT A

DEDUCTIBILITY OF ADVERTISING EXPENSES FOR FEDERAL INCOME TAX PURPOSES

Whether the cost of non-product advertisements is deductible for federal income tax purposes depends upon the content of the particular ad. This is implicit in much of the testimony at the May 6, 1974 hearing before the Subcommittee on the Environment of the Senate Commerce Committee.

Prior to 1962 there was no legislation on the subject. All of the court decisions on the point cited at the May 6 hearing dealt with taxable years governed by the Internal Revenue Code of 1939, and relied on broadly worded regulations. Similar language of broad scope was contained in the original regulations under the Internal Revenue Code of 1954.

Congress legislated on this matter for the first time in 1962. The Revenue Act of 1962 added Section 162(e) to the Code, applicable to taxable years beginning after December 31, 1962.

The 1962 provision was liberalizing legislation. Paragraph (1) of Section 162(e) permits the deduction as ordinary and necessary business expenses of, among other expenditures, costs incurred in connection with legislative appearances, expenses which previously were nondeductible.

Paragraph (2) of Section 162(e) provides that paragraph (1) *"shall not be construed as allowing* the deduction of any amount paid or incurred * * * in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums" (emphasis supplied). It may be of some significance that paragraph (2) does *not* say in so many words that the cost of attempting to influence the public with respect to legislative matters is not deductible. Sections of the Code which disallow deductions typically state explicitly that "no deduction shall be allowed" for certain amounts or expenses; see, for example, Sections 261 through 279, "Items Not Deductible".

In 1965 the Treasury Department adopted regulations under new Section 162(e). These new regulations under the liberalizing statute do not go so far in the direction of denying deductibility as did the old regulations. In his May 6 testimony Mr. Harvey J. Shulman of Media Access Project, after proposing that there be changes in the present statutory and administrative provisions to narrow the field of deductibility, stated (page 48 of the transcript):

"As I have previously indicated, pre–1965 IRS regulations appear to have taken a broader view in favor of non-deductibility. Specifically, expenses associated with 'the exploitation of propaganda' were not to be deductible. * * * "

The regulation under Section 162(e) of the Code is Reg. § 1.162–20. Paragraph (c) of that regulation is captioned "Taxable years beginning after December 31, 1962". The pertinent part of paragraph (c)(1) is as follows:

"* * * All other expenditures for lobbying purposes, for the promotion or defeat of legislation (see paragraph (b)(2) of this section), for political campaign purposes * * * or for carrying on propaganda (including advertising) *relating to any of the foregoing purposes* are not deductible from gross income for such taxable years. * * *" (Emphasis supplied)

Paragraph (d)(2), which is referred to in paragraph (c)(1), reads as follows:

"(2) *Expenditures for promotion or defeat of legislation.* For purposes of this paragraph, expenditures for the promotion or the defeat of legislation include, but shall not be limited to, expenditures for the purpose of attempting to—

(i) Influence members of a legislative body directly, or indirectly by urging or encouraging the public to contact such members for the purpose of proposing, supporting, or opposing legislation, or

(ii) Influence the public to approve or reject a measure in a referendum, initiative, vote on a constitutional amendment, or similar procedure."

The only other language in the regulations dealing with Section 162(e)(2) of the Code is paragraph (c)(4). It reads as follows:

"(4) *Limitations.* No deduction shall be allowed under section 162(a) or any amount paid or incurred (whether by way of contribution, gift, or otherwise) in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums. For example, no deduction shall be allowed for any expenses incurred in connection with 'grass-root' campaigns or any *other* attempts to urge or encourage the public *to contact members of a legislative body* for the purpose of proposing, supporting, or opposing legislation." (Emphasis supplied)

We are not here concerned, as was the Supreme Court in the *Cammarano* case cited to this Subcommittee in the May 6 testimony, with a matter on which the general public is to vote.

There has been no court decision under the liberalizing 1962 legislation which is helpful in determining the deductibility of the cost of advertisments such as those which have been the subject of these hearings. Our guidelines are therefore limited to the language of the statute and the new regulation thereunder.

This regulation, in denying deductibility in some instances, places very considerable emphasis in paragraphs (b)(2)(i) and (c)(4) on urging and encouraging the public to contact members of a legislative body for the purpose of proposing, supporting or opposing legislation. The regulation, in paragraph (a)(2), allows deductions for "expenditures for advertising which presents views on economic, financial, social, or other subjects of a general nature, but

which does not involve any of the activities specified in paragraph (b) or (c) of this section for which a deduction is not allowable".

American Electric Power System ads fall into three categories:

1. Some of the ads inform the public on certain problems connected with the energy shortage and are concerned with assuring an adequate and reliable supply of electricity. Companies which are subject to regulation are not permitted to cease rendering service, or to limit their services, unless permitted by the regulatory agency or by legislation. Specifically, electric utilities have the duty and responsibility of providing reliable and adequate electric service at reasonable cost. We believe it is clear that these ads, which neither ask the reader to contact a legislator nor make any specific reference to legislation, are deductible.

2. Some of the ads, in addition to making certain other points, state that the Clean Air Act should be amended if the American Electric Power System and the industry as a whole are to be able to furnish the adequate and reliable service which it is their duty to provide. These ads pursue what we view as an educational program to that end. The readers are *not* urged to contact their legislators, or to take any kind of action at all. The ads merely lay the facts before them. We believe that under the 1962 legislation and the new regulations, undeniably more liberal than the old regulations, the costs of these ads are deductible.

3. One ad we have published, urging the necessity to burn coal (of which we have ample reserves) instead of oil or gas (which are in short supply), requests the reader who agrees to send the ad to his Congressman. Even though no legislation of any kind is mentioned, we do not intend to claim a tax deduction for the cost of this ad.

In summary, we believe that the costs of all the ads we have published, with the possible exception of the ad referred to in 3 above, are deductible as ordinary and necessary business expenses.

July 18, 1974.

Senator HART. Next is Mr. E. F. Loveland, vice president of Shell Oil Co. Mr. Loveland.

STATEMENT OF E. F. LOVELAND, VICE PRESIDENT, MARKETING—COMMERCIAL SALES, SHELL OIL CO.

Mr. LOVELAND. Senator, thank you very much. My name is Gene Loveland, vice president of marketing—commercial sales.

I appreciate very much the opportunity to be here on behalf of my company to express our views on this topic.

We have already outlined in written communications to the subcommittee chairman the position Shell intends to take regarding the tax status of the two 1974 advertisements which are questioned in your study. Rather than repeat those statements, which explain why we consider the advertisements to be tax deductible, I wish to comment today on what Shell believes is really at stake in any investigation of this subject.

First, we recognize that the current regulations take the position that no advertising is tax deductible if it attempts to influence the public with respect to legislation.

On one point, we agree with those who testified earlier before this subcommittee. We, too, believe that generally there has been an imbalance in the news and information available to the American public in the mass media today.

But the imbalance tilted not in favor of business, but rather against it.

It is indeed a sad state of affairs when business finds it necessary to resort to advertising to clarify important issues affecting its activities. Advertising is one of the least effective ways of doing this particular job.

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Comments printed in editorial columns and aired on daily news programs are far more effective. Lacking ready access to these high-impact media, we chose to publish the two advertisements in question simply because our critics had been eminently successful in using both the print and electronic media to present their views of our profits to the public. Our advertisements thus were essentially a defensive move designed only to properly balance the perspective on the subject. And their exposure, when compared with the printing ink and air time received by our critics, amounted to a bb shot in response to a salvo.

That situation was not unique.

Even today, if both Ralph Nader and a businessman were to hold press conferences in Washington on the same subject, whose comments would predominate in the pages of tomorrow's newspapers and in tonight's newscasts? Critics of business, such as Mr. Nader, have little trouble in getting their views before the public. They don't have to advertise because their views are publicized free.

The businessman would have trouble even getting a reporter to cover his press conference.

We do not question Mr. Nader's right to speak out or the press' right to cover and publish his views. We are only saying that it has been difficult to get all the relevant facts about business published today.

Also, let me make it clear that I am not singling out Mr. Nader. However, his statements are representative of the criticism leveled at business these days. I have brought along a few articles clipped from our daily newspapers as examples of what I mean. In the interest of time, I shall read only a few of the headlines. They represent the gist of the news that was spread across America in January, when our ads were published.

"Nader charges energy scare designed to double oil prices."
"Aspin claims oil companies gouging public."
"Senator claims oil shortage put-up job."
"Jackson says oil firms irk public with evasions."

Often, antibusiness, antiprofit system messages are run on the air free of charge. With your indulgence and permission, I would like to play a tape recording of such a message that was sent to over 400 radio stations across the Nation by a group called Public Interest Communications.

Senator HART. Yes, do.

Mr. LOVELAND. If this won't come through, I will try to read it.

[The taped material played is as follows:]

HOST. Welcome to Highway Robbery. The game where giants of industry see just how much they can get away with.

ANNOUNCER. Thanks, Bob. Our first contestant today is Mr. Robert Baron, President of the Windfall Oil Company.

BARON. Howdy.

ANNOUNCER. On our last show Mr. Baron got away with the Alaska Pipeline, the oil depletion allowance, numerous anti-trust exemptions, astronomical price increases and record profits.

HOST. Well, that's quite a haul, Bob! Well, Mr. Baron, what would you like to get away with today?

BARON. Total control of the world's resources, Bob.

HOST. Total control of the world's resources! How about that! And just how do you intend to get away with that, Mr. Baron?

BARON. Well, Bob, I thought I'd sorta stop pumping my old wells and make the public pay to get me a whole bunch of new ones. I'll just tell 'em no money, no oil, know what I mean?

HOST. Oh, ho, sure do. Mr. Baron. Well, Bob, he wants to control the world's resources.

ANNOUNCER. That's right, Bob. Let's see if our audience will let him get away with Highway Robbery!

Senator HART. That is tough.

Mr. LOVELAND. I thank you for your indulgence, but I just wanted you to know how someone like us feels when something like this goes out across the Nation.

Senator HART. Out of curiosity, do you have any idea how many stations picked that up?

Mr. LOVELAND. Our first alert on this was our own employees who called in from various parts of the Nation. And we do have an organization that does media research, a California-based audio-video reporting service, who told us it did go to 400 stations. How many played that, I frankly don't know. But it got pretty good coverage because our people were a little disturbed about it.

This message was not only aired free of charge, but also was funded by contributions which then could be deducted from income taxes since Public Interest Communications is a nonprofit organization. Thus, this message was free of any tax charges.

Is it any wonder that in such circumstances business has turned to advertising in an attempt to tell its story? At times, it seems to be the only way a business has to express its point of view on subjects important to its future.

The American people have nothing to fear from this kind of advertising. In fact, they stand to gain by it. The average citizen is sensible enough to know when he is being sold a bill of goods. But this holds true only if he has the opportunity to consider all sides of the important issues of the day.

In our view, our laws should encourage the free exchange of ideas. Our concern should be not how to further limit the access of business or anyone else to the mass media but rather how to make the mass media more available for the free exchange of information and ideas so vital to the functioning of a democracy.

Why should the people who oppose the ideas of business have the opportunity to express their views free, while more often than not, business must pay for the same right? If the tax deduction for institutional or goodwill advertising is denied to energy-related companies, would we not then be forced to pay nearly a double penalty for the right to free speech and the use of a free press?

One of the issues that precipitated the American Revolution was the Stamp Act. It would have greatly increased the cost of newsprint in the colonies and thereby made the cost of expressing ideas almost prohibitive. The issue facing us today is little different. We should not levy an economic penalty on the business community for expressing its views.

It seems to us that opponents of business are now asking you to penalize business for expressing its views or else to find some way of limiting what it can say in the mass media.

Here, it is appropriate to express another concern. Trying to define what is propaganda and what isn't, what should be said and what should not be permitted, is a difficult matter fraught with risk.

You are being asked to consider ways to limit what business can say in tax deductible advertising. This is the same old problem censors face everywhere: Where do you draw the line? Who will be affected by today's decisions, tomorrow? How do you define what is proper and what is not?

In our textbooks, the only historical guide that had any merit was the prohibition on obscenity, and today even obscenity is proving difficult to define.

In closing let me say that recently, we have been more successful in getting our views across in the mass media—without resorting to the kind of advertising being studied by this subcommittee. The media are being more evenhanded as they gain insight into the complexities of the energy problem.

We do hope, however, that no one has been lulled into complacency regarding the energy problem confronting this Nation. It is a serious problem and one that will be with us for some years to come. Thus, it is conceivable that from time to time we at Shell may again find it necessary to advertise to make the facts of the situation known to the public. Although we do not believe that advertising is the best way of getting our views on vital issues across to the public, we would not hesitate to use it again if there were no other way to do the job.

Shell endorses the idea of an open society in which the ideas of all people may be freely expressed, in which the public has access to the information and facts it needs to have in a democratic society. Only in this way is there any hope that balanced, sensible views will ultimately prevail.

I thank you.

Senator HART. You have heard me say earlier today, one part of the problem, and understandably it is not the one which you face, is that this is an emotionally loaded matter, the impoverished good idea. What can we do? Though the impression may not be very strong, I recognize the desirability of permitting the strongest and the most powerful among us—corporate or individuals—freedom to effectively present their ideas. But how can we insure an effective presentation by the least powerful of their ideas, because the balance sheet doesn't determine who's got the better idea at all.

Mr. LOVELAND. Well, I wonder, Senator, if that is in fact a need. In other words, you have mentioned the impoverished. We are talking here about a climate of antibusiness that is using sensationalism to bang away at them. And I don't know of any media or any newspaper who would take that tack relative to the impoverished. So I am not sure that we can say that this situation does occur or would occur. If they have a particular message and it is of interest, I think we can assume that the media in this case would pick it up, because this is the nature of our country, to play up the little fellow, to——

Senator HART. I think that's an attitude those of us who are more comfortably situated generally accept as valid. But if we were uncomfortably situated, I am sure we could cite to this committee, and Shell Oil, a dozen groups, welfare mothers. Now recently they managed to get a point of view across. But that is typical of a group. I am not sure that given the limitations of time on television and the way you have to put a newspaper together, that the advantage that comes from wealth is not still significant in your ability to get ideas out.

Mr. LOVELAND. I think we have a unique situation here. We had a particular moment in history where we have just waves of this sort of a situation focusing in. And we attempted to push those back and even the waters.

Senator HART. I agree that the roof seemed to fall in on you at that particular point in history.

Mr. LOVELAND. Yes. I think as we had said earlier, we have got to open this up. I think you have recognized today that your committee is getting broader in this activity. And I think somewhere along the lines we have to address ourselves to the media. Because here in our estimation was a segment of our society who neglected their responsibility and resorted to sensationalism which had to be counteracted.

Now maybe we should ask them, as I have many, many times, going back to where I worked with young people, I used to wonder why it was that the Eagle Scout and some of the other do-gooders and scholarship boys hit the last page when the murderers and rapists were on the front page. And I asked that, why are these teenagers here? And usually the answer is well, it sells papers, it creates circulation, it is a better Nielsen rating.

I think these are the things we have to say, that they have a responsibility to present the facts and they have a total responsibility to all people. I think this is the area that we have to open up.

Senator HART. Well, narrowing it a little now, in your advertising program, are you familiar with how Shell determines in the case of a particular ad whether it is or isn't deductible?

Mr. LOVELAND. Well, in our advertising program, we have had two forms of advertising. We have our product advertising, mainly out of our marketing department, and we have had our institutional out of our public affairs area. We have never considered our type of institutional advertisting in a tax situation or a tax problem. We do not have, as in the case of Mobil, a long-term dedicated type of message that they are on. Ours was an emergency situation, at the time we ran four ads. We felt that these were public education ads and what they should know. We talked about price and how the Cost of Living Council established the price and why they were paying that price at the service station. We talked about the allocation program. There was tremendous confusion among people and all classes of customers on how that allocation program sorted out and who had priorities and who didn't, and so forth. We ran an ad which graphically described that. Then we ran the ad talking about our profits, and then—which is one of the ads in question. And we ran another one depicting our results and what those results meant. What they meant in cash generation, the need for cash generation, how if this world was going to continue to enjoy the measures of its energy and so forth, that cash generation was a must.

And it didn't occur to us that we were involved in any legislation or lobbying in any way. But we felt that because the media had neglected their particluar responsibility, we had to tell the public where this oil was, what it was going to take to get this oil, and what it would mean to them in the way of conservation and other items. It is a public service.

Senator HART. Since then, have you taken a reading on the deductibility or nondeductibility of any of those ads?

Mr. LOVELAND. No; we haven't. Well, I say we haven't with any taxing body. Our own tax people are quite firm, as I have indicated in our letter, quite firm on their position. And as far as a true reading, of course, that will not occur until these are filed coming into next year.

Mr. BICKWIT. On the tape recording that you played, you say that was sent to over 400 radio stations. Do you by any chance know how many of those stations actually played the tape on the air free of charge?

Mr. LOVELAND. No; I don't know whether we could find out. We employed Audio-Video Reporting Services through a Mr. Erickson of Monte Rio, Calif., to tell us how many of these were sent out. And this is what he told us.

Now whether they have a reading, I can try to find out and report to you, whether they have a reading on actual airing of that.

Mr. BICKWIT. It would be useful for the record.

Mr. LOVELAND. We will send you that if we have it.

[The following information was subsequently received for the record:]

SHELL OIL CO.,
Washington, D.C., August 19, 1974.

Hon. PHILIP A. HART,
Chairman, Subcommittee on the Environment, Senate Commerce Committee. Dirksen Senate Office Building, Washington, D.C.

DEAR SENATOR HART: The following response has been provided to me by Shell's Head Office in Houston in reply to your inquiry of July 18, 1974, at the Committee on Commerce, Subcommittee on the Environment, hearings on Corporate Energy and Environmental Advertising.

We refer to the Transcript of Proceedings of July 18, 1974, in which Mr. Bickwit of your staff requested available information on the actual airing of the "Highway Robber" radio tape. We can confirm at least that the following stations aired this tape:

KSFO—San Francisco, Calif.
KFRC—San Francisco, Calif.
WABB—Mobile, Ala.
KPFT—Houston, Tex.

Our own employees reported the above stations to us and, undoubtedly, other stations used the tape, but we have no way of knowing this.

Sincerely,

J. CARTER PERKINS,
Vice President.

Mr. BICKWIT. This is a question that you may have some difficulty with, but I feel it is appropriate to ask. In your view, would a company run ads like the ones in question, even if in your view they were nondeductible?

Mr. LOVELAND. I think they would. I don't think that was the question. The point was, here was a void, and that void had to be filled. If we have to pay for that expense, it would be worth the money. We think it is a matter of principle and not a matter of dollars.

Mr. BICKWIT. In the advertisement entitled, "How in all conscience can anyone call these excess profits?" is it your intent in that ad to influence the public?

Mr. LOVELAND. Well, maybe we have a matter of semantics. You are talking about influence and we are talking about education. We are talking about bringing to the public the facts, and the facts are that this is our profit picture, this is how we attained it and this is why we need it.

Mr. BICKWIT. Do you think influence is an improper characterization?

Mr. LOVELAND. Well, influencing legislation because we were not involved in legislation, I would say influence might be stronger than we felt. We felt it is educational. I think the end of our ad says all we ask is that the Government and the public approach the subject with objectivity and a minimum preconceived—of preconceived notions.

After all, we have basically the same ends in mind, that is, providing for the needs of the American consumer as well and as fully as possible. And these are the educational facts to back that up.

Mr. BICKWIT. Well, I wouldn't go on in semantics except that it is relevant to the tax matter. But when you have got a camapign for an election, you have got two people running against each other and some people support one guy and some people support the other guy. If you go out and give to the public facts with respect to why a particular one of those is better, it strikes me that education is perhaps not nearly as good a characterization of what you are doing as influence.

Mr. LOVELAND. But you are saying influence. And I would have to say influence what or for what reason? Ours was not a matter of influence. We found ourselves in a position in an energy crisis with information about the energy crisis antioil up here and facts about it down [indicating]. So I am saying we needed to educate the people and bring the true facts to them and bring that up here. Now if we go beyond this point and we are trying to peddle some fish, for a particular situation or a particular bill, then we are influencing. But when you bring the people up to a knowledgeable level of understanding of the oil business, which is as I must say, a most difficult job, then to me that is education.

Mr. BICKWIT. So it is the reference to legislation which in your view decides the question of whether there is——

Mr. LOVELAND. Reference to education and influence. I can't understand what we are trying to influence. We are not trying to influence anything, we are trying to educate the people in the very facts of the case. And the facts are, this is the money we made. This is the money that we would have made had there not been inflation. This is the need. And this is what is going to bring you more oil.

Mr. BICKWIT. The problem is that those who perceive those facts entirely different from you—and there are many that do—have difficulty characterizing your role as that of an educator, just as that guy who wants to vote for President Nixon has difficulty conceiving that the guy who is out campaigning for McGovern is educating.

Mr. LOVELAND. I am sure we are equally adamant in our particular positions and probably another forum will resolve it.

Mr. BICKWIT. Again, as was pointed out with the last witness, if your understanding of what is educational, as opposed to influential, were accepted, it is very difficult to see what remains of the law which says that you may not deduct when you are influencing the public with respect to legislation.

Given that, any one who confronted the question of whether he was so doing could, under the way you define the term education, resolve it in favor of the fact that he was educating rather than influencing.

Mr. LOVELAND. Well, I have to start with a point that it would appear that certainly the media had an almost zero knowledge of the oil industry. If they didn't have a zero knowledge, then they didn't

report it very well. So I start from that point that I have an uneducated public and I have an uneducated media, and therefore, I have to put the facts before them. They prefer not to put the facts there, so we put the facts there. Those are facts. Now, I don't consider them influence.

Mr. BICKWIT. You don't consider that educating the public with respect to the nondesirability of certain legislation is in any way trying to influence the public with respect to that legislation?

Mr. LOVELAND. I am talking about these two ads and I am talking about the situation. And I don't know about the noninfluence of legislation. I am not aware of any legislation.

Mr. BICKWIT. There was legislation referred to in the excess profits ad.

Mr. LOVELAND. Well, that is only to establish the entire ad in positioning, and let them know in total what is going on and is, I feel—comes under the category of facts.

Mr. BICKWIT. Again, if we view it that way, Congress may well have legislated a nonlaw.

Thank you very much.

Mr. LOVELAND. Thank you.

Senator HART. The exchange was very interesting. I don't want to acknowledge that Congress has legislated a nonlaw. But I do acknowledge that education by itself, from its Latin derivation suggests influence.

Mr. LOVELAND. Once the man puts the education into practice.

Senator HART. More influence than it is education. As far as the semantics go, I think we ought to acknowledge that the root derivation of the word education is really influence, to lead.

Mr. LOVELAND. Well, I——

Senator HART. Yet I fall back, having said that, that there are identifiable situations where it is more to influence than to inform.

Mr. LOVELAND. I just have to say that we had a bad situation of ignorance prevailing in this country relative to the oil industry. And we felt facts were necessary because one segment did not give them in sufficient quantity to satisfy, let's say, the education of these people. And, therefore, we attempted to fill that void and lay out the facts.

Senator HART. Thank you very much.

Mr. LOVELAND. Thank you, Senator.

[The articles referred to follow:]

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* * *

(Pages 132-135 deleted)

STATEMENT OF SAMUEL BLACK, TAX ANALYSTS & ADVOCATES

Mr. BLACK. Good morning, Senator.

Senator HART. You may proceed.

Mr. BLACK. Thank you.

For the record, my name is Samuel H. Black. I am a staff attorney at the public interest law and research firm, Tax Analysts & Advocates.

Senator, I don't have a prepared statement. I have an outline, which I would like to insert into the record at the end of my testimony. I would like to speak only briefly, and I will then be pleased to respond to whatever questions the committee might have.

I appreciate the opportunity to be here, and appreciate the invitation extended by the committee staff. I am here in part as a neutral party, I think, neither representing a utility nor any of the public interest groups that are involved in the media or broadcasting field.

Senator HART. Where does your money come from?

Mr. BLACK. Tax Analysts, as we call it, is supported by the sale of publications. We have a weekly magazine. We sell other professional publications to tax professionals. We also have foundation grants and we have a national membership.

I want to make just a few points. I have read the transcript of the earlier hearing and heard, of course, the presentations here this morning.

I think that under the traditional way of looking at the corporation income tax or our income tax in general in this country, that it would be improper to characterize the deductible status of business advertising or business lobbying as a tax subsidy. Our corporation income tax is a net, not a gross, income tax. And corporations are permitted—as individuals are permitted—to deduct the costs of doing business as they compute taxable income. If lobbying is seen as a cost of doing business, as it is, for example, for the utility and oil company witnesses who were here this morning, the costs are simply deductible from their gross income. And the fact that it is deductible is not a tax subsidy.

Similarly, with respect to advertising: advertising a product is simply seen as a cost of doing business, and those costs are properly deductible from gross income to reach taxable income.

I would assert, Senator, that if lobbying and advertising are directly related to the generation of income, they should be deductible from gross income in order to reach taxable income, and the deductibility wouldn't be a subsidy. As you know, and as this hearing has pointed out very well—unprecedentedly well—the revenue code does disallow deductions for grassroots business lobbying, usually taking the form of advertising. I would conclude, then, under the traditional way of looking at our tax system, that this is a tax penalty for business lobbying.

Now, contrast that situation, which I view as involving a tax penalty, to the situation of public interest groups.

The charitable deduction and tax exemptions for charities are true tax subsidies. They have little to do with the computation of net income. Many charitable organizations are able to lobby and are able to advertise, and they do so as beneficiaries of tax subsidies, so I would

argue that overall, the Congress has chosen to subsidize the lobbying activities of charities more than it could be said that Congress may be subsidizing the lobbying activities of business.

I prepared for today a very small chart pointing up one aspect of this problem. The chart, which I would like to insert in the record at this point, if I may, shows charitable organizations, their lobbying activities, and their eligibility for deductible contributions.

[The chart follows:]

CHARITABLE ORGANIZATIONS, LOBBYING, AND DEDUCTIBLE CONTRIBUTIONS

Fraternal	Veterans	Large public charities, large religious denominations	Small public charities, public interest law firms	Social welfare organizations
May lobby with deductible donations.	May lobby with deductible donations.	May carry on sizable lobbying programs with deductible donations.	Eligible for deductible donations, but forbidden all but "insubstantial" lobbying.	May lobby, but not eligible for deductible donations.

All these charities are tax exempt. There are some charitable organizations eligible for deductible contributions which may lobby to an unlimited extent. These include fraternal and veterans' organizations.

Some large public charities and large religious denominations may carry on relatively sizable lobbying programs, including advertising programs, if they so wish, with deductible donations.

Small public charities, including public interest law firms and including by far most of the environmental groups are eligible for deductible donations, but are forbidden all but insubstantial lobbying. The effect of this restriction is greatly to impede, and almost prohibit, any kind of legislative activities on the part of the small public charities, environmental groups or public interest law firms.

Last, at the right side of the chart, is the category which the tax code refers to as "social welfare organizations." These groups may lobby, but they are not eligible for deductible donations.

I can give specific examples of how these various and capriciously varying, restrictions work.

The veterans' groups, for example, can lobby against amnesty with deductible money, but a small religious denomination such as, for example, the Quakers, are not able to lobby for amnesty with tax-deductible contributions. The Catholic Church can lobby against abortion with deductible funds, but a woman's rights group would not be able to lobby for abortion with deductible funds.

The Sierra Club is eligible to lobby, but isn't eligible to do so with deductible donations. The principal Sierra organization is not eligible at all for deductible donations, which, I think, was pointed out in the last hearing.

I would argue then that within the class of charitable organizations, the environmental groups and public interest law firms are severely discriminated against vis-a-vis these other kinds of charitable organizations.

Senator HART. This discrimination is the result of the Code itself?

Mr. BLACK. Yes, sir, it results entirely from the statutory framework and not at all from interpretation. Of court, the Code provisions embodied in regulations, but only flesh out the intent of the Congress.

These prohibitions, or their absence, are all contained in the revenue code.

I think that this problem of discrimination among various kinds of charities, and the other problem, the nondeductibility of business grassroots advertising, is a situation with constitutional overtones. I think that to penalize businesses' grassroots lobbying is an embodiment in the tax code of an economic penalty based solely on kind of speech or the forum which is being used for speech. I think that is constitutionally quite questionable. With respect to the situation that the public interest law firms, including the environmental law firms and most environmental groups, the fact that they cannot lobby with deductible funds, whereas other charitable groups can and do, is another situation with constitutional overtones.

I think there is an equal protection problem here, in that otherwise identical charitable organizations are discriminated against on the basis, if you will, of their first amendment activities. And, of course, not only is there a fifth amendment problem, but also a first amendment problem, since after all, what we are talking about here is speech.

I think also that this committee's hearings, especially the earlier session, brought out another constitutional problem which arises not only in section 162(e), but also in the sections which regulate the charities. The terms in the statute are very vague. I would argue, Senator, that the terms in sections of the code which regulate charities, such as references to propaganda, references to influencing legislation, and references to substantial or insubstantial quantities of lobbying, are incapable of the kind of precise definition that the Supreme Court requires when statutes attempt to regulate speech.

In the area of speech, since first amendment rights are so important, the Supreme Court has long held that statutes must be drawn with crystal clarity, if you will, because it is crucially important that the people who are going to exercise first amendment rights have clear notice as to what they may or may not do. And vagueness in statutes regulating first amendment activities serves to chill those activities.

I have no way of knowing down at Tax Analysts what "substantial" or "insubstantial" lobbying is. Years and years of court cases and administrative interpretation have shed no light on this term. In the case of a group as small as we are, in order to stay on the safe side of the Internal Revenue Service, we don't engage in any kind of lobbying activities except those expressly permitted by the revenue rulings, such as my coming here today by invitation. This problem of insubstantial versus substantial just doesn't worry very large organizations such as the Catholic church. The test doesn't apply at all to veterans and fraternal organizations.

I think, to an admittedly lesser extent, that the phrase "legislative matters and grassroots lobbying," et cetera, in the code and regulations doesn't lend itself to any kind of clear definition which satisfies the Supreme Court's tests. In the last hearing Mr. Fant suggested that the term "legislative matters" should refer to any subject capable of being studied by a legislature. Mr. Bickwit challenged him on that, and said that that seemed too broad. Both these gentlemen are experienced attorneys. Mr. Bickwit has plenty of experience in the Congress, and Mr. Fant is a tax attorney. It doesn't augur well for the

constitutionality of the statute that two such attorneys' interpretations could vary so much.

Any administrative prerogative can be taken back by the Congress if that prerogative is granted by a statute. So under Mr. Fant's definition, it might be argued that companies couldn't deduct certain kind of expenditures relative to lobbying in the administrative process because at any point next year or the following year, the Congress might decide that it delegated too much authority and was going to take it back, and that therefore the "administrative" matter is really a legislative matter.

I would have a terribly difficult time defining that term. And I think that is the kind of vagueness problem that the statute embodies.

The impetus that gave rise to these hearings, apparently, was that people among whom a principal concern was the protection of environmental quality observed that there were millions of dollars being paid for advertisements that had to do with legislation, whether they fell under the restriction or not. And it was very unclear as to whether deductions were being taken or not taken for those advertisements.

One of my purposes today is to show that within the class of charities, we have a similar problem with respect to organizations, tax benefits, tax deductions, eligibility for deductible donations, et cetera, all crucially tied up in important first amendment activities, including lobbying with respect to environmental legislation.

It seems to me that one option open to the Congress here, and I think the better option in terms of constitutional policy is not to make the nondeductions rules of section 162 more strict, or expanding the scope of activities which are nondeductible, but rather taking off these two burdens: the lesser burden on business advertising, and the overwhelming burden on legislative activities of charitable groups. The direction the Congress should take, in my opinion, Senator, is to remove these restrictions or these excises, if you will, rather than in attempting to regulate speech more severely or in expanding the scope of the regulations or the statute.

This direction, of taking these references to first amendment activities out of the tax code and out of the hands of the Internal Revenue Service, since the discrimination against charities is so much greater, is the answer, Senator, to the problem you raised—which is a very real problem—of how can the impoverished idea find a forum.

If this committee decides to try to act to solve these problems, that the direction it should take is in changing the tax code to allow charities to carry on reasonable amounts of legislative activities.

And that, of course, would include the environmental charities.

That concludes my remarks, Senator.

Senator HART. I like the way you have phrased your VI. VI point. When one class constitutional rights are burdened relative to another otherwise similar class, the solution lies in expanding the liberties of the burdened class—not in burdening the favored class.

That is a musically written sentence.

Mr. BLACK. Well, thank you.

I do think, though, that that is the way to resolve this conflict that you have articulated so well.

Senator HART. Yes.

Mr. BLACK. And that the relief should flow to precisely those environmental groups for which I know you have particular concern.

Mr. BICKWIT. Is it your view that the IRS should adopt a procedure whereby public interest groups could challenge IRS rulings which they feel grant illegal tax concessions to the taxpayers?

Mr. BLACK. That is really not up to the IRS. It is up to the courts because to allow that is to expand the rules of standing as enunciated by the Supreme Court.

We believe strongly that when the Treasury or the IRS illegally softens the tax treatment on a group of taxpayers, that the public is injured; that there is no question revenues are not collected which would otherwise be collected; that there is resulting economic damage to the public at large and also to individual taxpayers; and that members of the public injured in such a way should, of course, be allowed to sue in order to bring these questions before a court.

If that doesn't happen, there is simply no way for the courts to review this kind of illegal activity.

I would point out there are half a dozen recent decisions in the Federal Court of Appeals for the D.C. Circuit which go to illegal activity by the IRS or Treasury in failing to collect tax.

Mr. BICKWIT. How about at the administrative level? Do you feel the IRS procedures are presently adequate to allow citizens groups to express their views there?

Mr. BLACK. Referring specifically to the section 162(e) problem, the citizens can challenge an ad, for example, by reporting it through the informer channels. If they get a reward, they know that the corporation was trying to deduct something improperly, and they will know that the Revenue Service disallowed the deduction.

There may be no other way of knowing how the Service is enforcing the law against such business interests. At Tax Analysts, prior to bringing most of our suits, we have filed a petition with the Commissioner and explained the rationale for our position.

There have been several instances in which the Commissioner has said this is something we consider has merit, and we will study it and report the results to you.

However, I will point out that we haven't gotten any results yet from these petitions.

It may be that there is something more that needs to be available.

Mr. BICKWIT. As I understand your testimony, you are not opposed to using the tax code to foster certain policy objectives. Your problem, rather, is that the existing taxes which in some way penalize forms of speech are constitutionally questionable?

Mr. BLACK. Well, I agree much more with the latter half of your question than the former.

Mr. BICKWIT. That is my question. Do you agree with the former?

Mr. BLACK. Yes.

Mr. BICKWIT. I can't remember what the former was.

Do you think the tax code should be used for policy purposes?

Mr. BLACK. Yes, it is an instrument of Federal governmental policy just as the budget is. You could point out specific tax subsidies, and I might say this one, or that one, has been proven not to be cost effective. If a subsidy benefits a high income class much more than a lower income class, then I would say that raises serious questions about the particular subsidy, but not about the overall question.

Mr. BICKWIT. Now, if you subsidize the speech of one person or one party to a controversy, do you think you have got constitutional problems in that you haven't given the other side of the controversy similar subsidization?

Mr. BLACK. Yes.

Not only do I think there are constitutional problems with that, but I think that the present tax subsidies to fraternal and veterans' organizations and the large charities as opposed the lack of subsidies to the smaller organizations, is unconstitutional and Tax Analysts has filed a suit to test the constitutionality of just this problem.

And if the committee feels it appropriate, I can insert into the record the complaint in that suit which I have here.

Senator HART. Yes, let it be printed.

Mr. BLACK. It articulates the first and fifth amendment problems as we see them with the existing statutes as they apply to different kinds of charities.

Mr. BICKWIT. But in your view, if you extend that kind of subsidy to all public interest groups, then you don't have constitutional problems? And what does the industry say on the other side of the fence?

Mr. BLACK. Well, I don't think business has articulated a position on the bills to allow charities to do a little more lobbying.

There are such bills, and there were extensive hearings held in Ways and Means in 1972.

Mr. BICKWIT. We would be interested if for the record you might appraise industry's possible constitutional arguments with respect to——

Mr. BLACK. With respect to section 162(e)?

Mr. BICKWIT. No, with respect to the proposal you have made to give favorable treatment to all public interest organizations who speak out on a given matter.

Mr. BLACK. I will be glad to do that.

Mr. BICKWIT. If you could, it would be helpful. Perhaps I am being paranoid, but such arguments, I think, could be anticipated.

[The following information was subsequently received for the record:]

TAX ANALYSTS & ADVOCATES,
Washington, D.C., August 27, 1974.

Mr. LEONARD BICKWIT,
Senate Commerce Subcommittee on the Environment,
Dirksen Senate Office Building, Washington, D.C.

DEAR MR. BICKWIT: During the hearings on the legislative propaganda activities of energy and utility companies, you asked me if there wass business opposition to recent proposals to liberalize the rules concerning the legislative activities of charities.

A preliminary analysis of the 1972 Ways and Means hearings on such a proposal, H.R. 13720, turns up no indication of business opposition.

The hearings contain several statements by representatives of charitable organizations to the effect that most charitable interests do not conflict with business.

A statement, by one member of Congress who is generally regarded as conservative, argues that foundation managers are people who have been successful in business; the spirit of this argument runs contrary to the thesis that charity and business lobbying would conflict.

A statement by the American Society of Association Executives, indicates no opposition to the bill, even though the organization's membership consists, in part, of business organization executives. The membership of the organization, however, also includes charitable association executives. The Society did suggest that a liberalization of the charity lobbying rules should be accompanied by a

liberalization of the grassroots lobbying provisions of Sec. 162(e) of the Internal Revenue Code.

Business interests would nevertheless have much at stake in a proposal to expand the effectiveness of public-interest groups in the tax, broadcasting, environment, safety, and consumer fields, to name only a few. You may find it useful, therefore, before you publish your hearings, to invite several corporrations and trade associations to take a position on the recent action by the Ways and Means Committee, announced on August 1, 1974, in Release No. 20, to lobbying by charities. Alternatively, you might invite these parties to comment on a proposal to liberalize both the Sec. 501(c)(3) (Internal Revenue Code) and the Sec. 162(e) rules simultaneously.

Very truly yours,

SAMUEL H. BLACK.

Mr. BLACK. There wasn't any significant business response to the Ways and Means testimony invitations or to the hearings themselves, as far as I know.

Interestingly, the Treasury Department at the time took what this committee might see as an antibusiness position. They said they would support all charities being able to lobby, but only where there was a business interest already lobbying on the other side.

Then other public charities came forward and said—the example I have in mind is a large mental health charity. They said there isn't any business interest against mental health and yet we cannot lobby either under present law or under this Treasury—this limited Treasury approval of the concept that where there was lobbying on one side, charities should be allowed to lobby on the other.

So they forcefully made the argument, or at least the argument was forcefully made that charities should be allowed to lobby whether there was a business interest opposing them or not, whether it had already been articulated or not. The specter of business opposition to charities' lobbying is something I haven't yet seen.

Mr. BICKWIT. Well, if you conclude that under no circumstances would it be raised rationally, that would also be helpful.

Mr. BLACK. I would also point out there are private hospitals and hospitals run by fraternal orders or veterans' organizations, private veterans' organizations, and the fraternal hospitals and veterans' hospitals are allowed to lobby under present law. And I haven't seen any private hospitals complaining of that.

Mr. BICKWIT. Thank you, Mr. Black.

Senator HART. Thank you very much.

Mr. BLACK. Thank you, Senator, very much.

[The material referred to follows:]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 843-73

Tax Analysts and Advocates, 732 Seventeenth Street, N.W., Washington, D.C. 20006
Taxation With Representation, 2369 North Taylor Street, Arlington, Va. 22207

v.

George P. Shultz, Secretary of the Treasury, 15th Street at Pennsylvania Ave., N.W., Washington, D.C. 20220
Johnnie M. Walters, Commissioner of Internal Revenue, 1111 Constitution Avenue, N.W., Washington, D.C. 20224

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF; THREE-JUDGE COURT REQUESTED

1. This is an action to:

a. Declare unconstitutional the restrictions on legislative activities contained in Sections 170, 501(c)(3), 2055, 2106, and 2522 of the Internal Revenue Code of 1954, as amended, "the Code", as violative of the First and Fifth Amendments to the Constitution of the United States, and

b. Enjoin defendants from continued enforcement of those restrictions and of all applicable regulations and rulings thereunder.

JURISDICTION

2. This Court has jurisdiction of this action under the following statutory provisions:

a. 5 U.S.C. Sections 701–706, because this action seeks to hold unlawful agency action found to be contrary to Constitutional right,

b. 28 U.S.C. Section 1331(a), because this action arises under the Constitution and laws of the United States and the matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs;

c. 28 U.S.C. Section 1340, because this action arises under the acts of Congress providing for internal revenue; and

d. 28 U.S.C. Section 1361, because this action is in the nature of mandamus to compel an officer of an agency of the United States to perform a duty owed to the plaintiffs.

PLAINTIFFS

3. Plaintiff Tax Analysts and Advocates (Tax A/A) is incorporated under the District of Columbia Non-profit Corporation Act. Tax A/A's organizational purposes are (a) to improve public understanding of the federal tax system, and (b) to improve the administration of the tax laws by conducting a public interest tax law practice. (Affidavit attached)

4. Plaintiff Taxation with Representation (Tax/Rep) is incorporated under the District of Columbia Non-profit Corporation Act. Tax/Rep's organizational purpose is to educate Congress and the public regarding federal tax issues by presenting the testimony of tax professionals at legislative and administrative hearings on tax matters. Tax/Rep has approximately 850 members throughout the United States. (Affidavit attached)

5. The Internal Revenue Service (IRS) has ruled that plaintiff Tax A/A is eligible to receive contributions which are deductible to the donor under Section 170(c)(2) of the Code and that Tax A/A is exempt from federal income tax under the provisions of Section 501(c)(3) of the Code. The IRS has ruled that plaintiff Tax/Rep is *not* eligible to receive contributions which provide tax deductions to the donor, but that it is exempt from federal income tax under Section 501(c)(4) of the Code.

DEFENDANTS

6. Defendant George P. Shultz is Secretary of the Treasury of the United States and is charged by law with the administration of the Code; he discharges this responsibility both directly and by delegation to subordinates. He is sued in both his official and his individual capacity.

7. Defendant Johnnie M. Walters was, at the time the original complaint was filed, Commissioner of Internal Revenue, and, as the delegate of the Secretary of the Treasury, had overall responsibility for administration of the Code. He is sued in both his official and his individual capacity.

8. In administering the Code defendants have enforced the statutory provisions that are at issue in this action, and the regulations and rulings which interpret those statutory provisions. Those provisions are Constitutionally invalid, and defendants' application of those provisions to the detriment of the plaintiffs violates the Constitutional rights of the plaintiffs.

THE STATUTORY FRAMEWORK

9. Sections 170 (c)(2), 2055, 2106, and 2522 of the Code (hereinafter "the Code's charitable deduction provisions") provide for the eligibility of charitable and educational organizations to receive charitable contributions which are

deductible for tax purposes by the payor or donor. Section 501(c)(3) of the Code provides exemption from federal income tax for charitable and educational organizations. Each of these sections conditions its tax benefits on the requirements that "no substantial part" of the activities of these organizations consists of "carrying on propaganda, or otherwise attempting, to influence legislation". This condition will hereinafter be referred to as "the Code's restrictions on legislative activities".

10. Section 501(c)(4) of the Code provides exemption from federal income tax for organizations "operated exclusively for the promotion of the social welfare" and does not restrict their legislative activities. Yet 501(c)(4) organizations of the type exemplified by Tax/Rep are not eligible to receive contributions which provide tax deductions to the donor.

11. The Code grants the benefits of tax exemption and eligibility to receive contributions which provide tax deductions to the payors or donors, without imposing restrictions on leigslative activities, to the following organizations:

a. Veterans organizations, contributions to which are deductible for the donor under conditions imposed by Sections 170, 2055, and 2522 of the Code, which sections impose no limits on the use of these contributions for legislative activities.

b. Fraternal beneficiary societies, contributions to which are deductible for the donor under the conditions imposed by Sections 170 and 2522 of the Code, which sections impose no limits on the use of these contributions for legislative activities.

c. Trade associations, chambers of commerce, and similar business associations, payments to which are deductible for the payor under the conditions imposed by Section 162 of the Code and which are free to carry on unlimited legisislative activities (other than grassroots appeals to the general public) whenever legislation has a direct relationship to the payor's business interests, and

d. Labor and agricultural organizations, dues contributions to which are deductible for the payor under the conditions imposed by Section 162 of the Code and which are free to carry on unlimited amounts of legislative activities (other than grassroots appeals to the general public) whenever legislation bas a direct relationship to the payor's business interests.

INJURIES SUFFERED BY THE PLAINTIFFS

12. Plaintiff Tax A/A desires to engage in substantial legislative activities in support of its charitable and educational purposes. In many cases, such activities are the only available means for pursuing these purposes effectively. However, plaintiff Tax A/A cannot engage in substantial legislative activities without jeopardizing its tax benefits under the Code's charitable deduction and tax exemption provisions.

13. Because the Code's restrictions on legislative activity are inherently vague, plaintiff Tax A/A is unable to establish precisely which, or to what extent, activities are prohibited by those restrictions. As a consequence, plaintiff is forced, in practice, to adopt a very broad reading of the restrictions on legislative activities and to eschew a variety of activities that may not, in fact, be proscribed.

14. Plaintiff Tax A/A is severely injured by the Code's restrictions on legislative activities in carrying out its charitable and educational purposes because many other organizations, such as those described in paragraph 11, *supra*, which are in all pertinent respects similar to plaintiff, but which express viewpoints opposed by plaintiff, are free to engage in legislative activities while enjoying the benefits of tax exemption and eligibility to receive contributions which provide tax deductions to the payors and/or donors.

15. In order to raise funds to support its charitable and educational activities, plaintiff Tax/Rep desires to enjoy the same tax benefits as are enjoyed by other charitable and educational groups, including eligibility to receive contributions which provide tax deductions to its donors. But, defendants have ruled that solely because of the Code's restrictions on legislative activities, Tax/Rep is not eligible to receive contributions which provide such tax deductions.

16. Plaintiffs do not have an adequate remedy at law. Each of them is irreparably injured by the Code's restrictions on legislative activities, which prevent them from carrying out their charitable and educational purposes. Continued enforcement of the challenged restrictions will result in further irreparable injury to the plaintiffs.

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GROUNDS FOR RELIEF

17. The Code's restrictions on legislative activities unconstitutionally abridge the First Amendment freedoms of speech, association, and press, and the First Amendment right of petition of plaintiff Tax A/A, by conditioning the benefits of eligibility under the Code's charitable deduction provisions, and under the tax exemption, upon surrender of such First Amendment freedoms and rights.

18. The Code's restrictions on legislative activities unconstitutionally deny the equal protection of the laws and unconstitutionally abridge the First and Fifth Amendment rights and freedoms of plaintiff Tax A/A in that:

a. The restrictions condition the enjoyment of tax benefits by plaintiff Tax A/A on the surrender of First Amendment freedoms and rights, while other organizations similar in all pertinent respects to plaintiff may carry on substantial legislative activities without restrictions and still enjoy the same tax benefits, and

b. The restrictions are based on impermissible distinctions of wealth and size because they permit legislative activities which are not a "substantial" part of an organization's total activities, and thus enable organizations subject to the restrictions but having larger budgets and membership than plaintiff, Tax A/A, to engage in more legislative activity than plaintiff while still retaining their tax benefits.

19. The Code's restrictions on legislative activities unconstitutionally abridge the First Amendment rights and freedoms of plaintiff Tax A/A and its right to due process of law as guaranteed by the Fifth Amendment, in that:

a. The restrictions—and specifically the words "substantial", "propaganda", and "attempting, to influence legislation"—are so vague that plaintiff Tax A/A cannot reasonably ascertain what activities are restricted, or the extent of the restriction,

b. The restrictions confer unconstitutionally broad discretion on defendants. Defendants' decision to grant, not to grant, or to revoke tax benefits are based on administrative determinations as to the extent to which plaintiff Tax A/A will engage in legislative activities. Because these determinations are based on unconstitutionally vague criteria, plaintiff, who is subject to this enforcement procedure, is denied due process of law,

c. The restrictions establish an unconstitutional prior restraint on activities protected by the First Amendment. This restraint arises because defendants may grant, fail to grant, or revoke substantial tax benefits based on defendants' determination as to the extent to which plaintiff Tax A/A has or will engage in legislative activities, and

d. The restrictions establish an additional prior restraint on activities protected by the First Amendment because the vagueness of the law forces plaintiff Tax A/A to engage in constant self-censorship, so as to avoid any activity that might cause the defendants to revoke plaintiff's tax benefits.

20. The Code's restrictions on legislative activities unconstitutionally deny the equal protection of the laws and unconstitutionally abridge the First and Fifth Amendment rights and freedoms of plaintiff Tax/Rep, in that:

a. The restrictions preclude plaintiff Tax/Rep from obtaining substantial tax benefits solely because Tax/Rep has chosen to exercise its freedoms of speech, association and press, and its right of petition, and

b. The restrictions deny eligibility to receive contributions which provide tax deductions to donors to Tax/Rep, while other organizations, similar in all pertinent respects to plaintiff Tax/Rep, may carry on legislative activities without restriction and nevertheless receive contributions which provide tax deductions to the payors and/or donors.

21. For the foregoing reasons, the Code's restrictions on legislative activities are unconstitutional, both on their face and as applied.

Wherefore, plaintiff pray:

That this Court convene a three judge court pursuant to 28 U.S.C. Section 2284 to hear the merits of this amended complaint;

That the three judge court declare the Code's restrictions on legislative activities null and void as violative of the First and Fifth Amendments to the United States Constitution;

That the three judge court permanently enjoin defendants from enforcing the Code's restrictions on legislative activities;

That the three judge court enjoin defendants from applying the Code's restrictions on legislative activities when considering whether plaintiff Tax/Rep is entitled to the tax benefits accorded to other charitable and educational groups;

That the plaintiffs be awarded their costs and disbursements, including reasonable attorneys' fees; and

That the plaintiffs be granted such other relief as the Court deems to be just and proper.

Respectfully submitted.

BERLIN, ROISMAN & KESSLER,
ANTHONY Z. ROISMAN,
CLIFTON E. CURTIS.
TAX ANALYSTS AND ADVOCATES,
SAMUEL H. BLACK,
THOMAS F. FIELD.

OUTLINE OF COMMENTS CONCERNING TAX TREATMENT OF BUSINESS EXPENSES RELATING TO LEGISLATION

(By Samuel H. Black, Tax Analysts & Advocates)

SENATE SUBCOMMITTEE ON THE ENVIRONMENT, JULY 18, 1974

I. Does the tax system subsidize business lobbying?

A. The corporation income tax is a net, not a gross, income tax.

B. Deductibility of actual, directly-related business expenses by business is simply the proper method for computing taxable income—not a tax subsidy.

C. If lobbying and advertising are directly related to the generation of income, they should be deductible.

D. Since Internal Revenue Code Sec. 162(e)(2)(B) disallows deduction for "grass roots" business lobbying, the Code *penalizes* rather than subsidizes business lobbying. Advertising and lobbying are exercises of the freedom of speech and the right to petition the Congress for a redress of grievances.

II. Does the tax system penalize lobbying by public-interest groups?

A. The charitable deduction, and tax exemption for charities, are true tax expenditures. These provisions have little to do with the computation of net income.

B. Some charitable organizations are not only tax-exempt, are eligible for deductible contributions, but also may lobby to an unlimited extent.

1. Fraternal charities.
2. Veterans' organizations.

C. Some charities are exempt and deductible and may carry one sizeable, but not unlimited lobbying.

1. Large public charities.

D. Some charities are exempt and deductible but may carry on only minor ("insubstantial") lobbying. This category consists of small and medium-sized public charities. As compared to categories II(B) and II(C), the group of small public charities, including most environmental groups and all public interest law firms, is discriminated against in the ability to lobby. This discrimination is presently the subject of a lawsuit by Tax Analysts and Advocates.

E. Some public-interest groups are tax exempt (but not eligible for deductible contributions) and may lobby to an unlimited extent. This category consists of "Social welfare" groups, organized under Sec. 501(c)(4) of the Internal Revenue Code, including such organizations as the Sierra Club, the ACLU, and the League of Women Voters. As compared to categories II(B) and II(C), social welfare organizations are also discriminated against because of their legislative activities. (This issue is also raised in the lawsuit mentioned above.)

F. Nevertheless, all these organizations may lobby at least to a small extent, and often to an unlimited extent, with tax-subsidized dollars. By contrast, as stated in I(D), above, business' legislative activities are penalized by the nondeductibility rule for grass roots lobbying.

III. Why single out business grass roots lobbying, which should be constitutionally protected, for penalty treatment?

A. Populist view that corporations and big business are intrinsically evil.

B. Know-nothing view that lobbying is evil.

C. View that the public can be fooled by advertising.

D. In a dispute between different interests, one interest is often tempted to censor the other.

IV. Vagueness in statutes can result in rights being placed in jeopardy; this statute is so vague as to be constitutionally suspect.

A. The term "legislative matters" (Sec. 162(e)(2)(B)) is not self-defining, and the regulations under Sec. 162, Regs. 1.162–20(c)(4), do not define this term. It is a fair assumption that there is *no* topic which is not (or could not be) considered by some federal, state, or local legislature each year. Does this mean that no advertisements are deductible at all?

B. This is a statute regulating speech. Is the statute specific enough to define exactly what is permitted, so that citizens will have clear notice of the law and of a "safe haven" of clearly permitted activity?

C. Would a small business think twice before running an ad relating to a matter before a legislature? Doesn't this force taxpayers to censor themselves? Does the statute chill the exercise of the freedom of speech and the right of petition?

D. Could the statute's lack of clarity lend itself to selective harassment of political "enemies" since a business would not be able to cite any "safe-haven" tests to prove to the government (and to reassure itself) that deductions were allowable?

V. If the present law is not to be changed, it could be better enforced.

A. The regulations should be lengthened and clarified, perhaps with examples in a continuum from clearly deductible advertisements to clearly non-deductible advertisements.

B. Coupons in ads, to be sent to legislators, taking a business-advocated position on a "legislative matter," could be prohibited.

C. The regulations could include the name of a specific office in Washington, to which citizen informants could mail "offending" advertisements on legislative matters, to be routed through channels to the appropriate enforcement office.

D. Public interest groups could help enforce the law by sending in offending ads to IRS and publicity demanding "informers' fees" if IRS enforcement led to a higher tax assessment.

VI. When one class' constitutional rights are burdened relative to another otherwise similar class, the solution lies in expanding the liberties of the burdened class—not in burdening the favored class.

A. The Congress could end one discrimination against public interest groups by repealing the lobbying and propaganda clauses in Sec. 501(c)(3) of the Internal Revenue Code (and related sections).

B. This repeal would lessen the apparent disparity between business' and public-interest organizations' ability to participate in the legislative process.

C. The constitutionally sound solution does *not* lie in the direction of censoring business advertising, nor does it lie in making business' access to the executive branch nondeductible.

Senator HART. Our concluding witness is senior vice president of Georgia Power, Mr. Harold C. McKenzie, Jr.

STATEMENT OF HAROLD C. McKENZIE, JR., SENIOR VICE PRESIDENT, GEORGIA POWER CO.; ACCOMPANIED BY FRANCES PLEDGER, ADVERTISING MANAGER; AND N. UNDERWOOD, GENERAL COUNSEL

Mr. MCKENZIE. I have with me Mr. Underwood, who is a member of the law firm who acts as our general counsel, and Mrs. Frances Pledger, our advertising manager.

I have distributed to the subcommittee and staff the full text of my statement. In the interest of time I will briefly summarize my testimony and then I will be happy to answer any questions.

Senator HART. Thank you, very much.

Let me order that it be printed in the record.

Mr. MCKENZIE. The Media Access Project, in testimony before this subcommittee on May 6, made a number of allegations against the

electric utility industry and several individual companies including the Georgia Power Co. The crux of the allegations which have been directed against my company is that our advertising program—or at least a portion of it—is "political propaganda" and therefore the costs of this advertising should be nondeductible for tax purposes and should constitute nonoperating expenses for ratemaking purposes.

Any legislation—or administrative regulations—which would result in the expenses of advertising of the type I will describe today being classified as nondeductible—or as nonoperating expenses—would seriously undermine the efforts of privately-owned utilities to cope with out national energy requirements.

I have attached some exhibits to my prepared testimony which will enable the subcommittee to see our total advertising program in perspective. I have also set forth in the exhibits our company's media costs as well as our total advertising expenses. In 1973 we spent less than one-fifth of 1 percent of our total revenues for media and approximately one-third of 1 percent of total revenues to carry out our entire advertising and public information program.

For a company involved in an industry as complex as the electric utility industry—to spend less than one-third of 1 percent of its revenues in a good-faith effort to communicate with its customers—investors—and the general public—simply can't be regarded as excessive or unreasonable under any criteria.

The question is often asked: "Does an electric utility need to advertise?" As with most short and simple questions—it's necessary to define the terms of the question before it has any real meaning.

Obviously, whether "advertising" is an appropriate expenditure by a utility depends upon what is meant by the term. Perhaps a better way to state the question would be to ask: "Is it necessary and appropriate for an electric utility to communicate effectively with its customers and the investing public?"

I submit to the subcommittee that if the investor-owned utility industry is going to survive and to supply this Nation with electric energy—it must continue to communicate with its customers and with the investing public. And these communications must be meaningful and go to the heart of problems which affect the industry today—and the costs of these communications must continue to be recognized as an essential operating expense.

I'm sure that every member of Congress recognizes that to be involved in an industry involving energy in the 1970's is "a whole new ball game." In the electric industry we had two decades of price stability in the 1950's and 1960's when virtually every other industry experienced a steady increase in prices.

But toward the end of the 1960's a number of forces interacted to change drastically the patterns of cost and price stability which utilities and their customers had enjoyed for 20 years.

The underlying cause of the crisis which faces the electric utility industry today is growth. In the State of Georgia the consumption of electricity doubles each 7 years. This means that we have to double this size of our plant each 7 years, as contrasted with an earlier figure used today of 7½ percent nationally. This is a 10½-percent annual growth of the combined rate.

A public utility has a lawful duty to serve the needs of its service area. We don't have the option—during a period of unusually high

interest rates—of deciding to forgo expansion or delay it. We have a lawful responsibility to build generating facilities to serve the needs of the State of Georgia.

In the next 3 years we must spend $1½ billion for new construction. Nothing illustrates the magnitude of our problems more clearly than the fact that yesterday our company was prepared to open bids on a $130 million bond issue—and $60 million of preferred stock—and for the first time in our history, there were no bids.

This means that we now have to look for other ways to obtain this necessary long-term financing—and the cost of this capital is going to be very expensive.

Who is affected by the cost of this capital? Not just the management and stockholders of the Georgia Power Co., but every consumer of electricity in our service area.

The increasing cost of capital is an example of an economic fact of life which affects our customers in a very direct way, and we believe they have a right to be informed about these facts.

We have used our advertising program to inform the public about the economic and technical realities which are changing this industry so dramatically—and we solicit the active cooperation of the public in copying with these problems.

For example, we have devoted a significant portion of our advertising program to encouraging energy conservation. We have explained billing options available to customers. We have explained our rate schedules including the seasonal changes in our rate structure.

What we attempt to convey to the public is a sense of perspective regarding electric service. We have not overstated any of the problems confronting our company, nor have we consciously permitted our customers to remain unaware of the problems which have increased our cost of operation and consequently our customers' rates for service.

We believe dissemination—through advertising—of factual information indicating the nature and extent of future and present problems of a financial nature affecting the company and its customers is good will or institutional advertising of the highest and most responsible order.

Is this political propaganda? Are we misleading the public in any way? Certainly not. I sincerely believe that we would be guilty of dangerously misleading the public if we remained silent during this period and did not inform our customers of the true circumstances of their supplier of electric energy.

If the premise is accepted that the public has a right to information which affects them in a direct and meaningful way, the next question is whether it is appropriate to disseminate this information through the traditional advertising media?

We have found that the use of our institutional and good will advertising is by far the least expensive way for us to communicate. If we sent one individual item of information to each of our customers, the postage cost alone would be more than $100,000.

The Media Access Project contends there is something sinister about our advertising during a period in which we are involved before a regulatory agency. Apparently this argument assumes that a regulator might be unfairly influenced by the advertising program. Everyone familiar with regulation knows that a regulatory proceeding lasts

several months and involves thousands and thousands of pages of testimony.

It is ludicrous to argue that a regulator who reads one of our advertisements conveying factual information about an economic issue would be unfairly influenced when he has been presented with days of testimony and hundreds of pages of data on that issue in a regulatory proceeding.

It is an exercise in fantasy to pretend that a utility could sustain a meaningful communications program with the consuming and investing public if it suspended its advertising program during the pendency of regulatory proceedings.

Likewise, it would be absurd to modify the advertising program to omit references to the underlying circumstances facing the company which coincidentally may also be factors in the company's regulatory proceeding.

In summary, public utilities are now deeply immersed in the economic and political crosscurrents of our society, in environmentalism, consumerism, uncontrolled inflation, and the energy crisis.

I believe that the failure of a public utility to provide the public with information needed to see utility service in a reasonable perspective would be a dereliction of our responsibility as a public utility.

There can be no serious doubt that to change the current accounting treatment of advertising expenses of utilities would significantly restrict the flow of information from utilities to their customers. This would be one more profoundly disturbing development in our industry and I urge the subcommittee to reject any suggestion which would tend to restrict rather than enlarge the public's right to know.

Senator HART. Thank you, very much.

I won't give you a chance to respond to this because it would keep us here until late afternoon. But an almost throwaway line that you used, the experience on yesterday's market was it, or your efforts——

Mr. MCKENZIE. Yes, sir.

Senator HART. It is an item of enormous concern. And it should be to this committee and every committee of Congress.

I know more than one utility in Michigan will have to scale down substantially its projected program because of the difficulty of getting additional——

Mr. MCKENZIE. This inevitably means that at some point in time there well may not be enough capacity to meet the demand. Or more expensive short-term solutions will have to be solved.

Mr. BICKWIT. I wonder if you, for the record, could give us an example of the kind of ad which should be included in FPC 426.4 and this treated as a below-the-line expense for ratemaking purposes.

Mr. MCKENZIE. I think rather clearly, yes—well, I will give you a specific example.

Several years ago there was quite a legislative battle in Georgia to enact what was known as the Territorial Service Act, which assigned the responsibility to the Public Service Commission to divide territory between municipal suppliers, cooperatives, and private utilities.

Had we run an ad advocating a position on that particular legislation, yes, that certainly would have been appropriate.

Mr. BICKWIT. Your statement speaks of your company's responsibility to keep its consuming and investing public informed as to the problems faced by Georgia Power in providing service. What kind of

benefits do you see accruing to the company as a result of your advertising campaign?

Mr. McKenzie. Stated most briefly and most succinctly, our basic survival. At the time we are being faced with growth and inflation-producing compound problems for us, and I see no change on the horizon right now on either one. The price of electricity is going up just as dramatically there as it is anywhere else. And we have got to have the public willing to continue to accept us as a supplier if we are going to remain in business.

Mr. Bickwit. This is a question I should have asked of the representative from Shell, but couldn't find the ad at the time he was on the stand.

We discussed the distinction between influence and educate. Senator Hart pointed out that there may not be, from a pure literal interpretation, any distinction, in that education includes influence.

But the language in the Shell ad said, "We urge most strongly that the type and form of the control be carefully considered to be sure that it will have the correct impact. It should not be a hastily enacted attack on the industry which would impose corporate excess profits taxes based on some arbitrarily chosen historical performance.

Quite apart from whether this meets all the requirements for nondeductibility or deductibility, do you regard the words, "We urge most strongly" to be an attempt to influence as opposed to merely educate? And I should say we will seek a response to that question from the Shell witness as well.

Mr. McKenzie. Well, I came prepared to discuss our advertising and not Shell's. We have done no advertising falling in that category. So, I am really not competent to express any position on that.

Mr. Bickwit. That is fine.

Thank you, very much.

Senator Hart. Does counsel want to take a shot at it?

Mr. Underwood. No, thank you, Senator.

Senator Hart. Did either of you have anything you would like to add?

Mr. Underwood. No, we filed a rather lengthy statement.

Senator Hart. Thank you, very much.

[The statement follows:]

STATEMENT OF HAROLD C. McKENZIE, JR., SENIOR VICE PRESIDENT
GEORGIA POWER COMPANY

My name is Harold C. McKenzie, Jr. and I am Senior Vice President of Georgia Power Company. I appear today in response to a letter dated June 26, 1974, from the Chairman of this Subcommittee to the President of our Company inviting our participation in today's hearing. Senator Hart's letter indicated that the Committee is considering the "treatment of certain energy and environmental advertising expenses for tax and FPC accounting purposes" and made reference to testimony received on May 6, 1974, from attorneys representing Media Access Project alleging that the cost of some of the advertising considered by the Subcommittee is not deductible under Section 162 of the Internal Revenue Code and has not been properly categorized for FPC accounting purposes.

I have obtained a copy of the testimony submitted to the Subcommittee on May 6, 1974, by Harvey J. Shulman, Attorney with the Media Access Project, Washington, D.C. I will respond to the allegations made by Mr. Shulman against the Georgia Power Company, and while I do not purport to speak for the electric utility industry generally, I am aware of the fact that the circumstances affecting our company today and the relationship between those circumstances and

our advertising program are certainly not unique in the industry. Since the Chairman's letter did not invite comment relative to any specific legislative proposal, I will not comment on any specific pending legislation. However, if the Subcommittee's deliberations encompass consideration of specific legislation including S–2532, which is a proposed Amendment to the Federal Power Act, I would appreciate the opportunity to file a supplemental statement dealing specifically with the proposed legislation. The crux of Mr. Shulman's testimony is that certain firms in the energy-related industries are incurring expenses for advertisements which are either non-deductible under the Internal Revenue Code or should not be permitted as "operating expenses" for ratemaking purposes.

REGULATIONS INVOLVED

The Regulation which Mr. Shulman contends has been violated by certain energy related companies is Treasury Regulation 1.162–20, the applicable portion of which is set forth below:

> "*Institutional or 'good will' advertising.* Expenditures for institutional or "good will' advertising which keeps the taxpayer's name before the public are generally deductible as ordinary and necessary business expenses provided the expenditures are related to the patronage the taxpayer might reasonably expect in the future. For example, a deduction will ordinarily be allowed for the cost of advertising which keeps the taxpayer's name before the public in connection with encouraging contributions to such organizations as the Red Cross, the purchase of United States Savings Bonds, or participation in similar causes. In like fashion, expenditures for advertising which presents views on economic, financial, social or other subjects of a general nature, but which does not involve any of the activities specified in paragraph (b) or (c) of this section for which a deduction is not allowable are deductible if they otherwise meet the requirements of the regulations under Section 162." Reg. 1.162–20(a)(2).
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> * * * * * * *
>
> . . . [C]ertain types of expenses incurred with respect to legislative matters are deductible under section 162(a) if they otherwise meet the requirements of the regulations under section 162 . . . All other expenditures for lobbying purposes, for the promotion or defeat of legislation . . . for political campaign purposes (including the support of or oppsition to any candidate for public office), or for carrying on propaganda (including advertising) relating to any of the foregoing purposes are not deductible from gross income for such taxable years." Reg. 1.162.20(c)(1).

It should be pointed out that on pages 10 and 11 of his testimony, Mr. Shulman has significantly misstated the applicable Treasury Regulation by setting forth excerpts from Regulation 1.162–20(b), which applies only to taxable years beginning before 1963. Regulation 1.162–20(c), set forth above, superseded the sections of the Regulation which Mr. Shulman quoted pertaining to taxable years beginning after 1962. For the sake of clarity, therefore, the record of these proceedings should note that the portion of the Regulation quoted in Mr. Shulman's testimony on pages 10 and 11 is not applicable today.

With respect to the treatment of advertising expenses for ratemaking purposes, Mr. Shulman contends that our Company has incurred expenses for advertising which should be listed as non-operating expenses in Subaccount No. 426.4 of the FPC Uniform System of Accounts, which Subaccount includes those expenses incurred

> ". . . for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation or ordinances (either with respect to the possible adoption of new referenda, legislation or repeal or modification of existing referenda, legislation or ordinances); approval, modification or revocation of franchises; or for the purpose of influencing the decisions of public officials . . ."

The advertisements of Georgia Power Company which the Media Access Project characterized as "political propaganda" do not fall within the category of "non-deductible" expenses for tax purposes or "non-operating" expenses of the Federal Power Commission and are in no way violative of the Regulations cited by the Media Access Project.

Moreover, the promulgation of Regulations or the enactment of legislation which would have the effect of classifying as non-deductible or as "non-operating

expenses" those costs associated with advertisements of the type I will describe today would seriously undermine the efforts of privately owned public utilities to cope with our national energy requirements.

Georgia Power Co.'s Advertising Program

In order for the Subcommittee to see our advertising programs in some reasonable perspective, I have attached some Exhibits which reflect our overall advertising program for 1973.

Exhibit A sets forth Georgia Power's total advertising outlays except for certain appliance advertising by the Retail Appliance Division of the Company which is not related to electric service. This Exhibit shows that the Company's total media costs for 1973 represent less than one-fifth of one percent of total revenues and that total advertising expenditures including salaries of all advertising and public information personnel were approximately one-third of one percent of total revenues.

Exhibit B reflects the division of our advertising program among various types of advertising messages dealing with energy conservation, environment, customer billing, technological developments, utility economics and other subjects. Of course, many of the advertising messages make reference to two or more of these topics in the same advertisement.

Exhibit C[1] is a complete set of the Company's advertisements for 1973. I have included a complete set of the advertisements to accurately reflect the purposes, nature and tone of the advertising program when taken as a whole and I invite the Subcommittee's attention to the overall program as well as to the specific advertisements cited by the Media Access Project in its presentation of May 6, 1974.

Objectives of Georgia Power Co.'s Advertising Program

In discussing the issue before the Subcommittee today, as it relates to Georgia Power, I believe it would be helpful for me to state in general terms the circumstances which underlie our Company's advertising program and to outline briefly the objectives which we seek to accomplish through advertising.

The Georgia Power Company is a public utility corporation holding a franchise to provide electric service in substantially all of the State of Georgia. Our retail rates and service are subject to the regulatory jurisdiction of the Georgia Public Service Commission. The Company is subject to the Federal Power Act and to the jurisdiction of the Federal Power Commission and numerous other regulatory agencies ranging from the Securities and Exchange Commission to the Atomic Energy Commission. I am sure that the members of the Subcommittee and Staff are quite familiar with the Public Utility concept. This is the concept which holds that regarding certain utility services, society is best served by private firms dedicating their property to public service under conditions of a natural monopoly in order for the public to obtain the benefit of high production levels and high levels of efficiency. Governmental regulation is, of course, the substitute for direct market competition.

Since public utilities have long been held to be "affected with a public interest,"[2] such a company is accountable to the public to a much more meaningful extent than non-regulated firms. It would be naive for the management of our Company not to recognize that the public we serve constantly appraises our performance much more closely than it appraises the performance of companies which provide a service in a directly competitive market.

Our Company, like many other electric utilities, experienced a long period of retail price stability from approximately 1950 to 1970. In fact, we were able to implement a number of retail rate reductions during this period. This was due in part to the fact that generating plants grew in size and the accompanying economies of scale and a number of dramatic technological advancement made it possible for our Company to provide electric energy during these two decades on a descending cost curve. However, as the decade of the 1960s came to a close, a number of economic, technological and social forces interacted to drastically change the patterns of cost and price stability to which electric utilities and their customers had become accustomed.

The underlying catalyst which has affected our Company so dramatically in the 1970s has been the growth in demand for electric energy in our service area.

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[1] See p. 199.

[2] *Munn* v. *Illinois*, 94 U.S. 113 (1877).

The demand for electric energy in Georgia now doubles each seven years which, of course, means that the Company must double the size of its generation, transmission, and distribution facilities to accommodate this growth in demand.

I would like to illustrate the kind of compounded economic realities which confront our Company because of this growth in demand for electric service. To install a coal-fired unit of generating capacity today costs more than one and one-half times what it cost in the late 1960s. The current unit cost of installing nuclear generating capacity is approximately three times the cost of installing coal-fired generating capacity. But the effect upon our customers of these increased costs is compounded by other economic circumstances of today. The capital which must be attracted from investors to build such plant is twice as expensive as was new capital ten years ago. For example, in January of this year, our Company marketed a $150 Million bond issue at an interest rate of 8¾%, whereas, in 1964 the interest rate on our bonds was 4¾%. In addition to these obvious economic realities of the 1970s, the commitment to environmental protection, a commitment which our Company shares, means that we are required to invest millions of dollars for equipment used solely for environmental protection.

Lawful Duty To Serve

One of the legal responsibilities which distinguishes a public utility from other types of business is the "duty to serve." Under our franchise as a public utility, our Company has a lawful obligation to take the steps necessary to provide the electric power which is demanded by the public in our service area. This distinction cannot be overemphasized in the context of the subject which is under consideration by the Subcommittee, and I would like to illustrate the practical application of this distinction by reference to a recent example involving another industry with which I am sure the Subcommittee is familiar.

You will recall that in 1973, when most of the economy was subject to price regulation, the Cost of Living Council prescribed retail prices for beef at a level which many beef-distributing firms felt to be inadequate. A number of these companies simply announced that they would close down their packing facilities, which they did for a limited period of time. A public utility, regardless of its view of the regulatory polices to which it is subject, never has the option of shutting down its operations nor the option of refusing to construct additional plants having the capacity to meet projected energy demands of its service area. It is my strong conviction that this legal duty to serve carries with it a duty to communicate effectively with the consuming public which we serve as well as the investing public upon which we depend for capital to expand facilities in furtherance of our lawful duty to serve our customers.

It is of crucial importance to the utility industry that the investing public, including those who comprise and support investment institutions, have a basic understanding of the principles of economics which are unique to this industry.

We should never lose sight of the fact that a utility has NOWHERE to turn for capital for expansion except to the investing public, and if this source of capital is lost through a lack of public understanding of the utility industry, the only alternative is government financing and operation of facilities to provide utility service.

Content of Georgia Power Co. Advertising Program

In view of the fact that our Company and our customers experienced the long period of price stability which I have described and have had this price stability upset by the economic and technological realities to which I have alluded, we have the responsibility to inform our customers of the implications of these developments. Therefore, we have devoted a substantial portion of our advertising program to encouraging energy conservation. We have used our advertising messages to explain seasonal changes in our rate schedules as well as billing options available to customers. We have tried to give our customers an insight into the nature of the electric utility industry including the basic nature of the economic problems confronting it in the 1970s. Consistent with this approach of providing meaningful information to our customers, in a limited number of advertising messages we have indicated the nature and extent of economic problems that will confront the State of Georgia if our Company is unable to attract the capital necessary to carry out the minimum expansion program which will permit us to supply Georgia with its electrical needs.

In short, what we attempt to convey to the public we serve is a sense of perspective with respect to our Company. We have not over-stated any of the problems confronting our Company and the electric utility industry; nor have we consciously permitted our customers to remain unaware of the profound and vexing problems which drastically have increased our cost of operation and, consequently, our customers' rates for service. The dissemination, through advertising, of factual information indicating the nature and extent of future and present problems of a financial nature affecting the Company and its customers is "good will" or "institutional" advertising of the highest and most responsible order.

In the advertisements which the Media Access Project has labeled as "propaganda" we convey the simple truth that the retail price for electric service in our area will increase, and we indicate why. Is this political propaganda? Is it political advertising, or an attempt to influence legislation? Certainly not. It is an effort to convey the practical implication of facts known to the Company's management which, in all probability, are not known to our customers. There are multiple pragmatic reasons for this. For example, if a customer is contemplating the construction of a new home to be furnished with all electric appliances, we believe we have an obligation to inform him that any estimates he obtains relating to operating costs for these appliances must be based upon the realization that rates will increase Furthermore, basic notions of fairness strongly suggest to us that the customer has the right to know that his electric bill is about to increase. Advertising is by far the least expensive way for us to convey this message. If we sent an individual item of information to each of our customers through the regular mail, the postage cost would be more than $100,000. The total media expenditures during 1973 for the advertisements which Mr. Shulman has questioned were approximately $39,000.

Mr. Shulman characterizes these particular advertisements as "political propaganda" because, during certain periods of time in which these advertisements were included in our advertising program, our Company was involved in rate adjustment proceedings before a regulatory agency. Mr. Shulman implies that there is something sinister about communicating with our customers in the *manner* of the specific advertisements which he cites and at a *time* in which a legal proceeding involving a rate adjustment was in progress. I can think of nothing more fundamental to the survival and well-being of the electric utility industry than the free flow of information of the kind that I have described, and efforts to communicate along these lines with the public would be totally ineffective if they could be implemented only during periods of time in which a company is not involved in legal proceedings concerning rate matters.

During a period of inflation when periodic rate adjustments are essential to survival and in a period in which regulatory rate proceedings are highly complex and require many months to conclude, it is an exercise in fantasy to pretend that a utility could sustain a meaningful communications program with the consuming and investing public if it suspended its advertising program during the pendency of rate proceedings. Likewise, it would be absurd to modify the advertising program during rate proceedings to omit references to the underlying circumstances facing the Company which coincidentally are also factors in the Company's request to the regulatory agency for authority to adjust rates.

The pricing interface between a utility and its customers is a tariff or rate schedule which is filed with the appropriate regulatory agency. Such a rate schedule is necessarily complex, and when there are seasonal or structural modifications in our rate schedules, we have a definite obligation to inform the public we serve in a direct and effective way of the substantive changes in these rate schedules. Another example of the practical value of informational advertising with respect to a regulatory proceeding is a billing practice which the Georgia Public Service Commission has approved for our Company, known as "levelized billing." Because of the widespread growth of air-conditioning in our service area, a typical customer pays significantly more for electric service during the summer months than he does for service during the winter. Recognizing that this disparity of monthly electric charges creates a hardship on some family budgets, we asked the Georgia Public Service Commission to authorize "levelized billing." Under this procedure, an estimate of the customer's total annual bill is made based upon his billing history; and the customer is permitted to make averaged monthly payments based on annual use and their accounts are reconciled annually as to overpayment or underpayment. We alerted our customers to the availability of "levelized billing" and explained its operation through our advertising program.

I cannot overemphasize my sincere belief that electric customers are entitled to know when they will experience rate increases and what are the bases for rate adjustments. For illustrative purposes, let us assume that an electric utility has chosen to inform its customers of an impending energy shortage and the need for reduction in the level of consumption of electricity by customers. Let us assume further that, despite the customers' heed to the plea by the electric utility to reduce consumption, their electric bills increase for the next several months. Naturally, the customers would be highly confused by the fact that their usage of electricity had been reduced and still their electric bills continued to increase.

What the utility customer in the above example would not fully understand, however, was that the energy crisis was the catalyst that effected the changes in the entire economic structure of our society. In other words, economic theory is closely analogous to theories in other specialized fields—to-wit, any single action which causes changes in a complex system will invariably affect the whole.[3] Thus, in my example, the energy shortage caused the rising costs of all fuels. This in turn necessitated what is known in the electric utility industry as the "fuel adjustment clause." This is a device which, when approved by a regulatory agency, permits the utility to pass on to the customer the increased cost of fuel on a month-to-month basis without having multple full-blown rate increase proceedings. Without this explanation of the need to increase rates with a simultaneous need to reduce consumption of electricity, the customer's understanding of the overall economic picture is reduced to an emotional response to his economic plight.

Consequently, the consumer of electricity must understand the need for higher rates or he will be unable to make a rational decision as to the efficacy of such an increase. Should this misunderstanding lead to the utility's inability to obtain a "fair return," then investors who put up some 80% of the capital each year to expand systems such as ours will invest elsewhere. When capital flees, construction must slow drastically. Moreover, if the remaining construction cannot satisfy demand, then many sacrifices must be made by the utility and by the public in general.

Advertising is a utility's one consistent way to present facts to the public. Interfering with an advertising program can hardly be done without sacrificing a well-informed public for one which is ill-informed. In sum, I submit to you that, as my above example illustrates, a public utility must inform its customers of all relevant economic factors pertaining to the utility's present and future needs in order to fulfill its obligations to those citizens whom it serves.

The Dangers of Classifying Advertisements as "Political" in Nature

The Media Access Project has utilized circular reasoning in characterizing three of our advertisements as "political" and contending that expenses for these advertisements should be classified as non-operating expenses. In his testimony before this Subcommittee, Mr. Shulman frankly acknowledges that Georgia Power Company's advertisements which refer to rate adjustments are not of such character as to render the monies expended therefor non-deductible for tax purposes. On page 24 of his testimony, Mr. Shulman asserts that, ". . . if the rate increase controversy seems far removed from a legislative forum and is confined to state utility commissioners or courts, a strict reading of the current IRS regulations would seem to permit deductibility." However, Mr. Shulman contends that such ads represent non-operating expenses, and he cites as support for this thesis the fact that the Federal Communications Commission in 1973 directed two Georgia television stations to "afford opportunity for the presentation of contrasting views on the rate increase issue." I would like to illustrate the circular reasoning which Mr. Shulman has employed to arrive at his conclusion.

In the FCC proceeding referred to, the Media Access Project was representing a group known as the Georgia Power Project. The Georgia Power Project is a

[3] Note the biological theory known as "Harding's Law," which holds that "You cannot do only one thing"—that is, any one biological change in a biological system will affect the *entire* system.

small group of individuals whose spokesmen publicly acknowledge that the Project's primary goals are the political objectives of the ultimate replacement of capitalism with socialism and that the group believes that the first step in this process is to undermine confidence in public utilities and to achieve total public ownership of utilities.[4] While publicly acknowledging these ultimate goals, the Georgia Power Project has sought to politicize virtually every public statement and position which our Company has taken in recent months. For example, in its advertising program the Company has made the simple factual observation that it must expand its physical plant because the demand for electric energy will continue to increase. The Georgia Power Project has sought to politicize such statements by simply proclaiming that they constitute propaganda intended to increase sales and profits. The Federal Communications Commission, without purporting to pass upon the correctness or incorrectness of our Company's advertising program, directed two Georgia television stations to do more than they previously had done in providing opportunity for contrasting views concerning our rate proceedings.

Ironically, the Media Access Project now points to the FCC case as evidence that the subject advertisements are political. In reality, any political connotation which the advertisements may have acquired has been the result of public statements of a political nature by Media Access Project's client in the FCC proceeding, Georgia Power Project. It is patently obvious that in the case of a group with political goals as broad as those of the Georgia Power Project (such goals being to replace capitalism with socialism), virtually any informational message of substance could be politicized by publicly proclaiming that it is inconsistent with the political goals espoused by such group.

In illustrating the circular reasoning of the Media Access Project, I want to make it clear to the Subcommittee that I am in no way quarreling with the full rights of the members of the Georgia Power Project to criticize capitalism, the private ownership of utilities, or the Georgia Power Company in particular. In fact, I have participated in many television and radio discussion programs in Georgia with members of the Georgia Power Project and I fully respect their rights to articulate their political and economic philosophy. But the point I want to emphasize is that merely because a group such as the Georgia Power Project takes issue with information conveyed in our advertising program, that does not change the essential character of our advertising program from being one of an informational character to one that is political in nature. In a real sense, the acknowledged public efforts of a group of individuals bent upon radical economic change and to undermine public confidence in a particular industry or company makes it all the more crucial to the continued well-being of the Company that it have useful and effective channels of communication with the public it is franchised and obligated to serve.

In summary, public utilities are now deeply immersed in the economic and political cross currents of our society, in environmentalism, consumerism, uncontrolled inflation, and the energy crisis. I believe that the failure of a public utility to provide the public with information needed to see utility service in a reasonable perspective would be a dereliction of our responsibility as a public utility. It is axiomatic that these complex realities do not have a discrete existence apart from the factors weighed by a regulatory agency in a proceeding for a rate adjustment. To seize on this fundamental truth as a basis for characterizing substantive utility advertising as "political propaganda" is to play a dangerous semantical game. It is obvious to me that if the electric utility industry is going to serve the public interest, it must make use of more rather than less sophisticated communications with its customers and with the public in general. I respectfully ask that this Subcommittee not entertain the type of impractical and punitive recommendations presented by the Media Access Project. I strongly urge that this Subcommittee recognize the right and the obligation of a business to inform its customers, as well as the right of the customers to be so informed.

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[4] See Transcript of Georgia Public Service Commission Docket No. 2465U and materials discussed therein.

EXHIBIT A

Year	Gross revenue sales of electricity	Institutional advertising media costs	Institutional media costs cents per gross revenue dollar	Total advertising expenditures including all salaries, expenses and marketing advertising	Total advertising cents per gross revenue dollar
1971	$417,696,151	$1,034,772	.24773	$2,154,757	.51587
1972	$506,058,516	947,993	.18733	1,876,794	.37086
1973	596,777,465	1,057,267	.17716	2,013,623	.33742
1974 [1]	752,776,660	1,600,214	.21257	2,968,220	.39430
1974 [2] (January–May)	282,086,034	391,936	.13894	784,426	.27808

[1] 1974 budget.
[2] January–May actual.

EXHIBIT B

1973 advertising media expenditures by subject matter:	Amount
Conservation of energy	[1] $215,218
Utility economics	[3] 324,211
Environmental information	[3] 98,270
Security lighting	[4] 14,666
Other customer information	[5] 162,147
Total	814,512

[1] Ads giving factual tips for residential customers on how to conserve electric energy. Examples: "How does 73 differ from 78?" and "Please. Turn it down when you're leaving."
[2] Ads giving basic economic facts about utility operation. For the 3 advertisements—1 radio, 1 television, 1 newspaper—attached to Senator Hart's letter, referred to in Mr. Shulman's testimony before the subcommittee, media costs were $39,536.
[3] Ads explaining company programs for environmental protection and conservation of natural resources. Examples: "The Chattahoochee River is cleaner this year" and "The Etowah" television spot.
[4] 1 television commercial on night street lighting.
[5] All ads are informational in nature, but this category includes those which give information not specifically related to preceding categories. Examples: "Plan. The plant." and "High temperatures may cause a spurt in your electric bill."

Senator HART. This concludes the testimony scheduled on the subject matter. I never was a tax man. I have inhaled enough of this testimony, though, to have the feeling that there are differences in degree at least, in the several ads that have been presented, and the earlier testimony, whether any of them are of such character as should be treated under the Code as not deductible, I don't know. I am sure many people have strong opinions. But I think the responsibility of that is simply to refer to the Bureau the record, and indicate to them that we will expect them to make the judgment which they are qualified to make and which I am not, and as to the treatment that should be accorded each of the several ads.

Mr. Bickwit reminds me that there was some question with respect to the treatment above and below the line on accounting under the Federal Power Commission Act regulations, and I am even less informed in that area.

All I can do is send the transcript to them to make that judgment.

Thank you very much. I am sorry we have held the witnesses for so long.

[Whereupon, at 1:27 p.m., the hearing was adjourned.]

(Pages 159-194 deleted)

* * *

ASSOCIATION OF NATIONAL ADVERTISERS, INC.,
New York, N.Y., July 15, 1974.

Hon. PHILIP A. HART,
Chairman, Subcommittee on the Environment,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: It has come to our attention that the testimony of some witnesses before your Subcommittee on the Environment can be interpreted as recommending that all advertising which is not exclusively product-oriented should be disallowed as a proper business expense for Federal income tax purposes. While we suspect that such sweeping proposals are not germane to the constructive investigation you are conducting, we feel we should comment at this time in the interest of a balanced record.

Our concern stems from the following:

1. A business, to prosper—even to survive—may be called upon to communicate with a variety of publics on matters which are only indirectly related to the sale of products or services.

2. To discourage such communications—to ban them from all practical purposes in some instances—by censorship through the tax laws and the Internal Revenue Service is not in the public interest.

May I illustrate our concern briefly:

Any business, like any organization, must communicate with many audiences on a variety of possible topics. These, for example, could include:

(a) The financial and stockholder community audience. . . . A business may find it essential to communicate its operating results, its growth potential, steps it is taking to resolve problems or its management's philosophy in regard to foreign trade and our balance of payments.

(b) The employee and plant community audience. . . . An employer may find it essential to communicate on productivity programs, about employee benefits and retirement programs, on local zoning issues, or on ecological questions of interest to the plant community.

(c) The professional or "high technology" audience. . . . In many instances, a company will need to communicate on new developments in science, engineering, agriculture, medicine and the like on which it has information to specialized audiences, including government officials.

(d) The more generalized public on questions indirectly related to the products of the company. . . . Insurance companies, for example, have helped make us aware of safety practices; nutritional guidance is in corporated into food product advertising; health and dental care procedures can be both implicit and explicit in the communications of a variety of companies.

These brief examples of some "audiences" and some communications other than those directly product-oriented which a business may reasonably feel it important or essential to transmit only scratch the surface. Many more, and in far greater detail, could be presented.

This Association, whose membership is comprised of users of national advertising, has consistently recognized a) that advertising expenditures, to be considered as an expense for income tax purposes, have to have a reasonable relationship to the business of the taxpayer; and b) that advertising explicitly designed to defeat or encourage the passage of specific legislative proposals is non-deductible.

It is apparent, I believe, that the examples cited above, as would be true of many others, are reasonable business expenses. It is also apparent that on occasions such communications may relate to matters—safety and health, for example—which could also be the subject of legislation as almost any question would fall in that category. In our judgment, however, it would clearly not be in the public and national interest to so distort the meaning of "lobbying" or "influencing legislation" as to discourage or preclude the inputs to public knowledge and discussion which business organizations can provide.

As I suggested at the outset of this letter, we suspect that the recommendation that all advertising other than strictly product-oriented advertising be disallowed is not germane to your Subcommittee's investigation. Should that not be the case, or should you wish further amplification of our point of view and experience, we would, of course, be more than pleased to provide testimony. Please just have your office let us know.

Very sincerely,

PETER W. ALLPORT,
President.

AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, INC.,
New York, N.Y., July 16, 1974.

Senator PHILIP A. HART,
Dirksen Senate Office Building,
Washington, D.C.

DEAR SENATOR HART: The American Association of Advertising Agencies (A.A.A.A.) submits these comments in opposition to certain proposals contained in the statement made by Harvey J. Shulman to the Subcommittee on May 6, 1974 on behalf of Media Access Project. The A.A.A.A. is the national association of the advertising agency business. Its membership consists of 392 advertising agencies, large and small, which are located in all parts of the United States and account for about three-fourths of the national advertising volume placed by advertising agencies.

The Shulman statement challenges the tax-deductibility of a number of corporate advertisements dealing with energy and environmental issues on the ground that they should be classified as political advertising which does not quality for deduction as a business expense under Section 162(e) of the Internal Revenue Code and the applicable I.R.S. regulations. It also challenges the accounting treatment as operating expense of a number of advertisements by public utilities. Our statement does not relate to the legal status of the particular advertisements under attack, since this is primarily a matter for the advertisers involved, but expresses our concern with proposals that would extend the denial of tax-deductibility for political advertising to institutional advertising generally.

The Shulman Proposals

Our concern arises from statements such as the following: "In short, the 1962 law was not a license to corporate advertisers to propagandize to the public on matters of legislative concern, *or any other controversial matters*, through subsidization from the public offers." (p. 12)

We are also concerned by the guidelines for denying deductibility which Mr. Shulman suggests on pages 33 and 34 of his statement. A number of these plainly have nothing whatever to do with the question whether advertising advocates the passage or defeat of legislation but would engage the I.R.S. in censorship of advertising style and content: for instance, whether the subject matter is fairly discussed, whether the tone is polemical, whether readers or listeners are invited to express their views, etc.

Summing up his antagonism towards any corporate advertising which deals with issues, regardless of whether it is addressed to pending legislation, Mr. Shulman proposes that regulations should be adopted creating a presumption of nondeductibility for any advertising that "presents social or economic views, or deals with a matter which might reasonably be expected to become the subject of legislation." This would have the effect of "restraining propaganda masquerading as goodwill advertising." (p. 35) Finally, Mr. Shulman recommends that the I.R.S. should reinstate its dangerously vague regulation, discarded in 1965, which disallowed the deduction of expenses associated with "the exploitation of propaganda." (p. 41).

These passages exhibit a hostility not just to political advertising but to any corporate advertising which does not directly promote a product or service. Any other advertising is viewed as "propaganda" which must be discouraged whether or not it is intended to promote or defeat the passage of legislation. The A.A.A.A. believes that this attitude demonstrates a misunderstanding of the nature of institutional advertising and of its importance not only to corporations and their stockholders but to the public at large.

Institutional Advertising as a Corporate Necessity

In today's climate, institutional or corporate advertising has become an unavoidable way of life for more and more companies if they are to stay healthy and grow, or sometimes even stay alive. As an indispensable ingredient of corporate profitability, present and future, institutional advertising is plainly entitled to treatment as an "ordinary and necessary" business expense which may be deducted from before-tax income.

Mergers and acquisitions, diversification, the quick pace of product innovation—these trends which have accelerated so rapidly in the past decade have made it increasingly desirable for many companies to establish an overall identity that will unify their richly varied offering of products and services. To the extent that such corporate sponsorship assures uniform standards of quality and reliability, it meets public as well as corporate needs.

But a reputation for high quality product and services is no longer enough to guarantee their acceptance in the marketplace. People have come to expect companies to be good citizens in every sphere of corporate life. One recent study found that 73% of the group surveyed believed that corporate management should be committed both to earning a profit and to helping solve social problems. A company's failure to live up to the public's growing demands for social responsibility may depress sales of its products and services, excellent though they be. According to Robert Sarnoff: "Other things being equal, a customer's impression of a business can make the difference between a sale or no sale, between profit and loss."

A poor reputation for good citizenship may also adversely affect employee morale and productivity, stockholder relations, the price of the company's stock, its ability to secure financing, and its success in recruiting talented personnel, one of the most critical needs of companies of all sizes. For such reasons it has been said: "A strong corporate reputation with the public at large has become one of the most important assets on a company's balance sheet."

Corporate Communication and Good Citizenship

Corporate advertising may itself be the vehicle of social action. When company ads give tips on how to save gas, show parents how to teach their children to use the telephone in emergencies, offer low cost cooking hints with computer-tailored menus and recipes or tell minority vendors how to make their products known to the company, they are directly demonstrating corporate sensitivity to consumer needs. A campaign devoted to the need for increased productivity to combat inflation and foreign competition both constitutes and displays activity on behalf of the common weal. Companies that have spent millions of dollars to underwrite programs on public TV such as Masterpiece Theater and Sesame Street, advertising only the fact of their sponsorship, have taken action in the public eye to enhance their prestige.

For the most part, however, what a company has done, or plans to do, about conserving energy, reducing pollution, eliminating race or sex discrimination and like matters of public moment will remain unknown to the public unless communicated to it. Corporate advertising is a principal instrument for such communication. To require high standards of corporate behavior but limit the corporation's opportunity to tell truthfully how well it has behaved seems not only unfair but self-defeating. By removing a major incentive for corporate good citizenship, it would not be in the public interest.

The Right of Self-Defense

Those persons like Mr. Shulman who would like to muzzle American corporations emphasize the imbalance between the resources available to the average citizen and the corporate millions that may be poured into advertising to "propagandize" that citizen. Anyone who reads the daily press or listens to the news should know better. Corporations are constantly under attack from every quarter. Charges by consumer groups, Congressional Committee and Subcomimttee Chairman, individual Congressmen and the various organs of federal, state and local government set front-page headlines. It is common practice for administrative agencies to launch a complaint with a fanfare of devastating publicity against which a company has little recourse though the charges later prove to be unfounded or even reckless.

Silence by a company in the face of attacks upon its policies and practices is interpreted as an admission of guilt. Corporate advertising provided one avenue of self-defense, but it is a limited one. The Supreme Court has recently ruled that there is no right of access to broadcast media and that no duty to permit response may be imposed on print media. The fairness doctrine, which does impose a duty on broadcasters to fairly present all sides of controversial issues, has restricted freedom of corporate expression by shrinking broadcasters' willingness to accept any but the most innocuous institutional advertising. Thus it is both difficult and expensive for corporations to gain the public ear, even in self-defense.

Conclusion

We respectfully urge that the existing law and regulations should not be enlarged by amendment or interpretation to deny tax-deductibility to institutional advertising which is not for the promotion or defeat of legislation or for political campaign purposes. Corporations have a critical business need to maintain their reputation as good citizens. The public interest in corporate social responsibility requires that corporations have full opportunity to give an account of their stewardship. There is an even greater public interest in uninhibited debate. We have learned that Government is not necessarily right or always accurate and that public interest groups, however sincere, often lack the discipline of accountability. Controversy should not be stifled by prejudgment. The public has the right to hear from all parties.

Sincerely,

JOHN CRICHTON,
President.

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
Reston, Va., July 19, 1974.

HON. PHILIP A. HART,
Chairman, Senate Subcommittee on the Environment,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The American Newspaper Publishers Association (ANPA) submits these comments for the record of the Subcommittee hearings on Tax Treatment of Corporate Energy and Environmental Advertising because of our deep concern over the possible adverse effect, even if unintended, on institutional or good will advertising which serves a useful purpose in public discussion of public issues.

ANPA is the national trade association of daily newspapers with a membership of more than 1,100 daily newspapers having more than 90 percent of the total daily and Sunday newspaper circulation in the United States. Institutional advertising is an important element of the total advertising that sustains all newspapers in the United States.

We are concerned, that this Subcommittee not initiate action which could eventually lead to the elimination of a large volume of institutional advertising through the adoption of proposals such as that submitted to this Subcommittee

May 6, 1974 on behalf of the Media Access Project. That proposal would revise existing tax regulations concerning institutional advertising in a way that could lead to the virtual elimination of such corporate advertising. It would substantially impair the ability of advertisers to communicate with the public their views on matters heretofore legitimate and allowable under IRS regulations as ordinary and necessary business expenses. As corporate citizens of their communities, their views need to be known on "economic, financial, social or other such subjects of a general nature."

To prevent a taxpayer from deducting expenditures for advertising which comments on any "controversial matters" would constitute a totally unworkable rule for administration by an agency of the government or for compliance by a corporate advertiser. To prohibit tax deductions for institutional advertising dealing with matters which "might reasonably be expected to become the subject of legislation" would make a rule so broad in scope as to make institutional or good will advertising virtually a thing of the past. Virtually no economic, financial or social subject matter is not controversial in someone's mind. Virtually no matter of consequence is not a potential subject of legislation. Such suggestions are virtually proposals to lump all institutional advertising of any nature into the "political" category thus eliminating its tax deductibility and, consequently greatly inhibiting the discussion of public issues. We are confident this is a result you and the Subcommittee would not want to bring about.

ANPA strongly supports the practice of institutional advertising. We contend that there are already sufficient restrictions on its tax deductibility. We urge the Subcommittee to firmly reject any recommendations that would further endanger this necessary business practice for communicating in the marketplace through the media.

With high esteem.

Yours very truly,

STANFORD SMITH,
President.

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* * *

(Pages 200-220, remainder of hearing, deleted

FEDERAL TRADE COMMISSION JURISDICTION

Exhibit 72: Excerpts From Federal Trade Commission Act, 15 U.S.C. 41, et seq.

FEDERAL TRADE COMMISSION

§ 41. Federal Trade Commission established; membership; vacancies; seal

A commission is created and established, to be known as the Federal Trade Commission (hereinafter referred to as the Commission), which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate.

§ 45. Unfair methods of competition unlawful; prevention by Commission—Declaration of unlawfulness; power to prohibit unfair practices

(a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(2) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

Exhibit 73: *Warner-Lambert* v. *FTC*, 562 F.2d 749 (D.C. Cir. 1977)

WARNER-LAMBERT COMPANY,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

No. 76-1138.

United States Court of Appeals,
District of Columbia Circuit.

Argued March 25, 1977.

Decided Aug. 2, 1977.

Rehearing Denied Sept. 14, 1977.

Manufacturer of mouthwash petitioned for review of order of Federal Trade Commission requiring it to cease and desist from advertising that its product prevented, cured, or alleviated the common cold and requiring it to disclose in future advertisements for mouthwash that product would not help prevent colds or sore throats or lessen their severity. The Court of Appeals, J. Skelly Wright, Circuit Judge, held that: (1) substantial evidence supported Commission's conclusion that mouthwash was not beneficial for colds or sore throats; (2) Federal Trade Commission had the authority to require corrective advertisements, even though Federal Trade Commission Act did not specifically mention such authority; (3) manufacturer would not be required to include in corrective advertising the phrase "Contrary to prior advertising,"

since such phrase was not needed to attract attention to corrective statement nor was such phrase justified as a humiliation of the manufacturer, and (4) Commission properly ordered that corrective advertising would be required until manufacturer expended on advertising of its mouthwash sum equal to average advertising budget for that product for period from April 1962 to March 1972.

Order affirmed as modified.

Robb, Circuit Judge, dissented in part and filed opinion and filed dissenting opinion on petition for rehearing.

1. Trade Regulation ⇐841

Federal Trade Commission's findings in cease and desist order must be sustained if they are supported by substantial evidence on the record viewed as a whole.

2. Trade Regulation ⇐841

Substantial evidence supported Federal Trade Commission's conclusion that contrary to advertising claims certain mouthwash was not beneficial for colds or sore throats. Federal Trade Commission Act, § 5 as amended 15 U.S.C.A. § 45.

3. Trade Regulation ⇐808

Where Food and Drug Administration study as it related to effectiveness of certain mouthwash was not inconsistent with the Federal Trade Commission's conclusion that advertising claims of manufacturer of such mouthwash were deceptive, Federal Trade Commission did not err in refusing to reopen its proceedings to consider Food and Drug Administration's study nor did such study establish that Federal Trade Commission's conclusions were wrong. Federal Trade Commission Act, § 5 as amended 15 U.S.C.A. § 45.

4. Trade Regulation ⇐812

Federal Trade Commission has the authority to require "corrective advertising" by an advertiser which has engaged in deceptive advertising, even though Federal Trade Commission Act does not specifically mention such authority. Federal Trade Commission Act, § 5 as amended 45 U.S.C.A. § 15.

5. Trade Regulation ⇐812

Fact that 1975 amendments to Federal Trade Commission Act added section to Act authorizing Commission to bring suits in federal district courts to redress injury to consumers resulting from deceptive practices did not establish that Federal Trade Commission by itself did not have power to require "corrective advertising." Federal Trade Commission Act, §§ 5, 19 as amended 15 U.S.C.A. §§ 45, 57b.

6. Trade Regulation ⇐812

Under section of Federal Trade Commission Act authorizing Federal Trade Commission to bring suits in federal district court to redress injury to consumers resulting from a deceptive practice and authorizing court to grant necessary relief, including "public notification" respecting rule violation or unfair or deceptive act or practice, "public notification" is not synonymous with corrective advertising, but, rather, "public notification" is a much broader term and may take any one of many forms; "public notification" is directed at past consumers of product. Federal Trade Commission Act, § 19 as amended 15 U.S.C.A. § 57b.

7. Statutes ⇐219(1)

Court will not construe agency's request for authorizing legislation as affirmative proof of no authority, as public policy requires that agencies feel free to ask for legislation which will terminate or avoid adverse contentions and litigations.

8. Statutes ⇐220

Subsequent grant of congressional authority does not prove agency's prior lack of authority, for it is possible that Congress granted power out of uncertainty, understandable caution, and a desire to avoid litigation.

9. Constitutional Law ⇐90.1(1)

First Amendment triggers special responsibility on Federal Trade Commission to order corrective advertising only if the restriction inherent in its order is no great-

er than necessary to serve interest involved. Federal Trade Commission Act, § 5 as amended 15 U.S.C.A. § 45; U.S.C.A.Const. Amend. 1.

10. Constitutional Law ⇐90.1(1)

First Amendment presents no obstacle to government regulation of false or misleading advertising. U.S.C.A.Const. Amend. 1.

11. Eminent Domain ⇐2(1)

Federal Trade Commission's cease and desist order which required corrective advertising did not constitute an unconstitutional taking of property without just compensation, and Commission was not required to engage in rule making rather than adjudication to require such corrective advertising.

12. Administrative Law and Procedure ⇐332

Fact that an agency has not asserted a power over a period of years is not proof that the agency lacks such power.

13. Trade Regulation ⇐812

Where substantial evidence supported Federal Trade Commission's finding that mouthwash was not beneficial for colds or sore throats, Commission properly ordered manufacturer of mouthwash to disclose in future advertisements that the mouthwash would not help prevent colds or sore throats or lessen their severity, but manufacturer would not be required to include as preamble to corrective statement the phrase "Contrary to prior advertising," since such phrase was not required to attract attention to disclosure nor could phrase be justified as humiliation of manufacturer, in view of lack of evidence that previous advertising had been in bad faith. Federal Trade Commission Act, § 5 as amended 15 U.S.C.A. § 45.

14. Trade Regulation ⇐811, 844

Federal Trade Commission is expert body to determine what remedy is necessary to eliminate unfair or deceptive trade practices which have been disclosed; Commission has wide latitude for judgment and courts will not interfere except where remedy selected has no reasonable relation to the unlawful practices found to exist. Federal Trade Commission Act, §§ 1 et seq., 5(a)(1) as amended 15 U.S.C.A. §§ 41 et seq., 45(a)(1).

15. Trade Regulation ⇐812

Good faith of an advertisement is generally irrelevant to the need for corrective advertising, for innocence of motive is not a defense if an advertisement is prejudicial to the public interest. Federal Trade Commission Act, § 5 as amended 15 U.S.C.A. § 45.

16. Trade Regulation ⇐812

In view of evidence indicating that manufacturer of mouthwash had since 1879 represented its product as being beneficial in certain respects for colds, cold symptoms, and sore throats and in view of substantial evidence which supported Federal Trade Commission's conclusion that mouthwash was not beneficial for colds or sore throats, Federal Trade Commission order requiring corrective advertising until manufacturer had expended on such mouthwash advertising sum equal to average annual mouthwash-advertising budget for previous ten-year period was not excessive in its duration and was reasonably related to violation found by Commission. Federal Trade Commission Act, § 5 as amended 15 U.S.C.A. § 45.

On Petition for Rehearing

17. Constitutional Law ⇐90.1(1)

Only truthful, and not misleading or false, advertising claims are protected under First Amendment. U.S.C.A.Const. Amend. 1.

18. Constitutional Law ⇐90.1(1)

"Corrective advertising" order entered by Federal Trade Commission in response to false or misleading advertising does not necessarily have unconstitutional chilling effect on protected truthful speech. U.S.C.A.Const. Amend. 1.

19. Constitutional Law ⇐90.1(1)

"Corrective advertising" order entered by Federal Trade Commission in response to false or misleading advertising by mouth-

wash manufacturer did not impose unconstitutional burden upon manufacturer's current and future advertising, even if current and future advertising was constitutionally protected speech, where governmental interest of protecting citizens against deception would not be substantially served by less restrictive remedy of cease and desist order. U.S.C.A.Const. Amend. 1; Federal Trade Commission Act, § 5 as amended 15 U.S.C.A. § 45.

Petition for Review of an Order of the Federal Trade Commission.

Herbert A. Bergson, Washington, D. C., with whom James H. Kelley, Donald L. Hardison, and Larry D. Sharp, Washington, D. C., were on the brief, for petitioner.

Jerold D. Cummins, Acting Asst. Gen. Counsel, F. T. C., Washington, D. C., with whom Gerald P. Norton, Acting Gen. Counsel, F. T. C., Washington, D. C., was on the brief, for respondent. Gerald Harwood, Asst. Gen. Counsel, F. T. C., Washington, D. C., at the time the record was filed, also entered an appearance for respondent.

Gilbert H. Weil, New York City, filed a brief on behalf of the Association of National Advertisers, Inc. as amicus curiae urging reversal.

William W. Rogal, Washington, D. C., filed a brief on behalf of the American Advertising Federation as amicus curiae urging reversal.

Before BAZELON, Chief Judge, and WRIGHT and ROBB, Circuit Judges.

Opinion for the court filed by Circuit Judge WRIGHT.

Dissenting opinion filed by ROBB, Circuit Judge.

J. SKELLY WRIGHT, Circuit Judge:

The Warner-Lambert Company petitions for review of an order of the Federal Trade Commission requiring it to cease and desist from advertising that its product, Listerine Antiseptic mouthwash, prevents, cures, or alleviates the common cold. The FTC order further requires Warner-Lambert to disclose in future Listerine advertisements that: "Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity."[1] We affirm but modify the order to delete from the required disclosure the phrase "Contrary to prior advertising."

I. BACKGROUND

The order under review represents the culmination of a proceeding begun in 1972, when the FTC issued a complaint charging petitioner with violation of Section 5(a)(1) of the Federal Trade Commission Act[2] by misrepresenting the efficacy of Listerine against the common cold.

Listerine has been on the market since 1879. Its formula has never changed. Ever since its introduction it has been represented as being beneficial in certain respects for colds, cold symptoms, and sore throats. Direct advertising to the consumer, including the cold claims as well as others, began in 1921.

Following the 1972 complaint, hearings were held before an administrative law judge (ALJ). The hearings consumed over four months and produced an evidentiary record consisting of approximately 4,000 pages of documentary exhibits and the testimony of 46 witnesses. In 1974 the ALJ issued an initial decision sustaining the allegations of the complaint. Petitioner appealed this decision to the Commission. On December 9, 1975 the Commission issued its decision essentially affirming the ALJ's

1. This requirement terminates when petitioner has expended on Listerine advertising a sum equal to the average annual Listerine advertising budget for the period of April 1962 to March 1972, approximately ten million dollars.

2. 15 U.S.C. § 45(a)(1) (1970). At the time the complaint issued, § 5(a)(1) stated that "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." This was amended in 1975 to substitute "in or affecting commerce" for the phrase "in commerce." *See* 15 U.S.C. § 45(a)(1) (Supp. V 1975).

findings. It concluded that petitioner had made the challenged representations that Listerine will ameliorate, prevent, and cure colds and sore throats, and that these representations were false. Therefore the Commission ordered petitioner to:

(1) cease and desist from representing that Listerine will cure colds or sore throats, prevent colds or sore throats, or that users of Listerine will have fewer colds than non-users; [3]

(2) cease and desist from representing that Listerine is a treatment for, or will lessen the severity of, colds or sore throats; that it will have any significant beneficial effect on the symptoms of sore throats or any beneficial effect on symptoms of colds; or that the ability of Listerine to kill germs is of medical significance in the treatment of colds or sore throats or their symptoms;

(3) cease and desist from disseminating any advertisement for Listerine unless it is clearly and conspicuously disclosed in each such advertisement, in the exact language below, that: "Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity." This requirement extends only to the next ten million dollars of Listerine advertising.[4]

Petitioner seeks review of this order. The American Advertising Federation and the Association of National Advertisers have filed briefs as *amici curiae*.

II. SUBSTANTIAL EVIDENCE

[1, 2] The first issue on appeal is whether the Commission's conclusion that Listerine is not beneficial for colds or sore throats is supported by the evidence. The Commission's findings must be sustained if they are supported by substantial evidence on the record viewed as a whole.[5] We conclude that they are.

Both the ALJ and the Commission carefully analyzed the evidence. They gave full consideration to the studies submitted by petitioner. The ultimate conclusion that Listerine is not an effective cold remedy was based on six specific findings of fact.

First, the Commission found that the ingredients of Listerine are not present in sufficient quantities to have any therapeutic effect. This was the testimony of two leading pharmacologists called by Commission counsel. The Commission was justified in concluding that the testimony of Listerine's experts was not sufficiently persuasive to counter this testimony.[6]

Second, the Commission found that in the process of gargling it is impossible for Listerine to reach the critical areas of the body in medically significant concentration. The liquid is confined to the mouth chamber. Such vapors as might reach the nasal passage would not be in therapeutic concentration. Petitioner did not offer any evidence that vapors reached the affected areas in significant concentration.[7]

Third, the Commission found that even if significant quantities of the active ingredients of Listerine were to reach the critical sites where cold viruses enter and infect the body, they could not interfere with the activities of the virus because they could not penetrate the tissue cells.[8]

Fourth, the Commission discounted the results of a clinical study conducted by petitioner on which petitioner heavily relies. Petitioner contends that in a four-year study schoolchildren who gargled with Listerine had fewer colds and cold symptoms than those who did not gargle with Listerine. The Commission found that the design and execution of the "St. Barnabas study" made its results unreliable. For the first two years of the four-year test no placebo was given to the control group. For the last two years the placebo was

3. Petitioner does not contest this part of the order on appeal.

4. *See* note 1 *supra*.

5. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

6. JA 881–884, 909–921, 531–552.

7. JA 556–557.

8. JA 508–510, 533.

inadequate: the control group was given colored water which did not resemble Listerine in smell or taste. There was also evidence that the physician who examined the test subjects was not blinded [9] from knowing which children were using Listerine and which were not, that his evaluation of the cold symptoms of each child each day may have been imprecise, and that he necessarily relied on the non-blinded child's subjective reporting. Both the ALJ and the Commission analyzed the St. Barnabas study and the expert testimony about it in depth and were justified in concluding that its results are unreliable.[10]

Fifth, the Commission found that the ability of Listerine to kill germs by millions on contact is of no medical significance in the treatment of colds or sore throats. Expert testimony showed that bacteria in the oral cavity, the "germs" which Listerine purports to kill, do not cause colds and play no role in cold symptoms. Colds are caused by viruses. Further, "while Listerine kills millions of bacteria in the mouth, it also leaves millions. It is impossible to sterilize any area of the mouth, let alone the entire mouth."[11]

Sixth, the Commission found that Listerine has no significant beneficial effect on the symptoms of sore throat. The Commission recognized that gargling with Listerine could provide temporary relief from a sore throat by removing accumulated debris irritating the throat.[12] But this type of relief can also be obtained by gargling with salt water or even warm water.[13] The Commission found that this is not the significant relief promised by petitioner's advertisements. It was reasonable to conclude that "such temporary relief does not 'lessen the severity' of a sore throat any more than expectorating or blowing one's nose 'lessens the severity' of a cold." [14]

[3] In its attack on the Commission's findings, petitioner relies heavily on a recent study of over-the-counter cold remedies by the Food and Drug Administration [15] which petitioner alleges found Listerine "likely to be effective." [16] Its argument is two-pronged: first, that the fact that the Commission's findings differ from the FDA's proves that the Commission's findings are wrong; and second, that it was error for the Commission to refuse to reopen its proceedings when the FDA study was released. We conclude that both of these arguments are without merit for the simple reason that the FDA study does not, to any significant degree, contradict the Commission's findings.

The FDA study is the product of an expert panel appointed in 1972 to study all over-the-counter cold, cough, allergy, bronchodilator, and anti-asthmatic drug products—some 180 ingredients used in as many as 50,000 products.[17] The panel's draft report was issued in February 1976, two months after the FTC issued its order

9. People who are given medication for an ailment frequently feel better because they think they should, even though the product has no therapeutic value. This is known as the placebo effect. In order to eliminate the bias of the placebo effect in a clinical study, it is common practice to "blind" the participants, *i. e.*, dispense to the control group a placebo which simulates in taste, smell, and appearance the product being tested. Similarly, to neutralize any subconscious bias of the examiner, it is important to blind him, *i. e.*, prevent him from knowing which subjects received the medication and which did not. A study in which both the subjects and the examiner are blinded is referred to as "double-blind." *See* JA 914–916.

10. JA 515–528, 913–920.

11. JA 879–881.

12. JA 876, 506.

13. Petitioner argued that the lower the surface tension of a gargle the greater its ability to remove the irritating debris, and there was evidence that Listerine has a lower surface tension than salt water. However, there was no evidence that this lower surface tension translates into meaningfully greater relief. JA 876.

14. Respondent's br. at 32 n.27.

15. Petitioner's motion requesting that the court take judicial notice of the FDA study is hereby granted.

16. *See* note 23 *infra*.

17. JA 3121–3129, 3280.

against Listerine. The FTC refused to reopen its proceedings to consider the draft report. In September 1976 the expert panel's report was published, but it has not yet been adopted by the Commissioner of the FDA.[18]

The only evidence pertinent to the effectiveness of Listerine that the FDA panel considered was the St. Barnabas study, and it appears that reference to it was included in the report only as an afterthought.[19] More importantly, the reference which does appear does not endorse or adopt the St. Barnabas study; the FDA report merely describes it and recounts the results.[20] The panel's own conclusions are reflected in the operative language repeated for each ingredient of Listerine:

> There are no well-controlled studies documenting the effectiveness of [eucalyptol/eucalyptus oil, menthol, thymol] as an [antitussive, expectorant, nasal decongestant].
>
> * * * * * *
>
> For use as a mouthwash: Data to demonstrate effectiveness will be required * * *.[21]

Each ingredient of Listerine was placed in Category III, defined as "the available data are insufficient to classify such condition under either [Category I, generally recognized as safe and effective] or [Category II, not generally recognized as safe and effective] and for which further testing is therefore required."[22] Petitioner's assertion that this is equivalent to finding the product "likely to be effective" is not supported by the facts.[23]

18. 41 Fed.Reg. 38312 (Sept. 9, 1976). The Commissioner stated: "The Commissioner has not yet fully evaluated the report, but has concluded that it should first be issued as a formal proposal to obtain full public comment before any decision is made on the recommendations of the Panel." *Id.*

19. The draft report published in February 1976 did not refer to mouthwashes or the St. Barnabas study. After it was issued the panel received a letter, apparently from petitioner, "concerning the fact that no references were made in the report on a submission concerning the use of volatile aromatics in mouthwashes for the symptomatic relief of the common cold." Minutes of the panel's meeting of March 2 and 3, 1976, JA 3045. The panel then voted to add to the sections of the report dealing with menthol, eucalyptol, and thymol (three of Listerine's active ingredients) a paragraph describing the St. Barnabas study. JA 3046.

20. The effect of rinsing and gargling twice daily with an aqueous mixture of volatile substances on the incidence of colds and the severity of the symptoms associated with colds was evaluated in a long-term double-blind, placebo-controlled, subjective study in school children. The results of the study revealed milder nasal symptoms and cough symptoms in individuals using the medicated mouthwash as compared to the placebo. Although the medicated mouthwash contained [eucalyptol, menthol, thymol], the results did not demonstrate the contribution of this component to the overall alleviation of symptoms * * *.

21. 41 Fed.Reg. 38347–38349 (1976); *see also id.* at 38350–38351, 38353, 38361, 38364–38365, 38408–38411, 38413 (1976).

41 Fed.Reg. 38348 (1976); *see also id.* at 38351, 38353, 38409, 38411, 38413. To the extent that the report describes the St. Barnabas study as "double-blind, placebo-controlled," it appears to be in error. *See* text at notes 8–10 *supra*.

22. 21 C.F.R. § 330.10(a)(5)(iii) (1976).

23. The only place in the FDA report where the phrase "likely to be effective" appears is in the introduction to the report, where the panel outlines its duties. In an apparent reference to Category III, the panel lists as one task:

> Advising the Food and Drug Administration regarding those ingredients which in their judgment are likely to be safe and effective, but for which more data are needed.

41 Fed.Reg. at 38319. Petitioner concludes from this that every ingredient which the panel placed in Category III—including those in Listerine—was found "likely to be effective." This extrapolation is unwarranted. Every other reference to Category III in the report says simply "the available data are insufficient." *See, e. g., id.* at 38312, 38329, 38343, 38359, 38405. Similarly, the notation that data are insufficient is made for each ingredient of Listerine, *see* note 21, *supra*, while the phrase "likely to be effective" is never used in connection with any of them. We conclude that the panel put in Category III ingredients which were not proven effective or ineffective, in accordance with the mandate of 21 C.F.R. § 330.10(a)(5)(iii), and that the phrase "likely to be effective" in the introduction was an aberration.

In sum, the FDA study does not reflect any new data not considered by the FTC. Since the FDA did not consider the extensive record compiled in the FTC proceedings, its conclusion that there is insufficient data about the ingredients of Listerine to justify classifying it as effective or ineffective is not necessarily inconsistent with the FTC's conclusion that Listerine's advertising claims are deceptive. The FTC did not err in refusing to reopen its proceedings to consider the draft FDA study, and the FDA findings do not establish that the FTC's conclusions are wrong.

III. THE COMMISSION'S POWER

Petitioner contends that even if its advertising claims in the past were false, the portion of the Commission's order requiring "corrective advertising" exceeds the Commission's statutory power. The argument is based upon a literal reading of Section 5 of the Federal Trade Commission Act, which authorizes the Commission to issue "cease and desist" orders against violators and does not expressly mention any other remedies.[24] The Commission's position, on the other hand, is that the affirmative disclosure that Listerine will not prevent colds or lessen their severity is absolutely necessary to give effect to the prospective cease and desist order; a hundred years of false cold claims have built up a large reservoir of erroneous consumer belief which would persist, unless corrected, long after petitioner ceased making the claims.

[4] The need for the corrective advertising remedy and its appropriateness in this case are important issues which we will explore *infra*. But the threshold question is whether the Commission has the authority to issue such an order.[25] We hold that it does.

Petitioner's narrow reading of Section 5 was at one time shared by the Supreme Court. In *FTC v. Eastman Kodak Co.* the Court held that the Commission's authority did not exceed that expressly conferred by statute. The Commission has not, the Court said, "been delegated the authority of a court of equity."[26]

But the modern view is very different. In 1963 the Court ruled that the Civil Aeronautics Board has authority to order divestiture in addition to ordering cessation of unfair methods of competition by air carriers.[27] The CAB statute, like Section 5, spoke only of the authority to issue cease and desist orders, but the Court said, "We do not read the Act so restrictively. * * [W]here the problem lies within the purview of the Board, * * * Congress must have intended to give it authority that was ample to deal with the evil at hand." The Court continued, "Authority to mold administrative decrees is indeed like the authority of courts to frame injunctive decrees * * *. [The] power to order divestiture need not be explicitly included in the powers of an administrative agency to be part of its arsenal of authority * *."[28]

Later, in *FTC v. Dean Foods Co.*, the Court applied *Pan American* to the Federal Trade Commission.[29] In upholding the

24. Section 5(b) provides in pertinent part:

> If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by [this Act], it shall * * * issue * * an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice.

15 U.S.C. § 45(b) (1970).

25. For reasons set forth below, we have decided to modify the Commission's order by deleting the phrase "Contrary to prior advertising." All of our discussion of the Commission's power refers to the order as modified.

26. 274 U.S. 619, 623, 47 S.Ct. 688, 689, 71 L.Ed. 1238 (1927) (setting aside order requiring Kodak to divest itself of three laboratories as part of unfair competition remedy).

27. *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963).

28. *Id.* at 311–312 & 312 n.17, 83 S.Ct. at 486.

29. 384 U.S. 597, 86 S.Ct. 1738, 16 L.Ed.2d 802 (1966). The Court also noted that *Eastman Kodak* had been "repudiated" in *Pan American*. *Id.* at 606 n.4, 86 S.Ct. 1738.

Commission's power to seek a preliminary injunction against a proposed merger, the Court held that it was not necessary to find express statutory authority for the power. Rather, the Court concluded, "It would stultify congressional purpose to say that the Commission did not have the * * * power * * *. * * * Such ancillary powers have always been treated as essential to the effective discharge of the Commission's responsibilities." [30]

Thus it is clear that the Commission has the power to shape remedies which go beyond the simple cease and desist order. Our next inquiry must be whether a corrective advertising order is for any reason outside the range of permissible remedies. Petitioner and *amici curiae* argue that it is because (1) legislative history precludes it, (2) it impinges on the First Amendment, and (3) it has never been approved by any court.

A. *Legislative History*

Petitioner relies on the legislative history of the 1914 Federal Trade Commission Act [31] and the Wheeler-Lea amendments to it in 1938 [32] for the proposition that corrective advertising was not contemplated. In 1914 and in 1938 Congress chose not to authorize such remedies as criminal penalties, treble damages, or civil penalties, but that fact does not dispose of the question of corrective advertising.[33]

[5] Petitioner's reliance on the legislative history of the 1975 amendments to the Act [34] is also misplaced. The amendments added a new Section 19 to the Act authorizing the Commission to bring suits in federal District Courts to redress injury to consumers resulting from a deceptive practice. The section authorizes the court to grant such relief as it "finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice," including, but not limited to,

> rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice * * *.[35]

Petitioner and *amici* contend that this congressional grant *to a court* of power to order public notification of a violation establishes that the Commission by itself does not have that power.

[6–8] We note first that "public notification" is not synonymous with corrective advertising; public notification is a much broader term and may take any one of many forms.[36] Second, the "public notification" contemplated by the amendment is directed at *past* consumers of the product ("to redress injury"), whereas the type of corrective advertising currently before us is directed at *future* consumers. Third, petitioner's construction of the section runs directly contrary to the congressional intent as expressed in a later subsection: "Nothing in this section shall be construed to affect any authority of the Commission un-

30. 384 U.S. at 606–607, 86 S.Ct. at 1744.

31. 38 Stat. 717 (1914).

32. 52 Stat. 111 (1938).

33. It is true that one Court of Appeals has relied on this history in concluding that the Commission does not have power to order restitution of ill-gotten monies to the injured consumers. *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974). But restitution is not corrective advertising. Ordering refunds to *past* consumers is very different from ordering affirmative disclosure to correct misconceptions which *future* consumers may hold. Moreover, the *Heater* court itself recognized this distinction and expressly distinguished corrective advertising, which it said the Commission is authorized to order, from restitution. 503 F.2d at 323 n.7 and 325 n.13.

34. The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 88 Stat. 2183 (1975).

35. 15 U.S.C. § 57b(b) (Supp. V 1975).

36. For example, it might encompass requiring the defendant to run special advertisements reporting the FTC finding, advertisements advising consumers of the availability of a refund, or the posting of notices in the defendant's place of business.

der any other provision of law."[37] Moreover, this intent is amplified by the conference committee's report:

> The section * * * is not intended to modify or limit any existing power the Commission may have to itself issue orders designed to remedying [*sic*] violations of the law. That issue is now before the courts. It is not the intent of the Conferees to influence the outcome in any way.[38]

We conclude that this legislative history cannot be said to remove corrective advertising from the class of permissible remedies.[39]

B. *The First Amendment*

[9] Petitioner and *amici* further contend that corrective advertising is not a permissible remedy because it trenches on the First Amendment. Petitioner is correct that this triggers a special responsibility on the Commission to order corrective advertising only if the restriction inherent in its order is no greater than necessary to serve the interest involved.[40] But this goes to the appropriateness of the order in this case, an issue we reach in Part IV of this opinion. *Amici curiae* go further, arguing that, since the Supreme Court has recently extended First Amendment protection to commercial advertising,[41] mandatory corrective advertising is unconstitutional.

[10, 11] A careful reading of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*[42] compels rejection of this argument. For the Supreme Court expressly noted that the First Amendment presents "no obstacle" to government regulation of false or misleading advertising. The First Amendment, the Court said,

> as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely.[43]

In a footnote the Court went on to delineate several differences between commercial speech and other forms which may suggest "that a different degree of protection is necessary * * *." For example, the Court said, they may

> make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.[44]

37. 15 U.S.C. § 57b(e) (Supp. V 1975).

38. Conference Report No. 93-1408, 93d Cong., 2d Sess., 1974 U.S.Code Cong. & Admin.News at 7774.

39. The dissent infers from the 1975 amendments a congressional judgment that the Commission did not already have the power to order corrective advertising. That inference is not justified. *See FTC v. Dean Foods Co.*, 384 U.S. 597, 610, 86 S.Ct. 1738, 1746, 16 L.Ed.2d 802 (1966) (Court will not construe an agency's request for authorizing legislation as affirmative proof of no authority; "[p]ublic policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations"); *National Petroleum Refiners Ass'n v. FTC*, 157 U.S.App.D.C. 83, 107, 482 F.2d 672, 696 (1973), *cert. denied*, 415 U.S. 951, 94 S.Ct. 1475, 39 L.Ed.2d 567 (1974) (subsequent grant of congressional authority does not prove agency's prior lack of authority; "it is equally possible that Congress granted the power out of uncertainty, understandable caution, and a desire to avoid litigation").

40. *United States v. Nat'l Society of Professional Engineers*, 555 F.2d 978, 984 (D.C.Cir. 1977); *Beneficial Corp. v. FTC*, 542 F.2d 611, 618–620 (3d Cir. 1976), *cert. denied*, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977).

41. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975).

42. 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).

43. *Id.* at 772, 96 S.Ct. at 1831. *See also Bates v. State Bar of Arizona*, —— U.S. ——, ——, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977).

44. 425 U.S. at 771–772 n.24, 96 S.Ct. at 1830–31.

The Supreme Court clearly foresaw the very question before us, and its statement is dispositive of *amici's* contention.[45]

C. *Precedents*

[12] According to petitioner, "The first reference to corrective advertising in Commission decisions occurred in 1970, nearly fifty years and untold numbers of false advertising cases after passage of the Act." [46] In petitioner's view, the late emergence of this "newly discovered" [47] remedy is itself evidence that it is beyond the Commission's authority. This argument fails on two counts. First the fact that an agency has not asserted a power over a period of years is not proof that the agency lacks such power.[48] Second, and more importantly, we are not convinced that the corrective advertising remedy is really such an innovation. The label may be newly coined, but the concept is well established. It is simply that under certain circumstances an advertiser may be required to make affirmative disclosure of unfavorable facts.

One such circumstance is when an advertisement that did not contain the disclosure would be misleading. For example, the Commission has ordered the sellers of treatments for baldness to disclose that the vast majority of cases of thinning hair and baldness are attributable to heredity, age, and endocrine balance (so-called "male pattern baldness") and that their treatment would have no effect whatever on this type of baldness.[49] It has ordered the promoters of a device for stopping bedwetting to disclose that the device would not be of value in cases caused by organic defects or diseases.[50] And it has ordered the makers of Geritol, an iron supplement, to disclose that Geritol will relieve symptoms of tiredness only in persons who suffer from iron deficiency anemia, and that the vast majority of people who experience such symptoms do not have such a deficiency.[51]

Each of these orders was approved on appeal over objections that it exceeded the Commission's statutory authority.[52] The decisions reflect a recognition that, as the Supreme Court has stated,

> If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the

45. Equally without merit are *amici's* arguments that the order constitutes an unconstitutional taking of property without just compensation and that rulemaking, not adjudication, was the proper vehicle for issuance of such an order.

46. Petitioner's br. at 27.

47. *Id.* at 29.

48. *United States v. Morton Salt Co.*, 338 U.S. 632, 647–648, 70 S.Ct. 357, 94 L.Ed. 401 (1950); *National Petroleum Refiners Ass'n v. FTC, supra* note 39, 157 U.S.App.D.C. at 104–105, 482 F.2d at 693–694.

49. *Ward Laboratories, Inc. v. FTC*, 276 F.2d 952 (2d Cir.), *cert. denied*, 364 U.S. 827, 81 S.Ct. 65, 5 L.Ed.2d 55 (1960); *Keele Hair & Scalp Specialists, Inc. v. FTC*, 275 F.2d 18 (5th Cir. 1960).

50. *Feil v. FTC*, 285 F.2d 879 (9th Cir. 1960).

51. *J. B. Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967). *Compare Alberty v. FTC*, 86 U.S. App.D.C. 238, 182 F.2d 36, *cert. denied*, 340 U.S. 818, 71 S.Ct. 49, 95 L.Ed. 601 (1950), discussed in note 52 *infra*.

52. In *Alberty v. FTC, supra* note 51, this court set aside an order similar to the one upheld in *J. B. Williams Co. v. FTC, supra* note 51. The precise holding of *Alberty* is disputed. Several courts have stated that it held only that the Commission must make an express finding that failure to make disclosure is misleading before it can require such disclosure. *Feil v. FTC, supra* note 50; *Ward Laboratories, Inc. v. FTC, supra* note 49; *Keele Hair & Scalp Specialists, Inc. v. FTC, supra* note 49. To the extent that *Alberty* may have held that the Commission lacked power to order corrective advertising, it has never been followed. The characterization of the required disclosure as "additional interesting, and perhaps useful, information" may or may not have been accurate in *Alberty*, but it grossly understates the case at hand. The disclosure that Listerine does not relieve colds is essential information to correct a widely held, mistaken belief which was cultivated by petitioner's past advertising.

FTC v. Simeon Management Corp., 532 F.2d 708 (9th Cir. 1976), is readily distinguishable on this ground. There an order requiring affirmative disclosure was set aside because there was no evidence that consumers seeing the advertisements formed an incorrect belief or were misled. In short, there was nothing to correct. That is not this case.

narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.[53]

Affirmative disclosure has also been required when an advertisement, although not misleading if taken alone, becomes misleading considered in light of past advertisements. For example, for 60 years Royal Baking Powder Company had stressed in its advertising that its product was superior because it was made with cream of tartar, not phosphate. But, faced with rising costs of cream of tartar, the time came when it changed its ingredients and became a phosphate baking powder. It carefully removed from all labels and advertisements any reference to cream of tartar and corrected the list of ingredients. But the new labels used the familiar arrangement of lettering, coloration, and design, so that they looked exactly like the old ones. A new advertising campaign stressed the new low cost of the product and dropped all reference to cream of tartar. But the advertisements were also silent on the subject of phosphate and did not disclose the change in the product.

The Commission held, and the Second Circuit agreed, that the new advertisements were deceptive, since they did not advise consumers that their reasons for buying the powder in the past no longer applied. The court held that it was proper to require the company to take affirmative steps to advise the public.[54] To continue to sell the new powder on the strength of the reputation attained through 60 years of its manufacture and sale and wide advertising of its superior powder, under an impression induced by its advertisements that the product purchased was the same in kind and as superior as that which had been so long manufactured by it, was unfair alike to the public and to the competitors in the baking powder business.[55]

In another case[56] the Waltham Watch Company of Massachusetts had become renowned for the manufacture of fine clocks since 1849. Soon after it stopped manufacturing clocks in the 1950's, it transferred its trademarks, good will, and the trade name "Waltham" to a successor corporation, which began importing clocks from Europe for resale in the United States. The imported clocks were advertised as "product of Waltham Watch Company since 1850," "a famous 150-year-old company."

The Commission found that the advertisements caused consumers to believe they were buying the same fine Massachusetts clocks of which they had heard for many years. To correct this impression the Commission ordered the company to disclose in all advertisements and on the product that the clock was not made by the old Waltham company and that it was imported. The Seventh Circuit affirmed, relying on "the well-established general principle that the Commission may require affirmative disclosure for the purpose of preventing future deception."[57]

53. *FTC v. Ruberoid Co.*, 343 U.S. 470, 473, 72 S.Ct. 800, 803, 96 L.Ed. 1081 (1952) (footnote omitted).

54. The order required Royal to cease using any label which simulated the old familiar label, to incorporate the word "phosphate" as part of the name of the product on all labels and in all advertisements, to cease from representing that the old product had been reduced in price, and to cease from representing that the new product was the baking powder sold by Royal for many years.

55. *Royal Baking Powder Co. v. FTC*, 281 F. 744, 753 (2d Cir. 1922).

56. *Waltham Watch Co. v. FTC*, 318 F.2d 28 (7th Cir.), *cert. denied*, 375 U.S. 944, 84 S.Ct. 349, 11 L.Ed.2d 274 (1963). *See also Waltham Precision Instrument Co. v. FTC*, 327 F.2d 427 (7th Cir.), *cert. denied*, 377 U.S. 992, 84 S.Ct. 1918, 12 L.Ed.2d 1045 (1964).

57. 318 F.2d at 32. *Accord, Ward Laboratories, Inc. v. FTC, supra* note 49. The dissent incorrectly states that the Royal and Waltham ads and labels were false on their face (just as selling moonshine in Haig & Haig bottles would be) and that the courts simply ordered the misrepresentations removed. To the contrary, the Royal and Waltham ads and labels were strictly truthful, but they *became* misleading when considered in light of past advertisements. *See* 281 F. at 748–749 and 318 F.2d at 30–31.

It appears to us that the orders in *Royal* and *Waltham* were the same kind of remedy the Commission has ordered here. Like Royal and Waltham, Listerine has built up over a period of many years a widespread reputation. When it was ascertained that that reputation no longer applied to the product, it was necessary to take action to correct it.[58] Here, as in *Royal* and *Waltham*, it is the accumulated impact of *past* advertising that necessitates disclosure in *future* advertising.[59] To allow consumers to continue to buy the product on the strength of the impression built up by prior advertising—an impression which is now known to be false—would be unfair and deceptive.[60]

58. In *Royal* and *Waltham* the advertising claims that had given rise to the products' reputations were concededly true when made, but because the products themselves had changed that reputation was no longer deserved. Consumers would have been deceived, in the future, if they had continued to make purchases in reliance upon this reputation. Here, of course, the Commission has determined that Listerine's cold claims were *never* true, and that its reputation as a cold remedy was thus never deserved. What has changed in this case is not the product itself, but the extent of our knowledge of the evidence underlying the advertising claims. But the result here is the same as in the earlier cases—like Royal baking powder or Waltham watches, Listerine continues to enjoy a reputation it does not deserve, and consumers would therefore be deceived if they were to make purchases in reliance upon that reputation.

59. We thus find unpersuasive petitioner's contention that the corrective advertising ordered here is unprecedented in that it seeks "to eliminate perceived future effects of past violations that are wholly unrelated to future conduct * * *." Petitioner's br. at 26. We agree with the Commission that the "common thread" linking earlier corrective advertising cases extends to the present case as well. *See* JA 894.

The distinctions petitioner seeks to draw between the present case and earlier corrective advertising cases are essentially semantic. It argues that, unlike *Royal*, *Waltham*, and similar cases, here the Commission made no specific finding that even truthful future Listerine ads would themselves be deceptive without a corrective statement. Petitioner's br. at 38. Similarly, while petitioner appears to concede that continued *sales* of a product under false pretenses may constitute violation of the FTC Act justifying imposition of corrective advertising, it argues that the Commission offered no evidence to support a finding of such a violation here. Petitioner's br. at 26. It seems clear to us that these various different "theories" are in fact simply different ways of describing the same thing. The nature of the violation, and the nature of the remedy required, are no different whether one says that future truthful *ads* will be "deceptive" when viewed against the backdrop of earlier advertising, or that future *sales* to customers who have been misled by earlier advertising will constitute the deceptive practice, or, as the Commission said here, that "there is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief [that arose from prior deceptive advertisements]." JA 894. The Commission's authority to impose corrective advertising obviously should not turn upon the particular verbal formula chosen in a particular case.

60. There is also precedent in other contexts for Commission action to dissipate future effects of a company's past wrongful conduct. In *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966), *after remand*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920, 89 S.Ct. 1195, 22 L.Ed.2d 453 (1969), the court approved an order requiring the petitioner to grant patent licenses where he had obtained the patent by illegal conduct. The court said his retention of the fruits of his unlawful conduct would itself be an unfair practice and the Commission had the power to prevent it.

In *Lorain Journal Co. v. United States*, 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162 (1951), the Supreme Court affirmed a judgment that a newspaper publisher, in an effort to destroy a competing radio station, had unlawfully refused to accept advertising from anyone who advertised on the radio station. The Court approved a District Court order requiring the newspaper to publish each week for 25 weeks a conspicuous notice apprising the public of the terms of the judgment. The order was necessary to prevent the newspaper from continuing to reap the benefits of its wrongful conduct.

While we do not know and do not decide whether our petitioner made its false cold claims in good faith or bad, we do observe that for an advertiser who knowingly advertises falsely a simple cease and desist order provides no real deterrent. He has nothing to lose but attorneys' fees. He gets to use the deceptive advertisements until he is caught—more precisely, until Commission proceedings, which usually drag on for years, are completed against him. By the time the order has become final, the particular campaign has probably been squeezed dry, if not already discarded. In

IV. THE REMEDY

[13] Having established that the Commission does have the power to order corrective advertising in appropriate cases, it remains to consider whether use of the remedy against Listerine is warranted and equitable. We have concluded that part 3 of the order should be modified to delete the phrase "Contrary to prior advertising."[61] With that modification, we approve the order.

[14] Our role in reviewing the remedy is limited. The Supreme Court has set forth the standard:

> The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.[62]

The Commission has adopted the following standard for the imposition of corrective advertising:

> [I]f a deceptive advertisement has played a substantial role in creating or reinforcing in the public's mind a false and material belief which lives on after the false advertising ceases, there is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief. Since this injury cannot be averted by merely requiring respondent to cease disseminating the advertisement, we may appropriately order respondent to take affirmative action designed to terminate the otherwise continuing ill effects of the advertisement.[63]

We think this standard is entirely reasonable. It dictates two factual inquiries: (1) did Listerine's advertisements play a substantial role in creating or reinforcing in the public's mind a false belief about the product? and (2) would this belief linger on after the false advertising ceases? It strikes us that if the answer to both questions is not yes, companies everywhere may be wasting their massive advertising budgets. Indeed, it is more than a little peculiar to hear petitioner assert that its commercials really have no effect on consumer belief.

For these reasons it might be appropriate in some cases to presume the existence of the two factual predicates for corrective advertising.[64] But we need not decide that question, or rely on presumptions here, because the Commission adduced survey evidence to support both propositions. We find that the "Product Q" survey data and the expert testimony interpreting them[65]

the meantime the seller has increased his market share and reaped handsome profits. The order to cease making the false claims takes none of this away from him. In short, "[a] cease and desist order which commands the respondent only to 'go, and sin no more' simply allows every violator a free bite at the apple." Note, *"Corrective Advertising" Orders of the Federal Trade Commission*, 85 Harv.L.Rev. 477, 482–483 (1971). *See also* Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv.L.Rev. 661, 693–694 (1977); Note, *Corrective Advertising and the FTC: No, Virginia, Wonder Bread Doesn't Build Strong Bodies Twelve Ways*, 70 Mich.L. Rev. 374 (1971).

61. The Federal Trade Commission Act gives the reviewing court the power to "enter a decree affirming, modifying, or setting aside the order of the Commission * * *." 15 U.S.C. § 45(c) (1970).

62. *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612–613, 66 S.Ct. 758, 760, 90 L.Ed. 888 (1946). *See also FTC v. Ruberoid Co., supra* note 53; *Carter Products, Inc. v. FTC*, 268 F.2d 461, 498 (9th Cir.), *cert. denied*, 361 U.S. 884, 80 S.Ct. 155, 4 L.Ed.2d 120 (1959).

63. JA 894.

64. *See* Pitofsky, *supra* note 60, 90 Harv. L. Rev. at 696–700.

65. The Commission used the results of a series of market surveys known as "Product Q" reports on the "Mouthwash Market." The surveys were conducted by petitioner for its own purposes from 1963 to 1971. According to petitioner's own advertising agency, "Product Q is ideally suited to provide guidance in such vital areas as * * * [h]ow successful are the current advertising campaigns of different

constitute substantial evidence in support of the need for corrective advertising in this case.

We turn next to the specific disclosure required: "Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity." Petitioner is ordered to include this statement in every future advertisement for Listerine for a defined period.[66] In printed advertisements it must be displayed in type size at least as large as that in which the principal portion of the text of the advertisement appears and it must be separated from the text so that it can be readily noticed. In television commercials the disclosure must be presented simultaneously in both audio and visual portions. During the audio portion of the disclosure in television and radio advertisements, no other sounds, including music, may occur.[67]

[15] These specifications are well calculated to assure that the disclosure will reach the public. It will necessarily attract the notice of readers, viewers, and listeners, and be plainly conveyed. Given these safeguards, we believe the preamble "Contrary to prior advertising" is not necessary. It can serve only two purposes: either to attract attention that a correction follows or to humiliate the advertiser. The Commission claims only the first purpose for it, and this we think is obviated by the other terms of the order.[68] The second purpose, if it were intended, might be called for in an egregious case of deliberate deception,[69] but this is not one. While we do not decide whether petitioner proffered its cold claims in good faith or bad, the record compiled could support a finding of good faith.[70] On these facts, the confessional preamble to the disclosure is not warranted.

[16] Finally, petitioner challenges the duration of the disclosure requirement. By its terms it continues until respondent has expended on Listerine advertising a sum equal to the average annual Listerine advertising budget for the period April 1962 to March 1972. That is approximately ten

brands on awareness, recall, attitudes and sales?" JA 2785–2786. The surveys showed that about 70% of the consumers questioned recalled "effective for colds and sore throats" as a main theme of Listerine advertising. During the summer, when no cold claims had been broadcast for about six months, the percentage fell to only 64%; *i. e.*, the recall of cold claims after six months of silence was very substantial. The surveys also showed that about 60% of consumers questioned believed Listerine was "one of the best" mouthwashes for the quality "effective against colds and sore throats." JA 568–580.

The Commission also relied on the testimony of two experts in the field of consumer marketing surveys. Dr. Bass testified that cold efficacy belief levels would continue at about 60% for two years after colds' advertising ceased and would remain high after five years. JA 1591–1592, 1617. Dr. Rossi testified that cold efficacy beliefs would decline at no greater a rate than 5% per year. JA 1522, 1556–1559.

66. *See* note 1 *supra*.

67. JA 865.

68. Cf. *United States v. Nat'l Society of Professional Engineers*, *supra* note 40, 555 F.2d at 984 (order should not be more intrusive than necessary to achieve fulfillment of the governmental interest); *Beneficial Corp. v. FTC*, *supra* note 40, 542 F.2d at 618–620 (same).

69. We express no view on the question whether an order intended to humiliate the wrongdoer would be so punitive as to be outside the Commission's proper authority.

70. Petitioner strenuously urges its good faith and offers in support thereof its reliance on the St. Barnabas study which allegedly supported Listerine's claims, *see* text at notes 8–10 *supra*, and on previous "acquittals" by the Commission. The Commission reviewed Listerine's cold claims in 1932, 1940, 1951, 1958, and 1962, and took no action against them. JA 2738–2740.

While good faith may be relevant to the fairness of a confessional preamble, it is irrelevant to the need for corrective advertising in general. Innocence of motive is not a defense if an advertisement is prejudicial to the public interest. As the Supreme Court stated in *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 81, 54 S.Ct. 315, 321, 78 L.Ed. 655 (1934):

> Indeed there is a kind of fraud * * * in clinging to a benefit which is the product of misrepresentation, however innocently made. * * * That is the respondents' plight today, no matter what their motives may have been when they began. They must extricate themselves from it by purging their business methods of a capacity to deceive.

(Citations omitted.)

million dollars.[71] Thus if petitioner continues to advertise normally the corrective advertising will be required for about one year. We cannot say that is an unreasonably long time in which to correct a hundred years of cold claims. But, to petitioner's distress, the requirement will not expire by mere passage of time. If petitioner cuts back its Listerine advertising, or ceases it altogether, it can only postpone the duty to disclose.[72] The Commission concluded that correction was required and that a duration of a fixed period of time might not accomplish that task, since petitioner could evade the order by choosing not to advertise at all. The formula settled upon by the Commission is reasonably related to the violation it found.

Accordingly, the order, as modified, is *Affirmed.*

ROBB, Circuit Judge, dissenting in part:

I agree with the majority that there is substantial evidence in the record to support an order requiring Warner-Lambert to cease and desist from advertising Listerine as a remedy for colds and sore throats. I therefore agree that Parts I, II, IV and V of the Commission's order must be affirmed.

I dissent from the affirmance of Section III of the order which (1) forbids Warner-Lambert to disseminate any advertisement for Listerine unless accompanied by a corrective statement relating to past advertising, and (2) provides that this "duty to disclose the corrective statement shall continue until respondent has expended on Listerine advertising a sum equal to the average annual Listerine advertising budget for the period of April 1962 to March 1972."—a sum of approximately ten million dollars.[1] In my judgment this requirement of corrective advertising is beyond the statutory authority of the Federal Trade Commission. The Commission's authority to enter cease and desist orders is prospective in nature; the purpose of cease and desist orders is "to prevent illegal practices in the future", *FTC v. Ruberoid Co.*, 343 U.S. 470, 473, 72 S.Ct. 800, 803, 96 L.Ed. 1081 (1952), not "to punish or to fasten liability on respondents for past conduct". *FTC v. Cement Institute*, 333 U.S. 683, 706, 68 S.Ct. 793, 806, 92 L.Ed. 1010 (1948). The cases that have construed the Commission's remedial power, *e. g., FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244, 92 S.Ct. 898, 31 L.Ed.2d 170 (1972); *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 392–93, 79 S.Ct. 818, 3 L.Ed.2d 893 (1959); *FTC v. Ruberoid Co.*,

71. Petitioner's br. at 56.

72. The ALJ had set the duration of the requirement at two years, but conceded that "[o]ne variable that will have an effect upon what is accomplished is the amount of Listerine advertising respondent may see fit to engage in." JA 585. The Commission's formula takes that variable into account.

1. Section III of the FTC Order contains the corrective advertising requirement. It states in full:

> IT IS FURTHER ORDERED that respondent Warner-Lambert Company, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from disseminating or causing the dissemination of any advertisements for the product Listerine Antiseptic unless it is clearly and conspicuously disclosed in each such advertisement in the exact language below that:
>
> Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity.
>
> In print advertisements, the disclosure shall be displayed in type size which is at least the same size as that in which the principal portion of the text of the advertisement appears and shall be separated from the text so that it can be readily noticed. In television advertisements, the disclosure shall be presented simultaneously in both the audio and visual portions. During the audio portion of the disclosure in television and radio advertisements, no other sounds, including music, shall occur. Each such disclosure shall be presented in the language, *e. g.*, English, Spanish, principally employed in the advertisement.
>
> The aforesaid duty to disclose the corrective statement shall continue until respondent has expended on Listerine advertising a sum equal to the average annual Listerine advertising budget for the period of April 1962 to March 1972.

86 F.T.C. 1398, 1485–86 (1975).

supra; FTC v. National Lead Co., 352 U.S. 419, 428–29, 77 S.Ct. 502, 1 L.Ed.2d 438 (1957); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 610–12, 66 S.Ct. 758, 90 L.Ed. 888 (1946), stand only for the proposition that the Commission has broad discretion in determining what conduct of a respondent shall be forbidden prospectively. I think this authority does not encompass the power to employ the retrospective remedy of corrective advertising; and I find no other basis for that asserted power.

As the majority recognizes, Congress by amendment of the Federal Trade Commission Act in 1975 authorized the Commission to commence civil actions in federal district courts, to remedy unfair or deceptive acts or practices "with respect to which the Commission has issued a final cease and desist order". As part of the relief granted in such an action the court was given the power to order "public notification respecting the . . . unfair or deceptive acts or practices". So far as pertinent the amendment reads as follows:

> (2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of section 45(a) of this title) *with respect to which the Commission has issued a final cease and desist order* which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of a State. *If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b) of this section.*
>
> (b) The court in an action under subsection (a) of this section shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, recission or reformation of contracts, the refund of money or return of property, the payment of damages, and *public notification* respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

15 U.S.C. § 57b(a)(2) and 57b(b). [Emphasis supplied]

The majority comments briefly that the 1975 Amendment "cannot be said to remove corrective advertising from the class of permissible remedies"; the expressed "congressional intent", says the majority, is to the contrary. I think the 1975 legislation cannot be so lightly dismissed. The amendment indicates to me that at least in the judgment of the Congress the Commission does not have, and is not intended to have, the power to order "public notification" by way of corrective advertising. If the Commission already had that power, why was the amendment necessary? Moreover, the majority fails to note that under the amendment a district court can order public notification only on a showing that the respondent acted in bad faith. Yet the theory of the Commission, accepted by the majority, is that the Commission may enter a corrective advertising order even though a false advertisement was published in good faith. To me it is strange that the Congress would require a court to find bad faith, while authorizing the Commission to act in the absence of bad faith.

The majority attempts to distinguish "public notification" from corrective advertising. First, says the majority, "public notification is a much broader term" than corrective advertising. It is clear to me however that the term public notification includes corrective advertising of the type ordered in this case. Indeed, the examples of public notification given by the majority (n.36) are simply variations of corrective

advertisements.[2] Second, the majority says "the 'public notification' contemplated by the amendment is directed at *past* consumers of the product . . . whereas the type of corrective advertising currently before us is directed at *future* consumers." [Emphasis in original] I think the term "public notification" must not be construed so narrowly that future consumers are ignored.

My view of the significance of the amendment is buttressed by the statement of Senator Moss, a co-sponsor of the bill, 120 Cong.Rec. 40712 (1974): "The Federal Trade Commission's improvements specified in the bill will afford, in my opinion, long-term improvement in the fairness of the American marketplace. No longer will the Federal Trade Commission be confined to slapping the wrists of persons who engage in unfair or deceptive practices and telling them not to do it again."

The majority relies upon the statement in the Conference Committee's report and the provision in the amendment to the effect that it does not affect any "existing power" of the Commission. S.Rep. No. 93–1408, 93d Cong., 2d Sess. 1974, reprinted in [1974] U.S.Code Cong. & Ad.News 7774; 15 U.S.C. § 57b(e). The majority seems to think these statements indicate a congressional intent to give the Commission authority to order corrective advertising. I am unable to understand this reasoning. The question before us is what is the "existing power" of the Commission, and that question is not answered by either the amendment or the Committee's report.

I find nothing in the cases that justifies the Commission's corrective advertising order. In particular, I am not persuaded by the majority's quotations from the opinions of the Supreme Court in *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963), and *FTC v. Dean Foods Co.*, 384 U.S. 597, 86 S.Ct. 1738, 16 L.Ed.2d 802 (1966). Taken in the context of the facts of those cases the quoted language does not support the majority's conclusion.

In the *Pan American* case the Court considered the power of the Civil Aeronautics Board under section 411 of the Civil Aeronautics Act of 1958, 49 U.S.C. § 1381, to order an air carrier to cease and desist from "unfair . . . practices or unfair methods of competition". The Court held that the Board's jurisdiction over unfair practices and unfair methods of competition, together with its power under the Act to regulate air carriers, and to deal with consolidations, mergers, interlocking relations, pooling arrangements, etc., 49 U.S.C. §§ 1378, 1379, and its authority to enforce the Clayton Act as it is applicable to air carriers, 15 U.S.C. § 21, empower the Board to order divestiture when a combination between carriers violates the antitrust laws and hinders the Board's restructuring of routes. Considered in the light of the specific and extensive statutory underpinning upon which the Court based this decision it is a far cry from a holding that the power to order divestiture was derived only from the authority to issue cease and desist orders, as the majority opinion suggests.[3] Certainly it does not follow from this case

2. As one example of "public notification" the majority says in n.36 "it might encompass requiring the defendant to run special advertisements reporting the FTC finding . . . ." I note however that according to the FTC such advertisements are "corrective advertising". In its opinion in the case before us, 86 F.T.C. 1398, 1498 (1975) the Commission states that it "has accepted numerous consent orders which require corrective advertising." In support of this statement the Commission cites several cases as examples of cases in which corrective advertising was ordered. (*Id.*, pp. 1498–99, n.22) In at least three of those cases the Commission required the respondent to publish advertisements advising the public of the FTC finding and retracting prior deceptive statements. *Pay Less Drug Stores Northwest, Inc.*, 82 F.T.C. 1473 (1973); *Boise Tire Co.*, 83 F.T.C. 21 (1973); *Wasem's, Inc.*, 84 F.T.C. 209 (1974).

3. Compulsory licensing of an illegally obtained patent, referred to in the majority's n.60, is an aspect of divestiture. A legally obtained patent permits a valid monopoly for the period of the patent; an illegally obtained patent shelters an invalid monopoly which can be "broken up" by requiring the patent holder to license its patent to competitors.

that the power of the Federal Trade Commission to order corrective advertising can be derived from its authority to issue cease and desist orders, standing alone.

For similar reasons the language quoted by the majority from the *Dean Foods* case is not persuasive. As stated by the Supreme Court the issue in that case was:

> . . . the power of the Court of Appeals under the All Writs Act, 28 U.S.C. § 1651(a) (1964 ed.), to temporarily enjoin the consummation of a merger that is under attack before the Federal Trade Commission as violative of § 7 of the Clayton Act, as amended, 64 Stat. 1125, 15 U.S.C. § 18 (1964 ed.).

Id. at 599, 86 S.Ct. at 1740. The Court noted that the Clayton Act granted the Commission the power to determine the legality of a merger and to order divestiture if it proved to be appropriate, 15 U.S.C. § 21(b); and the Court therefore held that the Commission might apply to a court of appeals for a preliminary injunction to maintain the status quo until the Commission decided the matter and the court of appeals reviewed the Commission's decision. The power to pray for an injunction was described by the Supreme Court as "incidental" to the Commission's authority under the Clayton Act. *Id.* at 606, 86 S.Ct. 1738. To deny this plainly incidental power to preserve the Commission's and the court's jurisdiction, said the Supreme Court, "would stultify congressional purpose." Here again I think this decision does not support the majority's leap to the conclusion that the power to issue a cease and desist order, without more, authorizes the Commission to enter a corrective advertising order, nor does the decision justify a conclusion that the corrective order can be sustained under some general remedial power of the Commission.

The other cases cited by the majority do not justify the Commission's order. In those cases an affirmative disclosure was required because failure to reveal material facts, in the light of the representations made in advertisements, made them misleading. Thus in the case of *Ward Laboratories, Inc. v. FTC*, 276 F.2d 952 (2d Cir.), *cert. denied*, 364 U.S. 827, 81 S.Ct. 65, 5 L.Ed.2d 55 (1960), cited by the majority, the court said:

> Any requirement of an affirmative disclosure of a negative is always to be approached with caution. Merely because a remedy is useful for any one ailment is no reason to demand an accompanying statement of all the ills for which it is not beneficial. Even this principle, however, must yield *where the advertisements are misleading because of failure to reveal facts material in the light of the representations made therein. In arriving at such a conclusion the advertisements (format and copy) and the potential customer they are intended to reach must be analyzed.*

Id. at 954. [Emphasis supplied]

Similar reasoning may be found in *Keele Hair & Scalp Specialists, Inc. v. FTC*, 275 F.2d 18 (5th Cir. 1960); *Feil v. FTC*, 285 F.2d 879 (9th Cir. 1960); and *J. B. Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967).

In *Royal Baking Powder Co. v. FTC*, 281 F. 744 (2d Cir. 1922), relied upon by the majority, a manufacturer by employing false and misleading labeling and advertising represented that a phosphate baking powder which it was offering for sale was the same as the more expensive cream of tartar baking powder which it had manufactured for many years. The baking powder company was in the position a liquor dealer would be in today if he used Haig & Haig pinch bottles and labels when purveying moonshine whiskey. The court held that the Commission properly ordered the company, by correcting its false and misleading advertising, to cease and desist from this unfair method of competition. In *Waltham Watch Co. v. FTC*, 318 F.2d 28 (7th Cir.), *cert. denied*, 375 U.S. 944, 84 S.Ct. 349, 11 L.Ed.2d 274 (1963), an advertisement represented that clocks offered for sale were manufactured by a "famous 150-year-old company", the original Waltham Watch Company of Massachusetts. The fact was that the original Waltham Company had nothing to do with the clocks of-

fered for sale, which were imported from Europe. The Commission ordered the advertisers to cease and desist from using the name Waltham in connection with the sale of clocks unless the public was warned that they were not manufactured by the Waltham Watch Company in Waltham, Massachusetts.

The majority finds "that the orders in *Royal* and *Waltham* were the same kind of remedy the Commission has ordered here". I cannot agree. In those cases advertisements falsely represented that the products offered for sale were the same as the products, well-known to the public, which had been offered in the past. The Commission's orders simply required these false representations to be corrected in future advertisements using the same or similar format or copy. In the present case, however, when Warner-Lambert has ceased and desisted from advertising Listerine as a remedy for colds and sore throats there will be nothing to correct in the text of the Listerine advertisements. Any "corrective statement" will relate solely to past advertising.

Finally, in considering the validity of the Commission's order the majority fails to focus on all its terms. Section III of the order forbids *any* advertisements for Listerine without the corrective statement. Yet it is conceded that Listerine is effective as a mouth wash and breath freshener, and it appears that in recent years much the greater part of Warner-Lambert's advertising budget for Listerine has been spent in promoting these uses of the preparation. Thus the Commission and the majority would forbid the publication of truthful advertisements of Listerine's effectiveness unless coupled with a disclaimer relating to uses advertised in the past. I cannot believe that the statute contemplates such a remedy, which goes far beyond the prevention of "illegal practices in the future."

The theory of the majority is that whenever "advertisements play a substantial role in creating or reinforcing in the public's mind a false belief about [a] product" and "this belief [may] linger on after the false advertising ceases", corrective advertising may be ordered. As the majority apparently concedes, this test would apply to almost any advertisement which is the subject of a cease and desist order. I cannot accept this concept. I reject the proposition that the after-effects of advertising which has been discontinued pursuant to a cease and desist order can thus expand the Commission's statutory power to prevent future illegal practices. *See Heater v. FTC*, 503 F.2d 321, 323–25 (9th Cir. 1974). In my opinion such an expansion must be made by the Congress, not by this court.

SUPPLEMENTAL OPINION ON PETITION FOR REHEARING

In its petition for rehearing petitioner has urged this court to reconsider its earlier decision affirming, with some modifications, the order of the Federal Trade Commission requiring Warner-Lambert Company to cease and desist from deceptively advertising its product Listerine as a cure for colds or sore throat and affirmatively to correct in its future advertisements the impression created by its prior deceptive advertising. The primary argument raised in the petition for rehearing is that the Commission is barred by the First Amendment from imposing a corrective advertising order in this case. Having considered this claim carefully, it is our conclusion that it must be rejected. Because of the importance of the issues raised, however, we think it desirable to set forth in some detail our reasons for so concluding.

I

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), the Supreme Court rejected prior precedents holding that commercial speech is "wholly outside the protection of the First Amendment." *Id.* at 761, 96 S.Ct. at 1825. In reaching this conclusion the Court emphasized the interest of consumers in the free flow of truthful information necessary for formulation of intelligent opinions and proper resource allocation. *Id.* at 764–765, 96 S.Ct. 1817. Consistent with this concern,

the Court was careful to distinguish truthful commercial speech from that which is false, misleading, or deceptive: "Untruthful speech, commercial or otherwise, has never been protected for its own sake. * * * Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem." *Id.* at 771, 96 S.Ct. at 1830 (citations and footnote omitted). Furthermore, the Court went on to suggest that, because of the "commonsense differences" between commercial speech and other varieties, even commercial speech subject to First Amendment protections may nonetheless enjoy a "different degree of protection" than that normally accorded under the First Amendment. *Id.* at 771–772 n.24, 96 S.Ct. 1817.

[17] Applying these principles to the case at bar, there can be no question of the legitimacy of the FTC's role in regulating and preventing false and deceptive advertising. In this case it has been found that Warner-Lambert has, over a long period of time, worked a substantial deception upon the public; it has advertised Listerine as a cure for colds, and consumers have purchased its product with that in mind. That the Commission has authority to prohibit Warner-Lambert from continuing to make such false and deceptive claims in its advertisements is not disputed, for it is only truthful claims which are protected under the First Amendment.[1] Here, however, the FTC has determined on substantial evidence that the deception of the public occasioned by Warner-Lambert's past advertisements will not be halted by merely requiring Warner-Lambert to cease making such claims in the future. To be sure, current and future advertising of Listerine, when viewed in isolation, may not contain any statements which are themselves false or deceptive. But reality counsels that such advertisements cannot be viewed in isolation; they must be seen against the background of over 50 years in which Listerine has been proclaimed—and purchased—as a remedy for colds. When viewed from this perspective, advertising which fails to rebut the prior claims as to Listerine's efficacy inevitably builds upon those claims; continued advertising continues the deception, albeit implicitly rather than explicitly.[2] It will induce people to continue to buy Listerine thinking it will cure colds. Thus the Commission found on substantial evidence that the corrective order was necessary to "dissipate the effects of respondent's deceptive representations." FTC op. at 41, JA 907.

Under this reasoning the First Amendment presents no direct obstacle. The Commission is not regulating truthful speech protected by the First Amendment, but is merely requiring certain statements which, if not present in current and future advertisements, would render those advertisements themselves part of a continuing deception of the public. As the Supreme Court recognized in *Virginia State Board*, in some cases it may be "appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." 425 U.S. at 772 n.24, 96 S.Ct. at 1830–31. We must conclude—as did the Commission—that this is such a case.

II

[18] Admittedly, corrective advertising orders such as that imposed here may give

1. Cease and desist orders aimed at false or deceptive speech may, in theory, have a chilling effect on truthful speech, and be subject to First Amendment scrutiny on that account. In practice, however, this should rarely if ever be necessary. *See* Part II *infra*.

2. In this connection it is worth noting that Warner-Lambert currently advertises Listerine's ability to kill germs that cause bad breath. While we have no reason to doubt the truth of this claim, the emphasis on Listerine's germ-killing ability does seem to tie in closely with prior false advertising as to its capacity to alleviate health problems. *See* FTC op. at 38 n.28, JA 904.

rise to concern as to their chilling effect on protected truthful speech. The potential advertiser must consider not only the possibility that he will be forced, at some future date, to abandon his advertising campaign, but also that he may be required to include specific disclaimers in future advertisements. But this danger seems more theoretical than real. As the Supreme Court pointed out in *Virginia State Board*, not only is the truth of commercial speech "more easily verifiable by its disseminator" than other forms of speech, but "[s]ince advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely." 425 U.S. at 771–772 n.24, 96 S.Ct. at 1830.

Moreover, whatever incremental chill is caused by a corrective advertising order beyond that which would result from a cease and desist order may well be necessary if the interest of consumers in truthful information is to be served at all. Otherwise, advertisers remain free to misrepresent their products to the public through false and deceptive claims, knowing full well that even if the FTC chooses to prosecute they will be required only to cease an advertising campaign which by that point will, in all likelihood, have served its purpose by deceiving the public and already been replaced. *See* panel majority op. at —— n.60, 562 F.2d at 761 n.60; Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L.Rev. 661, 692–693 & nn.129–130 (1976) (emphasizing the relatively small number of complaints issued by the FTC each year and the lengthy time period between complaints and orders); Note, *"Corrective Advertising" Orders of the Federal Trade Commission*, 85 Harv.L.Rev. 477, 482–483 (1973).

III

[19] A more serious First Amendment problem which may be raised by corrective advertising orders involves the burden thereby imposed upon the constitutional right recognized in *Virginia State Board* to advertise truthfully: the party subject to a corrective advertising order may be precluded from exercising his right to advertise unless he also includes specified statements undermining his prior deceptive claims. On the facts of this case, no burden is imposed upon truthful, protected advertising since, as the Commission makes clear, Listerine's current advertising, if not accompanied by a corrective message, would itself continue to mislead the public. Even if, in the circumstances of this case, the current and future advertising of Listerine is considered constitutionally protected speech, however, we think the corrective advertising order in this case remains appropriate.

The Supreme Court, in invalidating the state ban on advertising of prescription drug prices in *Virginia State Board*, considered the scope of the restriction on First Amendment rights, the governmental purposes and public interests affected by the ban, and the availability of alternative means to accomplish the legitimate governmental objectives. *See* 425 U.S. at 764–770, 96 S.Ct. 1817. *See also Bates v. State Bar of Arizona*, —— U.S. ——, ——– ——, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). As we have indicated, it is not at all clear, even after *Virginia State Board*, that commercial speech protected by the First Amendment is, apart from "commonsense differences," entitled to the same degree of protection as other forms.[3] Indeed, the opposite conclusion seems the more appropriate one.[4] But in any event, it does seem clear that the corrective advertising order in this case is the least restrictive means of achieving a

3. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 779–781, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (Stewart, J., concurring); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 69 n.32, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U.Chi.L.Rev. 205, 225 n.121 (1976).

4. *Cf. Banzhaf v. FCC*, 405 F.2d 1082, 1101–1103 (D.C.Cir. 1968), *cert. denied, sub nom. Tobacco Institute, Inc. v. FCC*, 396 U.S. 842, 90 S.Ct. 50, 24 L.Ed.2d 93 (1969).

substantial and important governmental objective and that, on balance, it must be upheld.[5] *Cf. Buckley v. Valeo*, 424 U.S. 1, 25–29, 65–68, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). The governmental interest here, of course, is in protecting citizens against deception—with its attendant waste and misallocation by consumers to the benefit of the wrongdoers—by ensuring that advertising conveys truthful information to the public. As we noted earlier, it is this very interest which was invoked by the *Virginia State Board* Court as support for its conclusion that commercial speech is protected by the First Amendment. *See* 425 U.S. at 764–765, 96 S.Ct. 1817. *See also Bates v. State Bar of Arizona, supra*, —— U.S. at ——, 97 S.Ct. 2691.

And the facts of this case make it eminently clear that this interest will not be substantially served by the less restrictive remedy—a cease and desist order. Whatever one may conclude as to the effect of Warner-Lambert's long history of deception on the protected status of its current advertising, we see no basis—and none has been offered—for questioning the Commission's conclusion that, absent a corrective remedy, consumers will continue to purchase Listerine as a cure for colds. *See* FTC op. at 38, JA 904. Indeed, at least one advocate of corrective advertising has urged that such orders not be confined to obvious cases such as *Warner-Lambert* where the proof presented to the Commission of the success of a deceptive campaign is so striking. Noting the long history of a deceptive claim uniquely asserted for Listerine, the absence of consumer confusion as to which mouthwash was effective against colds, and the persuasive evidence that this claim was believed by consumers after the false advertising had ceased, Professor Pitofsky has argued that "[c]omparable proof of deception-perception-memory influence would be virtually impossible in most advertising cases. * * * If the Commission is to do an effective job in regulating deceptive advertising, corrective advertising must apply to more than the one-in-a-million type of ad campaign present in *Warner-Lambert*." *See* Pitofsky, *supra*, 90 Harv.L.Rev. at 698.

Finally, the corrective advertising order in this case, by tying the quantity of correction required to the investment in deception, is tailored to serve the legitimate governmental interest in correcting public misimpressions as to the value of Listerine—and no more.[6] Taking all these factors into account, we think it beyond doubt that the FTC order is a valid one.

Petition for rehearing denied.

ROBB, Circuit Judge, dissenting:

I adhere to the view expressed in my dissent that the corrective advertising order imposed on Warner-Lambert goes beyond the statutory authority of the Federal Trade Commission. Accordingly, so far as that order is concerned I find it unnecessary to reach the constitutional question discussed by the majority. I would set aside the corrective advertising portion of the Commission's order.

5. We do not here consider whether the Commission, under principles of administrative exhaustion, should be required initially to decide this constitutional issue in light of the decision in *Virginia State Board*. The extent to which administrative exhaustion of constitutional claims is required presents difficult and unsettled questions of law, and since this point has been neither raised nor briefed by petitioner, we decline to address it in this decision. *See Mathews v. Eldridge*, 424 U.S. 319, 327–330, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 764–767, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975); K. Davis, Administrative Law of the Seventies §§ 20.00 to 20.00–3 (1977 Supp.); Note, *The Authority of Administrative Agencies to Consider the Constitutionality of Statutes*, 90 Harv.L.Rev. 1682 (1977).

6. As the Commission itself noted, it may well be impossible to "determine in advance with computer-like precision the minimum amount of corrective advertising which will dispel the otherwise continuing beliefs at issue." FTC op. at 39, JA 905. Even so, considering the 50 years of deceptive Listerine advertising, continuing inflation with attendant increased advertising costs leaves no doubt that the Commission is requiring a significantly smaller quantity of corrective advertising than prior deceptive advertising. As a result, any imprecision in the order's scope would seem likely to inure to Warner-Lambert's benefit.

Exhibit 74: *FTC* v. *National Commission on Egg Nutrition*, 517 F.2d 485 (7th Cir. 1975)

FEDERAL TRADE COMMISSION,
Petitioner-Appellant,

v.

NATIONAL COMMISSION ON EGG NUTRITION, Respondent-Appellee.

No. 74-2043.

United States Court of Appeals,
Seventh Circuit.

Argued April 5, 1975.

Decided May 15, 1975.

Rehearing Denied June 17, 1975.

Federal Trade Commission sought temporary injunction against continued publishing and broadcasting, by private

not-for-profit corporation composed of egg producer associations, of statements to the effect that there is no scientific evidence linking egg consumption and heart disease. The District Court, for the Northern District of Illinois, James B. Parsons, J., denied relief and Commission appealed. The Court of Appeals, Tone, Circuit Judge, held that the not-for-profit corporation was subject to jurisdiction of the Commission; that the statements published and broadcast by the corporation were advertisements; that the advertisements were misleading; that district court was not required to balance equities or consider Commission's likelihood of success where the advertisements dealt with food and were misleading; and that issuance of temporary injunction did not violate First Amendment rights.

Reversed and remanded with directions.

Fairchild, Chief Judge, concurred and filed an opinion.

1. Trade Regulation ⇐776

Not-for-profit corporation which was organized to promote the general interests of the egg industry came within the jurisdiction of the Federal Trade Commission. Federal Trade Commission Act, § 4, 15 U.S.C.A. § 44.

2. Trade Regulation ⇐766

Published and broadcast statements, which were sponsored by not-for-profit corporation composed of representatives of various associations of egg producers and which were designed to allay fears of the public concerning relationship between consumption of eggs and high cholesterol were "advertisements" within Federal Trade Commission Act, as they were representations concerning the qualities of a product and promoting its purchase and use. Federal Trade Commission Act, §§ 4, 5, 12, 13(a), 15 U.S.C.A. §§ 44, 45, 52, 53(a).

See publication Words and Phrases for other judicial constructions and definitions.

3. Trade Regulation ⇐846

Congress has indicated an intention that considerations of equities and Federal Trade Commission's likelihood of ultimate success be applied only where Commission seeks to act under its general grant of authority to seek injunctions and not to those situations in which injunction is sought because Commission has reason to believe that corporation is engaged in disseminating misleading advertising intended to induce the purchase of items of food. Federal Trade Commission Act, §§ 12, 13, 13(a, b), 15 U.S.C.A. §§ 52, 53, 53(a, b).

4. Trade Regulation ⇐846

Where Federal Trade Commission demonstrated that it had reason to believe that advertisements sponsored by not-for-profit corporation composed of egg producer associations were materially misleading concerning relationship between egg consumption and cholesterol and where FTC showed that it believed that an injunction would be in the best interest of the public, FTC was entitled to temporary injunction against the advertisements without consideration of balance of equities or likelihood of ultimate success of the FTC. Federal Trade Commission Act, §§ 12, 13, 13(a, b), 15 U.S.C.A. §§ 52, 53, 53(a, b).

5. Constitutional Law ⇐90.1(1)

First Amendment is not wholly irrelevant if government selectively seeks to prohibit commercial advertisements because they espouse one side of a genuine controversy. U.S.C.A.Const. Amend. 1.

6. Constitutional Law ⇐90.1(1)

Issuance of temporary injunction against continued advertisements, sponsored by not-for-profit corporation composed of egg producer associations, which espoused one side of controversy concerning relationship between egg consumption, cholesterol, and heart attacks, and which made statements denying the existence of scientific evidence contrary to its view, although such evidence clearly existed, did not violate First Amendment; there is no constitutional right to

disseminate false or misleading advertisements. Federal Trade Commission Act, §§ 12, 13, 15 U.S.C.A. §§ 52, 53; U.S.C.A.Const. Amend. 1.

7. Trade Regulation ⇐847

Temporary injunction against continuation of advertisements, which were sponsored by not-for-profit corporation formed by egg producer associations and which made misleading statements concerning relationship between egg consumption and cholesterol, should not go so far as to prohibit the association from making a fair presentation of its side of the controversy so long as it did not state that there was no scientific evidence relating egg consumption and cholesterol; association was entitled to state that there was scientific evidence supporting the theory that dietary cholesterol intake is not harmful provided that it also stated that there was substantial contrary evidence. Federal Trade Commission Act, §§ 12, 13, 15 U.S.C.A. §§ 52, 53.

8. Trade Regulation ⇐846

Where Court of Appeals was framing temporary injunction against misleading advertisements and where recent advertising bore on the nature of the provisions which should be included in that injunction, Court would grant motion for leave to supplement the record with copies of the advertisements published by advertiser shortly before and after all argument in the Court of Appeals, even though the evidence was not before the district court. Federal Trade Commission Act, §§ 12, 13, 15 U.S.C.A. §§ 52, 53.

Calvin J. Collier and Karl H. Buschmann, F. T. C., Washington, D. C., James R. Thompson, U. S. Atty., and Gary L. Starkman, Asst. U. S. Atty., Chicago, Ill., for petitioner-appellant.

James L. Fox, Chicago, Ill., for respondent-appellee.

Before FAIRCHILD, Chief Judge, and CUMMINGS and TONE, Circuit Judges.

TONE, Circuit Judge.

The National Commission on Egg Nutrition (NCEN), a private, not-for-profit corporation composed of representatives of various associations of egg producers throughout the United States, has caused to be published and broadcast statements, in the form of paid advertisements, representing in substance that there is no scientific evidence that eating eggs increases the risk of heart disease or a heart attack. The Federal Trade Commission filed an administrative complaint against NCEN alleging that these statements were false and in violation of sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 52, and sought from the District Court a temporary injunction under section 13(a) of the Act, 15 U.S.C. § 53(a), restraining the continuation of the advertising pending completion of the administrative proceeding. Before the District Court, the Commission offered substantial evidence that there is a medical controversy about the subject and considerable expert opinion based on experimental evidence showing a correlation, and possibly a causal connection, between high levels of dietary cholesterol resulting from eating eggs and other foods with a high cholesterol content and increased risk of heart disease. The District Court held that it had jurisdiction notwithstanding NCEN's claim that it was not subject to the Act, but denied the application on the ground that the equitable conditions required for issuance of an injunction under section 13(a) of the Act, 15 U.S.C. § 53(a), had not been met. We reverse that court's order and direct that an injunction be entered.

I.

[1, 2] We agree with the District Court that the Commission had jurisdiction over NCEN and the statements in question. Although NCEN is a nonprofit corporation, it was formed to promote "the general interests of the egg industry," according to its articles of incorporation and bylaws. Thus, it comes

within the scope of section 4 of the Act, 15 U.S.C. § 44, which defines "corporation" as "any company . . . which is organized to carry on business for its own profit or that of its members . . .." See Community Blood Bank of Kansas City Area, Inc. v. F. T. C., 405 F.2d 1011 (8th Cir. 1969), where the court interpreted the legislative history of this section, stating:

> ". . . Congress did not intend to provide a blanket exclusion of all nonprofit corporations, for it was also aware that corporations ostensibly organized not-for-profit, such as trade associations, were merely vehicles through which a pecuniary profit could be realized for themselves or their members." 405 F.2d at 1017.

In holding that the Blood Bank was a solely charitable enterprise, the Eighth Circuit distinguished the line of cases following F. T. C. v. Cement Institute, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948), and Fashion Originators' Guild of America v. F. T. C., 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941), explaining:

> "It is evident, however, that the organizations in the above cases were designed to and did in fact bring together firms having common business concerns and such organizations or their members derived a profit over and above the ability to perpetuate or maintain their existence." 405 F.2d at 1019.

See also National Harness Mfrs.' Ass'n v. F. T. C., 268 F. 705 (6th Cir. 1920). In the instant case, there is sufficient evidence to support the District Court's finding that NCEN was organized for the profit of the egg industry, even though it pursues that profit indirectly. The clear purpose of the statements in issue in this case is to encourage the consumption of eggs by allaying fears the public may have about their high cholesterol content. Also, given the nature of the pronouncements in question, the District Court could properly conclude that they were advertisements within the meaning of that term as used in the Act, because they were representations concerning the qualities of a product and promoting its purchase and use. See Koch v. F. T. C., 206 F.2d 311, 317–318 (6th Cir. 1953); compare Scientific Mfg. Co. v. F. T. C., 124 F.2d 640, 643–645 (3rd Cir. 1941).

II.

As the District Court recognized, the Commission invoked section 13(a) as the basis for the issuance of a temporary injunction. We now turn, therefore, to the showing the Commission must make in order to receive injunctive relief under that subsection.

Section 13 of the Act consists of two different grants of authority to the Commission to seek injunctions against violations of the Act. Section 13(a) provides in substance that "[w]henever the Commission has reason to believe" that a corporation is engaged in dissemination of materially misleading advertising intended to induce the purchase of items of food, in violation of section 12 of the Act, and further has reason to believe that enjoining that conduct "would be to the interest of the public," the Commission is authorized to bring suit in a federal district court for injunctive relief, and "[u]pon [a] proper showing a temporary injunction . . . shall be granted . . .." By contrast, section 13(b) is a general grant of authority to seek injunctions "[w]henever the Commission has reason to believe . . . that any . . . corporation . . . is violating . . . any provision of law enforced by the Federal Trade Commission," and provides that "[u]pon a proper showing that, *weighing the equities and considering the Commission's likelihood of ultimate success,* such action would be in the public interest, . . . a preliminary injunction may be granted." (Emphasis added.)

[3] Congress added subsection (b) in 1973, leaving subsection (a) unchanged. By providing the traditional equity standards italicized in the above quota-

tion and the permissive "may" in (b), while leaving (a) without those standards and with its peremptory "shall," Congress indicated an intention that those standards be applied in proceedings under (b) but not in those under (a), and no intention that the judicial interpretations of (a) should be affected by the amendment. This inference is not refuted by the somewhat ambiguous legislative history of the amendment. Accordingly, our decision in F. T. C. v. Rhodes Pharmacal Co., 191 F.2d 744 (7th Cir. 1951), remains the law and is controlling in this case. We there held that the following standard was applicable under subsection (a):

> ". . . all the Commission had to show was a justifiable basis for believing, derived from reasonable inquiry or other credible information, that such a state of facts probably existed as reasonably would lead the Commission to believe that the defendants were engaged in the dissemination of false advertisements . . . in violation of the Act . . .. This is to say, in the instant case, the court had only to resolve the narrow issue of whether there was 'reasonable cause' to believe that the alleged violation had taken place." 191 F.2d at 747–748.

[4] Under this standard, the Commission in the case at bar was entitled to temporary injunctive relief against NCEN's advertising statements to the effect that there was "no scientific evidence" of any relationship between dietary cholesterol intake resulting from eating eggs and increased risk of heart disease. The District Court explicitly found that the Commission had demonstrated that it had reason to believe NCEN's advertisements to be materially misleading. The Commission also showed that it believed an injunction would be in the best interest of the public, a statement which the District Court credited to the extent that more people were likely to be misled if the pronouncements were permitted to continue. It was error for the District Court to go further than the statutory requirements, which had been satisfied according to *Rhodes*, by requiring the Commission to justify its request for an injunction on the basis of a balancing of the equities and the likelihood of ultimate success, the traditional equity standards prescribed in subsection (b).

III.

[5, 6] NCEN argues that the issuance of an injunction would at least raise a serious First Amendment question. As Chief Judge Fairchild's concurring opinion suggests, the First Amendment is not "wholly irrelevant if government selectively seeks to prohibit commercial advertising because it espoused one side of a genuine controversy." Cf. Pittsburgh Press Co. v. Human Relations Commission, 413 U.S. 376, 384–389, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973); Barrick Realty, Inc. v. City of Gary, 491 F.2d 161, 163–164 (7th Cir. 1974); compare Breard v. Alexandria, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233 (1951). NCEN has done more than espouse one side of a genuine controversy, however. It has made statements denying the existence of scientific evidence which the record clearly shows does exist. These statements are, therefore, false and misleading. "There is no constitutional right to disseminate false or misleading advertisements." E. F. Drew & Co. v. F. T. C., 235 F.2d 735, 740 (2d Cir. 1956). The First Amendment problem suggested above is therefore not before us.

IV.

[7, 8] Regardless of the reach of the First Amendment in this area, we think the injunction should not go so far as to prohibit NCEN from making a fair presentation of its side of the controversy. NCEN should, as the Commission contends, be enjoined from disseminating in commerce or by mail advertising containing statements to the effect that there is no scientific evidence that increased intake of dietary cholesterol resulting from eating eggs increases the

risk of heart disease or attendant or related conditions or other statements tending to misrepresent the state of scientific evidence on the subject in question. The injunction should not, however, prohibit NCEN from stating that there is scientific evidence supporting the theory that dietary cholesterol intake is not harmful, or from describing that evidence, provided that it also states that there is substantial contrary evidence.

In order to avoid further delay, we are directing that an injunction in the form appearing in the Appendix to this opinion * be entered by the District Court on remand.

Reversed and remanded with directions.

FAIRCHILD, Chief Judge (concurring).

The material involved consists of statements of position with respect to a controversial issue. It is deemed advertising because its dissemination is caused by those whose profit interests are served by the view espoused.

We are in an area of difficulty in considering whether and to what extent the First Amendment protects such material. It is clear that "purely commercial advertising" is treated differently from other communication of information and opinion in terms of applicability of the First Amendment. Valentine v. Chrestensen, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942). Compare, Pittsburgh Press Co. v. Human Rel. Comm'n., 413 U.S. 376, 384, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973) with New York Times v. Sullivan, 376 U.S. 254, 266, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). See also, Breard v. Alexandria, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233 (1951). I question whether the cases mean that the First Amendment is wholly irrelevant if government selectively seeks to prohibit commercial advertising because it espoused one side of a genuine controversy.

Mr. Justice Brennan has recently observed:

> ". . . while it is possible that commercial advertising may be accorded *less* First Amendment protection than speech concerning political and social issues of public importance, compare Valentine v. Chrestensen, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942), with Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939), and Breard v. City of Alexandria, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233 (1951), with Martin v. City of Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943), it is 'speech' nonetheless, often communicating information and ideas found by many persons to be controversial." Lehman v. City of Shaker Heights, 418 U.S. 298, 314, 94 S.Ct. 2714, 2723, 41 L.Ed.2d 770 (Brennan, J., dissenting) (Emphasis in original, footnote omitted).

Like political speech, the purveyor of a commercial advertisement has an interest in expression, and the mere fact that government seeks to regulate advertising bespeaks the interest the recipients have in receiving the message. See Note, Freedom of Expression in a Commercial Context, 78 Harv.L.Rev. 1191 (1965). Most importantly, society, as a whole, has a substantial interest in the free interplay of opinion when an advertisement addresses a matter of current public debate.

When we are dealing with a genuine controversy, I do not think that mere reason to believe that a statement is false or misleading is a sufficient basis for an injunction. I conclude that the First Amendment at least requires a higher standard. I can, however, concur in ordering a limited injunction in this

* NCEN has moved for leave to supplement the record with copies of advertisements published by it shortly before and after the oral argument in this court. While we would ordinarily not consider evidence that was not before the District Court, we grant the motion, because we are framing the temporary injunction, and the recent advertising bears on the nature of the provisions that should be included in that injunction.

case because I consider that it has been demonstrated that the particular statements enjoined are misleading.

APPENDIX

Injunction Order

Petitioner, the Federal Trade Commission, having invoked the authority of this court pursuant to 15 U.S.C. § 53(a) for the purpose of temporarily enjoining the respondent from disseminating advertisements which the Commission has reason to believe violate section 12 of the Federal Trade Commission Act, 15 U.S.C. § 52; the court hereby finds as follows:

The court has jurisdiction over the subject matter and the respondent.

Eggs are a "food" as defined by 15 U.S.C. § 55(b).

The Federal Trade Commission has made a proper showing that it has reason to believe that the respondent's advertisements for eggs which have been disseminated in commerce or through the United States mails were false in violation of 15 U.S.C. § 52.

The Federal Trade Commission has made a proper showing that the issuance of a temporary injunction against respondent's continued dissemination of advertisements which the Commission had reason to believe were false, pending completion of its administrative proceeding with respect to respondent, would be in the public interest.

It is therefore ordered that respondent, National Commission on Egg Nutrition, is forthwith enjoined from disseminating or causing the dissemination of any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. Represents that there is no scientific evidence that consuming eggs, even in large quantities, increases the risk of heart attacks, heart or artery disease, or any attendant condition;
2. Represents the insignificance of the available scientific evidence that the consumption of eggs may increase the risk of heart attacks, heart or artery disease, or any attendant condition, or represents that there is overwhelming scientific evidence or otherwise misrepresents the amount of scientific evidence, if any, that eating eggs does not increase the risk of heart attacks, heart or artery disease, or any attendant condition;
3. Represents that there exists, or describes, scientific evidence which supports the theory that eating eggs does not increase or in any way decreases the risk of heart attacks, heart or artery disease, or attendant conditions, unless such representation is accompanied by a statement that this theory and its supporting evidence are the subject of considerable scientific controversy, and there is much evidence to the contrary.

It is further ordered that respondent shall:

Distribute or mail a copy of this order, within 30 days from the date of this order, to each of its members and to all persons, corporations, associations or other entities to which it has provided advertising materials for publication or republication and which contain any of the claims which respondent is enjoined by this order from making;

Furnish petitioner, within 30 days from the date of this order, with a list of all members, persons, corporations or other entities to whom it has furnished copies of this order as required above; and

Notify the Commission at least 30 days prior to any proposed change in NCEN, such as dissolution, emergence of a successor corporation, or any other change in the corporation which may affect compliance with obligations arising out of this order.

This order shall continue in effect until the pending complaint against respondent by petitioner Federal Trade Commission (F.T.C. Docket No. 8987) is either dismissed by petitioner or until a final order issued by petitioner against respondent in that matter becomes final as defined by section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, unless sooner vacated or modified by this court.

Exhibit 75: *National Commission on Egg Nutrition* v. *FTC*, 570 F.2d 157 (7th Cir. 1977)

NATIONAL COMMISSION ON EGG NUTRITION and Richard Weiner, Inc., Petitioners-Appellants,

v.

FEDERAL TRADE COMMISSION, Respondent-Appellee.

Nos. 76–1969 and 76–1975.

United States Court of Appeals, Seventh Circuit.

Argued June 17, 1977.

Decided Nov. 29, 1977.

As Amended Dec. 6, 1977.

Supplemental Opinion on FTC's Motion to Amend Judgment Jan. 23, 1978.

Following remand, 517 F.2d 485, Federal Trade Commission entered order prohibiting false and misleading advertising by egg industry trade association concerning the relationship between cholesterol, eggs, and heart disease. The Court of Appeals, Tone, Circuit Judge, held that: (1) evidence sustained determination that representations made by the industry and various advertisements had been false; (2) the statements complained of were not immune under the First Amendment from FTC action; (3) order was not unconstitutionally vague, but (4) industry should not have been required to include, in any future statements concerning the relationship between eggs and heart disease, information that many medical experts believe that increased consumption of cholesterol may increase the risk of heart disease.

Enforced in part.

1. Amicus Curiae ⇐1

Argument which was not made before the Federal Trade Commission or by the parties themselves in the Court of Appeals was not properly before the Court of Appeals when presented in brief filed by amicus curiae.

2. Trade Regulation ⇐802

Evidence sustained determination of Federal Trade Commission that advertising statements made by trade association of the egg industry concerning lack of relationship between cholesterol, eggs, and heart disease were false.

3. Constitutional Law ⇐90(1)

First Amendment embraces the interests of both the speaker and the prospective audience. U.S.C.A.Const. Amend. 1.

4. Constitutional Law ⇐90.1(1)

Advertising statements of egg industry which categorically and falsely denied the existence of evidence considering relationship between cholesterol, eggs, and heart disease, which evidence in fact existed, were not immune under the First Amend-

ment from FTC order prohibiting false advertising. U.S.C.A.Const. Amend. 1; Federal Trade Commission Act, §§ 5, 12, 15 U.S.C.A. §§ 45, 52.

5. Trade Regulation ⇐816

Neither the use of the term "advertisement" in FTC order prohibiting certain misleading statements in advertising nor statement of the Administrative Law Judge that he did not predicate a finding of violation on certain materials published by the respondent rendered the order unconstitutionally vague. Federal Trade Commission Act, §§ 5, 12, 15 U.S.C.A. §§ 45, 52.

6. Trade Regulation ⇐816

Provision of Federal Trade Commission order prohibiting advertising which represented as insignificant the available scientific evidence that the consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease or which otherwise misrepresented the amount of scientific evidence that eating eggs does not increase the risk of heart attacks was not unconstitutionally vague. Federal Trade Commission Act, §§ 5, 12, 15 U.S.C.A. §§ 45, 52; U.S.C.A.Const. Amend. 1.

7. Trade Regulation ⇐812

Federal Trade Commission, in barring false and misleading advertisements, was not limited to prohibiting the precise misrepresentations which had occurred in the past. Federal Trade Commission Act, §§ 5, 12, 15 U.S.C.A. §§ 45, 52.

8. Constitutional Law ⇐90.1(1)

First Amendment does not permit Federal Trade Commission to impose a remedy for false and misleading advertising which is broader than that necessary to prevent deception or correct the effects of past deception. U.S.C.A.Const. Amend. 1; Federal Trade Commission Act, §§ 5, 12, 15 U.S.C.A. §§ 45, 52.

9. Trade Regulation ⇐812

In the absence of showing of long history of deception on the part of egg industry with respect to advertisements concerning relationship between cholesterol, eggs, and heart disease, Federal Trade Commission requirement that the industry include in any future advertisements concerning the relationship between eggs and heart disease the statement that many medical experts believe the increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart attack; egg industry should not have been required to argue the other side of the controversy; the requirement could be imposed only when the industry chose to make a representation as to the state of available evidence or information concerning the controversy. U.S.C.A.Const. Amend. 1; Federal Trade Commission Act, §§ 5, 12, 15 U.S.C.A. §§ 45, 52.

James L. Fox, Donald P. Colleton, Chicago, Ill., for petitioners-appellants.

John T. Fischbach, Atty., F. T. C., Washington, D. C., for respondent-appellee.

Before SPRECHER and TONE, Circuit Judges, and CAMPBELL, Senior District Judge.*

TONE, Circuit Judge.

The subject of this appeal is commercial speech under the First Amendment. Acting pursuant to its power to prohibit false and misleading advertising, the Federal Trade Commission has entered a final order directing petitioners to cease and desist from disseminating advertisements containing statements to the effect that there is no scientific evidence that eating eggs increases the risk of heart and circulatory disease.[1] Certain statements ancillary to the one just described are also prohibited, and the right to make still others is limited and condi-

* The Honorable William J. Campbell, Senior District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

1. The term "heart and circulatory disease" is used in this opinion to include, in the Commission's phrase, "heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition."

tioned by the order. We sustain the order, except for a provision which we hold to be overbroad.

Petitioners are a trade association that calls itself the National Commission on Egg Nutrition (NCEN), and its advertising agency, Richard Weiner, Inc. Despite its official-sounding title, NCEN was formed by members of the egg industry, to counteract what the FTC described as "anti-cholesterol attacks on eggs which had resulted in steadily declining per capita egg consumption." To carry out this mission, NCEN, with Weiner's assistance, mounted an advertising and public relations campaign to convey the message that eggs are harmless and are needed in human nutrition. In 1974 the FTC filed a complaint charging petitioners with having violated §§ 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45, 52, by placing newspaper advertisements containing various false and misleading statements with respect to the relationship between eating eggs and heart and circulatory disease. In its answer, NCEN admitted that it had made representations in its advertising concerning the absence of scientific evidence that eating eggs increases the risk of heart and circulatory disease and also had represented that eating eggs does not increase the blood cholesterol level in a normal person, but stated that it was no longer making such representations in its advertising. NCEN did not contest that other representations charged were misleading but denied having made them.

After filing its complaint, the FTC sought a temporary injunction in the District Court under § 13(a) of the Federal Trade Commission Act, 15 U.S.C. § 53(a), to prohibit NCEN from continuing its allegedly false advertising while the administrative proceeding was pending. The District Court denied the relief sought by the FTC. We reversed and directed the entry of an injunction forbidding the misrepresentations complained of but allowing NCEN to make "a fair presentation of its side of the controversy." *FTC v. National Commission on Egg Nutrition*, 517 F.2d 485, 489 (7th Cir. 1975), *cert. denied*, 426 U.S. 919, 96 S.Ct. 2623, 49 L.Ed.2d 372 (1976).

After hearing the evidence, an administrative law judge sustained the allegations of the complaint and recommended a cease and desist order. On appeal to the FTC, the ALJ's findings were sustained and the recommended order was adopted with some modifications. NCEN and Weiner have filed petitions for review of that order by this court. Only NCEN has filed a brief.

The order directs NCEN and Weiner to cease and desist from disseminating, by mail or means in or affecting commerce, advertising which directly or indirectly makes certain specified representations. The one which is of principal concern here is "that there is no scientific evidence that eating eggs increases the risk of . . . heart [and circulatory] disease . . . ." Other specifically prohibited statements, which the FTC found petitioners had made in the past, are variations on the same general theme.[2] In addition, any representation concerning the relationship of eating eggs, or of dietary cholesterol, including

2. Petitioners are forbidden from making any statement which directly or indirectly represents

> . . . that there is scientific evidence that dietary cholesterol, including that in eggs, decreases the risk of . . . heart [and circulatory] disease . . .;
>
> . . . that there is scientific evidence that avoiding dietary cholesterol, including that in eggs, increases the risk of . . . heart [and circulatory] disease . . .;
>
> . . . that eating eggs does not increase the blood cholesterol level in a normal person;
>
> . . . that the blood cholesterol level is prevented from being raised or lowered by dietary cholesterol intake;
>
> . . . that the human body increases its manufacture of cholesterol in an amount equal to a decrease in dietary cholesterol intake;
>
> . . . that the average human body eliminates the same amount of cholesterol as that eaten;
>
> . . . that dietary cholesterol, including that in eggs, is needed by the body for building sex hormones, for transmitting nerve impulses and for maintaining life in cells . . .

that in eggs, to heart and circulatory disease, is permissible only if

> it is clearly and conspicuously disclosed in immediate conjunction therewith that many medical experts believe that existing evidence indicates that increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease.

Also forbidden is any statement which

> [r]epresents as insignificant the available scientific evidence that the consumption of dietary cholesterol, including that in eggs, may increase the risk of . . . heart disease, . . . or represents that there is overwhelming scientific evidence or otherwise misrepresents the amount of scientific evidence that eating eggs does not increase the risk of . . heart disease . . . [or] [m]isrepresents in any other manner the physiological effects of consuming dietary cholesterol or eggs.

The order also prohibits NCEN from using its name ". . . unless it is clearly and conspicuously disclosed in immediate conjunction with the name that the National Commission on Egg Nutrition is composed of egg producers and other individuals and organizations of, or relating to, the egg industry."

[1] NCEN does not challenge the requirement that it identify itself as a trade association if it wishes to continue using its current title. Nor does it specifically challenge the findings that the various statements found to have been made, other than the "no scientific evidence" statement, were false and misleading. The debate before us is focused on that statement, *i. e.*, that there is no scientific evidence linking the eating of eggs to an increased risk of heart and circulatory disease. NCEN argues, first, that the statement is true; second, that even if it is misleading, the FTC's prohibition infringes upon NCEN's First Amendment rights; and, finally, that even if the FTC's holding of a violation is upheld, its order is unconstitutionally vague and overbroad, going beyond what is necessary to remedy that violation.[3]

I. *Falsity*

[2] What the FTC describes as the "diet/heart disease" hypothesis, subscribed to by "many well-qualified medical science experts . . .", with varying degrees of conviction," is as follows: For many people, the amounts of cholesterol and saturated fats which are ingested affect the risk of heart and circulatory disease; increasing the amounts increases the risk, and decreasing the amounts decreases the risk.

Egg yokes contain substantially more cholesterol than any other commonly eaten food and are a major contributor of cholesterol in the American diet. The yoke of one egg provides cholesterol in an amount equal to about one-third of the average daily per capita consumption of cholesterol. (Although the yoke also contains saturated fat, the amount per egg is equal to less than four percent of the average per capita intake of that substance.)

The diet/heart disease hypothesis is based on several propositions: First, in many people the cholesterol level in the blood stream (serum cholesterol) is affected by the amount of cholesterol and saturated fat in the diet. Second, relatively high levels of serum cholesterol have been associated with relatively high incidence of coronary heart disease in sample populations. Third, relatively high levels of serum cholesterol contribute to the formation of atherosclerotic lesions, which precipitate heart disease. These propositions have been formulated by scientists based upon, in the FTC's words, "the results of a large body of clinical-pathological, experimental, and epidemiological studies." After describing these studies, the ALJ had found that they

3. The Association of National Advertisers, Inc., in an *amicus* brief filed in support of NCEN, argues that the FTC's hearing procedures violated the First Amendment standards set forth in *Blount v. Rizzi*, 400 U.S. 410, 417, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971). As the FTC points out, however, this argument was not made before the FTC or even by the petitioners themselves in this court and is therefore not properly before us. See *American Meat Institute v. Environmental Protection Agency*, 526 F.2d 442, 449 (7th Cir. 1975).

were conducted using scientific methodologies, were performed by competent and highly regarded investigators, have been reported in recognized scientific journals after peer review, and have been generally accepted by experts in the field and by the scientific community.

These administrative findings of fact are not challenged by NCEN. Instead, it relies upon testimony of its own expert witnesses that some scientists and doctors are not persuaded by the studies, and that in the opinion of the witnesses the studies are not "evidence" and, in the words of one witness, "would not convince anybody that the number of eggs consumed does increase the risk of ischemic heart disease."

The FTC concluded that, impossible though it may be to determine whether consuming eggs in fact increases the risk of heart and circulatory disease, it is possible to determine the existence and amount of evidence on that issue. Referring to the testimony of NCEN's experts that, in their opinion, there was no evidence of a connection between eggs and heart and circulatory disease, the FTC said that

> in rendering their testimony respondents' witnesses did not dispute the fact that many experts, in the exercise of reasonable, albeit disputed, scientific judgment, have relied upon a large body of scientific studies in formulating the diet/heart disease hypothesis.

Responding to the argument that the "no evidence" statement would be recognized by readers as merely an expression of opinion, the FTC said,

> Unfortunately, however, the phrase "there is no evidence" is also, and perhaps more reasonably subject to the interpretation that "there do not exist competent and reliable scientific studies from which well-qualified experts could reasonably hypothesize that eating eggs increases the risk of heart disease." This latter message is patently false and misleading.[4]

As the Third Circuit observed in *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (1976), *cert. denied*, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977), "[w]hether particular advertising has a tendency to deceive or mislead is obviously an impressionistic determination more closely akin to a finding of fact than to a conclusion of law." Applying the "substantial evidence" rule, and giving due regard to the FTC's expertise, we cannot disturb the finding.

Moreover, our own finding, if it were our province to make one, would be less charitable to petitioners than that of the FTC. The various scientific studies and the expert opinions based on those studies constitute evidence, not merely in the legal sense, but in the commonly understood sense of that word. That a given expert is not persuaded by the studies does not remove them, or another expert's contrary opinion, from the category of evidence. After reviewing the record now before us, we find no reason to alter the conclusion stated in our opinion on the interlocutory appeal:

> NCEN has done more than espouse one side of a genuine controversy . . . . It has made statements denying the existence of scientific evidence which the record clearly shows does exist. These statements are, therefore, false and misleading.

517 F.2d at 489.

II. *The First Amendment*

The argument most strongly pressed is that the FTC's order impinges upon First

4. The FTC went on to say,

> It is well established, and critical to the notion of preventing false advertising, that where an advertisement conveys more than one meaning, one of which is false, the advertiser is liable for the misleading variation. *Murray Space Shoe Corp. v. FTC*, 304 F.2d 270, 272 (2d Cir. 1963); *Rhodes Pharmacal Co. v. Federal Trade Commission*, 208 F.2d 383, 387 (7th Cir. 1953), modified by restating the Commission's order, 348 U.S. 940, 75 S.Ct. 361, 99 L.Ed. 736 (1953). Nor does our application of that principle in this instance rest upon some mere semantic quibble or strained interpretation of words, since that meaning of respondents' claim which deceives is one which is likely to be understood, and reasonably so, by consumers. A more appropriate statement of the principle in this case might thus be that an otherwise false advertisement is not rendered acceptable merely because one possible interpretation of it is not untrue.

Amendment guarantees, which, at least since *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975), extend to commercial speech. It is argued that the principles established in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), prohibit the agency from considering the content of the statement without reference to the state of mind with which it was uttered, and require that a commercial misrepresentation on a controversial public issue be treated in the same manner as it would a libel of a public figure, see *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), *i. e.*, as actionable only if it is made deliberately or with reckless disregard for the truth.

In the *Virginia Pharmacy* opinion, upon which NCEN relies, the Court expressly recognized that the First Amendment did not interfere with a "State's dealing effectively" with the problem of "deceptive or misleading" commercial speech, even when it is "not provably false, or even wholly false." The state is not prohibited "from insuring that the stream of commercial information flow cleanly as well as freely." 425 U.S. at 771–772, 96 S.Ct. at 1831. This position was amplified by the Court in *Bates v. State Bar of Arizona*, 433 U.S. 350, 381–384, 97 S.Ct. 2691, 2708–2709, 53 L.Ed.2d 810 (1977):

> Advertising that is false, deceptive, or misleading of course is subject to restraint. See *Virginia Pharmacy Board v. Virginia Citizens Council*, 425 U.S. at 771–772 [96 S.Ct. 1817] and n. 24 . . . Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech. *Id.*, at n. 24 . . . . And any concern that strict requirements for truthfulness will undesirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated. Indeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena.

See also Mr. Justice Stevens' statement in *Young v. American Mini Theatres*, 427 U.S. 50, 68–69, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); and see *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 97 S.Ct. 1614, 1618, 52 L.Ed.2d 155 (1977).

[3] The Court's recognition that the First Amendment does not preclude restraint of false, misleading, or deceptive advertising is consistent with the principle that the protection afforded to speech of any kind is to be determined by "assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Bigelow v. Virginia*, *supra*, 421 U.S. at 826, 95 S.Ct. at 2235. The First Amendment interest is twofold: it embraces the interests of both the speaker and the prospective audience, which, in the case of commercial speech, consists of consumers. The consumers' interest, which is in obtaining information on which to base the decision of whether to buy, see *Linmark Associates, Inc. v. Township of Willingboro*, *supra*, 97 S.Ct. at 1618, is served by insuring that the information is not false or deceptive, and, in fact, coincides with the public interest served by the regulation. The fact that health is involved enhances the interests of both consumers and the public in being assured "that the stream of commercial information flow cleanly as well as freely." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, *supra*, 425 U.S. at 772, 96 S.Ct. at 1831. When these considerations, together with those expressed by the Court in *Bates* relating to the hardiness of commercial speech, are balanced, the scale is tipped in favor of regulation.

[4] NCEN argues that its advertisements do not fit the paradigm of commercial speech which the Court had in mind in *Virginia Pharmacy*, *viz.*, "speech that does 'no more than propose a commercial transaction,'" 425 U.S. at 771, 96 S.Ct. at 1830, n. 24, quoting from *Pittsburgh Press Co. v.*

Human Relations Comm'n, 413 U.S. 376, 385, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973), but rather were expressions of opinion on an important and controversial public issue. Thus, it is said, they are more like the paid political advertisements in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). First, as to the nature and purpose of NCEN's statements, they were not phrased as statements of opinion but categorically and falsely denied the existence of evidence that in fact exists and were made for the purpose of persuading the people who read them to buy eggs. Second, as to the nature of the issue, the right of government to restrain false advertising can hardly depend upon the view of an agency or court as to the relative importance of the issue to which the false advertising relates. Third, as to the intended scope of the Supreme Court's expressions on the subject of commercial speech, we believe they were not intended to be narrowly limited to the mere proposal of a particular commercial transaction but extend to false claims as to the harmlessness of the advertiser's product asserted for the purpose of persuading members of the reading public to buy the product. The nature of the communication is not changed when a group of sellers joins in advertising their common product. See Note, *Protection for Commercial Advertising*, 44 U.Chi.L.Rev. 205, 231 (1976). The considerations the Court has viewed as distinguishing commercial speech from other speech, stated in the passage from *Bates* quoted above, are present here. The order does not offend the First Amendment.

III. *Vagueness*

[5] NCEN's argument that the order is unconstitutionally vague is based on the ALJ's statement of his reasons for not "predicat[ing]" a "finding of violation" on certain of the materials published by NCEN. In the material in question were quotations from an advisory report of a committee of British experts published by the British Government and from an editorial in an American medical journal, and commentary by NCEN critical of governmental action, including that of the FTC in this case. The ALJ said these materials "may warrant First Amendment protection," because they lacked the "strong promotional message" of the condemned material, were "basically true," contained information which was "a matter of public concern," and constituted "comment on government action." The FTC, however, stated,

> [W]e must reject the suggestion attributed to the ALJ . . . that [the materials just described] are necessarily not commercial publications, although they do not form the basis for our finding of liability in this matter.

In addition, after defining "advertising" to require a "tendency or capacity to induce the sale of the product," the FTC said,

> Publications designed to convey the point that consumption of a particular product, will not increase the risk of heart disease, are clearly likely to induce the purchase of that product. The fact that the message is conveyed by means of selected quotations from the works of scientists and popular writers does not alter the commercial character of the publication. Nor is it altered by self-serving professions of eleemosynary intent, e. g. "Brought to you in the public interest".[*] If anything the misleading effect of respondents' advertisements is enhanced by casting them in the guise of a "public service message" presented by an unidentified "National Commission".

The FTC's pronouncement eliminates any confusion the ALJ's statement may have caused. Further clarification is available from the FTC upon request, if the need arises. 16 C.F.R. § 3.61(d). See *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965). Neither the use of the term "advertisement" nor the comments of the ALJ on which NCEN bases its argument render the order unconstitutionally vague.

[6, 7] The FTC's order also prohibits (in paragraph I, C) advertising which

* Some of the advertisements carried this legend.

represents as insignificant the available scientific evidence that the consumption of dietary cholesterol, including that in eggs, may increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition

. . . .

or which

otherwise misrepresents the amount of scientific evidence that eating eggs does not increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition.

NCEN attacks this language as unconstitutionally vague. The FTC was of course not limited to prohibiting the precise misrepresentations that had occurred in the past. Here, as in *FTC v. Colgate-Palmolive Co., supra*, 380 U.S. at 393, 85 S.Ct. at 1047, the challenged language is "as specific as the circumstances will permit." In that case, the Court also stated,

> We think it reasonable for the Commission to frame its order broadly enough to prevent respondents from engaging in similarly illegal practices in future advertisements. As we said in *Federal Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470, 473 [72 S.Ct. 800, 96 L.Ed. 1081]: "[T]he Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past." Having been caught violating the Act, respondents "must expect some fencing in." *Federal Trade Comm'n v. National Lead Co.*, 352 U.S. 419, 431 [77 S.Ct. 502, 1 L.Ed.2d 438].

380 U.S. at 395, 85 S.Ct. at 1048. The challenged provision is not unconstitutionally vague.

IV. *The Required Additional Statement*

The order also directs NCEN to include in any future advertisements or public statement it makes concerning the relationship between eating eggs and heart and circulatory disease, the further statement that many medical experts believe increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease. (Paragraph I, B.) NCEN argues that, even if its advertisements contained misrepresentations, this provision of the order exceeds that which is necessary to prevent repetition of the violation.

[8, 9] The First Amendment does not permit a remedy broader than that which is necessary to prevent deception, *Beneficial Corp. v. FTC, supra*, 542 F.2d at 619–620, or correct the effects of past deception, *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 760 (D.C.Cir. 1977). In its present form, the challenged condition on the right to make an assertion that is not deceptive does not meet this test. Because the record here, unlike that in *Warner-Lambert Co. v. FTC, supra*, does not show a long history of deception which has so permeated the consumer mind that the "claim was believed by consumers after the false advertising had ceased," *id.*, at 771, we are concerned primarily with preventing future deception. The condition in its present form would require NCEN to argue the other side of the controversy, thus interfering unnecessarily with the effective presentation of the pro-egg position. The desired preventive effect can be achieved by requiring the disclosure that there is a controversy among the experts and NCEN is presenting its side of that controversy. The additional statement in the form now ordered by the FTC should be required only when NCEN chooses to make a representation as to the state of the available evidence or information concerning the controversy. As thus modified, the challenged condition would not unnecessarily curtail NCEN's right to present its position.

If the provision requiring an additional statement is so modified by the FTC, it will be enforced. The rest of the order will be enforced in its present form.

ENFORCED IN PART.

SUPPLEMENTAL OPINION ON FTC'S MOTION TO AMEND JUDGMENT NUNC PRO TUNC

The FTC has moved that we amend the above opinion "by performing the modification of the portion of the Commission's or-

der requiring affirmative disclosure of certain facts directed [in Part IV] of that opinion." A proposed form of order is submitted with the motion.[5] In response, petitioners oppose the motion, and also ask, in effect, that we reconsider other portions of our opinion.

Petitioners having omitted to file a petition for rehearing within the time allowed by Rule 40(a), Fed.R.App.P., we decline to entertain their request for reconsideration. Insofar as their arguments relate to their interpretation of Part IV of the opinion, they are without merit. It is true, as we said there, that this record does not show effects of the deceptive advertising on the consumer mind comparable to those in the *Warner-Lambert* case, and therefore "we are concerned *primarily* with preventing future deception" (emphasis supplied). The past cannot be totally ignored, however. Concrete evidence of past effects is likely to be difficult and expensive, if not impossible, to obtain in most deceptive advertising cases.[6] Even though such evidence is not present, the FTC is entitled to draw reasonable inferences as to the effects deceptive statements are likely to have had upon consumers. Although the weight we can give to these effects in the present case is limited by the absence of any findings by the FTC on the subject, we are at least entitled to assume that many persons interested in the egg-cholesterol question have read NCEN's advertisements, as it was intended they should, and that therefore enough taint remains to justify the limited corrective advertising order we have approved.[7]

The revised order the FTC now asks us to enter, which appears as an appendix hereto, carries out the directions contained in Part IV of our opinion. Inasmuch as that order is presumably the one that would be adopted by the FTC if the case were returned to it, there is no reason to delay the proceeding by a remand. Accordingly, the order entered by the FTC is modified to read as shown in the appendix and, as modified, is ordered enforced.

ENFORCED AS MODIFIED.

APPENDIX

The full text of the order of the Federal Trade Commission as modified, affirmed, and enforced by the Court is:

IT IS ORDERED that respondents National Commission on Egg Nutrition and Richard Weiner, Inc., corporations, their successors and assigns, either jointly or individually, and respondents' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of eggs for human consumption do forthwith cease and desist from:

A. Disseminating or causing the dissemination of any advertisement by

5. In a footnote in its supporting memorandum, the FTC states that its motion is not a concession of the correctness of the modification and reserves the right to file a petition for certiorari on this question.

6. See R. Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv.L.Rev. 661, 698 (1977):

> . . . Comparable proof of deception-perception-memory influence would be virtually impossible in most advertising cases.
>
> If the Commission is to do an effective job in regulating deceptive advertising, corrective advertising must apply to more than the one-in-a-million type of ad campaign present in *Warner-Lambert*.

(Footnote omitted.)

7. See Judge J. Skelly Wright's statement in *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 770 (D.C.Cir.1977):

> . . . [W]hatever incremental chill is caused by a corrective advertising order beyond that which would result from a cease and desist order may well be necessary if the interest of consumers in truthful information is to be served at all. Otherwise, advertisers remain free to misrepresent their products to the public through false and deceptive claims, knowing full well that even if the FTC chooses to prosecute they will be required only to cease an advertising campaign which by that point will, in all likelihood, have served its purpose by deceiving the public and already been replaced.

See also *Pitofsky, supra*, n. 6, at 692–693 and nn. 129–130, and Note, *"Corrective Advertising" Orders of the Federal Trade Commission*, 85 Harv.L.Rev. 477, 482–483 (1973), both of which Judge Wright cites in support of the quoted statement.

APPENDIX—Continued

means of the United States mails or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly

1. Represents that there is no scientific evidence that eating eggs increases the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition;

2. Represents that there is scientific evidence that dietary cholesterol, including that in eggs, decreases the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition;

3. Represents that there is scientific evidence that avoiding dietary cholesterol, including that in eggs, increases the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition;

4. Represents that eating eggs does not increase the blood cholesterol level in a normal person;

5. Represents that the blood cholesterol level is prevented from being raised or lowered by dietary cholesterol intake;

6. Represents that the human body increases its manufacture of cholesterol in an amount equal to a decrease in dietary cholesterol intake;

7. Represents that the average human body eliminates the same amount of cholesterol as that eaten;

8. Represents that dietary cholesterol, including that in eggs, is needed by the body for building sex hormones, for transmitting nerve impulses and for maintaining life in cells; or

9. Utilizes the name "National Commission on Egg Nutrition" unless it is clearly and conspicuously disclosed in immediate conjunction with the name that the National Commission on Egg Nutrition is composed of egg producers and other individuals and organizations of, or relating to, the egg industry.

B. Disseminating, or causing the dissemination, of any advertisement by means of the United States mails or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly

1. Represents that eating eggs does not increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition or

2. Makes any representation concerning the relationship of dietary cholesterol, including that in eggs, to heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition

unless it is clearly and conspicuously disclosed in immediate conjunction therewith that there is a controversy among medical experts concerning the relationship of dietary cholesterol, including that in eggs, to heart disease, and that respondents are presenting their side of that controversy.

C. Disseminating, or causing the dissemination of, any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly

1. Represents that there exists, or describes, scientific evidence which supports the theory that consumption of dietary cholesterol, including that in eggs, does not increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition or

2. Makes any representation concerning the state of the available evidence or information concerning the relationship of dietary cholesterol, including that in eggs, to heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition

unless it is clearly and conspicuously disclosed in immediate conjunction therewith that many medical experts believe that existing evidence indicates that increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease.

APPENDIX—Continued

D. Disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly

1. Represents as insignificant the available scientific evidence that the consumption of dietary cholesterol, including that in eggs, may increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition, or represents that there is overwhelming scientific evidence or otherwise misrepresents the amount of scientific evidence that eating eggs does not increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis or any attendant condition.

2. Misrepresents in any manner the physiological effects of consuming dietary cholesterol or eggs.

Exhibit 76: "Abatement of Corporate Image Environmental Advertising," 4 *Ecology Law Quarterly* 247 (1974)

Abatement of Corporate Image Environmental Advertising*

*Charles E. Ludlam***

Since the early part of this century, many corporations have been spending considerable portions of their advertising budgets on attempts to project favorable public images. In recent years much of this image advertising has been focused on mammoth campaigns designed by many of the largest industrial concerns to portray themselves as leaders in the fight for a clean, healthy environment. This Article, written by an attorney for the Federal Trade Commission, describes and categorizes the nature, extent, and effects of corporate image advertising, especially that dealing with environmental issues. The author discusses the applicability of the first amendment guarantee of free speech to this advertising, delving into the "commercial speech" exception delineated by the Supreme Court. Pointing out the need to control such advertising, he outlines a possible regulatory role for the Federal Trade Commission.

Corporate advertising designed to project a positive environmental image is prevalent in the nation's communications media and has become especially common following the advent of the "energy crisis."[1]

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* Remarks made in this article are solely those of the author and are not intended to be, and should not be construed as, representative of an official Federal Trade Commission policy. In presenting the author's views it must be emphasized that no reference is intended to the merits of any case or investigation currently before or contemplated by the Commission; to do so would be unfair to the parties concerned and would be to rely on incomplete facts.

This article incorporates and elaborates upon a speech written with the assistance of the author and delivered by David S. Dennison, former Commissioner, Federal Trade Commission, at the 1973 FORTUNE Corporate Communications Seminar held at the Sterling Forest Conference Center, Tuxedo, N.Y., on May 2, 1973. The speech was reviewed briefly in *Value of Corporate Ads Debated by Agency Men*, ADVERTISING AGE, May 21, 1973, at 26. The text of that speech is reprinted in *Crosscurrents in Corporate Communications No. 2, Highlights of the 1973 Fortune Corporate Communications Seminar*, published by Time Magazine Inc. Copies may be obtained for $1.75 from James B. Hoefer, Advertising Director, FORTUNE, Time-Life Building, Rockefeller Center, New York, N.Y., 10020.

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1. The definition and extent of corporate image advertising are discussed in text

This advertising has often been a subject of criticism.[2] Although it is defended by some for its education of the public on activities of companies that have "joined the fight against pollution,"[3] many environmentalists consider this advertising to be "ecopornography."[4]

Whatever one's reaction to environmental advertising, its prevalence poses a significant challenge for the Federal Trade Commission,[5] which is charged with regulating false, deceptive, or unfair advertising,[6]

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accompanying notes 18-21 *infra*. Oil company image advertising in particular is recently in evidence. *See Oil Ads Center on Corporate, TBA*, ADVERTISING AGE, Sept. 17, 1973, at 1; *Winter Heating Outlook Tops New Oil Ad Themes*, ADVERTISING AGE, Oct. 29, 1973, at 1; *Energy Boss Warns Oil Marketers: No Gasoline Promotion*, ADVERTISING AGE, Aug. 12, 1974, at 1; *Amoco's Ads Tell Benefits of Lead-Free Fuel*, ADVERTISING AGE, Oct. 14, 1974, at 4.

2. Statement of Lawrence S. Blumberg, Public Action To Protect Environmental Resources (P.A.P.E.R.), *Hearings on S. 1461 Before the Sen. Comm. on Commerce*, 92d Cong., 2d Sess., ser. 92-70, at 104 (1972) [hereinafter cited as *Advertising 1972*]; Statement of Sam Love, Editor, Environmental Action, *Hearings on Activities of Regulatory Agencies Relating to Small Businesses Before the House Select Comm. on Small Business*, 92d Cong., 1st Sess., 453 (1971); SANDMAN, note 17 *infra*; Turner, *Eco-Pornography, or How to Spot an Ecological Phony*, in THE ENVIRONMENTAL HANDBOOK 263 (1970); Turner, *Eco-Pornography Revisited*, in THE VOTER'S GUIDE TO ENVIRONMENTAL POLITICS 115 (1970); *Ecopornography*, ENVIRONMENT ACTION BULL., Feb. 17, 1973, at 1; Sandman, *Who Should Police Environmental Advertising?*, COLUM. JOURNALISM REV., Jan.-Feb. 1972, at 41; Mander, *Eco-Pornography: One Year and Nearly a Billion Dollars Later, Advertising Owns Ecology*, COMMUNICATION ARTS, Nov. 2, 1972; Weiss, *Management: Don't Kid the Public With Those Noble Anti-Pollution Ads*, ADVERTISING AGE, Aug. 3, 1970, at 35.

3. Advertising Supplement, *What Are We Doing About Our Environment?*, READER'S DIGEST, Sept. 1971, at 171 (reprints available at nominal cost from P.O. Box 5905, Grand Central Station, New York, N.Y. 10017) [hereinafter cited as *Digest Supp.*]; see also note 9 *infra*; Ways, *Business Needs to Do a Better Job of Explaining Itself*, FORTUNE, Sept. 1972, at 85; *see generally* G. FLANAGAN, MODERN INSTITUTIONAL ADVERTISING (1967); J. RILEY, THE CORPORATION AND ITS PUBLICS (1963); BRISTOL, DEVELOPING THE CORPORATE IMAGE, 1960.

4. See note 2 *supra*.

5. For an excellent summary of the first amendment and other issues facing the FTC in regulating image advertising, *see* Address by former Commissioner Mary Gardner Jones, *Public Service Oriented Advertising: A Regulatory Dilemma*, presented before the Corporate Counsel Ass'n of Minn., Apr. 30, 1971 (Copies available upon request to the Office of Public Information, Federal Trade Commission, Washington, D.C. 20580).

6. Recent cases have held that an advertisement may be unfair without being false or deceptive. *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972); *compare In re* Pfizer, Inc., 81 F.T.C. 23 (1972) *with In re* Firestone Tire & Rubber Co., 81 F.T.C. 398 (1973), *aff'd*, 481 F.2d 246 (6th Cir. 1973), *cert. denied*, 94 S. Ct. 841 (1973). In *Sperry & Hutchinson* the Supreme Court noted that the

> Commission has described the factors it considers in determining whether a practice that is neither in violation of the antitrust laws nor deceptive is nonetheless unfair:
>
> '(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at

and for other governmental and non-governmental bodies with potential interests and jurisdiction in this field.[7] This challenge poses questions both of law and policy. The legal questions arise under the first amendment, which may bar the exercise of FTC jurisdiction. The policy questions arise if that jurisdiction is established. This article will deal only with corporate *image* environmental advertising, not corporate *product* advertising, because no barrier exists to the Federal Trade Commission's active regulation of false, deceptive, or unfair product advertising regarding the environmental consequences of a product.[8]

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least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).'

Id. at 244-45, n.5, citing the *Statement of Basis and Purpose of Trade Reg. Rule 408* (Cigarette Rule), 29 Fed. Reg. 8355 (1964). In *Pfizer, supra*, the Commission stated that it is an unfair practice to make claims in advertising for which the advertiser has no "reasonable basis." *Id.* at 62, 64. The precise formulation of this standard "is an issue to be determined . . . on a case-by-case basis." *Id.* at 64. *See In re* Nat'l Dynamics Corp., 82 F.T.C. 488 (1973), *aff'd in part, remanded in part*, Civil No. 73-1754 (2d Cir. 1974); Baker & Baum, *Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition*, 7 VILL. L. REV. 517 (1962); Comment, *Section 5 of the Federal Trade Commission Act—Unfairness to Consumers*, 1972 WIS. L. REV. 1071 (1972); Austern, *What Is "Unfair Advertising?"*, 26 FOOD, DRUG, COSMETIC L.J. 659 (1971); Note, *The Pfizer Reasonable Basis Test—Fast Relief for Consumer But A Headache for Advertisers*, 1973 DUKE L.J. 563; Note, *Unfairness in Advertising: Pfizer, Inc.*, 59 VA. L. REV. 324 (1973). More recently the Commission has issued complaints against the three leading advertisers of non-description analgesic drugs alleging, *inter alia*, that it is an unfair act or practice to make performance, effectiveness, or side effects claims when there existed a "substantial question, recognized by experts qualified by scientific training and experience to evaluate the safety and efficacy of such drugs, as to the validity of such" claims. *See, e.g., In re* Bristol-Myers Co., No. 8917 (FTC, Feb. 23, 1973). Regardless of which of these legal theories is relied upon, it is the Commission's burden to establish the nature of the representations contained in the challenged advertising, whether they are explicit or implied. It is well established law that if an advertisement contains multiple representations, the advertiser may be held liable if any one of the material representations made is false, deceptive, or unfair. Rhodes Pharmaceutical Co. v. FTC, 348 U.S. 940 (1955).

7. Some of the agencies or bodies with potential interest or jurisdiction in the field of image advertising are discussed in text accompanying notes 97-115 *infra*.

8. *See, e.g., In re* Crown Central Petroleum Co., 3 Trade Reg. Rep. ¶ 20,348 (1973). For general information on the regulation of advertising, see *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005 (1967); Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439 (1964); Thain, *Consumer Protection: Advertising—The FTC Response*, 26 FOOD, DRUG, COSMETIC L.J. 609 (1971); Loomis, *Those Throbbing Headaches on Madison Avenue*, FORTUNE, Feb. 1972, at 102. Advertising claims which are related to environmental concerns, such as automobile mileage claims, have also been the subject of extensive Commission action. *See, e.g., Automobile Fuel Economy Claims* [FTC Rulemaking Proposal], 39 Fed. Reg. 34382 (Sept. 24, 1974); and *In Re* General Motors Corporation, Docket C-2564 (Oct. 7, 1974) (consent settlement regarding fuel economy claims); *Ford Set to Use New E.P.A. Mileage Data*, ADVERTISING AGE, Sept. 23, 1974, at 111.

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I

IMAGE ADVERTISING: FACTS, HISTORY, ANALYSIS

A. Industry's Tarnished Image

The role of industry in creating or abating pollution has been hotly debated in recent years. In a May 1970 survey, commissioned by *Reader's Digest*,[9] 52 percent of the respondents rated pollution as the most or second most important domestic problem. Only the cost of living rated higher. 72 percent of the respondents placed "a great deal" of the responsibility for pollution on private industry. Almost half rated industry's pollution abatement efforts as "poor or very poor." Only 12 percent gave business good marks for combating pollution. Surprisingly, 83 percent said that they were willing to give up certain products to help solve pollution problems. A second *Reader's Digest* survey confirmed these results.[10] More recently, an Opinion Research Corporation study[11] found that 53 percent of the sample thought corporations were doing "very little" to control pollution—up from 41 percent only five years before. Significantly, 81 percent thought that plants which violate pollution laws should be closed, an increase from 70 percent five years before. A poll of business school students published in *Business and Society* in July, 1972, ranked 50 American corporations on their social responsibility.[12] Utilities, oil companies, and steel companies were ranked low while banks and insurance companies were ranked high. Presumably the reputation of the former as polluters was a major factor. This latter poll indicates serious image problems for major corporations among potential employees. The recent "energy crisis"[13] may worsen business' image; in a Gallup Poll at the

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9. Nat'l Family Opinion, Inc., *Environment Study Conducted for Reader's Digest*, May, 1970, in *Reader's Digest* Prospectus for Advertising Supplement, *What Are We Doing About Our Environment?* (Sept. 1971). For a critical analysis of the Supplement, *see* Council on Economic Priorities, *Corporate Advertising and the Environment*, ECONOMIC PRIORITIES REPORT (Sept.-Oct. 1971), reprinted in *Advertising 1972*, *supra* note 2, at 111. A review and partial reprint of the C.E.P. Report is found in COMMUNICATION ARTS, Nov. 2, 1972, at 17.

10. *Trendex Public Issue Study Conducted for Reader's Digest* (May, 1970). In this study, 70.9 percent of the respondents agreed with the statement, "Both air and water pollution are among the most serious problems facing America today." Approximately 35 percent thought the problem would be corrected by industry while 65 percent thought government legislation and political pressure by the public were more effective.

11. Opinion Research Corp., *Trends in Public Attitudes Toward Business and the Free Enterprise System*, presented to the White House Conference on the Industrial World Ahead, Washington, D.C.; reprinted in *Crosscurrents in Corporate Communications: Highlights of the 1972 Fortune Corporate Communications Seminar*, FORTUNE MAGAZINE.

12. *Corporate Ratings—From Xerox to Con Ed*, BUSINESS AND SOCIETY, July 4, 1972, at 1.

13. The FTC has recently charged the eight leading petroleum companies with an-

height of the "energy crisis," 25 percent of the people surveyed thought the oil companies were responsible for the crisis, slightly more than attributed responsibility to any other cause.[14]

B. *Image Advertising As Industry's Response*

Whether or not the image of industry with regard to environmental protection is in all cases deserved, many corporations have taken to defending themselves in corporate image environmental advertising. The *Reader's Digest* survey, mentioned above, was used in the magazine's prospectus to promote an Advertising Supplement on the environment, which eventually appeared in its September, 1971 issue.[15] Many magazines, including *Fortune*, *Time*, *Newsweek*, *Barron's*, and *The New Yorker*, have prepared extensive materials to justify corporate expenditures on image advertising and to encourage corporations to engage in image advertising.[16]

It is important to gain some understanding of the nature and extent of image advertising; this, however, is a difficult term to define.[17]

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titrust violations. *In re* Exxon Corp., No. 8934, 3 Trade Reg. Rep. ¶ 20,388 (complaint issued) (July 17, 1973). The Director of the Bureau of Consumer Protection, James Halverson, stated in a press conference on July 18, 1973, that the Commission was not charging these companies with having caused the energy crisis but only with having taken advantage of it. See notes 56, 58 *infra*.

14. Gallup, *25% Blame Oil Firms for Crisis*, Wash. Post, Jan. 10, 1974, at A15, col. 1.

15. *Digest Supp.*, *supra* note 3.

16. Salter, *The Case for Corporate Advertising*, included in TIME MAGAZINE promotional materials for corporate advertising, from their LIBRARY OF BUSINESS AND INDUSTRIAL MARKETING, undated (emphasizes impact on financial community). Also from the TIME LIBRARY *see Strategic Advertising: 1850-1962, An Historical Portfolio; Strategic Advertising: A Portfolio from the Pages of the U.S. Editions of Time*, mostly taken from 1970 (100 corporate ads divided into 16 categories including Management Philosophy, Public Responsibility, and Recruitment). *See also* FORBES MAGAZINE, THE IMAGE BUILDER (1970), a portfolio of corporate advertisements with a commentary on the emphasis of each; several publications by NEWSWEEK MAGAZINE, ACCOUNTABILITY: TESTED CAMPAIGNS BY MONSANTO AND WESTINGHOUSE PROVE THAT CORPORATE ADVERTISING PAYS ITS WAY (1965); CORPORATE ADVERTISING IN TODAY'S ECONOMIC CLIMATE: AN EVALUATION BY NEWSWEEK; VITAL TARGETS OF CORPORATE COMMUNICATIONS; SOCIAL INVOLVEMENT—A CORPORATE STAKE IN THE FUTURE; THE CHANGING CORPORATE PROFILE (ALLIS CHALMERS); CORPORATE COMMUNICATIONS (with portfolio).

For bibliographies of similar publications see PUBLIC RELATIONS J., Nov. 1971, at 70; PUBLIC RELATIONS J., Nov. 1972, at 74; PUBLIC RELATIONS J., Nov. 1973, at 62.

17. Attempts have also been made to define "environmental advertising," most notably by Dr. Peter M. Sandman, now Assistant Professor, School of Natural Resources, U. of Michigan, in *Eco-Pornography: Environmental Advertising and Advertising Acceptance in the San Francisco Bay Area*, unpublished Ph.D. Thesis, Stanford U., (Aug. 1971). In Chapter 2, *Environmental Advertising: Prevalence and Acceptability*, Dr. Sandman defines "environmental advertising" as including both "ads, regardless of the product or service advertised, that explicitly refer to the environment in their copy" and "ads, regardless of their copy, that are on behalf of a product or service with clear-cut environmental implications."

The Publishers Information Bureau (P.I.B.) and Leading National Advertisers (L.N.A.) both report on the amount of "General Promotion Advertising" found in most of the nation's consumer magazines and newspaper supplements. Their definition of "General Promotion Advertising" includes advertising which is "devoted primarily to selling the corporate personality; its first objective goes *beyond* the direct sale of a single product or service."[18] While this definition indicates that the effects of an image advertisement may include the sale of products or services, it distinguishes General Promotion Advertising from brand and multi-brand advertising, political advertising, public service advertising, and association advertising. With these restrictions, the total billings for General Promotion Advertising in the 100 magazines covered by the report amounted to 68 million dollars for 1972.[19] "Association advertising," most of which promotes corporate image, added 23 million, for a total of 91 million dollars. Using somewhat different definitions and including amounts paid for broadcast and newspaper advertising results in figures ranging from the hundreds of millions all the way to one billion dollars.[20]

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18. PUBLIC RELATIONS J., Nov. 1973, at 30 [hereinafter cited as *P.I.B. Survey*]. *See* PUBLIC RELATIONS J., Nov. 1972, at 26 and PUBLIC RELATIONS J., Nov. 1971, at 30 for 1970 and 1971 figures.

According to P.I.B., an image ad must fulfill one or more of the following purposes:

> It must educate, inform, or impress the public regarding the company's policies, functions, facilities, objectives, ideals, and standards.
>
> It must build favorable opinion about the company by stressing the competence of the company's management, its scientific knowhow, manufacturing skills, technological progress and product improvements, and its contribution to social advancement and public welfare, and on the other hand, to offset unfavorable publicity and negative attitudes.
>
> It must build up the investment qualities of its securities, or improve the financial structure of the company.
>
> It must sell the company as a good place to work (and so is often designed to appeal to college graduates or to people of certain skills).

Another definition of image advertising, broader than the one used here, served as the basis for a major INDUSTRIAL MARKETING survey in 1967. The INDUSTRIAL MARKETING definition was, "Advertising in media, the prime audience of which is other than a direct influence on the purchase of a product or products, and the motive behind which is the projection of the corporate image (even though such advertising may be 'product' in nature)." Harding, *Corporate vs. Product Advertising*, INDUSTRIAL MARKETING, Sept. 1967, at 60. One of the ad agencies questioned in that survey proposed a definition which seemed to obliterate any distinction between corporate image and product advertising by defining the former as, "advertising conceived and placed on behalf of a total company with the prime objectives of creating a more favorable climate for the sale of all of the company's products, present and future." *Id.* at 61.

19. *P.I.B. Survey*, *supra* note 18.

20. In compiling network and spot television expenditures, BROADCAST AD REPORTS does not use a formal definition for image advertising, but its coders are instructed to determine whether the public can consume the advertised entity. If it cannot, the ad is termed an "image advertisement." Unlike P.I.B.-L.N.A., BROADCAST AD REPORTS includes public service advertising within the image category, but like the others, it does exclude political and association advertising. The resulting total cost for both corporate

The amount spent on image advertising is a controversial issue, particularly important to environmentalists, who are anxious to compare the amount spent on advertising pollution abatement with the amount spent on the abatement itself.[21]

Examples of image advertising are easy to find. One type is advertising which seeks to relate corporate activities or products directly to the corporation's sense of social responsibility, without at the same time describing any particular product or service of the company; examples are a paper company advertising that steps have been taken to minimize effluent discharges at one of its pulp mills or an auto manufacturer describing its efforts to produce a catalytic converter to reduce auto emissions. The emphasis in such advertisements is on the worth or reputation of the company, it employees, and therefore, all of its activities. These ads do not present—except very indirectly—arguments in favor of any particular position on a controversial public issue. Although the information contained in such advertisements may arguably have latent relevance to controversial public issues, that relevance is never made explicit.

It is important to distinguish "image advertising" from "public service advertising," in which a corporation addresses topics *not* directly related to corporate activities or products, such as a steel company advertising the benefits of the Girl Scouts or an oil company explaining the facts about marijuana. It can, of course, be argued that indirectly every corporation has an interest in every public or private activity or problem, the Girl Scouts and marijuana included. For example, use of marijuana may be a significant personnel problem which seriously affects corporate productivity. Similarly, the very fact that a corporation will speak out on such matters may reflect favorably on the corporation's sense of social responsibility. However, such advertisements are not corporate image advertisements in the sense here discussed, as they

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and association television advertising for 1972 was 161 million dollars. With magazine, radio, and outdoor advertising added, the total cost for corporate image advertising for 1972 was at least 267 million dollars. Other sources put the total expenditures much higher. For example, privately-owned utilities alone spent 300 million dollars on advertising in 1970. FEDERAL POWER COMM'N, STATISTICS OF PRIVATELY-OWNED UTILITIES IN THE U.S. IN 1970 (1971). Much of this advertising promoted the image of utilities and thus could be included in the total. One critic of environmental advertising claims that the grand total, including product and utility advertising, is one billion dollars a year. Mander, *supra* note 2.

21. Debate on this question was especially heated in the phosphate pollution controversy, that is, whether expenditures by the detergent industry for development of a non-phosphate detergent were comparable to their advertising expenses for phosphate detergents. *See Hearings on the Toxic Substances Control Act of 1971 and Amendment (S. 1478) Before the Subcomm. on Environment of the Senate Comm. on Commerce*, 92d Cong., 1st Sess., ser. 92-50, pt. 2 (1972); Rukeyser, *Fact and Foam in the Row Over Phosphates*, FORTUNE, Jan. 1972, at 71.

do not describe the corporation itself but are more in the nature of editorials, which are unlikely to have the effect of corporate image advertisements and less likely to be deceptive.[22]

The definition of image advertising outlined above does not include all that may be called image advertising. It does, however, include most of the ads which have caused controversy. Although this article addresses only image advertising on environmental issues, the analysis also applies to advertising which focuses on issues such as minority rights, equal employment opportunity, and women's rights.[23] Advertising by utilities raises distinct legal and policy issues.[24]

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22. An advertisement describing the corporation might result in responses relating to the corporation itself while an editorial would be taken more as a statement of opinion, not leading to a response directly related to corporate activities. Statements of opinion are likely to be weighed by the viewer against other statements of opinion whereas claims regarding corporate activities are not readily comparable to or neutralized by competing claims. While many product advertisements now name their competitors and directly refute competing claims, environmental image advertising as yet stresses only the advertiser's virtues, without criticizing the environmental programs of its competitors.

23. *See, e.g.*, Council on Economic Priorities, *Advertising to the Military*, ECONOMIC PRIORITIES REPORT (Nov.-Dec. 1972).

24. The issues raised by utility advertising are, for example, possible concurrent or preemptive jurisdiction by the Federal Power Commission or Atomic Energy Commission and conflicts in jurisdiction between these agencies and the local public service or utilities commissions. The propriety of a public utility advertising at all or advertising to increase consumption of scarce fuels or to cause other shifts in fuel consumption or use patterns, and then including the cost of such advertising in the utility's operating expenses, is a matter of extreme controversy and well beyond the scope of this article. However, it appears clear that at least a utility's promotional advertising—as distinct from image or public service advertising—is no more protected by the first amendment than is corporate product advertising. The best single source of information on the regulation of utilities' promotional advertising is Jerabek, *A Survey of State Utility Regulatory Commissions: Initiatives Taken to Affect the Growth In Demand For Electric Power* (July 1973), available from the Environmental Action Foundation, Room 720, Dupont Circle Building, Washington, D.C. 20036. *See also* FEDERAL POWER COMM'N, PROMOTIONAL PRACTICES OF PUBLIC UTILITIES: A SURVEY OF RECENT ACTIONS BY STATE REGULATORY COMMISSIONS, A REPORT TO THE SUBCOMM. ON REGULATORY AGENCIES, SELECT COMM. ON SMALL BUSINESS (1970); E. HIRST, ELECTRIC UTILITY ADVERTISING AND THE ENVIRONMENT, 1970, Oak Ridge Nat'l Lab., Nat'l Sci. Found. Environmental Program (an updated and expanded version of this report may soon be released); Sesser, *Critics Say Utilities Worsen Power Problems by Pushing Electricity*, Wall St. J., July 27, 1972, at 1, col. 8; Council on Economic Priorities, *The Price of Power, Electric Utilities and the Environment*, ECONOMIC PRIORITIES REPORT (May-June 1972); L. METCALF, OVERCHARGE, ch. 9 (1967); Permar, *A Legal Solution to the Electric Power Crisis: Controlling Demand Through Regulation of Advertising, Promotion, and Rate Structure*, ENVIRONMENTAL AFFAIRS, Dec. 1971, at 670; *Portfolios of The Electric Companies Advertising Program*, available from N.W. Ayer & Son, Inc., 1345 Ave of the Americas, N.Y., N.Y. 10019 and The Electric Energy Ass'n, 90 Park Ave., N.Y., N.Y. 10016.

The Environmental Action Foundation is serving as a clearinghouse of information on citizen challenges to electric utility policies, including promotional and image advertising. They have recently published a citizen's handbook on utility challenges, entitled,

Corporate image advertising thus defined has a long history. Often cited as the pioneering corporate advertising program, American Telephone and Telegraph Company began image advertising in 1908.[25] Although this type of advertising was then far more likely to be called public-service or institutional advertising, its objective was then—as now—to make known and understood the purposes, problems, and policies of the telephone system. Streetcar companies advertised to teach the rules of the road and to allay prejudices against their companies. Railroads promoted "safety first." During the wars, image advertising concentrated on interpreting the corporation's role in the war effort. A trend was established; increasing amounts of image advertising have been disseminated since.

C. *Image Advertising Analyzed*

The purpose of corporate *product* advertising is clearly to promote sales and use of a particular product.[26] Most product advertisements

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How to Change Your Local Utility: A Citizen's Guide to the Power Industry, available for $1.50 (1974) and plan to publish a citizen's newsletter dealing with electric utilities. Their phone number is (202) 659-9682. Groups and individuals who have attempted or considered intervening in public hearings before state utilities commissions include Citizens For a Better Environment, before the Illinois Commerce Comm'n concerning Commonwealth Edison Co. advertising, Philip E. Miller, Ass't Dir. For Research, 256 North Clark St., Chicago, Ill. (312) 248-1984; the Sierra Club, before the P.U.C. of Ohio regarding advertising by the Cleveland Electric Illuminating Co., Dr. Tom Jenkins, Physics Dep't, Case Western Reserve U., Cleveland, Ohio, 44106, (216) 368-2999; The Iowa Public Interest Research Group regarding Iowa Power and Light Co. advertising for the Duane Arnold Energy Center, Skip Laitner, IPIRG, Activities Center, Iowa Memorial Union, Iowa City, Iowa 52242 (515) 255-6710. Of special note to the discussion of image advertising generally is the action of the Oklahoma Public Service Commission which has prohibited both institutional and promotional advertising. Many of the parties to that proceeding raised the argument that image adverising cannot be regulated, let alone prohibited, because of the first amendment. *See Public Utilities Face Increased Pressure to Cut Ads*, ADVERTISING AGE, Nov. 26, 1973, *Demarketing Power: Utility Companies Explain the Energy Crisis*, PUBLIC RELATIONS J., Nov. 1973, at 32.

25. MAGAZINE ADVERTISING BUREAU, COMMUNICATING THE TOTAL CORPORATE PERSONALITY (available from the Magazine Publishers' Ass'n, 575 Lexington Ave., N.Y., N.Y., which maintains an excellent library on corporate communication). *See also Strategic Advertising: 1850-1962*, *supra* note 16; for a copy of the 1908 AT&T ad, *see* PUBLIC RELATIONS J., Nov. 1971, at 22.

26. The debate regarding the relative merits of image and product advertising is intense. *Industrial Ads: A Debate Heats Up*, BUSINESS WEEK, July 17, 1971, at 68-69; Galli, *Corporate Advertising: More Than Just a Nice Warm Feeling All Over*, PUBLIC RELATIONS J., Nov. 1971, at 19; *It's Hard to Say if Sales of Anything Have Gone Up in 1970, But Ads Are Getting Better*, INDUSTRIAL MARKETING, Sept. 1970, at 69; Tyler, *Look How These Ads Combine Business and Public Service*, ADVERTISING AGE, May 4, 1970, at 70; Weiss, *Most Corporate Image Advertising Couldn't Pass Ten Simple Tests*, ADVERTISING AGE, Nov. 3, 1969, at 79; Weil, *Role of PR in Environmental Action*, PUBLIC RELATIONS J., Nov. 1970, at 10; *When Corporate Advertising Is the Answer*, PUBLIC RELATIONS J., Nov. 1973, at 12.

do not even mention the company producing the product, particularly where the same company also sells a number of very similar brands. But corporate *image* advertising concentrates heavily on the company name and has more complex purposes and effects, some of which can be identified relatively easily:

1. In the case of a company which sells products or components which are associated with its name, image advertising about corporate activities may favorably affect the sales of such products.[27] Common

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For case studies on the purpose and impact of corporate image advertising, *see Alcan Cuts Corporate Campaign in Midstream*, INDUSTRIAL MARKETING, Oct. 1967, at 80; Trout, *Uniroyal Takes a Middle Road*, INDUSTRIAL MARKETING, Oct. 1967, at 82; *Trees Pay Off for St. Regis*, INDUSTRIAL MARKETING, Dec. 1967, at 39; *Sperry Rand Pulls Itself Together*, INDUSTRIAL MARKETING, Dec. 1967, at 42; Black, *It's a Small Company's Dilemma*, INDUSTRIAL MARKETING, Dec. 1967, at 46; *Marbon Chemical Goes "Consumer"*, INDUSTRIAL MARKETING, Nov. 1967, at 52; *Keeping The Name in Front of the Public*, INDUSTRIAL MARKETING, Nov. 1967, at 62; Herhusky, *Corporate Identity—By Design, Not Default*, INDUSTRIAL MARKETING, Nov. 1969, at 49; Shylar, *A Quiet Revolution . . . The Rise of the Corporate Image*, INDUSTRIAL MARKETING, Sept. 1967, at 63 (emphasizing impact on financial community); Gerrity, *ITT's Approach to Corporate Advertising*, PUBLIC RELATIONS J., Nov. 1972, at 33; *Corporate Advertising: Those Who Try It Like It*, PUBLIC RELATIONS J., Nov. 1972, at 43 (case studies of Tenneco Chemical, Liberty Mutual, Burlington Northern, Sperry Rand, Chrysler Motors, State Farm Insurance Companies, Metropolitan Life, Trans Union, North American Rockwell); Cloke, *A Corporate Case History* (North American Rockwell), TIME MAGAZINE materials, *supra* note 16, *U.S. Steel—"We're Involved," RCA—"The Electronic Way," AT&T—"We Hear You,"* and *Texaco—"Putting Aesop to Work,"* PUBLIC RELATIONS J., Nov. 1973.

For general studies attempting to measure the effectiveness of corporate image advertising, *see* Thomas E. Ryan, Inc., *Strategic Advertising and Attitudes Toward Corporations* (1972), fifth in a series of studies for Time Magazine, Inc., included in *Time Promotional Materials*, *supra* note 17; Thomas E. Ryan, Inc., *Measuring Strategic Advertising Effectivenss* (1971), fourth in same series (measures changes in general impression towards company knowledge of its activities, acceptance of new product claims, impression of company's research and development activities, rating of company's stock, impression of company as a place to work, and personal inclination to invest in its stock). *See also The Impact of Corporate Advertising on the Institutional Money Manager*, *infra* note 34, research sponsored by BARRON'S MAGAZINE; *Is Advertising, Too, Read For Profits in Barrons: Here's What Starch Has to Say*, ads in BARRON'S MAGAZINE, 1971-72.

For general commentary on the benefits and detriments of corporate image advertising *see What Industrial Advertisers Really Think*, INDUSTRIAL MARKETING, Oct. 1967, at 73-75; *Sales Executives Express Positive Attitude About Value of Advertising*, INDUSTRIAL MARKETING, July 1972, at 42; Harding, *Corporate vs. Product Advertising*, INDUSTRIAL MARKETING, Sept. 1967, at 59; Hewens & Poppe, *Corporate Advertising: New Imperatives for an Old Device*, PUBLIC RELATIONS J., Nov. 1972, at 8.

For a list of ways to use corporate advertising, *see Corporate Advertising and its Function*, release of THE NEW YORKER MAGAZINE No. 2381; Hofsoos, *Thirty-Two Ways to Use Industrial Advertising*, INDUSTRIAL MARKETING, Feb. 1972, at 46.

Finally, for the single best bibliography of all of the above see AMER. MARKETING ASS'N, IMAGES AND MARKETING (1971).

27. For example, it has been shown that appeals to consumers' concerns about the environment are effective. Kinnear, Taylor & Ahmed, *Ecologically Concerned Consumers: Who Are They?*, 38 J. OF MARKETING, Apr. 1974, at 20; Kinnear & Taylor, *The Effect of Ecological Concern on Brand Perceptions*, 10 J. OF MARKETING RESEARCH,

logos or tag lines maximize the association of the product with the image advertisement.[28] Image advertising may prove especially important during recessions and shortages of particular products when it may not be appropriate to advertise the products directly. Studies of advertising before, during, and after the 1949, 1954, 1958, and 1961 recessions found that firms which did not cut their advertising budgets during these recessions did much better in sales and profits in the year following the recession than those which had cut their budgets.[29]

2. Positive environmental image advertising encourages investment in the company by individuals, universities, foundations, mutual funds, and others whose concern for the environment may affect their investment decision. E.B. Weiss has stated that "a substantial percentage of corporate image advertising is intended, primarily or secondarily, to appeal to the financial community."[30] Some investment groups may operate under an assumption that a company which pays close attention to environmental problems will also pay attention to the broad range of other factors which affect a company's long run profitability. However, there exists substantial controversy whether a socially responsible company is likely to be more profitable.[31] Positive environmental image advertising may attract other investors, who would not wish to invest in a company which is likely to face expensive litigation with pollution control agencies or public interest groups, which may have to in-

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May 1973, at 191; Henion, *The Effect of Ecologically Relevant Information on Detergent Sales*, 9 J. OF MARKETING RESEARCH, Feb. 1972, at 10.

The importance of the environmental aspect of corporate activity to investors was recognized in 1971 by the SEC. In that year, it promulgated a release requiring disclosure to investors when compliance with environmental protection statutes may necessitate significant capital outlays, may materially affect the earning power of the business, or cause material change in the business being carried out or intended to be carried out. Securities Act Release No. 5170, Exchange Act Release No. 9252 (July 19, 1971), CCH Securities Law Reporter ¶ 78,150, as amended, Securities Act Release No. 5386 (May 9, 1973).

28. B. ROSEN, THE CORPORATE SEARCH FOR VISUAL IDENTITY (1970); P. MARTINEAU, MOTIVATION IN ADVERTISING 5-7, 18 (1957).

29. THE BUCHEN CO., ADVERTISING IN RECESSION PERIODS: A NEW YARDSTICK (1958); THE BUCHEN CO., ADVERTISING IN RECESSION PERIODS: A NEW YARDSTICK REVISITED (1970); ELMO ROPER SURVEY FOR THE AMER. ASS'N OF ADVERTISING AGENCIES, COMMENTS ON THE VALUE OF ADVERTISING IN TIMES OF SHORTAGES, 1947-1964; Kotter, *Marketing During Periods of Shortages*, 38 J. OF MARKETING 20 (July 1974); *How To Market During Periods of Shortages and Confusion*, Wall St. J., Jan. 17, 1974, at 11 (Advertisement by Metromedia, Inc.).

30. ADVERTISING AGE, Nov. 3, 1970, at 80.

31. RESEARCH DEP'T, BATTEN, BARTON, DURSTINE & OSBORN, INC., HOW PUBLIC ATTITUDES INFLUENCE CORPORATE PROFITS (1969) (attempt to show relationship between price/earnings ratio and public reputation); *Social Responsibility Stocks Outperform the Market*, BUSINESS & SOCIETY, Jan. 16, 1973.

Burck, *The Hazards of Corporate Responsibility*, FORTUNE, June 1973, at 114; Wallich, *Books and Ideas: How Business Can Rescue Capitalism*, FORTUNE, Mar. 1972, at 123; N. JACOBY, CORPORATE POWER AND SOCIAL RESPONSIBILITY (1973).

stall new equipment for pollution it has caused or is causing, or which may suffer adverse environmental publicity.

Aside from these conventional investment considerations, some investors may simply wish to invest in more socially responsible companies when all other considerations are equal—and perhaps even when they are not. In this regard, some universities and foundations have experienced severe pressure from students and other activists to consider the environmental record of companies before investing in them.[32] Similarly, some mutual funds express in their prospectuses particular policies regarding the social responsibility of companies in which they invest.[33] A committee of the Investment Company Institute, a group which promotes the interest of mutual funds, declared recently that "issues of corporate responsibility should . . . be considered investment issues."[34]

In terms of investment decisions some surveys have shown that security analysts and others who manage or influence the flow of investment dollars believe that corporate advertising favorably affects security values, that corporate advertising has led them to look into companies as investments, and that those who have looked into companies as a result of corporate advertising have gone on to invest in the companies.[35]

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32. It is important to note that

> concern with their reputation in the financial community . . . is one of the reasons most frequently given privately, but least mentioned publicly, for launching corporate campaigns . . . [because a] company which announced it was embarking upon corporate advertising because it wanted to influence its stock price upward would be certain to attract unwelcome attention from the Securities and Exchange Commission. So they don't say that.
>
> They know, however, that a high price/earnings ratio will put them in a favorable position for further expansion through acquisition or merger, since most such arrangements are based upon exchange of stock.

Harding, *Corporate v. Product Advertising*, INDUSTRIAL MARKETING, Sept. 1967, at 61. *See* Skylar, *A Quiet Revolution . . . The Rise of the Corporate Image*, INDUSTRIAL MARKETING, Sept. 1967, at 63-70 (influencing the financial community through corporate ads); Sexton, *A Merger Maker Relates His Field to the Debate*, INDUSTRIAL MARKETING, Sept. 1967, at 71-75; Dix, *Mergers: Their Effect on the Page Volume*, INDUSTRIAL MARKETING, Oct. 1967, at 76. *See generally* PEOPLE/PROFITS: THE ETHICS OF INVESTMENT (C. Powers ed. 1972); C. POWERS, J. SIMON & J. GUNNEMAN, THE ETHICAL INVESTOR: UNIVERSITIES AND CORPORATE RESPONSIBILITIES (1972).

33. *See* Shapiro, *Wall Street's New "Social Responsibility" Funds*, SAT. REV., Aug. 26, 1972, at 43; Moskowitz, *Why the "Good Guy" Funds Have Flopped*, N.Y. Times, Feb. 11, 1973, at 15, col. 3; *Social Responsibility Portfolio Collapses*, BUSINESS & SOCIETY (biweekly), Jan. 15, 1974, at 1. Compare note 31, *supra*.

34. INVESTMENT CO. INST., CORPORATE RESPONSIBILITY AND MUTUAL FUNDS: A REPORT TO MEMBERS OF THE INVESTMENT CO. INST. FROM THE COMM. ON BUSINESS STANDARDS 2 (1971).

35. ERDOS & MORGAN SURVEY FOR BARRON'S MAGAZINE ON CORPORATE ADVERTISING FROM 1970, THE IMPACT OF CORPORATE ADVERTISING ON THE INSTITUTIONAL MONEY MANAGER (1971). A questionnaire was sent to 278 subscribers of BARRON'S who managed or influenced the flow of corporate funds. The results found that 87.2 percent an-

3. Corporate image advertising may favorably impress prospective or existing employees who wish to work for a company which has shown concern rather than disdain for the environment. Image advertising may be particularly important in attracting students who have attended the larger and more politically active campuses, which are prime recruiting areas for many corporations. Companies are also responding to the prospective employee's concern about his own working conditions since a company's air pollution may affect its employees' health more than anyone else's. The positive effects of image advertising on recruitment are documented by many case histories showing dramatic increases in inquiries about employment with a corporation after it has engaged in an image advertising campaign.[36]

4. Banks, insurance companies, and other financial institutions take image into account in providing their services to corporations. Such financial sources may be hesitant to insure or lend money to a company that pollutes, especially if expensive litigation or casualty claims may later result.[37]

5. Through image advertising corporations also seek to influence the attitudes of their shareholders; the hope is that image advertising will mitigate dissatisfaction with corporate policies.

6. Purchasing agents may be inclined to purchase from a company with a known sense of social responsibility. Recent studies indicate that "an unknown supplier may make more effective use of his advertising budget by spending most of his money on institutional advertising" rather than product advertising. "The preference towards institutional advertisements . . . can be attributed to decision makers' interests in the capabilities of prospective suppliers."[38] This conclusion un-

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swered yes to the question, "In your opinion, does 'Corporate Image' advertising favorably affect the company's security values?" 82.1 percent stated that corporate advertising had "served to call [their] attention to a company as an investment potential," and 79.3 percent of the latter stated that they had gone on to purchase the securities.

See also THOMAS E. RYAN, INC., MEASURING BROKERAGE FIRM ADVERTISING EFFECTIVENESS (TIME MAGAZINE study, conducted in 1968).

36. COMMUNICATING THE TOTAL CORPORATE PERSONALITY, *supra* note 25 at 27 (3,000 letters received regarding employment after eleven individual magazine ads). *See also Strategic Advertising and Attitudes Toward Corporations* and *Measuring Strategic Advertising Effectiveness*, *supra* note 26 (recruitment recommendation measurement, *id.* at 31). For examples of recruitment ads *see* TIME MAGAZINE, STRATEGIC ADVERTISING 97-99.

37. Private communications to the author. *See* THE NEW YORKER MAGAZINE, CORPORATE ADVERTISING AND ITS FUNCTION.

38. Lehman & Cardozo, *Product or Industrial Advertisements*, J. OF ADVERTISING RESEARCH, Apr. 1973, at 43. This conclusion differs from the presumption, raised by Prof. Theodore Levitt of the Harvard Business School, that an unknown supplier might find product advertising more effective than institutional advertising in enhancing a selling firm's reputation. LEVITT, INDUSTRIAL PURCHASING BEHAVIOR: A STUDY OF COMMUNICATION EFFECTS (1965). *See* Colley, *What About Pretesting Industrial Advertis-*

dercuts the traditional view that the best way to build image is through product advertisements.

7. Finally, a host of other factors may influence a corporation's choice to engage in image advertising. Some image advertising serves as an "ego trip" for the company's officers by putting them and their company in the limelight.

This enumeration of benefits achieved through image advertising is by no means exhaustive. It is clear from this recital, however, that most corporate image advertising has the same goal as traditional product advertising—increased profits. In each case the company attempts by its image advertising to gain the support of groups and individuals whose favorable attitudes improve profits and whose distrust or enmity erodes them. One survey of the motivation of companies which engage in corporate image advertising found that, of the advertisers surveyed, 55 percent engaged in image advertising to improve consumer relations, 47 percent to improve product sales, 46 percent to improve general trading relations, and 64 percent to improve stockholder/financial relations.[39]

However, in addition to these clearly economic and commercial benefits, political motivation is involved in certain types of corporate image ads. Thus, in the same survey, 11.4 percent of the respondents stated their prime objective to be improvement of governmental relations. Presumably, the corporations hope to use image advertising to influence regulatory or legislative bodies which can act in ways adverse to the company's financial interests. Politically motivated image advertising, directed towards governmental bodies or the electorate, is easily distinguished from that aimed at investors or consumers. The former identifies and discusses specific legislative proposals by name or reference and often calls upon the reader to take political action. In contrast, a commercially motivated image ad describes the corporation and its activities with the intention of arousing favorable action directed towards the corporation itself, not towards the legislature. The fact that the corporation's activities may be controversial—and perhaps the subject of proposed or existing government regulation—does not detract from the commercial emphasis of such an advertisement that is aimed at stimulating the purchase of corporate products or stock.

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ing?, INDUSTRIAL MARKETING, May 1973, at 38; Grass, *Measuring Corporate Image Ad Effects*, J. OF ADVERTISING RESEARCH, Dec. 1972, at 15.

39. *Are Public Relations Executives Becoming More Involved with Corporate Advertising*, PUBLIC RELATIONS J., Nov. 1973, at 28. For 1972 survey results, *see Are Public Relations Executives Becoming More Involved with Corporate Advertising*, PUBLIC RELATIONS J., Nov. 1972, at 24 (prime objective of image advertising is improvement of consumer relations: 31.5 percent; improvement of stockholder/financial relations: 23.5 percent; improvement of product sales: 19.2 percent; improvement of trade relations: 8.9 percent).

It is interesting to note that corporations rarely if ever fail to take a business expense tax deduction for their image advertising, even though the Internal Revenue Code states that no deduction can be taken for messages run "in connection with any attempt to influence *the general public* . . . with respect to legislative matters. . . ."[40] The possible consequences of this practice are discussed below.[41]

D. The Resulting Controversy

A disturbing aspect of corporate image environmental advertisements is the apparent assumption that creating an appearance of environmental consciousness is an adequate substitute for positive action. In other words, many corporations seem to feel that their sole task is to advertise their concern rather than to take action. One critic claims that "most of industry still sees pollution and environment questions as more of a public relations problem—in other words, an image problem—than as anything fundamentally related to the way they are doing business."[42] The noted advertising columnist E.B. Weiss seems to agree with this contention. Weiss has commented that "the gap between corporate claims and performance is at least as sizeable as the generation gap—and that's a whopper. . . . [T]he total disregard for the role the corporation played in bringing about some of our major ecological problems has genuine 'Alice-in-Wonderland' characteristics."[43] Because of the corporations' myopic and misleading treatment of environmental matters, the Council on Economic Priorities concludes in its report *Corporate Advertising and the Environment* (1971) that some advertisements "subtly co-opt . . . the public's right to free and informed decision-making in this area of vital concern."[44]

These criticisms are being taken seriously in Congress. In the last Congress, Senators Spong, Baker, Bayh, Dole, Muskie, and Randolph introduced S. 927, which would make it a criminal act subject to fine and imprisonment for any person knowingly to make "any false or deceptive statement, representation or claim in advertising a product, service, system, or device of any kind or description with respect to the ability of the product, service, system, or device to prevent or control" air or water pollution.[45] One of the sponsors' reasons for proposing the bill was that "many industries apparently are placing more emphasis

40. INT. REV. CODE OF 1954, § 162(e)(2)(B) (emphasis supplied).

41. See text accompanying notes 104-05, 108, *infra*.

42. Mander, *supra* note 3, at 45. He also claims that advertising "now owns the word 'ecology.'" *Id.*

43. Weiss, *Management: Don't Kid the Public with Those Noble Ads*, ADVERTISING AGE, Aug. 3, 1970, at 35.

44. *Corporate Advertising and the Environment*, *supra* note 9, at 13.

45. S. 927, 92d Cong., 1st Sess. (1972).

on advertising their abatement activities than they are on abatement itself. The advertisements in some cases are worse than misleading—they are not even truthful."[46] More recently, in its original form, S. 2176, the "Truth-In-Energy Bill" would have banned all advertising "encouraging increased energy consumption."[47] Conceivably this bill would have banned many corporate image environmental campaigns.[48]

E. Petitions to the Federal Trade Commission

The Federal Trade Commission has received many criticisms of environmental advertising, in part because of its heightened visibility in the regulation of unfair product and deceptive advertising.[49] Public reference can be made only to some of these complaints—those in which the complainant issued a press release or otherwise publicized his petition. Aside from complainant-initiated publicity, complaints to the FTC are, of course, confidential.

In a press release on July 9, 1971, the Center for Science in the Public Interest forwarded a Caterpillar Tractor Company advertisement which had appeared in *Time* and *Business Week* claiming that the Interstate Highway System saved lives and should therefore be completed without delay.[50] In a press release dated August 1, 1971, Senator Philip Hart sent to the Commission an advertisement by Bethlehem Steel Corporation regarding its efforts to restore its strip-mined lands.[51]

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46. 117 CONG. REC. 3565 (1971) (remarks of Senator Spong).

47. S. 2176, 93d Cong., 1st Sess. (1973).

48. Revett, *Ad Curbs in New Energy Bills Could Mean Widespread Ban*, ADVERTISING AGE, Nov. 19, 1973, at 1; Revett, *Groups Press for Pullout of Energy Bill Ad Strictures*, ADVERTISING AGE, Nov. 26, 1973, at 1; Revett, *Ad Curbs Deleted from Energy Bill, but Simon May Act*, ADVERTISING AGE, Dec. 24, 1973, at 1; *FEO Concern over Energy Ads Fading; No Ban Seen*, ADVERTISING AGE, Jan. 7, 1974, at 1.

49. Schoenfeld, *FTC's New Boldness Tests Limits of its Authority*, 3 NAT'L J. 207 (1971); Gardner, *Attacks on Advertising Continue as Agencies Work on New Regulatory Policies*, 4 NAT'L J. 1427 (1972); Gardner, *Presidential Veto of Pipeline Bill Threatened Despite Fuel Shortage*, 5 NAT'L J. 1693 (1973) (regarding FTC Improvement Act rider on Alaska Pipeline bill which grants expanded power to the FTC).

50. Press release from Dr. James Sullivan, Center for Science in the Public Interest, 1779 Church Street, N.W., Washington, D.C. 20036. *See Debunking Madison Avenue*, ENVIRONMENTAL ACTION, July 24, 1971; and *Corporate Advertising and the Environment, supra* note 9, at 27.

51. Press release from the Office of the Senate Subcomm. on Antitrust and Monopoly, Senator Philip A. Hart, Aug. 1, 1971, with attached copy of letter of July 28, 1971, to The Honorable Miles W. Kirkpatrick. *See Debunking Madison Avenue*, ENVIRONMENTAL ACTION, May 5, 1971; *Another Look at Eastern Kentucky*, BETHLEHEM REV., A BULLETIN OF NEWS FOR BETHLEHEM STEEL EMPLOYEES, No. 133, Sept. 1971; Wolff, *Little Scar of Bethlehem*, AUDUBON, Nov. 1971, at 116; *Peeling Back the Land for Coal*, NEWSWEEK, June 28, 1971, at 69; *FTC Mulls Look-See into Corporate Ads*, ADVERTISING AGE, Aug. 9, 1971, at 2; *Corporate Advertising and the Environment, supra* note 9, at 26. On the practice and effects of strip mining *see* DEP'T OF THE INTERIOR, SURFACE MINING AND OUR ENVIRONMENT (1967); SPAULDING & OGDEN, EFFECTS OF

On May 12, 1972, a group called Public Action to Protect Environmental Resources (P.A.P.E.R.) announced that it was sending the FTC a complaint about an advertisement by Potlatch Forests, Inc., regarding its commitment to pollution control on the Clear Water River and an ad by St. Regis Paper Company concerning installation of pollution control equipment at its pulp and paper mills.[52] In October 1972, Senator Mike Gravel sent a complaint to the FTC regarding an advertisement by Westinghouse Corporation on its breeder reactor program.[53] On January 31, 1973, Citizens for a Better Environment issued a press release with a copy of a complaint it had filed with the FTC concerning advertisements by Commonwealth Edison Company in Chicago about its environmental program.[54] Then on April 4, 1973, the Center for Science in the Public Interest again petitioned the FTC, this time regarding a Chrysler Corporation advertisement appearing in the *Washington Post* on September 26, 1972, February 13, 1973, and March 13, 1973, and elsewhere, entitled "Thirty Handy Facts On Safety, Highways, and Emissions" quoting from the Administrator of the Federal Highway Administration regarding the cost of the 1975-76 emission requirements of the Clean Air Act.[55] On November 21, 1973, Senator Thomas McIntyre sent a complaint to the FTC regarding advertising by the petroleum industry about the energy shortage.[56]

SURFACE MINING ON THE FISH AND WILDLIFE RESOURCES OF THE UNITED STATES, (Dep't of the Interior, 1968); DEP'T OF THE INTERIOR, STUDY OF STRIP AND SURFACE MINING IN APPALACHIA (1966); BOCCARDY & SPAULDING, EFFECTS OF SURFACE MINING ON FISH AND WILDLIFE IN APPALACHIA (Dep't of the Interior, 1968). The best bibliography on strip mining is by F.V. Kieffer, Ohio Dep't of Natural Resources, Columbus, Ohio. On Bethlehem's public relations effort, *see* J. CANNON, COUNCIL ON ECONOMIC PRIORITIES, ENVIRONMENTAL STEEL 226-29 (1974), excerpted in ECONOMIC PRIORITIES REPORT (May 1973).

52. Press release of May 12, 1972, by P.A.P.E.R., Suite 1915, One Rockefeller Plaza, N.Y., N.Y., with a copy of letter of May 12, 1972, to The Honorable Miles W. Kirkpatrick. *See also Advertising 1972*, *supra* note 2; *Columbia Law Students Ask FTC Action on "Polluters"*, ADVERTISING AGE, May 15, 1972, at 102. For favorable commentary on the St. Regis advertising program see *Trees Pay Off for St. Regis*, INDUSTRIAL MARKETING, Dec. 1967, at 38; *St. Regis/Time*, a case study by TIME.

53. Press release from Senator Mike Gravel, *Gravel Calls for FTC Investigation of Deceptive Advertising for Nuclear Power Plants*, Oct. 13, 1972, with attached letter of Oct. 10, 1972 to The Honorable Miles W. Kirkpatrick. *See* Alexander, *The Big Blowup Over Nuclear Blowdowns*, FORTUNE, May 1973, at 216.

54. Press release of January 31, 1973 from Citizens for A Better Environment, Room 1101, 109 N. Dearborn, Chicago, Ill. *See also* Ingersoll, *Environmental Group Hits Edison Ads*, Chicago Sun Times, Jan. 31, 1973; *Chicago Utility's Ads under Attack at FTC*, BROADCASTING, Feb. 17, 1973, at 28.

55. Clean Air Amendments of 1970, 42 U.S.C. §§ 1857 *et seq.* (1970). CAVEAT EMPTOR, Oct. 1973, at 20; *Debunking Madison Avenue*, ENVIRONMENTAL ACTION, March 3, 1973; CENTER FOR SCIENCE IN THE PUBLIC INTEREST NEWSLETTER, Spring 1973.

56. Shifrin, *McIntyre Hits Ads About Oil: FTC Asked to Put Stop to Campaigns*, Wash. Post, Nov. 23, 1973, at D10. See note 13 *supra*; *Senator Talks NARB Support Against 'Deceptive' Energy Ads*, ADVERTISING AGE, Dec. 3, 1973, at 1; *NARB Steps into*

The Deputy Administrator of the Environmental Protection Agency, John R. Quarles, sent a letter on November 29, 1973 to the Chairman of the FTC, Lewis S. Engman, regarding two newspaper ads by PPG Industries, Inc., claiming that EPA regulations reducing the amount of lead in gasoline would waste crude oil.[57] On January 9, 1974, Congressman Benjamin Rosenthal, along with five colleagues, filed a petition to commence a rulemaking proceeding to require substantiation of environmental ads, 16 examples of which were attached to the petition.[58] Finally, on January 18, 1974, Russell Train, EPA Administrator, complained about an advertisement by a Chevrolet dealer association regarding relaxation of emission control standards.[59]

All complaints received by the FTC, except for those directed to a specific Commissioner or individual staff member, are referred by the Office of the Secretary to the division responsible for the subject of the complaint.[60] Corporate image advertising would normally be referred for review, investigation, and response to either the Division of National Advertising or the Division of Marketing Practices, both in the Bureau of Consumer Protection. Citizens can also petition the FTC to initiate an investigation or rulemaking proceeding.[61] Specific investigations

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Energy Ad Situation via McIntyre Note, ADVERTISING AGE, Dec. 10, 1973, at 1; Editorial, *Refining Oil Advertising*, ADVERTISING AGE, Dec. 17, 1973, at 14; *NARB Panel Will Handle Energy Ads*, ADVERTISING AGE, Dec. 24, 1973, at 4.

57. Press release by the Environmental Protection Agency, Dec. 3, 1973, with copy of a letter of Nov. 29, 1973, to Mr. Joseph Neubauer, President, PPG Industries, Inc. *See Ads Backing Lead in Gas Hit by EPA*, Wash. Post, Dec. 3, 1973, at A6; *EPA Protests PPG Ad on Lead Content Rules*, ADVERTISING AGE, Dec. 10, 1973, at 10; *PPG Documents Ads Attacking EPA Proposal*, ADVERTISING AGE, Dec. 17, 1973, at 8. The ads appeared in the N.Y. Times, Nov. 25, 1973, § 4, at 16, and the Wash. Post, Nov. 27, 1973, at A21.

58. Press release, Office of Congressman Benjamin Rosenthal, Jan. 9, 1974. *See* Shifrin, *FTC Urged to Act on 'Misleading' Energy Crisis Ads*, Wash. Post, Jan. 10, 1974, at A14, col. 7; Revett, *Oilmen Rip Bid for Proof on Energy Ads*, ADVERTISING AGE, Jan. 14, 1974, at 1. In response to the Rosenthal petition, Mobil Oil Corp. filed a Memorandum in Opposition on April 4, 1974, arguing that the FTC should not extend its advertising substantiation resolution to cover Mobil's corporate image ads. A major contention of Mobil was that such action by the FTC would further bar the access of Mobil to the media to express its views. In the case of CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973) the Supreme Court had held that the networks could refuse paid editorial advertisements by individuals and organizations.

59. Press release, Environmental Protection Agency, Jan. 18, 1974. *See EPA Fears Dealer Ad Portends Move on Emission Curbs*, ADVERTISING AGE, Jan. 21, 1974, at 8.

60. By statute the FTC is not empowered to assist an individual in a purely private dispute, but may both refer the matter to agencies which may do so and review the complaint for possible violations of law warranting Commission action. 16 C.F.R. § 2.3 (1974). The best summary of the Commission's procedures in handling complaints is Staff Notice 18, Sept. 21, 1973, which was forwarded to Senator Henry Jackson in response to an inquiry regarding the Commission's handling of congressional correspondence.

61. 16 C.F.R. §§ 2.1, 2.2 (investigations), 1.15 (rulemaking proceedings) (1974).

are undertaken by staff attorneys and can lead to staff recommendations that the Commission issue a proposed complaint.[62] After allowing for consent negotiations, a formal complaint may then be issued,[63] resulting in a formal adjudicative hearing conducted by an Administrative Law judge.[64] The hearing decision can be appealed to the Commission[65] and subsequently in the federal courts.[66] This procedure is obviously very costly and time consuming.[67] As a result, many cases are settled with consent agreements prior to the commencement or completion of the adjudicative hearing.[68]

Adjudicative and rulemaking proceedings do not depend only on the receipt of consumer complaints or petitions. In fact, the Commission responded to criticisms that it was overly dependent on a "mail-bag" development of policy[69] by establishing an Office of Policy, Planning, and Evaluation directly responsible to the Commission itself.[70] In addition, the individual bureaus within the Commission have developed a system of Analytical Policy Guides to assist each Bureau in the detailed formulation of policy and programs.[71] The Commission has successfully asserted its power to engage in substantive rulemaking, a procedure especially well suited to policy formulation.[72]

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62. *Id.* § 2.31.

63. *Id.* §§ 2.33, 2.34.

64. *Id.* §§ 3.1-3.46.

65. *Id.* §§ 3.52-3.55.

66. Federal Trade Commission Act § 6(c), 15 U.S.C. § 45(c) (1970).

67. The delay frequently inherent in FTC proceedings has been a prime source of criticism of the agency's effectiveness; see note 69 *infra.*

68. *See, e.g., In re* ITT Continental (Profile Bread), 79 F.T.C. 248, 253, 3 Trade Reg. Rep. ¶ 19,681, 21,727 (FTC 1971).

69. E. Cox, The Nader Report on the Federal Trade Commission (1969); The Amer. Bar Ass'n, Commission to Study the Federal Trade Commission, (1969).

70. Fed. Trade Comm'n Organization Chart, United States Gov't Manual 1973/74, at 470. For an analysis of the success of these planning activities *see Planning the Commission's Consumer Protection Activities: False Starts and Tentative Progress*, speech by Comm'r Mary Gardner Jones before the Amer. Council on Consumer Interest, Apr. 12, 1973. An example of such planning in the area of advertising is the *FTC Hearings on Modern Advertising Practices, 1972*, analyzed in The Case for Advertising, Highlights of the Industry's Presentation to the Fed. Trade Comm'n (J. Moskin ed., Amer. Ass'n of Advertising Agencies, 1973); J. Howard & J. Hurlbert, Advertising and the Public Interest, a Staff Report to the Fed. Trade Comm'n (1973), reviewed in *A Critical Analysis of the Howard Report*, address by Comm'r Jones before the Advertising and Public Interest Workshop, Amer. Marketing Ass'n, Washington, D.C., May 9, 1973.

71. *Agriculture, Environmental and Consumer Protection Appropriations for 1973, Hearing before a Subcomm. of the House Comm. on Appropriations*, 92d Cong., 2d Sess. 462 (1973).

72. National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.D.C. 1973), *cert. denied*, 94 S. Ct. 1475 (1974); *see* Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921 (1965); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication*

The Commission, under section 6(b) of the FTC Act,[73] can require the advertiser to submit material in substantiation of its claims; such material has frequently been made public by the FTC. Unsatisfactory substantiation can serve as the basis for a formal complaint.[74]

The FTC has so far taken no public action on the environmental advertising complaints mentioned above, nor has it publicly enunciated a policy on corporate image environmental advertising. However, the present Chairman of the FTC, Lewis S. Engman, stated in a speech on February 15, 1974: "To the extent that [image] ads, like product ads, seek to encourage, or do, in fact, encourage economic responses from consumers or businessmen—to that extent, they are subjects of legitimate interest to the Federal Trade Commission."[75] The legal and policy issues raised by FTC action in this area are discussed below.

II

IMAGE ADVERTISING AND THE FIRST AMENDMENT

Central to any discussion of whether the Commission may assert jurisdiction over image advertising is whether the first amendment's guarantee of freedom of speech protects these advertisements from regulation or whether image advertising is a form of "commercial speech" and thus unprotected by the first amendment.[76]

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and Administrative Procedure Reform, 118 U. PA. L. REV. 485 (1970). There are even some pressures on federal agencies to require rulemaking proceedings when they are changing established policy; *see* NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); Bell Aerospace Co. v. NLRB, 475 F.2d 485 (1973), *aff'd in part and rev'd in part*, 94 S. Ct. 1757 (1974); United Fed. of College Teachers v. Miller, 479 F.2d 1074 (1973). However, SEC v. Chenery Corp. (Chenery II), 332 U.S. 194 (1947), makes it clear that "[t]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *Id.* at 203. This position was reaffirmed by the Supreme Court in *Bell Aerospace, supra.*

73. 15 U.S.C. § 46(b) (1970).

74. 15 U.S.C. § 46 (1970). *See, e.g., Special Reports Relating to Advertising Claims: Requirement for Submission and Disclosure Thereof by the Commission*, 36 Fed. Reg. 12058 (1971), amended 36 Fed. Reg. 14680 (1971). The Rosenthal complaint, *supra* note 59, requested, *inter alia*, that substantiation be required for certain specified environmental ads.

75. Address by FTC Chairman Lewis S. Engman before the Antitrust Law Society, State Bar of Mich., Feb. 15, 1974. *See "Image" Ads Protected as Free Speech, Engman Says*, ADVERTISING AGE, Feb. 18, 1974, at 1 (the title is not wholly accurate; Chairman Engman stated only that, in a close case, any doubts as to whether an ad was protected as free speech should be resolved in favor of the advertiser, not that all image ads were protected); *Lawmakers Irked by FTC "Image" Stance*, ADVERTISING AGE, Feb. 25, 1974, at 8.

76. The only law review article which discusses the first amendment in relation to corporate image advertising assumes—contrary to the following analysis—that image advertising does *not* affect economic decisions of consumers since it does not "discuss the product or service itself" and, therefore, corporate image advertising is protected by

Several points must be considered in distinguishing commercial from protected speech. First, the mere fact that a message takes the form of a paid advertisement is insufficient to render the message commercial. In *New York Times Co. v. Sullivan*,[77] the Court barred a libel action based on statements regarding police brutality made in a paid advertisement and held that such advertisement was protected by the first amendment. The advertisement was held to retain first amendment protection because it "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."[78]

Secondly, the fact that a message involves economic interests or is impelled by profit motives does not necessarily negate first amendment protection. In *Ginzburg v. United States*,[79] the Court stated that "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." Similarly, in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[80] the incidental economic impact of the railroads' lobbying campaign was held insufficient to "transform" such campaign into an activity regulable under the Sherman Act.

Thirdly, the mere fact that an advertisement deals with matters of public importance and controversy does not render it immune from regulation. In the case of *Capital Broadcasting v. Mitchell*,[81] the Supreme Court affirmed the judgment of a three-judge court that the first

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the first amendment. Bird, Goldman & Lawrence, *Corporate Image Advertising: A Discussion of the Factors that Distinguish Those Corporate Image Advertising Practices Protected Under the First Amendment from Those Subject to Control by the Federal Trade Commission*, 51 J. OF URBAN LAW 405, 420 (1974).

The Supreme Court has apparently never directly held that corporations not engaged in the business of communication, e.g. newspapers, are accorded first amendment rights. *See generally* First National Bank of Boston v. Attorney General, 290 N.E.2d 526 (Mass. 1972) (law barring corporate expenditures to influence vote on referendums held unconstitutional); *Corporate Freedom of Speech*, 7 SUFFOLK UNIV. L. REV. 1117 (1973); *But cf.* Thomas v. Collins, 323 U.S. 516, 531 (1945) (that organization is one engaged in business activities does not resolve question of application of first amendment); *compare* Smyth v. Ames, 169 U.S. 466, 522 (1898) (corporations are "persons" within the meaning of the due process clause of the fourteenth amendment) *with* Orient Ins. Co. v. Daggs, 172 U.S. 557, 561 (1899) (corporations are not "citizens" within meaning of the privileges and immunities clause).

77. 376 U.S. 254 (1964).

78. *Id.* at 266-67. *See, e.g.*, People *ex rel.* Barton v. American Auto Ins. Co., 132 Cal. App. 2d 317, 282 P.2d 559 (1955) (insurance company advertisements intimating that excessive and unjustified verdicts raise insurance premiums held to be protected).

79. 383 U.S. 463 (1966).

80. 365 U.S. 127, 138 (1961).

81. 333 F. Supp. 582 (D.D.C. 1971) (three-judge court), *aff'd mem.*, 405 U.S. 1000 (1972).

amendment rights of cigarette advertisers were not violated by a law banning all television cigarette advertisements, despite the fact that cigarette advertising had earlier been held to state one side of a controversial subject of public importance under the fairness doctrine.[82] In *Capital Broadcasting* the lone dissenter, Judge J. Skelly Wright, objected only to the fact that cigarette ads were banned outright but thought that selective regulation of cigarette ads short of a ban was constitutional.[83] Similarly, in *Pittsburgh Press Co. v. Pittsburgh Comm.*

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82. Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert denied*, 396 U.S. 842 (1969).

The Federal Communications Commission has recently defined the type of corporate image ads to which the fairness doctrine may apply. On July 18, 1974, the FCC published the results of its "broad-ranging inquiry into the efficacy of the fairness doctrine . . . ." *Fairness Doctrine and Public Interest Standards*, 39 Fed. Reg. 26372 (1974). In that release the Commission stated that "institutional advertising . . . designed to present a favorable public image of a particular corporation or industry . . . ordinarily does not involve debate on public issue [unless] . . . the advertiser seek[s] to play an *obvious* and *meaningful* role in public debate." 39 Fed. Reg. 26380 (emphasis supplied). As an example of an institutional ad not raising fairness obligation the Commission cited Anthony R. Martin-Trigona, 19 F.C.C.2d 620 (1969) (passing reference to school prayers does not amount to advocacy) and as an example of institutional ads which did raise such obligation is cited Wilderness Society (ESSO), 30 F.C.C.2d 643 (1971), *reconsideration denied*, 31 F.C.C.2d 729 (1971), *reconsideration denied*, 32 F.C.C.2d 714 (1971), (ads arguing that the nation's urgent need for oil necessitated a rapid development of oil reserves on Alaska's North Slope and referring to ESSO's ability to build a pipeline in the Arctic while "preserving the ecology" inherently raised and had a cognizable bearing on the controversial issue of construction of an Alaska oil pipeline despite the fact that the pipeline controversy was not specifically referred to). In determining whether the fairness doctrine applies to an ad, the Commission begins by considering whether the advertisement "is an obvious participation in public debate," not by undertaking a "subjective judgment as to the advertiser's actual intentions . . . . If the ad bears only a tenuous relationship to that debate, or one drawn by unnecessary inference . . . the fairness doctrine would clearly not be applicable." 39 Fed. Reg. 26381. "[I]f the arguments and views expressed in the ad closely parallel the major arguments advanced by partisans on one side or the other of a public debate, it might be reasonable to conclude that one side of the issue involved had been presented thereby raising fairness doctrine obligations. See, e.g. Media Access Project (Georgia Power), 44 F.C.C.2d 755, 761 (1973)" (Power company ads proclaiming company's benevolent air and water pollution policies held not controversial while ads asserting the need for an increase in generating capacity and the inadequacy of prevailing rates did advocate one side of a rate-increase issue then pending before the state utility commission).

The FCC's statement on the fairness doctrine is inapposite to the position advocated by numerous public interest spokesmen. *See, e.g.*, Neckritz, et al, *Ecological Pornography and the Mass Media*, 1 ECOLOGY L.Q. 374 (1971) and a suit filed by the authors against the Federal Communications Commission: Neckritz v. FCC, 502 F.2d 411 (D.C. Cir. 1974).

83. 333 F. Supp. at 593-94. In a case with facts similar to *Capital Broadcasting*, the publisher of a Virginia newspaper had been convicted of disseminating the advertising of an abortion referral service in violation of a Virginia statute barring any person from "encourag[ing] or prompt[ing] the procuring of abortion." Bigelow v. Commonwealth, 213 Va. 191, 191 S.E.2d 173, 174 (1972). On appeal the United States Supreme Court remanded the case for reconsideration in light of the invalidation of anti-abortion statutes. Bigelow v. Virginia, 413 U.S. 909 (1973). The Virginia court then reaffirmed

on Human Relations,[84] the Supreme Court found the newspaper's claim that commercial advertising serves as a medium for "exchange of information" insufficient to "abrogate the distinction between commercial and other speech." The mere fact that the subject matter of an allegedly defamatory statement is a matter of "public or general concern" has recently been held by the Supreme Court to be insufficient to bar a defamation action in *Gertz v. Robert Welch, Inc.*[85]

The leading Supreme Court decision denying first amendment protection to commercial speech is *Valentine v. Chrestensen*.[86] In this case a municipal ordinance forbidding dissemination of printed handbills containing advertising was upheld, even though convictions of distributors of religious and political handbills had earlier been reversed.[87] The handbills in question were termed "purely commercial advertising" with respect to which the ordinance was valid,[88] despite the fact that on the opposite side from the commercial message the distributor had printed a political protest. This holding has been reiterated with approval, both by the Supreme Court and lower courts.[89] Although the

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Bigelow's conviction, and the Supreme Court has recently noted probable jurisdiction. Bigelow v. Commonwealth, 214 Va. 341, 200 S.E.2d 680 (1973), *probable jurisdiction noted*, 94 S. Ct. 3201 (1974).

84. 413 U.S. 376, 388 (1973).

85. 42 U.S.L.W. 5123 (1974). In reaching this decision, the Supreme Court expressly rejected the plurality opinion in Rosenbloom v. Metromedia, 403 U.S. 29, 44 (1971), which had found that all discussion and communication involving "an issue of public or general concern" were protected by the first amendment. Gertz, *supra* at 5130. One of the principal reasons for the Court's refusal to adopt this latter position is that to do so would involve the courts in the "dangerous business" of deciding which speech "address[es] issues of 'general or public interest' and which do[es] not"—a test equivalent to determining "'what information is relevant to self government.'" Gertz, *supra* at 5128, 5130, quoting Rosenbloom, *supra* at 79 (Marshall, J., dissenting). *See also* Healey v. Federal Communications Commission, 460 F.2d 917 (D.C. Cir. 1972) (fairness doctrine not extended to newsworthy events which were not controversial issues of public importance).

86. 316 U.S. 52 (1942).

The networks have successfully taken the position that they can refuse to air controversial advertisements for which a fairness doctrine claim might apply. To the extent that the networks effectively implement this policy, not even advertisements falling within the terms of the fairness doctrine reach the airwaves, let alone advertisements deserving first amendment protection.

87. Schneider v. State, 308 U.S. 147 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938).

88. 316 U.S. at 54.

89. New York Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964); Jamison v. Texas, 318 U.S. 413, 417 (1943); Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943); United States v. Hunter, 459 F.2d 205, 211 (4th Cir. 1972); SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1306 (2d Cir. 1971), *cert. denied*, 404 U.S. 1005 (1971); New York State Broadcasters Ass'n v. United States, 414 F.2d 990, 998-99 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970); Banzhaf v. FCC, 405 F.2d 1082, 1101 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969); Capital Broadcasting Co. v. Mitchell, 333 F. Supp.

Chrestensen doctrine has been criticized,[90] it has recently been cited with approval by the Supreme Court in the *Pittsburgh Press Co.* case involving placement of want ads in sex-designated columns.[91]

There has emerged no clear constitutional test to distinguish commercial from protected advertising. The circumstances and content of each individual advertisement must be analyzed to determine whether or not it is protected. In each of the major Supreme Court cases touching on the subject, the classification of the ad in question did not raise the subtle questions which would have required a close analysis. However, analogies can be drawn from some cases involving commercial speech and from other areas of first amendment law to support the conclusion that the *effects* of an advertisement will determine its constitutional status. *Pittsburgh Press* speaks in terms of the sex designations for the want ads as having the "practical effect" of an "overly discriminatory want ad. . . ."[92] Similarly, in *Noerr*, the Court cited the success of the railroads' lobbying campaign to support its conclusion that the campaign was in fact directed towards influencing legislation.[93] The effects of speech have long been the focus in first amendment analysis of "fighting words."[94] Likewise, the extent of an employer's free speech in labor disputes is regulated according to its effects,[95] as is a broadcaster's right to disseminate information on lotteries.[96]

In determining the effect of speech, the courts have frequently looked to the identity and purpose of the speaker. In *New York Times*, the Court emphasized that the sponsor of the ad was a "movement whose existence and objectives are matters of the highest public interest and concern."[97] Similarly in *Murdock v. Pennsylvania*,[98] in overturning the convictions of Jehovah's Witnesses who had been arrested under a statute requiring a licensing fee for solicitors, the Court emphasized the petitioners' religious beliefs. The advertiser's purpose,

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582, 584 (D.D.C. 1971) (three-judge court), *aff'd mem., sub nom.* Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972).

90. Cammarano v. U.S., 358 U.S. 498, 514 (1959) (Douglas, J., concurring); Radish, *The First Amendment In The Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971). *See also* Brief for Association of Nat'l Advertisers, Amicus Curiae, in Fur Information and Fashion Council, Inc. v. E.F. Timme and Son, Inc., Docket No. 73-2687 (2d Cir. April 1, 1974).

91. See note 84 *supra.*

92. *Id.* at 388.

93. 365 U.S. at 144.

94. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Gooding v. Wilson, 405 U.S. 518, 524 (1972).

95. NLRB v. Gissel Packing Co., 395 U.S. 575, 619-20 (1969).

96. New York State Broadcasters Ass'n v. United States, 414 F.2d 990 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970).

97. 376 U.S. at 266.

98. 319 U.S. 105, 109 (1943).

like the identity of the speaker, is a "persuasive interpreter" of "equivocal conduct."[99] In both *Murdock* and *Ginzburg* the advertiser's motive was a factor considered by the Court in classifying the challenged speech.[100]

Where the effects of the speech or the purpose of the speaker are mixed, there is some authority for regulating any separable commercial statements[101] or for regulating the speech where the "dominant" effect or purpose of the advertisement is commercial.[102] Advertisers cannot evade regulation by merely appending a "moral or civic platitude" to an otherwise clearly commercial advertisement.[103] Even an advertisement entitled to first amendment protection may lose that protection if it contains statements made with reckless disregard of the truth. In the context of libel and invasion of privacy the Supreme Court has extended first amendment protection except where a statement is published with " 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[104] Arguments can be made for extending this exception to deceptive advertising cases.[105]

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99. Chrestensen v. Valentine, 122 F.2d 511, 518 n.7 (2d Cir. 1941) (Frank, J., dissenting).

Although *New York Times Co. v. Sullivan*, *supra* note 89, is sometimes cited as holding purpose "immaterial," the profit motive held immaterial was that of the medium (i.e., the New York Times), not the sponsor of the ad. As the *Times* Court recognized, to deny protection to an ad, merely because a newspaper profits from its placement, would severely limit the rights of individual speakers who cannot afford to buy a printing press. 376 U.S. at 266. *But cf.* Radish, *supra* note 90.

100. 319 U.S. at 109; 383 U.S. at 471.

101. *See Pittsburgh Press Co.*, *supra*. 413 U.S. at 388 (sex-designated column headings were not "sufficiently dissociate[d] from the want ads placed beneath [them]" to make the placement severable for first amendment purposes from the want ads themselves); Chrestensen v. Valentine, 122 F.2d 511, 520, (2d Cir. 1941) (Frank, J., dissenting), *rev'd on other grounds*, 316 U.S. 52 (1941) (regulation of commercial claim constitutional if it does not "so inextricably penetrate [attached political appeal] so as to make fission impossible or impracticable"); Kois v. Wisconsin, 408 U.S. 229, 231 (1972) ("a quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication.")

102. Miller v. California, 413 U.S. 15, 24 (1973); New York State Broadcasters Ass'n v. United States, *supra* note 96 at 998; Chrestensen v. Valentine, 122 F.2d 511, 520-21 (2d Cir. 1941) (Frank, J., dissenting), *rev'd on other grounds*, 316 U.S. 52 (1941).

103. *Valentine*, *supra* note 88, 316 U.S. at 55. *See also*, *Noerr*, *supra* note 80, 365 U.S. at 144; *Ginzburg*, *supra* note 79, 383 U.S. at 474, n. 17; California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

104. 376 U.S. at 279-80. *See* St. Amant v. Thompson, 390 U.S. 727 (1968); Comment, *Calculated Misstatements of Fact Not Protected By First Amendment Guarantees of Free Speech and Press*, 1969 UTAH L. REV. 118. This exception has been severely criticized by Thomas I. Emerson in THE SYSTEM OF FREEDOM OF EXPRESSION 517-62 (1970).

105. In Ragano v. Time, Inc., 302 F. Supp. 1005 (M.D. Fla. 1969) the failure to indicate whether statements were fact or opinion, when known to be opinion and not

The courts appear to have acknowledged the expertise of regulatory agencies in determining whether messages cross the line between protected speech and speech that can be regulated.[106] There is some authority for the FTC's power to make factual inquiries in order to determine whether the first amendment is applicable.[107] However, if there are no reasonable grounds for believing that such inquiries will find the advertisements unprotected, then even these may be barred.[108]

III

A POLICY BASIS FOR REGULATION

A. The FTC Role

Assuming the FTC is not barred by the first amendment from regulating a given image advertisement, a question remains as to whether the FTC should, as a matter of policy, exercise such regulatory authority.

The Commission's role, in its broadest sense, is regulation of economic relationships. Specifically, its intended function is the correction and cure of imbalances in economic relationships brought about by unfairness or deception. The Commission's mandate is not defined by its past practices. It was clearly stated in a recent Supreme Court decision that the Commission's mandate is to be developed from those "public values" that constantly change, adopting new forms and applications.[109] The Commission's jurisdiction is limited by statute to entities "organized to carry on business for its profit or that of its members."[110] Therefore it would not be appropriate for the FTC to attempt to regulate image advertising by, for example, the Friends of the Earth,[111] which has in fact run ads on off-shore drilling.[112]

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fact, was held to evidence reckless disregard. *See* Titus, *Statement of Fact Versus Statement of Opinion—A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203 (1962).

106. NLRB v. Gissel Packing Co., 395 U.S. 575, 617-20 (1969); SEC v. Wall Street Transcript Corp., 422 F.2d 1371 (2d Cir. 1970), *cert. denied*, 398 U.S. 958 (1970).

107. *See* SEC v. Wall Street Transcript Corp., *supra* note 106.

108. *Cf.* Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963) (Court bars attempt of Florida legislature to obtain NAACP membership lists).

109. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972).

110. Section 4, 15 U.S.C. § 44, Federal Trade Commission Act.

111. *See* Community Blood Bank of the Kansas City Area, Inc. v. FTC, 405 F.2d 1011 (8th Cir. 1969) (nonprofit association held exempt from jurisdiction); and Rogers v. FTC, 492 F.2d 228 (9th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3209 (October 15, 1974) (Commission determination not to regulate campaign claims of opponents of anti-litter measure upheld).

112. *See, e.g., Oil Companies Have Spent Millions Defending Offshore Drilling: For 50¢ You Can See What It Costs The Earth—And You*, THE NEW YORKER, August 12, 1972, at 79 (F.O.E. Advertisement).

Any businessman who uses false or unfair advertising to sell a product *directly* to a consumer is creating an imbalance in the economic relationship he enjoys with consumers of that product. No one doubts that the Commission can and should correct that imbalance. The Commission should also be able to regulate image advertising which *indirectly* has the same effect. Most corporations enjoy a series of economic relationships beyond the narrow but important relationships with retail consumers of their products. It can be argued that corporations should not be permitted indirectly to bring about an imbalance in any of these relationships through the use of false or unfair advertisements about their own environmental policies, just as they could not do so by false product advertising.

In a number of contexts the Commission has already recognized its interest in regulating advertising claims regarding characteristics of the manufacturer, as distinct from claims regarding its products. For example, in *FTC v. Armour & Co. and Farmers' Cooperative Fertilizer Co.*,[113] the Commission issued a complaint against Armour for its failure to disclose its ownership of the fertilizer company. The Commission's order requiring Armour to disclose that fact was evidently intended to aid consumers not desiring to deal with monopolists. On similar grounds the Commission required one company to cease falsely claiming that its products were "union made."[114] Another company was ordered to cease using the name Blind Weavers, Inc., which misleadingly implied that its products were made by the blind.[115] Most recently, in *Ex-Cell-O Corp.*,[116] the Commission accepted a consent settlement barring alleged deception in a claim that milk cartons were biodegradable.

Assuming that a justiciable case is developed and litigated, the resulting remedy may be no more than a cease and desist order. Requiring the disclosure of material facts or corrective advertising would increase the benefit of a successful Commission proceeding.[117] It should

113. 1 F.T.C. 430 (1919).

114. Columbia Pants Mfg. Co., 13 F.T.C. 61 (1929).

115. 22 F.T.C. 145 (1936)

116. 82 F.T.C. 36 (1973).

117. On the corrective advertising remedy, *see* Thain, *Corrective Advertising: Theory and Cases*, 19 N.Y. L. FORUM 1 (1973); Note, *Federal Trade Commission and the Corrective Advertising Order*, 6 U. SAN FRAN. L. REV. 367 (1972); Comment, *Corrective Advertising: The FTC's New Formula for Effective Relief*, 50 TEX. L. REV. 312 (1972); Comment, *Corrective Advertising—The New Response to Consumer Protection*, 72 COLUM. L. REV. 415 (1972); Note, *Corrective Advertising and the FTC: No Virginia, Wonder Bread Doesn't Help Build Strong Bodies Twelve Ways*, 10 MICH. L. REV. 374 (1971); Note, *"Corrective Advertising" Order of the FTC*, 85 HARV. L. REV. 477 (1971). For cases involving corrective advertising, *see* ITT Continental Baking Co. (Wonder Bread), 3 Trade Reg. Rep. 20,464 (Final Order to Cease and Desist, Oct. 19, 1973; *appeal pending*); Firestone Tire & Rubber Co., 81 F.T.C. 398 (1973); *aff'd*, 481

be noted that the much discussed notion of *counter* advertising—free advertising time to counter paid advertising—has no direct relationship to *corrective* advertising, which may be the remedy resulting from a litigated Federal Trade Commission proceeding.[118] The timing of any order entered may affect the utility of corrective advertising, since the topic advertised may have diminished in public importance in the meantime. This objection can be met by proceeding against claims regarding long-term corporate programs with respect to which the public has more than a transitory interest. The Commission has recently been given broad powers to enjoin advertising which it reasonably believes to be false or unfair.[119] Finally, a Commission proceeding will, as a result of the Commission's broad subpoena powers, bring to the public record information invaluable to the public's understanding of environmental issues. It is possible that the FTC could request substantiation of claims[120] even if no litigation were contemplated.

B. Alternatives to the FTC as a Forum

The vast majority of corporate image advertising will go unregulated if jurisdiction is not asserted by the Federal Trade Commission. Although there is some private regulation of image advertising, it is not likely to be extensive or effective. According to news releases by two environmental groups, the National Advertising Review Board, the industry's self-regulating body, has recently received two complaints abovt environmentally oriented ads.[121] One of these, filed by

F.2d 246 (6th Cir. 1973), *cert. denied*, 94 S. Ct. 841 (1973); Campbell Soup, 77 F.T.C. 664 (1970). On the effects of corrective advertising, *see* Hunt, *Effects of Corrective Advertising*, J. ADVERTISING RESEARCH, Oct. 1973, at 15 (Chevron F-310 advertising used as model).

118. *See* request of Federal Communications Commission for comments on the Fairness Doctrine, In The Matter of the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Docket 19,260, Part III: *Access to the Broadcast Media as a Result of Carriage of Product Commercials*, and FTC Press Release, Jan. 6, 1972, entitled *Commission Supports Counter Advertising for Certain Types of Product Commercials* (on FTC recommendation to the FCC to allow counteradvertising. For an excellent law review article discussing the implications of the FTC counterad proposal *see* Foldes, *Shadows of the World: Deceptive Advertising and Counteradvertising*, RES IPSA LOQUITUR, Summer 1974, at 13 (Georgetown Law School). On July 18, 1974, the FCC rejected the counterad proposal. 39 Fed. Reg. 26372, 26382 (1974). See note 82 *supra*.

119. Pub. L. No. 93-153 (Nov. 16, 1973).

120. *See* Note, *The FTC Ad Substantiation Program*, 61 GEO. L.J. 1427 (1973); Rogge, *Inquisitions By Officials: A Study of Due Process Requirements in Administrative Investigations—Part I*, 47 MINN. L. REV. 939 (1963); Note, *Constitutional Rights and Administrative Investigations: Suggested Limitations on the Institutional Powers of the Federal Agencies*, 58 GEO. L.J. 345 (1969); Comment, *First Amendment Rights Inferior to SEC Subpoena Power?—SEC v. Wall Street Transcript Corp.*, 1971 UTAH L. REV. 132 (1971); Laird v. Tatum, 408 U.S. 1 (1972).

121. This does not include Sen. McIntyre's petition, mentioned in note 56 *supra*.

P.A.P.E.R. in March, 1973, concerned ads disseminated by the Weyerhaeuser Company on the environmental impact of clearcutting.[122] The other, filed by an editor of the *Environment Action Bulletin*, objected to ads of the Investor-Owned Electric Light and Power Companies, an association of 75 power companies, concerning radiation emitted from nuclear power plants.[123] The latter petition has recently been acted upon by the NARB, though the result was a very narrow order.[124]

Federal agencies other than the FTC may have a limited role in the regulation of image advertising. The SEC can regulate advertising which constitutes an "offering" of stock to the public or constitutes a "manipulative or deceptive device" which affects the price of a stock being traded.[125] The Food and Drug Administration and the Federal Trade Commission have a working agreement to avoid duplication and promote uniformity, as both agencies have responsibilities to regulate food, drugs, devices, and cosmetics.[126]

If most of the image advertisements go unregulated or are ineffectively regulated, then one must consider whether the claims made in image environmental advertising will go unchallenged altogether. In this regard, one must note the Supreme Court's recent denial of a first amendment right to media access for counter advertisements in *CBS v. Democratic National Committee*.[127] Appeals to the Federal Communications Commission under the "fairness doctrine" for the presenta-

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122. Press Release of March 5, 1973, Public Action to Protect Environmental Resources (P.A.P.E.R.), with copy of March 5, 1973, letter to the Honorable Charles W. Yost.

123. *Environment Action Bull.*, Mar. 10, 1973, article on complaint with copy of ad attached. *See Environment Action Bull.*, Feb. 17, 1973, at 6, where copy of challenged ad is reprinted. *See also*, NAT'L RESEARCH COUNCIL, THE EFFECTS ON POPULATIONS OF EXPOSURE TO LOW LEVELS OF IONIZING RADIATION, REPORT TO THE NAT'L ACAD. OF SCIENCES (Nov. 1972).

124. NARB Press Release, *Six Cases Involving National Advertising Resolved by NAD During July, NARB Reports*, Aug. 10, 1973. The complaint concerned the relative effects of background radiation and radiation released by nuclear power plants; the order barred discussion of the effect of radioactivity on successive generations of human beings. The advertiser was allowed to convey facts about radioactivity in other contexts.

125. Under the Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.* (1970), the SEC may regulate "offers" of securities for sale by a corporation. Almost any communication may be considered an "offer." *See* Release No. 33-38442, Oct. 4, 1957, 22 Fed. Reg. 8359 (1957). No offer may be made unless a registration statement has been filed with the SEC. Between the time it is filed and the time it is approved, offers may be made only if they include the prospectus filed with the SEC. After it is approved, the prospectus must accompany the offer. The result is that an advertisement might be considered an offer which violates the Act if a registration statement had not at least been filed. Securities Act of 1933, 15 U.S.C. §§ 77(b) and 77(e). *See* Securities Exchange Act of 1934, § 10(b) and Rule 10b-5; SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301 (2d Cir. 1971).

126. *Working Agreement Between FTC and Food and Drug Administration*, 3 CCH TRADE REG. REP. ¶¶ 9850.01-.03, at 17,675-77 (June 9, 1954).

127. 412 U.S. 94 (1973).

tion of alternate viewpoints have succeeded in the case of advertising, most notably cigarette advertising.[128] The right to rebuttal time, however, arises only with respect to statements regarding a "controversial issue of public importance." Most television image advertisements do not address such issues. In fact, it is the policy of the major networks to reject advertisements to which the fairness doctrine may apply.[129] To the extent that controversial image ads are aired for which no fairness doctrine appeal applies, one must rely on the controversial nature of the ad itself to arouse its own rebuttal in other forums.

As an alternative to regulation, it is possible that the Internal Revenue Service could challenge the legality of a business deduction taken for the cost of some image ads. Section 162(e)(2)(B) of the Internal Revenue Code denies a business expense deduction for advertising "in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums."[130] The Treasury Regulations further define this provision to include "carrying on propaganda . . . for the promotion or defeat of legislation."[131] The regulations allow deductions for "institutional or 'good will' advertising which keeps the taxpayer's name before the public . . . provided the expenditures are related to *the patronage* the taxpayer might *reasonably expect* in the future." Specifically, "expenditures for advertising which presents views on economic, financial, so-

128. Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969); *see* Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768 (1972).

129. *TV Execs See Oil Counter Ads as Primarily a Print Problem*, ADVERTISING AGE, Mar. 18, 1974, at 1; Ross, *Adding A Chorus of Dissent to the Words of the Profits*, Wash. Post, Mar. 12, 1974, at B1, col. 1. *See* CBS v. Dem. Nat'l Comm. 412 U.S. 94 (1973). For a discussion of the fairness doctrine in relation to a specific environmental ad, *see* Comment, *Ecological Pornography and the Mass Media*, 1 ECOLOGY L.Q. 374 (1971).

130. INT. REV. CODE OF 1954, § 162(e)(2)(B). The question of the deductibility of corporate image advertisements has been explored in two days of hearings on Corporate Energy and Environmental Advertising, May 6 and July 18, 1974, by the Subcomm. on Environment, Senate Commerce Committee. The Committee commissioned Lester Fant to prepare a study of the Internal Revenue Code as it applies to corporate image advertising. In Mr. Fant's testimony he interpreted the term "legislative matter" to refer to matters which are appropriately the subject of legislation; an advertisement can relate to a "legislative matter" and therefore be an inappropriate subject for a deduction even though no legislation is pending with respect to the subject of the advertisement. Release of Testimony of Lester Fant, at 17. As to the terms "attempt to influence," Mr. Fant would find the cost of any advertisement which presents only one side of an issue—as distinct from a purely educational format fairly presenting all factors which support both sides of an issue—as non-deductible. Such ads need not directly urge the public to contact legislators. Mr. Fant reasoned that any advertisement which generates concern about legislative matters has the effect of causing the public to contact its representatives. *Id.* at 18-20. *See generally*, Kuttner, *Oil, Utility Firms' Deductions Queried*, Wash. Post, May 7, 1974, at A4, col. 1.

131. Treas. Reg. § 1.162-20 (1969).

cial, or other subjects of a general nature" are deductible. Not deductible is any advertising "to influence the public with respect to the desirability or undesirability of proposed legislation," or which urges or encourages the public in this respect.

The vagueness of this provision and these regulations has required court interpretations, notably in *Consumers Power Co. v. United States.*[132] In that case, business expense deductions by one backer of the Electric Company Advertising Program were disallowed for advertisements which directly and indirectly attacked public ownership of power companies, such as TVA. However, deductions were also disallowed for ads which merely "suggested that private power companies can provide faster service because, unlike with publicly owned power companies, there was no waiting to have funds appropriated for the needed electrical facilities."[133] The court rejected arguments by the power companies that a part of the deduction should be allowed where only a single sentence in the ad related to government-operated utilities.

If present deductions for many corporate image advertisements ought to be disallowed, but the Internal Revenue Service fails to take such action, serious questions arise as to whether a taxpayer or shareholder would have standing to sue the IRS to force it to deny deductions. It would be especially ironic for a shareholder to sue, given the fact that the deduction benefits the corporation. However, a shareholder could claim he is protecting the corporation from penalties and interest which could occur if the deduction were improperly claimed.[134] Furthermore, a shareholder may be the only person able to compel disclosure by the corporation of what deductions have been taken. It must be noted that just as the corporation's taking a business expense deduction is evidence that the advertisement is commercial speech, therefore not protected by the first amendment, denial of a deduction under Section 162(e)(2)(B) may be evidence that it *is* protected.

Although any rational policy determination as to how best to allocate scarce Commission expenditures must take these factors into ac-

132. 299 F. Supp. 1180 (E.D. Mich. 1969), *aff'd in part, rev'd in part*, 427 F.2d 78 (6th Cir. 1970), *cert. denied*, 40 U.S. 925 (1970).

133. 427 F.2d at 79.

134. Several recent cases have upheld the standing of groups challenging IRS regulations or rulings. *See* Tax Analysts & Advocates v. Schultz, Civil No. 594-73 (D.D.C. 1973); Eastern Ky. Welfare Rights Org. v. Schultz, Civil No. 1378-71 (D.D.C. 1971); McGlotten v. Connally, 338 F. Supp. 448 (1972); Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970); Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd mem. sub nom.*, Coit v. Green, 404 U.S. 997 (1971). Absent an existing regulation or ruling, standing would be difficult to obtain unless the practice of the IRS could be characterized as a ruling. Standing is unlikely if the suit challenges a particular deduction for a particular corporation.

count, the viability of such alternatives cannot alleviate the need for the FTC to chart its own course in this controversial and complex area.

CONCLUSION

The controversy aroused by corporate image environmental advertising continues unabated and, with the energy shortages, has substantially increased. The pressure on the Federal Trade Commission to take action regarding particular image ads has, as a result, also increased. However, such pressures and the passions which generate them should not be allowed to hurry the Commission into taking precipitous action which may infringe upon the first amendment freedoms of corporations, regardless of the inaccuracy or offensiveness of their advertising claims. On the other hand, there is strong evidence of the impact of image advertising on commercial relationships, including retail sales. Widespread public interest in the claims challenged and the novelty of the legal questions raised by such challenges will continue to make the Federal Trade Commission's response to the call for the regulation of image advertising a topic of significant interest to the public generally as well as to environmentalists.

Exhibit 77: "Note—The Regulation of Corporate Image Advertising," 59 *Minnesota Law Review* 189 (1974)

Note: The Regulation of Corporate Image Advertising

American consumers are increasingly being exposed to corporate image advertising.[1] Reflected in the increased expenditures devoted to it,[2] this growing use of corporate image advertising has raised serious questions about its regulation.[3] While the general regulation of advertising by the Federal Trade Commission (FTC) is well established, corporate image advertising has remained unregulated.[4] This Note will outline the development and use of corporate image advertising, evaluate the extent of first amendment protection, and discuss possible FTC regulation.

I. THE DEVELOPMENT OF CORPORATE IMAGE ADVERTISING

A. Definitions

Corporate image advertising sells "ideas" rather than products.[5] Although the subject matter of image advertising is thus intangible, there are apparently two more or less distinct types of "ideas". The first is the image of the advertising corporation itself as an abstract reality. The second is the advertising corporation's position on issues which may appear not to concern the corporation directly, but on which it still wishes to express its opinion.

The concept of image advertising seemingly implies the existence of a corporate image. In its everyday transactions, a cor-

1. Hewens & Poppe, *Corporate Advertising: New Imperatives for an Old Device*, 28 Pub. Rel. J., Nov., 1972, at 8.

2. For example, corporate image advertising expenditures increased from approximately $158 million in 1971 to $182 million in 1972. *1971-72 Expenditures for Corporate and Association Advertising*, 29 Pub. Rel. J., Nov., 1973, at 30 (The corresponding figure for 1973 is not as yet available.) However, such expenditures are still only a minute portion of the nation's total advertising budget which amounted to approximately $21 billion in 1971 and $23 billion in 1972. U.S. Bureau of the Census, Statistical Abstract of the United States 758 (1973). During 1973 expenditures for all advertising hovered at $25 billion. Advertising Age, Dec. 17, 1973, at 3, col. 1.

3. *See* 103 Time, Feb. 11, 1974, at 30; Advertising Age, Aug. 9, 1971, at 3, col. 1.

4. Institutional advertising, as corporate image advertising has also been called, was involved in R.H. Macy & Co. v. FTC, 326 F.2d 445 (2d Cir. 1964). The practice at issue, however, was an advertising allowance, not the advertising itself.

5. G. Flanagan, Modern Institutional Advertising 7 (1967).

poration transmits numerous messages to customers, employees, shareholders, and others with whom it deals.[6] The corporate image might be defined as the sum of all the impressions created by these messages.[7] Unable to perceive or comprehend all the numerous facets of corporate activity, the public tends to condense its understanding of the corporation into a more manageable concept.[8] If generally held by the public, this simplified concept can be viewed as the corporation's image.[9]

Like advertising, public relations is used by the corporation to shape its image.[10] The task of public relations is to identify the favorable and unfavorable elements of the image and then to emphasize to the public the former while de-emphasizing the latter. Public relations is generally carried out through all forms of communications except paid advertising.[11] Paid advertising, in its most familiar form of product advertising, is the use of any paid forum for the purpose of imparting information, developing attitudes, and inducing action beneficial to the advertiser, such as the purchase of a particular product or service.[12] A specific type of product advertising is brand advertising, which seeks to create a unique set of properties or mental images corresponding to the advertised brand, so that these properties or images might affirmatively influence the consumer's buying decision.[13] Corporate image advertising is a hybrid creature designed to use the means of paid advertising to accomplish the goal of public relations. Unlike product or brand advertising, it seeks to create a favorable impression of the corporation

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6. Marinteau, *Sharper Focus for the Corporate Image*, 36 HARV. BUS. REV., Nov.-Dec., 1958, at 53-54.

7. J. CRAWFORD, ADVERTISING 23, 446 (2d ed. 1965). G. FLANAGAN, *supra* note 5, at 66-67, defines a corporation's image as its "personality" or its "reputation." E. BRINK & W. KELLEY, THE MANAGEMENT OF PROMOTION 156 (1965) defines the corporation's image as the "stereotype" with which the public equates the company.

8. H. HEPNER, ADVERTISING—CREATIVE COMMUNICATION WITH CONSUMERS 209 (1964).

9. G. FLANAGAN, *supra* note 5, at 64, suggests that there is not a single "image" of a corporation, but that the image is personal to the beholder. If that were true, however, there would be no logic in attempting to shape the corporation's image through advertising, as each individual would have to be approached separately.

10. B. ZOLLO, THE DOLLARS AND SENSE OF PUBLIC RELATIONS 6 (1967).

11. L. BLUMENTHAL, THE PRACTICE OF PUBLIC RELATIONS 3 (1972).

12. R. COLLEY, DEFINING ADVERTISING GOALS FOR MEASURED ADVERTISING RESULTS 51 (1961).

13. C. SANDAGE & V. FRYBURGER, ADVERTISING THEORY AND PRACTICE 205-07 (1958).

itself rather than just a product or brand, but unlike public relations, it is conducted through paid advertising.

Corporate image advertising may also be concerned with the other type of "idea" in the broad subject matter of nonproduct advertising.[14] Through the use of "advertorials," the advertiser may communicate his position on matters which he considers important, although they are not directly related to the advertiser's own image. This is a less common but increasingly important type of corporate image advertising.

There is no clear distinction in the effects of these two types of advertising. In some cases, for example, the stand which a corporation takes on public issues will affect its image markedly. It is nevertheless possible to analyze problems of regulation in terms of two types of corporate image advertising designed to perform two separate functions—sales-oriented advertising to improve a corporation's position in the market, and issue-oriented advertising to obtain access to the forum of opinion on general issues affecting the business climate or the public welfare. The ultimate goal of both types of advertising may well be economic benefit to the corporation.[15]

B. History and Current Use

A review of the development of corporate image advertising will demonstrate how it has been utilized. The publication in the fifties of *The Mass Image of Big Business*[16] by Gardner and Rainwater and other articles and studies on the image of big business and its economic consequences gave rise to a rash of corporate identity advertising campaigns.[17] Simply put, the thesis was that the average American had serious misgivings about the size and remoteness of big business, misgivings which could adversely affect his buying decisions.[18] Corporate identity campaigns were undertaken to dispel those misgivings and to instill

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14. *Id.* at 104.

15. In a closely related context, proponents of increased "corporate responsibility" sometimes justify the active intervention of corporations and their money in social problems such as urban decay and underemployment on the ground that business is better off in a generally healthier society. Albrook, *Business Wrestles With Its Social Conscience*, 78 Fortune, Aug., 1968, at 88; Blumberg, *Corporate Responsibility and the Social Crisis*, 50 Boston U.L. Rev. 157, 162-63 (1970).

16. Gardner & Rainwater, *The Mass Image of Big Business*, 33 Harv. Bus. Rev., Nov.-Dec., 1955, at 61-66.

17. B. Zollo, *supra* note 10, at 60.

18. Martineau, *supra* note 6, at 58.

in the consumer an image of the advertiser as an entity which he could trust.

This trend in advertising produced a bandwagon effect[19] which eroded the credibility of the advertisements themselves and complicated the already difficult task of assessing their effectiveness. By the early sixties, a reaction had set in critically questioning the basic premise that the consumer's buying decision might be significantly influenced by the image of the company from which he buys.[20] This premise was never conclusively established, but neither was it conclusively discredited; at best the critics assailed the corporate identity binge by condemning specific advertising campaigns that proved useless or even counter-productive. Possibly the epitome of the latter was the steel company advertisement depicting a burly steelworker to create an image of strength, but instead creating the image of a bully.[21]

This reaction did not eliminate corporate image advertising, but merely dispelled some of its mystique. In the late sixties, corporate image advertising was used to meet new challenges, principally the assaults of the consumer movement[22] and the growing popular impression that business was responsible for, yet indifferent to, rising social problems such as pollution and urban blight.[23] Utilizing both sales-oriented and issue-oriented corporate image advertising, a company could fend off assaults by creating the favorable image of a concerned, dynamic company involved in the solution of social problems,[24] and also by

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19. *See* G. FLANAGAN, *supra* note 5, at 63-64.

20. Finn, *Stop Worrying About Your Image*, HARPERS, June, 1962, at 77.

21. G. FLANAGAN, *supra* note 5, at 67-68.

22. Hewens & Poppe, *supra* note 1, at 10: "Social awareness emphasis has dwelled heavily upon such concerns as auto safety, ecology, interpersonal relationships, inflation, consumerism." Related to the need to respond to "consumerism" is the need for good relations with government agencies. Martineau, *supra* note 6, at 54, states that, "I think . . . the corporate image is extremely important in dealing with government functionaries." *See also* G. FLANAGAN, *supra* note 5, at 19.

23. Day, *Closing the Credibility Gap In Environmental Control*, 40 BUS. MGMT., June, 1971, at 36. The response of business is summed up in the "social responsibility doctrine." *See* McDonald, *How Social Responsibility Fits the Game of Business*, 82 FORTUNE, Dec., 1970, at 104-05. *See also* note 15 *supra*.

24. One of the more glaring failures in this endeavor was an advertisement by Potlatch Industries. In a promotion of its pollution expenditures, the company pictured the Clearwater River, on which its plant is located, as clean and free of pollution. Unfortunately, the picture was of the river *upstream* from the plant. *See We Nominate for Oblivion*

expressing its own opinion as to the correct solutions for society to adopt. The entire episode made prophets of Gardner and Rainwater, who had stated in 1955 that "unless management understands the public's underlying feelings, it can unwittingly pave the way for hostile reactions and a lowering of the prestige of big business."[25]

Currently, although corporations must still contend with the criticism of consumer and environmental interests,[26] an economy plagued with shortages presents corporate image advertising with new challenges. Shortages of paper and energy are expected to restrict the volume of the regular media, particularly the printed media, thus diminishing the amount of media space available for public relations. A contraction of normal public relations operations, such as press releases, through which corporations have long projected their images, will foist these functions upon paid corporate image advertising.[27]

The uncertain availability of products in a shortage economy will also cause a switch from product advertising to image advertising. Especially in the utilities industry, the current message of many advertisements encourages conservation rather than consumption and portrays the utility company's concern about an energy shortage and its efforts to overcome it. The objective is to survive the shortage period with as few disruptions of service as possible, and one means is to restrain demands for service.[28]

The energy shortage has also caused an attempt by the oil industry to avert undesirable political repercussions by responding to its critics through corporate image advertising.[29] The

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Those Stupid, Hypocritical Corporate Ads, 56 INDUST. MKTG., March, 1971, at 68.

25. Gardner & Rainwater, *supra* note 16, at 66.

26. Brouillard, *Some Advantages of Corporate Advertising* (editorial), 29 PUB. REL. J., Nov., 1973, at 3. "Consumerism" may not have the same impact in the 70's as it had in the 60's. *See* Advertising Age, Dec. 17, 1973, at 28, col. 1. The need to comment on public issues in general, however, may be increasing. *See* Danko, *A Perspective on Corporate Communications*, 30 PUB. REL. J., Aug., 1974, at 10; Advertising Age, March 4, 1974, at 6, col. 2.

27. Kindse & Callahan, *Facing the Issues: Corporate Advertising's Greatest Challenge*, 29 PUB. REL. J., Nov., 1973, at 7. *Cf.* Cohan, *The New Role of Advertising in a Period of Shortage*, 58 INDUS. MKTG., Nov., 1973, at 66, 68 (advertisements should advocate product efficiency, conservation, and utility).

28. Springer, *Demarketing Power: Utility Companies Explain the Energy Crisis*, 29 PUB. REL. J., Nov., 1973, at 32.

29. 103 TIME, Feb. 11, 1974, at 30.

pattern of problem and response in the oil industry is typical of public relations, and probably foreshadows a major use of corporate image advertising in the future. Shortages which cause curtailment of supply can result in consumer unrest, which in turn can spawn consumer action. To prevent adverse action, the industry must respond to the unrest, a task for which corporate image advertising is best suited.

Outside of industries beset by shortages, corporate image advertising is currently used primarily to promote sales rather than to express the corporation's opinion in the public forum. The promotion of sales may be pursued in two ways, both based on the premise that the consumer's buying decision is influenced by his impression of the producer. One technique is known as "corporate positioning"—an effort by the corporation to make its own name more or less synonymous with the product it makes.[30] For example, Campbell's is not just a producer of soup, Campbell's *is* soup. This is not because there are no other producers of soup, or because Campbell's produces nothing but soup, but Campbell's advertising has so reinforced the message that Campbell's is the primary soup producer that this idea has become virtually impregnated in the American culture. Ultimately, the goal of corporate positioning is to establish the manufacturer or seller as a strong, reputable leader in the industry, whose products must reflect its integrity and leadership.[31]

The other current technique of corporate image advertising is to project or transfer a corporate identity.[32] This is an important goal for a firm whose diversified holdings do not accord with the established identity of the parent firm.[33] In order for the company's employees to see their employer in proper perspective, the corporation should have an identity to which

30. Hewens & Poppe, *supra* note 1, at 8.

31. Effective "corporate positioning" can help a corporation ride out a crisis. For example, another soup producer, Bon Vivant, was forced into bankruptcy by adverse publicity resulting from the production of some contaminated soup. At nearly the same time, a few cans of Campbell's soup, suspected of being contaminated, created hardly a ripple because Campbell's reputation was much better established. *See* W. Salter, Upbeat! Just What is Corporate Advertising? (Time, Inc. memo (no date) on file in Univ. of Minn. Law Library).

32. BUS. WEEK, Feb. 20, 1971, at 52-53.

33. Stone, *What's Ahead for Corporate Advertising*, 28 PUB. REL. J., Nov., 1972, at 62. B. ZOLLO, *supra* note 10, at 67, cites Morton Salt Company as an example of a corporation which enjoyed a firmly established identity in one field and then sought to project that identity into other areas.

they can relate and which can survive the acquisition of diversified holdings.[34] This argument for an identity applies with even greater force to the company's customers, whose loyalty to the parent firm cannot be transferred to the subsidiary, or vice versa, unless each can be identified with the other.[35]

C. Effectiveness of Corporate Image Advertising

The effectiveness of any form of advertising is difficult to determine.[36] In *Confessions of an Advertising Man*, David Ogilvie relates the dilemma of the businessman who states, "Half the money I spend on advertising is wasted, and the trouble is I don't know which half."[37] The effectiveness of product advertising can theoretically be measured by the level of sales of the product: if sales improve following an advertising campaign, the increase can in some cases be attributed to the advertising.[38] But there are few statistics. With respect to corporate image advertising, the uncertainty is compounded by the lack of a standard of measurement. Corporate image advertising—even if "sales-oriented"—is designed to sell ideas rather than products, and its effect on product sales is at best indirect. Consequently, there is no monetary gauge of the effectiveness of corporate image advertising.[39] Other measurements are designed only to reflect the public's "awareness" of or "favorability" towards the corporation,[40] and while they can show changes in public opinion, these measurements are difficult to translate into terms of profit and loss.

The translation of public opinion into profit and loss raises a basic question about the theory of corporate image advertising. There has been an implicit assumption that the public's opinion of a corporation—that is, its image—somehow influences the

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34. *Id.* at 61-62.
35. H. Hepner, *supra* note 8, at 216.
36. A. Frey & J. Halterman, Advertising 483-84 (4th ed. 1970).
37. D. Ogilvie, Confessions of an Advertising Man 59 (1966).
38. A. Frey & J. Halterman, *supra* note 36, at 483.
39. *See* Moodie, *Organizing the Communications Effort*, 28 Pub. Rel. J., Nov., 1972, at 20.
40. Grass, *Measuring Corporate Image Advertising Effects*, 12 J. Advertising Research, Dec., 1972, at 15-22, relates research done on duPont advertising, concludes that the campaign increased "favorability," but does not suggest what benefit duPont received from this "favorability." In the early fifties, the A & P supermarket chain, faced with an antitrust suit, enlisted extensive popular support. The results of the litigation were favorable to A & P, but not necessarily because of this public support. *See* G. Flanagan, *supra* note 5, at 23, which suggests that the advertising did influence the outcome of the case.

consumer's buying decision.[41] This assumption has been criticized for lack of proof, as there have been no empirical studies supporting it. But by the same token there is no empirical data disproving it.[42] There is at best a subjective feeling within the advertising industry that advertising must sell more than the product—it must sell the company responsible for the product.[43]

In addition to the ground that the image is not relevant, corporate image advertising is also criticized as ineffective on the ground that advertising by itself cannot create an image. Advertising can only build upon reality.[44] If not supported by reality, the image advertising will merely aggravate distrust and cynicism.[45]

The effectiveness of issue-oriented advertising is even more speculative. Either because this form of corporate image advertising has been relatively uncommon or because it is not expected to have any impact beyond dissemination alone, the advertising industry apparently has not addressed the subject of its monetary effectiveness.

While the effectiveness of corporate image advertising is the subject of some disagreement, even among advertisers them-

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41. Martineau, *supra* note 6, at 58. However, Finn, *supra* note 20, argues that the connection between the image and the purchasing decision is not well established. *Cf.* Geist, *Confessions of an Ad Manager*, 93 DUN'S REVIEW, April, 1969, at 54:

> Advertising has one purpose: to help sell a company's product or capabilities. There is no valid distinction between promotion of products and corporate image—which just means reputation for reliability. A customer buys both, or he buys neither.

42. J. HOWARD & J. SHETH, THE THEORY OF BUYER BEHAVIOR (1969) is an in-depth study of the buying decision, but it does not treat the producer's image at all. V. LESSIG, PERSONAL CHARACTERISTICS AND CONSUMER BUYING BEHAVIOR: A MULTIDIMENSIONAL APPROACH 5-14 (1971) reviews all the major buying studies of the past decade, none of which have treated the relevance of the producer's image. At best, these studies indicate that a favorable brand image may be influential, but stop short of equating brand image with producer image.

43. Geist, *supra* note 41, at 54. *Companies Face An Identity Crisis*, BUS. WEEK, Feb. 20, 1971, at 54.

44. Berkwitt, *Does the Corporate Image Really Change?*, 95 DUN'S REVIEW, Jan., 1970, at 19.

45. Dalton, *Corporate Advertising . . . "A Short Course in Bootstrap Self-Improvement,"* 28 PUB. REL. J., Nov., 1972, at 67, suggests that image advertising will encourage the company and its employees to be what they are advertised to be. Whether or not in practical terms this will happen is not clear. The effort to "clean up" the image may encourage the corporation to "clean up" any obnoxious practices, but the evidence for this proposition is sketchy.

selves,[46] there is no indication that it is being abandoned. On the contrary, the increasing reliance on corporate image advertising is perhaps the strongest indication of its recognized effectiveness.[47]

II. ADVERTISING UNDER THE FIRST AMENDMENT

A. The Commercial Exception

The doctrine that the protections of the first amendment do not apply to commercial advertising was abruptly announced in 1942, in *Valentine v. Chrestensen*.[48] Citing no authority and discussing no public policy,[49] the Court upheld a municipal sanitation ordinance invoked to prohibit the distribution of a handbill with both a political and a commercial message. The Court held that states were free to regulate commercial advertising because it was not speech within the meaning of the first amendment.[50] In reaching this result, the Court was not troubled by the handbill's purported political message, because it had been included on the handbill "with the intent, and for the purpose, of evading

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46. *See* Advertising Age, May 21, 1973, at 20, col. 1; Advertising Age, Nov. 15, 1971, at 3, col. 3.

47. *See* note 2 *supra*. *See also*, B. Zollo, *supra* note 10, at 2-3.

48. 316 U.S. 52 (1942). In Schneider v. State, 308 U.S. 147 (1939), which reversed, on first amendment grounds, several convictions under municipal ordinances regulating the distribution of handbills, the Court may have been indicating the pattern of things to come. The Court stated, as dictum, that: "We are not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance [in that case] requires." *Id.* at 165.

49. Justice Douglas, concurring in Cammarano v. United States, 358 U.S. 498, 513-14 (1959) stated that:

> *Valentine v. Chrestensen*, 316 U.S. 52, 54, held that business advertisements and commercial matters did not enjoy the protection of the First Amendment, made applicable to the States by the Fourteenth. The ruling was casual, almost offhand. And it has not survived reflection.

50. 316 U.S. at 54-55. Although not protected as speech under the first amendment, advertising is protected as property under the fourteenth amendment. T. Emerson, Toward a General Theory of the First Amendment 105 n.46 (1966) [hereinafter cited as Emerson, General Theory]; Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 Geo. Wash. L. Rev. 429, 430 (1971). Prior to *Chrestensen*, regulation of advertising had been treated solely as a due process issue. *See* Packer v. Utah, 285 U.S. 105 (1932); Fifth Ave. Coach Co. v. New York, 221 U.S. 467 (1911). While *Chrestensen* dealt strictly with the mode of dissemination, the doctrine has been extended to permit the regulation of advertising content as well. E.F. Drewl & Co. v. FTC, 235 F.2d 735, 739 (2d Cir. 1956), *cert. denied* 352 U.S. 969 (1957); American Medicinal Prods., Inc. v. FTC, 136 F.2d 426 (9th Cir. 1943); T. Emerson, The System of Freedom of Expression 417 (1970) [hereinafter cited as Emerson, System].

the prohibition of the ordinance."[51] Thus the Court obliquely enunciated a primary-purpose test for determining if an advertisement is commercial and thus subject to regulation.

The primary-purpose test was expanded in *Breard v. City of Alexandria*,[52] in which the Court upheld an ordinance prohibiting salesmen from canvassing a community house-to-house for magazine subscriptions. Although the issue of freedom of the press was raised, the Court concluded that the purpose of selling magazine subscriptions was primarily commercial and the activities were therefore not protected.[53] This conclusion might imply that freedom of speech is protected only until it is used to obtain a financial return. However, later cases have made it clear that because the exercise of free speech is in some circumstances dependent on a financial return, the presence of a commercial transaction alone is not enough to deny first amendment protection.[54] Thus, in *New York Times Co. v. Sullivan*,[55] an advertisement soliciting support for the civil rights movement was held to be protected speech even though it sought financial contributions as well as moral support. The Court stated:

> The publication here was not a "commercial" advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.[56]

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51. 316 U.S. at 55.

52. 341 U.S. 622 (1951).

53. *Id.* at 642.

54. EMERSON, SYSTEM, *supra* note 50, at 416-17, citing Smith v. California, 361 U.S. 147, 150 (1959). In Cammarano v. United States, 358 U.S. 498, 514 (1959), Justice Douglas stated, in a concurring opinion: "Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive." *See also*, Comment, *The First Amendment and Commercial Advertising: Bigelow v. Commonwealth*, 60 VA. L. REV. 154, 158 (1974).

55. 376 U.S. 254 (1964).

56. *Id.* at 266. The court did not make clear the distinction between commercial and noncommercial advertising, and the quoted passage can be read to mean either that the advertisement was not commercial *and* it addressed an issue of "the highest public issue and concern," or that the advertisement was not commercial *because* it addressed a public issue. Justice Brennan recited several elements of the advertisement, stating that it "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support," but he did not indicate whether those elements are decisive or merely descriptive. *Id. See Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1029 n.16 (1967).

Although the impact of *New York Times* was to constitutionally exempt comment about official conduct from libel actions,[57] the opinion suggests a general rule that advertising which comments upon "matters of the highest public interest and concern" is noncommercial. This approach to distinguishing commercial and noncommercial advertising was apparently adopted in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations.*[58] In holding that the states can constitutionally prohibit job advertisements that state a sex preference, the Court stated:

> We emphasize that nothing in our holding allows government at any level to forbid Pittsburgh Press to publish and distribute advertisements commenting on the Ordinance, the enforcement practices of the Commission, or the propriety of sex preference in employment.[59]

Although this was dictum, the Court clearly recognized that the commercial exception doctrine does not remove all advertising from first amendment protection. While other factors may also be involved, the expression of opinion on a public issue is a factor common to both *New York Times* and the *Pittsburgh Press* dictum.

B. Application to Corporate Image Advertising

Sales-oriented corporate image advertising serves the function of improving the advertiser's image and thus of promoting an economic benefit such as sales revenue. For the same reasons that product advertising can be regulated, there is little doubt that corporate image advertising oriented *solely* toward an eco-

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57. Subsequent libel cases have delineated a large "public concern" exemption under the first amendment. Julian Messner, Inc. v. Spahn, 18 N.Y.2d 324, 221 N.E.2d 543, 274 N.Y.S.2d 865 (1966), *vacated per curiam*, 387 U.S. 239 (1967) (broadening the scope of *New York Times* to include "public figures"); Time, Inc. v. Hill, 385 U.S. 374 (1967) (including "newsworthy items" under the *New York Times* rule); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (expanding the rule to cover matters of "public or general concern"); Getz v. Robert Welch, Inc., 94 S. Ct. 2997 (1974) (overruling *Rosenbloom*, holding that public issues are not covered by the *New York Times* rule).

58. 413 U.S. 376 (1973).

59. *Id.* at 391. Plaintiff newspaper argued that because it exercised "editorial discretion" over the placement of want-ads, the activity was more than strictly commercial. The Court rejected this argument, and the decision of the Court on this matter can be read as a determination either that the alleged "editorial discretion" did not exist, or more probably, that it was insufficient to offset the primarily commercial nature of the activity. *Cf.* Miami Herald Publ. Co. v. Tornillo, 94 S. Ct. 2831 (1974) (right-to-reply statute struck down as an infringement on "editorial discretion." *See* text accompanying notes 166-69 *infra*).

nomic benefit is not protected by the first amendment.[60] The problem arises with issue-oriented advertising, which seeks to provide the advertiser a means to speak out on public issues.[61] In the light of the guidance presently available, it appears that such corporate image advertising would be outside the first amendment's protection and subject to regulation if and only if it is regarded as "commercial."[62]

1. Tests for Commercial Content

Recent commentators have suggested a "marketplace" test for distinguishing between commercial and noncommercial advertising and thus delimiting the commercial exception doctrine.[63] Starting from the proposition that protection should be

60. The same conclusion was reached by FTC Chairman Lewis A. Engman in a speech to the Antitrust Section of the State Bar of Michigan on Feb. 17, 1974. Mr. Engman concluded: "[T]o the extent that such [corporate image] ads like product ads, seek to . . . encourage economic responses . . . they are subjects of legitimate interest to the Federal Trade Commission" 5 TRADE REG. REP. ¶ 50,200, at 55,377 (FTC 1974). FTC Consumer Protection Bureau Director J. Thomas Rosch, responding to a request by certain congressmen that the FTC investigate oil company advertising, concluded: "Nevertheless, I think that the First Amendment cannot be used as a shield when that garb is simply a sham and the advertiser is actually intending to sell his product through unfair or false advertising. . . ." 646 BNA ANTITRUST TRADE REG. REP. A-11 to -12 (Jan. 15, 1974).

61. *See* text accompanying note 14 *supra*.

62. There are no cases specifically dealing with the application of the commercial exception doctrine to corporate image advertising. The problem of regulating advertising in which a social issue is included in the context of a commercial message is presented by two recent cases dealing with the advertising of abortion referral agencies. In Mitchell Family Planning, Inc. v. Royal Oak, 335 F. Supp. 738 (E.D. Mich. 1972), it was held that the advertising in question did not pose a "clear and present danger" that the city policy against abortion would be violated. *See* Comment, *Constitutional Law—The First Amendment and Advertising: The Effects of the "Commercial Activity" Doctrine on Media Regulation*, 51 N.C.L. REV. 581 (1973). In Bigelow v. Virginia, 213 Va. 191, 191 S.E.2d 173 (1972), *vacated*, 413 U.S. 909, *aff'd on rehearing*, 214 Va. 341, 200 S.E.2d 680 (1973), a misdemeanor conviction for violation of an ordinance prohibiting advertising for abortions was upheld because the advertising was outside the first amendment. *See* Comment, *supra* note 54. In neither case did the court address the utility of the advertising in the social debate on abortion. For a discussion of the uses of commercial advertising as a vehicle of free debate, see Redish, *supra* note 50, at 443. *See also* text accompanying notes 69-72 *infra*.

63. Bird, Goldman & Lawrence, *Corporate Image Advertising: A Discussion of the Factors that Distinguish Those Corporate Image Advertising Practices Protected Under the First Amendment from Those Subject to Control by the Federal Trade Commission*, 51 J. URBAN L. 405 (1974).

presumed unless specified conditions are met, this test permits regulation only if the corporate image advertising makes statements about the advertiser's business and these statements have an appreciable influence on consumers in the market place. This test has the advantage of certainty. It also has the advantage of being supported by current regulatory practice.[64] However, even assuming that it is possible to determine when the requisite conditions are satisfied, the test nonetheless is not sufficiently flexible to apply to all the variations of use in which corporate image advertising may be employed. Essential to this test is the assumption that in any one advertisement there is no overlap of the sales-oriented and issue-oriented purposes served by corporate image advertising. To the extent that public issues can be addressed by the advertiser to improve its position in the market, and efforts to improve market position can raise issues of importance to public decision making, the test is inadequate.[65]

A second possible method of drawing a line between the commercial and the noncommercial is to focus on the advertiser's intent. Where an economic benefit is intended, the advertisement would be commercial, regardless of what issues it addresses. Any method concerned with intent, however, involves obvious problems of proof,[66] especially in the case of corporate image advertising where different messages can be intended for different audiences.[67] Furthermore, what is intended and what actually results are not necessarily synonymous, for a message may be misunderstood or rejected. In order to reflect reality, an inquiry should look beyond intent.

To the extent that this economic-benefit test rests on a finding of benefit reasonably expected, rather than primarily in-

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64. *See Developments in the Law—Deceptive Advertising, supra* note 56, at 1031-32. The FTC's power to prevent the dissemination of a pamphlet which erroneously asserts that the use of aluminum cookware is unsafe has been held to turn on the presence of a commercial interest in dissemination. *Compare* Scientific Mfg. Co. v. FTC, 124 F.2d 640 (3d Cir. 1941) (cease and desist order set aside because the respondent had no commercial interest in the sale of cookware) *with* Perma-Maid Co. v. FTC, 121 F.2d 282 (6th Cir. 1941) (cease and desist order enforced with respect to dissemination of the same pamphlet because respondent had a commercial interest in the sale of non-aluminum cookware).

65. *See* text accompanying note 15 *supra.*

66. Significantly, the FTC has long considered intent immaterial, partly because of the problem of proof. *See* Kintner, *Federal Trade Commission Regulation of Advertising*, 64 MICH. L. REV. 1269, 1280 (1966).

67. *See* Brouillard, *supra* note 26, at 3.

tended, the test becomes too inclusive. Because of the expense involved in advertising, only a most atypical advertiser would not expect to derive at least some economic benefit from the expenditure. But it might not be appropriate to deny first amendment protection to otherwise political speech in the form of paid advertising simply because it is connected with an economic benefit. If, for example, the Court in *New York Times* had considered the ultimate economic benefits of better jobs, improved education, and a higher living standard which the civil rights movement sought, it might not have so easily found the advertisement protected by the first amendment under a strict economic-benefit test.[68] It would seem that some measure of proximity or directness between the advertisement and the resulting benefit is required; therefore, this test merely replaces one line-drawing problem with another.

A third possible method of distinguishing the commercial from the noncommercial is to develop the *New York Times* holding into a rule that advertising which addresses "matters of the highest public interest and concern" is protected by the first amendment.[69] However, if social commentary is sufficient to invoke first amendment protection, an advertiser would arguably be able to use any public issue as a shield for his advertisement.[70] To forestall such use of incidental social commentary, something more than mere association with a public issue must be required or the rule would allow "every merchant who desires to broadcast advertising . . . to achieve immunity from the law's command."[71] Although the test could turn on such distinguishing factors as magnitude of the issue, weight of the treatment given, or purpose for making the advertisement,[72] evalua-

68. *See* Comment, *supra* note 54, at 158.

69. *See* text accompanying notes 54-59 *supra*.

70. For example, the advertiser in Valentine v. Chrestensen, 316 U.S. 52 (1942), appended a political protest against city wharfage policy to his handbill in an attempt to evade the ordinance against disseminating commercial handbills. *See* text accompanying note 51 *supra*.

71. 316 U.S. 52, 55 (1942). For example, the Chevron commercials of Standard Oil of California associated the product and its ingredient F-310 with the public concern about pollution. It would be hard to justify a policy which would not permit FTC intervention merely because pollution is discussed. Berman, *Chevron's Pollution Solution*, COMMONWEAL, Mar. 5, 1971, at 547, uses the Chevron commercial as an example of the exploitation of environmental awareness by business:

> The red-eyed, smog-filled viewer is told that big companies are more concerned with "saving the environment" than making a fast buck and that he can help the problem along by succumbing to conspicuous consumption of all salable items that promise to help avert the coming environmental crisis.

72. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rela-

tion of those factors might also be difficult and might admit of application only on a case-by-case basis.

This public interest test would encounter a further difficulty because the criteria for "matters of the highest public interest and concern" are not always clear. A specific definition of public issues might prove unworkable, because issues change constantly and are not uniform throughout the nation. However, a broad definition may not be precise enough to forewarn advertisers of the scope of regulation.[73]

2. *A Balancing Approach*

To avoid some of the difficulties involved in a test for commercial content, it should be recognized that the characterization of an advertisement as "commercial" or "noncommercial" is a conclusion of law—simply another way of indicating whether regulation is considered appropriate. Thus the best "test" is one which identifies the respective interests involved and denominates "commercial"—and thus subject to regulation—that ad-

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tions, 413 U.S. 376, 385 (1973), may anticipate such a possibility. *See also* New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

73. Jones, *The Cultural and Social Impact of Advertising on American Society*, 8 OSGOODE HALL L.J. 65, 74 (1970) states that any product advertising, to be effective, "of necessity must replay or reflect some cultural aspects of our society. . . ." If such implicit social commentary were held sufficient to constitute a first amendment defense, the commercial exception doctrine would be defunct. This result could be avoided by an admission that the social commentary in the average product advertisement does not approach an issue of "public interest and concern," as the term was apparently used in New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964). However, in Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971), the court observed that the application of the "fairness doctrine" was triggered by advertisements extolling the desirability of big automobiles. Although the advertisements themselves were silent as to the effect of large engines on the environment, they did affect social value judgments concerning clean air and pollution. *See* Comment, *The Fairness Doctrine Requires Rebuttal to Air Pollution Policies Implicitly Espoused by Car and Gasoline Commercials*, 50 TEX. L. REV. 500 (1972).

Similarly, in reference to the FTC's proposal to regulate "nonrational" advertising, one writer has stated:

> Since television occupies a central place in most households, the viewer is continuously engulfed with messages which educate, messages which set standards, and messages which instill drives. Attitudes and life styles are most certainly influenced by the medium. Thus, the importance of understanding the new television advertising, as well as new advertising in general, cannot be overemphasized.

Thain, *Consumer Protection: Advertising—The FTC Response*, 26 FOOD DRUG COSM. L.J. 609, 622 (1971).

vertisement for which the interests in regulation outweigh the interests in protection.

The interest of the advertiser in being heard originates in the preferred place of speech in our society; it is reflected in the protection accorded to speech by the first amendment. That interest is reinforced by the fact that the advertiser bears the expense of being heard. A monetary interest alone, however, does not warrant first amendment protection; cases such as *New York Times* indicate some of the nonmonetary interests that might be sufficient to invoke such protection.[74]

To the advertiser's interest should be added the community's interest in hearing all sides of important public questions.[75] This interest is not served, however, by the dissemination of false facts,[76] although it might be served by the dissemination of erroneous ideas. Consequently, corporate image advertising which supports its message with erroneous factual information would not perform a function protected by the first amendment and theoretically would deserve protection only to the extent that it is a factually correct statement.[77] In practice, the distinction between factual assertions and opinion is not always clear. As the Supreme Court stressed in *Gertz v. Robert Welch, Inc.*,[78]

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74. *See* note 56 *supra*.

75. *See generally* Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245; Redish, *supra* note 50, at 434-36.

76. *See* Gertz v. Robert Welsh, Inc., 94 S. Ct. 2997, 3007 (1974), in which the Court stated:

> But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. New York Times Co. v. Sullivan, 376 U.S. at 270. . . . They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 . . . (1942).

Gertz, however, was a libel action and thus not entirely on point. The extent to which its analysis can be transferred to the different interests involved in advertising is speculative. *Cf.* Redish, *supra* note 50, at 459, which argues that libel suits and FTC regulation cannot be equated because the "chilling effect" of libel is greater.

77. As an illustration, Mobil Oil Company has asserted that as only one oil well in sixty pays off, higher gasoline prices and larger corporate profits are needed to develop more sources of oil. Figures compiled for the American Petroleum Institute indicate that three out of five new wells are productive. *See* Minneapolis Star, Apr. 25, 1974, § B, at 30, col. 1. While a corporation's claims that higher profits are justified is perhaps protected, the use of erroneous factual material to support these claims would not be.

78. 94 S. Ct. 2997 (1974).

"Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate."[79] Drawing a distinction between factual statements and opinion in an advertisement might present difficulties, and the result is likely to be a case-by-case approach to the problem.[80]

Because the Supreme Court has not subjected the commercial exception doctrine to a searching analysis, it has not clearly identified the interests served by regulation. Commentators have suggested several justifications for regulating advertising,[81] but only in the context of product advertising, not corporate image advertising. The first of these justifications is that false advertising, unlike erroneous ideas, does not address matters of public importance and therefore does not deserve a forum.[82] Thus, corporate image advertising which does address a matter of public importance would apparently deserve protection, regardless of any accompanying commercial motive, message, or effect. Under regulations supported by this justification the identification of matters of public interest again becomes the crux of the problem.[83]

A second justification for regulating advertising is that while erroneous ideas may contribute to the intellectual process, false product advertising adds nothing to the product.[84] To the extent that issue-oriented corporate image advertising contributes to the intellectual process then, it would not seem correct to encroach upon the advertiser's freedom of speech. However, this will present no obstacle to the regulation of false factual assertions, which do not contribute to the intellectual process.[85]

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79. *Id.* at 3007.

80. The restriction of regulation to matters of factual assertions is supported by a phenomenon peculiar to corporate image advertising. The credibility of an advertisement is determined by the factual assertions made to support it. Unless the advertisement is supported by facts, it will not be believed. As a practical matter, then, regulation of factual assertions alone would be sufficient to control abuse of corporate image advertising. *See* Day, *Closing the Credibility Gap in Environmental Control*, BUS. MGMT., June, 1971, at 29, 36. In the context of product advertising, Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 445 (1964), argues that only factual claims should be regulated; the FTC should not concern itself with an advertisement's economic utility.

81. *Developments in the Law—Deceptive Advertising, supra* note 56, at 1029-31.

82. *Id.* at 1029-30.

83. *See* text accompanying notes 69-73 *supra.*

84. *Developments in the Law—Deceptive Advertising, supra* note 56, at 1030.

85. One justification for subjecting advertising to a "test of truth"

Finally, it is suggested that advertising should be regulated to protect the consumer who would otherwise be unable to discover deception until after he has been injured by purchasing an inferior, advertised product.[86] Arguably, the consumer should be protected against inferior ideas in the same manner he is protected against inferior goods, but there is no mechanism for securing such "protection" in a free society. Accordingly, this justification for regulation does not appear to have much relevance to corporate image advertising of the issue-oriented variety.

In view of all the interests involved in the application of the commercial exception doctrine to corporate image advertising, it would appear that the factual claims made in image advertising could be regulated without transgressing first amendment guarantees, but that there is no corresponding justification for the regulation of ideas. This is consistent with the basic objective of advertising regulation, which is to protect the consumer against false or deceptive claims, not to censor advertisers' "incorrect" ideas.

III. THE ROLE OF THE FEDERAL TRADE COMMISSION

A. Jurisdiction

The jurisdiction of the FTC is limited by the requirements of section 5 of the Federal Trade Commission Act that the acts or practices regulated be "in commerce" and that "a proceeding by [the FTC] in respect thereof would be to the interest of the public . . . ."[87] The requirement that the acts or practices be

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in contrast to the general rule that truth is immaterial to first amendment protection of speech is the greater susceptibility of advertising claims to factual verification. *See id.* at 1030-31.

86. *See* Note, *Freedom of Expression in a Commercial Context*, 78 Harv. L. Rev. 1191, 1197 (1965).

87. 15 U.S.C. § 45 (1970) (originally enacted as Act of Sept. 26, 1914, ch. 311, § 5, 38 Stat. 92) reads in pertinent part:

> (b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint.

A bill currently pending in Congress would expand the FTC's jurisdiction in the area of consumer protection. *See* H.R. 7917, 93d Cong., 1st Sess. (1973). Reported to the House floor in H.R. Rep. No. 1107, 93d Cong., 2d Sess. (1974).

"in commerce" has been interpreted by the Supreme Court to deny the FTC jurisdiction over wholly intrastate sales. In *FTC v. Bunte Brothers*,[88] the Court held as a matter of statutory construction that because section 5 specifies activities "in commerce," rather than "affecting commerce," Congress intended to grant to the FTC only part of its broad constitutional power over commerce.[89] Although the sales of candy in *Bunte Brothers* admittedly "affected" interstate commerce, they did not meet the stricter "in commerce" requirement and the FTC was without jurisdiction.

While *Bunte Brothers* has not been directly challenged, and other federal courts have upheld the distinction,[90] its authority seems to be in doubt.[91] It has been suggested that the only reason the *Bunte Brothers* distinction has survived is that the FTC is discouraged for practical reasons from attempting to expand the limits of its jurisdiction.[92] The FTC has, however, asserted jurisdiction over local sellers who advertise by means of interstate media,[93] but this assertion has not been tested in the courts.[94] In *Guziak v. FTC*,[95] the Court of Appeals for the Eighth Circuit held that an aluminum siding vendor who advertised through interstate media and effected a minimal number of interstate sales was "in commerce" for the purposes of section 5. The court stressed that there was no "basis . . . for holding that the Commission may not assert its power until the interstate activity under scrutiny has reached a certain magnitude."[96] This is not to say, however, that advertising in interstate commerce alone would be sufficiently "in commerce," and the court seems to suggest that at least one interstate sale would be required.

While interstate advertising alone may not be enough to support jurisdiction, the FTC would have jurisdiction if the adver-

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88. 312 U.S. 349 (1941).

89. *Id.* at 355

90. *See, e.g.*, Royal Oil Corp. v. FTC, 262 F.2d 741 (4th Cir. 1959) (intrastate commerce not subject to federal regulation even though it may competitively affect interstate commerce); California Rice Indus. v. FTC, 102 F.2d 716 (9th Cir. 1939) (fixing quotas of rice to be milled "affected" but not "in" interstate commerce).

91. Millstein, *supra* note 80, at 455-56.

92. *Id.* at 456.

93. S. Klein Dep't Stores, 57 F.T.C. 1543 (1960).

94. Bankers Sec. Corp. v. FTC, 297 F.2d 403 (3d Cir. 1961) held that the FTC had jurisdiction where both interstate delivery of goods and advertising in interstate newspapers had occurred. Jurisdiction may conceivably rest on either ground.

95. 361 F.2d 700 (8th Cir. 1966).

96. *Id.* at 703.

tiser carries on interstate sales as well. Corporate image advertising could create special jurisdictional problems, as by definition this type of advertising is designed to sell ideas rather than products.[97] There is no requirement, however, that the regulated advertising be the *cause* of the interstate sales, and all corporate image advertising of any corporation with interstate sales could thus be subject to regulation. On the other hand, the corporate image advertiser who conducts no interstate business presumably would not advertise in interstate commerce, or even if he did, would not advertise enough to justify regulation.[98] As a practical matter, the FTC would thus have jurisdiction over all significant corporate image advertising.

The requirement of section 5 that regulation be in the public interest has also been interpreted to limit FTC jurisdiction.[99] In *FTC v. Klesner*,[100] the FTC sought to enforce an order prohibiting the respondent from using the name "Shade Shop," as another business had adopted the name. The Court held that without a showing of a specific substantial public interest, the FTC lacked authority to file a complaint.[101] Recent judicial treatment of the question of public interest, however, has tended to respect the discretion of the FTC.[102] The Supreme Court has not ruled specifically on FTC discretion, but in a trade name dispute similar to *Klesner* it has held that another administrative agency, the Civil Aeronautics Board, has wide discretion in determining what is a matter of public interest.[103] It is very unlikely that a court

97. *See* note 5 *supra* and accompanying text.

98. Such speculation could be avoided if section 5 were simply amended to provide for jurisdiction on the basis of interstate advertising alone. *See* note 87 *supra*.

99. Millstein, *supra* note 80, at 483-84.

100. 280 U.S. 19 (1929).

101. *Id.* at 30. Judge Friendly suggests that this case can be interpreted in one of two ways. It may mean literally that the FTC cannot intervene in private disputes, or it may be read merely as an expression of judicial disgust with the FTC for pursuing cases of no real or economic impact. *See* Exposition Press, Inc. v. FTC, 295 F.2d 869, 877 (2d Cir. 1961) (Friendly, J., dissenting), *cert. denied*, 370 U.S. 917 (1962).

102. In Moretrench Corp. v. FTC, 127 F.2d 792, 795 (2d Cir. 1942), Judge Learned Hand distinguished *Klesner* on grounds that it "is to be put down as deciding that the court may consider whether the controversy is not in general too trivial to justify the attention of the Commission." *See* Millstein, *supra* note 80, at 483; *Developments in the Law—Deceptive Advertising*, *supra* note 56, at 1023. *See also* Exposition Press, Inc. v. FTC, 295 F.2d 869 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962); Parke, Austin & Lipscomb, Inc. v. FTC, 142 F.2d 437 (2d Cir.), *cert. denied*, 323 U.S. 753 (1944); L & C Mayers, Inc. v. FTC, 97 F.2d 365 (2d Cir. 1938).

103. American Airlines, Inc. v. North Am. Airlines, Inc., 351 U.S. 79 (1956).

would rule corporate image advertising outside the FTC's jurisdiction for lack of a public interest in regulation.[104]

Corporate image advertising is not otherwise excluded from the intended scope of section 5. Although in general the legislative intent of the original Act of 1914 is anything but clear, the broad language of section 5 evidently was chosen to give the new Commission wide powers and the ability to adapt the definition of "unfair methods of competition" to changing circumstances.[105] The Wheeler-Lea Act[106] amended the FTC Act in 1938 to allow the Commission to regulate in the interest of the consumer as well as in the interest of competition, and its legislative history indicates that the regulation of false advertising was intended.[107] There is nothing to indicate that Congress had any particular type of false advertising in mind or that it sought to exempt any particular type. The language of the Act and the broad congressional approval given FTC efforts to regulate advertising compel the conclusion that the scope of the FTC's authority is broad enough to include corporate image advertising.[108]

For several reasons, as a matter of practice the FTC has limited its regulation almost solely to product advertising. The amount of corporate image advertising is insignificant in relation to product advertising.[109] The latter type of advertising has also represented a greater potential for injury both to the consumer

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104. Millstein, *supra* note 80, at 484. The FTC's decision to actually assert jurisdiction and to regulate corporate image advertising, however, would involve a different set of considerations. *See* text accompanying notes 109-11 *infra*.

105. S. REP. No. 597, 63d Cong., 2d Sess. 13 (1914); H.R. REP. No. 1142, 63d Cong., 2d Sess. 18-19 (1914). Power to regulate advertising as an "unfair method of competition" was asserted by the Commission in 1916 in its annual report: "[I]n certain cases of misbranding and falsely advertising the character of goods where the public was particularly liable to be misled, the Commission has taken jurisdiction." 1916 FTC ANN. REP. 6. This assertion of jurisdiction was apparently not intended by the framers of the Act. *See* Millstein, *supra* note 80, at 450. Nevertheless, the court upheld the FTC's jurisdiction over advertising in Sears, Roebuck & Co. v. FTC, 258 F. 307 (7th Cir. 1919). *Accord* FTC v. Winsted Hosiery Co., 255 U.S. 483 (1922).

106. Act of March 21, 1938, ch. 49, § 3, 52 Stat. 111, *amending* 15 U.S.C. § 45 (1934) (codified at 15 U.S.C. § 45 (1970)).

107. Senator Wheeler, reporting the Wheeler-Lea Act on the floor of the Senate, stated: "The Federal Trade Commission has always had jurisdiction over false advertising of foods, drugs, devices, and cosmetics, as well as over all other commodities." 83 CONG. REC. 3255 (1938).

108. *See id.* at 3255-56. *But see* Bird, Goldman & Lawrence, *supra* note 63, at 414-15.

109. *See* note 2 *supra*.

and to competition because it is a direct inducement to buy.[110] Finally, the claims of product advertising are more readily susceptible of verification.[111] However, while the FTC has accordingly concentrated its finite resources on product advertising, this cannot be regarded as abdication of jurisdiction over corporate image advertising.

Precedent supporting jurisdiction over corporate image advertising is supplied by cases in which the FTC has successfully exerted regulation over misrepresentations of matters extrinsic to the product itself. It has long been recognized as an unfair practice for a seller to represent himself as a manufacturer when in fact he does not manufacture, or for a seller to misrepresent the origin of his wares.[112] The rationale is not that the misrepresented goods are somehow inferior; rather, it is that a consumer should be free to exercise his preference for manufacturers over jobbers, or for the products of one country over those of another.[113] The same rationale can be extended to corporate image advertising to the extent that it is used by the advertiser to improve its image and thereby promote sales. The consumer who chooses to form product preferences on the basis of the policies or practices of the producer should be free to exercise this choice.

B. Rationale of Regulation

Before 1938, the only approach to the regulation of advertising available to the FTC under section 5 was to find the advertising an "unfair method of competition." Such a finding required a demonstration of some injury to competition.[114] Since this precluded regulation where there was no competition, or where all competitors alike engaged in the practice,[115] Congress amended section 5 to place protection of consumers on a common level

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110. *See* text accompanying note 39 *supra*.

111. Note, *supra* note 86, at 1197.

112. Barnes, *The Law of Trade Practices—II: False Advertising*, 23 Ohio St. L.J. 597, 618 (1962).

113. FTC v. Colgate-Palmolive Co., 380 U.S. 374, 388 (1965); FTC v. Algoma Lumber Co., 291 U.S. 67, 78 (1934); FTC v. Royal Milling Co., 288 U.S. 212, 217 (1933).

114. FTC v. Raladam Co., 283 U.S. 643 (1931) (FTC powerless to act unless injury to competition can be shown); Millstein, *supra* note 80, at 453. The passage of the Wheeler-Lea Act has made regulation by the "unfair method of competition" approach obsolete. *See* text accompanying note 106 *supra*.

115. FTC v. Raladam Co., 283 U.S. 643 (1931) (no injury to competition because there was no competition).

with protection of competition.[116] The Wheeler-Lea Act added to section 5 the phrase "unfair or deceptive act or practice."[117] This amendment has provided the FTC with the alternatives of finding advertising "deceptive"[118] or "unfair."

1. *Deceptive Practices*

The determination that an advertisement is deceptive is a four step operation. First, in order to establish some parameters of what is deceptive or potentially deceptive, it is necessary to establish an intelligence level against which the advertisement can be measured.[119] As a rule, an intelligence level somewhat below that of the "reasonable man" of tort law is employed,[120] because regulation is designed to protect "the credulous as well as the wary."[121] Second, it is necessary to determine what the advertisement means, or what promise is made, with reference to

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116. *See* 83 CONG. REC. 3256 (1938) (remarks of Senator Wheeler).

117. Act of March 21, 1938, ch. 49, § 3, 52 Stat. 111, *amending* 15 U.S.C. § 45 (1934) (codified at 15 U.S.C. § 45(a)(1) (1970)). *See* text accompanying note 106 *supra*.

118. *See* Jentz, *Federal Regulation of Advertising: False Representation of Composition, Character, or Source and Deceptive Television Demonstrations*, 6 AM. BUS. L.J. 409, 416-17 (1968).

119. Millstein, *supra* note 80, at 457-65.

120. Note, *Psychological Advertising: A New Area of FTC Regulation*, 1972 WIS. L. REV. 1097, 1100.

121. Charles of the Ritz Corp. v. FTC, 143 F.2d 676, 679 (2d Cir. 1944). Thain, *supra* note 73, at 615, suggests that the FTC will seek to adjust the intelligence level against which the advertisement will be judged for cases involving special groups such as children, the elderly, or the handicapped, who can be expected to be particularly vulnerable to certain kinds of claims. *See* text accompanying note 145 *infra*.

Where special audiences are not involved, the low level at which the intelligence standard is set has elicited criticism on grounds that it is wasteful and makes the FTC "look fairly foolish in this business of protecting fools," Alexander, *Federal Regulation of False Advertising*, 17 U. KAN. L. REV. 573 (1969), and on constitutional grounds because an intelligence level set this low denies the advertiser freedom of speech, Millstein, *supra* note 80, at 492.

In Heinz v. Kirchner, [1961-63 Transfer Binder] TRADE REG. REP. ¶ 16,664, at 21,540 (FTC 1963) the Commission stated: "A representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed." However, in ITT Continental Baking Co., 3 TRADE REG. REP. ¶ 20,464 (FTC 1973) the Commission, in reviewing a Wonder Bread advertisement, noted that although "most people above age six might view the literal message of the 'fantasy growth sequence' with skepticism," this would not prevent a finding that the advertisement had a potential for deceiving others. *See also* Eastern Detective Academy, Inc., [1970-73 Transfer Binder] TRADE REG. REP. ¶ 19,727 (FTC 1971) (reaffirmation that the law protects the credulous as well as the wary).

the selected intelligence level. Current practice is for the FTC to make this determination,[122] and the courts with rare exception defer to the Commission's expertise.[123] Third, it must be determined if the message or promise is true. This determination requires that the advertiser provide "substantial proof," both in the Commission's proceedings and on review.[124] Finally, the false message or promise must be found to be material. The test of materiality is whether the assertion is "capable of affecting purchasing decisions."[125] In establishing materiality, it is not important to prove actual deception, but only that the advertisement has the capacity to deceive.[126] The finding of materiality is also within FTC discretion.[127]

A determination that corporate image advertising is deceptive or potentially deceptive would thus follow the steps of selection of an intelligence level, interpretation of the advertisement to determine the promise made, evaluation of this promise for truthfulness, and assessment of the materiality of any untruth. This procedure has been employed for product advertising and should be feasible for similar, sales-oriented corporate image advertising. Indeed, the FTC has dealt with closely analogous situations in cases involving misrepresentation of extrinsic matters.[128] Cases involving misrepresentation of status are particularly relevant, as there is little difference between a seller who seeks to induce consumer confidence by misrepresenting his status and a corporation which seeks the same end by misrepresenting, for example, its concern with the environment.[129]

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122. Gellhorn, *Proof of Consumer Deception before the Federal Trade Commission*, 17 U. KAN. L. REV. 559, 565 (1969); Millstein, *supra* note 80, at 465, 470; *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1043 (1967). Gellhorn in particular criticizes the failure to use market surveys to determine what the advertisement means. Failure to use surveys and minimal reliance on expert testimony results in the advertisement meaning what the FTC says it means. Millstein, *supra* note 80, at 470. The Commission allowed the admission of market surveys in ITT Continental Baking Co., 3 TRADE REG. REP. ¶ 20,464, at 20,377 (FTC 1973), but made no effort to conduct its own.

123. Kalwajtys v. FTC, 237 F.2d 654 (7th Cir.), *cert. denied*, 352 U.S. 1025 (1957).

124. Millstein, *supra* note 80, at 478-83.

125. *Developments in the Law—Deceptive Advertising*, *supra* note 122, at 1056.

126. Millstein, *supra* note 80, at 485.

127. FTC v. Mary Carter Paint Co., 382 U.S. 46, 49 (1965). *See also Developments in the Law—Deceptive Advertising*, *supra* note 122, at 1056.

128. FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965).

129. *See* text accompanying notes 112-13 *supra*.

There might be difficulty in determining that the misrepresentation is material, because the inducement of image advertising is indirect. Liberal criteria of materiality may be justified on the ground that all sales-oriented advertising is necessarily intended to induce consumer action, and a conclusion that the false statement is "capable of affecting purchasing decisions" therefore conforms to the presumed intent with which the statement is made.[130]

Regulation of deceptive practices in issue-oriented corporate image advertising might be more difficult because the correlation between misrepresentation and inducement would typically be more attenuated. In the assessment of materiality, it is assumed that the induced action will be the purchase of a product or service, or some other commercial act. However, if the misrepresentation were allegedly material in a noncommercial sense, then the simple approach to materiality would no longer be acceptable; even if it is found that the statement is intended to induce some type of social or political action, there is a difference between such action and a simple consumer purchase. The more probable result would be that unless the representation were material in a commercial sense, the advertisement would be protected by the first amendment.[131]

Of greater interest, however, is the problem of interpreting the issue-oriented advertisement to determine its claim or promise. It is entirely conceivable that such an advertisement would have two permissible interpretations, one involving interests protected by the first amendment and another involving interests more appropriately subjected to regulation. Clearly, if the FTC chooses between such interpretations in a seemingly arbitrary manner,[132] without reference to the interests involved, and courts of appeals continue to give only cursory review to the Commission's choices,[133] a possible result would be a holding by the Supreme Court or a declaration by Congress that the first amendment precludes all regulation of issue-oriented advertising. The FTC should develop internal safeguards to prevent such a result, and courts of appeals should carefully enforce those safeguards.

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130. *See Developments in the Law—Deceptive Advertising, supra* note 122, at 1056.

131. The absence of materiality points to a basic logical difficulty in labelling an issue-oriented corporate image advertisement "deceptive." If consumer purchase decisions are not affected, there appears to be no deception. *See* FTC v. Colgate-Palmolive, Inc., 380 U.S. 374, 395 (1965) (Harlan, J., dissenting).

132. *See* note 122 *supra.*

133. *See* text accompanying note 123 *supra.*

2. Unfair Practices: The Unfairness Doctrine

The language added to section 5 by the Wheeler-Lea Act makes "*unfair* . . . acts or practices" unlawful.[134] This has become the basis of an "unfairness doctrine" under which the FTC exercises power to prohibit trade practices which are unfair to consumers. This power was upheld by the Supreme Court in *Sperry & Hutchinson v. FTC* .[135] Respondent, the leader in the trading stamps industry, sought to prevent trading in its stamps except by its own franchises. The Court of Appeals for the Fifth Circuit held that the FTC was without statutory power to declare this practice "unfair."[136] The Supreme Court reversed, holding that section 5 did indeed contain such a grant of power. Although the Court did not offer a precise definition of unfairness, it suggested some general guidelines in a footnote to the opinion:

> (1) whether the practice, without having been considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise . . . ; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers. . . .[137]

The Commission's approach to the problem of unfairness in advertising is illustrated by its decision in the leading case of *Pfizer, Inc.*[138] There the Commission stated that an advertiser who makes claims of product performance or safety without prior substantiation of these claims is unfair to the consumer who is expected to rely upon such representations.[139] Subsequent comment by the FTC has made it clear that the unfairness doctrine

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134. Act of March 21, 1938, ch. 49, § 3, 52 Stat. 111, *amending* 15 U.S.C. § 45 (1934) (codified at 15 U.S.C. § 45(a)(1) (1970)) (emphasis added). This is not the same as an "unfair method of competition," discussed in text accompanying notes 114-18 *supra*, because there is no requirement that competition or competitors be affected by the unfair practice.

135. 405 U.S. 233 (1972).

136. Sperry & Hutchinson Co. v. FTC, 432 F.2d 146 (5th Cir. 1970).

137. 405 U.S. at 244-45 n.5. This footnote quotes the FTC's "Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labelling of Cigarettes in Relation to the Health Hazards of Smoking," 29 Fed. Reg. 8324 (1964). *See also* Note, *supra* note 120, at 1106-11, 1124. *Cf.* S. 3377, 93d Cong., 2d Sess. (1974) (bill to require standardization of product testing criteria).

138. Pfizer, Inc., [1970-73 Transfer Binder] TRADE REG. REP. ¶ 20,056 (FTC 1972).

139. The complaint in *Pfizer* alleged that respondent advertised its sunburn remedy, Un-Burn, without having tested it first. The complaint was dismissed by the Commission, precluding judicial review. *See* Note, *Unfairness in Advertising: Pfizer, Inc.*, 55 VA. L. REV. 324, 340, 346 n.147 (1973).

applies to affirmative advertised claims for which the advertiser does not have a "reasonable basis."[140]

To satisfy the reasonable basis requirement, the advertiser must have evidence that would reasonably support the claim made, and this evidence must be the product of reasonable measures to verify the claim.[141] The first requirement is a factual issue dependent upon such considerations as the specificity of the claim, the type of product involved, the hazard posed if the claim is false, the degree of consumer reliance placed on the claim, and the type and accessibility of the evidence. While in *Pfizer* the Commission indicated that something less than scientific studies might be sufficient,[142] later complaints issued by the FTC have indicated that it might require claims to be supported by "competent scientific tests."[143] The requirement that the advertiser make reasonable efforts to obtain verification went undiscussed in *Pfizer*. The extent of the reasonable efforts requirement awaits precise definition, but it has been suggested that reasonable efforts consist of well-documented testing by impartial experts.[144]

Application of the unfairness doctrine is not limited to advertising involving untruthfulness. For example, it has been argued that advertising which appeals primarily to vulnerable groups such as children, the elderly, or the handicapped might be unfair, even though not strictly deceptive.[145] Similarly, advertising which invokes irrelevant factors such as sex appeal, rather than the objective utility of the product, has been questioned

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140. Note, *Pfizer Reasonable Basis Test—Fast Relief for Consumers but a Headache for Advertisers*, 1973 DUKE L.J. 563; Note, *The FTC Ad Substantiation Program*, 61 GEO. L.J. 1427, 1430-31 (1973).

141. Note, *supra* note 139, at 339-42.

142. Pfizer, Inc., [1970-73 Transfer Binder] TRADE REG. REP. ¶ 20,056, at 22,036, 22,039 (FTC 1972).

143. *See* General Motors [1970-73 Transfer Binder] TRADE REG. REP. ¶ 20,120 (FTC 1972) (complaint issued Oct. 12, 1972, alleging failure to substantiate claims made about the chassis of General Motors automobiles).

144. Note, *supra* note 139, at 339-42. *See* the FTC's "Resolution Requiring Submission of Special Reports Relating to Advertising Claims and Disclosure Thereof by the Commission," 36 Fed. Reg. 12,058 (1971).

145. Thain, *Consumer Protection: Advertising—the FTC Response*, 26 FOOD DRUG COSM. L.J. 609, 615 (1971). *See also* note 121 *supra*. The most significant feature of this argument concerns limitations on advertising for children. In this regard, it is interesting to note that the Canadian Broadcasting Company has decided to eliminate advertising on children's programs by the end of 1974. *See* 662 BNA ANTITRUST TRADE REG. REP. A-23 (May 7, 1974).

as unfair because it does not give the consumer information on which to base a rational buying decision.[146]

The FTC has begun a program requiring advertisers to submit to the FTC the material which allegedly supports their advertised claims.[147] Originally, this was done to further the statutory goal of informing the consumer by making this information available to the public.[148] It has not had much success in this respect, however; there is a long delay between demand for the material and its submission to the FTC,[149] and when received, much of the material is too bulky or technical to be of use to the consumer. Furthermore, requiring this material to be submitted may have actually induced advertisers to forego factual claims in favor of "mood" or "non-rational" claims and may have thus produced the perverse effect of further reducing the information available to the consumer.[150] Consequently, the FTC has changed the purpose for requiring substantiation to one of enforcement; it now uses the submitted material to discover product misrepresentations in the advertising.[151]

To the extent that sales-oriented corporate image advertising resembles product advertising, the same standards of unfairness are probably applicable. As these standards evolve in the context of product advertising, they should furnish clearer guidance for the regulation of sales-oriented corporate image advertising as well.

Application of the unfairness doctrine to issue-oriented corporate image advertising is more difficult. A threshold problem is the absence of any indication of what types of unfairness are affected. If a distinction can be made between unfairness to the consumer in his economic interests and unfairness in his non-

146. Note, *supra* note 120, at 1097.

147. Note, *The FTC Ad Substantiation Program, supra* note 140, at 1428.

148. Note, *Pfizer Reasonable Basis Test—Fast Relief for Consumers but a Headache for Advertisers, supra* note 140, at 596; Note, *supra* note 139, at 336. The basis for a program of consumer education lies in the avowed intent of Congress in passing the FTC Act to educate the public. *See* ABA COMM. TO STUDY THE FEDERAL TRADE COMMISSION 69-70 (1969).

149. The delay between submission of data and the issuance of complaints based on deficiencies is another shortcoming of this program. *See* Note, *Pfizer Reasonable Basis Test—Fast Relief for Consumers But a Headache for Advertisers, supra* note 140, at 584-85.

150. *Id.*

151. *See* 645 BNA ANTITRUST TRADE REG. REP. AA-1 (Jan. 8, 1974). *See also* 86 BROADCASTING, March 4, 1974, at 53 (FTC Bureau of Consumer Protection Director, J. Thomas Rosch's proposal to require substantiation of the meaning of the advertisement).

economic interests, the question arises whether the FTC can regulate noneconomic unfairness. The Court's language in *Sperry & Hutchinson* can be read to include broad noneconomic interests,[152] but that language refers to the cigarette commercial ban, which is based on the FTC's unquestioned power to prohibit acts or practices injurious to the health or well-being of the public. Thus, *Sperry & Hutchinson* sheds little light on the question of the Commission's power to curb simple "unfairness" in general noneconomic matters.

Even assuming a power in the FTC to regulate noneconomic, issue-oriented corporate image advertising, the application of the unfairness doctrine would still be difficult, because the meaning of "unfairness" would still be in doubt. If, for example, the reasonable basis test of *Pfizer* were interpreted to mandate a reasonable factual basis for the opinions expressed in issue-oriented advertising, the result would be a "chilling effect" on the advertiser's freedom to state his opinions independent of any factual basis. Application of the reasonable basis test only to the factual assertions actually expressed might reduce the strain on the first amendment, but this would still involve a cumbersome inquiry into the issue of reasonable verification. That inquiry can be avoided by adopting objective truthfulness of expressed assertions as the standard for invoking the unfairness doctrine. This is the standard presently used in the regulation of *deceptive* practices, but its proposed employment in the context of *unfair* practices would avoid the difficulty inherent in the deceptive practices approach—the difficulty of showing noneconomic materiality.[153] A determination that incorrect factual assertions in a corporate image advertisement were unfair rather than deceptive would avoid the requirement of showing a causal relationship to consumer action.

Regardless of the approach used, labelling an erroneous factual assertion "unfair" can imply that the entire advertisement

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152. *See* note 137 *supra* and accompanying text.

153. *See* text accompanying note 131 *supra*. *Cf.* ITT Continental Baking Co., 3 TRADE REG. REP. ¶ 20,464 (FTC 1973), in which, in a commercial context, the majority rejected an allegation of unfairness based on deception. Believing the deceptive practices approach to be more appropriate in that product-advertising case, the majority stated:

> As complaint counsel develop their unfairness argument, it rests almost entirely on the fact that the advertisements make *false* promises rather than that they address themselves to particularly vulnerable aspects of their audiences which might conceivably render even truthful messages unfair.

Id. at 20,382.

is "unfair." Such an implication might appear to threaten the advertiser's freedom of speech. The threat is greater when the FTC enjoys wide discretion in the application of standards of unfairness. Thus an objective standard of factual accuracy should be employed to diminish the threat to first amendment liberties. The Commission should be careful not to impute a finding of unfairness to the entire advertisement, especially to the opinions or conclusions expressed therein. If an opinion or conclusion necessarily rests on a factual basis found to be "unfair," then it is difficult to avoid concluding that the opinion expressed is unfair. But the policies of the first amendment would be best served if such an inference were left to the public.

C. Remedies

In its regulation of advertising the FTC enjoys broad discretion in the selection of remedies, limited only by the requirement that the remedy selected must have a "reasonable relation to the unlawful practices found to exist."[154] The usual remedy for deceptive or unfair advertising is the cease and desist order contemplated by the FTC Act.[155] That order has been criticized as ineffective because it addresses only future dissemination of the advertisement. Indeed, such an order does not take effect until the proceedings are final, and in the interim the advertiser is free to continue using the advertisement.[156] Often by the time

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154. FTC v. National Lead Co., 352 U.S. 419, 429 (1957); *accord* Jacob Siegel Co. v. FTC, 327 U.S. 608, 612-13 (1964).

155. 15 U.S.C. § 45(b) (1970). *See* note 87 *supra*. *See also* Note, *The Pfizer Reasonable Basis Test—Fast Relief for Consumers but a Headache for Advertisers*, *supra* note 140, at 587.

156. The *cause celebre* of an advertiser dragging out a proceeding while continuing to disseminate the allegedly deceptive advertising is Carter Products, Inc. v. FTC, 268 F.2d 461 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959). *See* Weston, *Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor*, 24 Fed. Com. B.J. 548, 561-63 (1964). The grant of injunctive powers to the FTC should remedy this defect to a certain degree. A temporary restraining order can be granted

> whenever the Commission has reason to believe—
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> (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
>
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or . . . has become final, would be in the interest of the public. . . .

14 U.S.C. § 53(b) (1970). Injunctive relief has been granted in two cases: Travel King, Inc., 3 Trade Reg. Rep. ¶ 20,502 (FTC 1974) (promotional practices of a "psychic surgery" tour to the Philippines); FTC

the order becomes effective, the advertising campaign has expired of its own accord.[157] In any event, a cease and desist order does not eliminate any residual effect which the advertising may have generated. False impressions created by the advertisement may well survive a cease and desist order.[158]

As a remedy for these shortcomings of cease and desist orders, corrective advertising[159] was proposed during the litigation of *Campbell Soup Co.*[160] Campbell's had been accused of using marbles at the bottom of a bowl in a mock-up of its soup, so that the soup would appear to contain more solid ingredients than it actually did. A group of law students organized as SOUP (Students Opposed to Unfair Practices) sought to intervene in the case and argued that since a cease and desist order would not undo the harm done both to consumers and to competitors who did not engage in that practice, Campbell's should be required to disclose in its future advertising that it had employed a deceptive practice. Although the cease and desist order did not include a requirement for corrective advertising, the Commission indicated that such a requirement would have been within its authority.[161]

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v. British Oxygen Co., 5 TRADE REG. REP. ¶¶ 75,003-04 (D. Del. 1974) (an acquisition). The FTC has declined to set down any guidelines for the use of its injunctive power, 646 BNA ANTITRUST TRADE REG. REP. A-6 (Jan. 15, 1974), but J. Thomas Rosch, Director of the FTC's Bureau of Consumer Protection, stated in an interview that the injunctive powers will not be used in any "novel" cases (as reported in 645 BNA ANTITRUST TRADE REG. REP. AA-1 (Jan. 8, 1974)).

157. Note, *supra* note 139 at 331-32.

158. Thain, *supra* note 145, at 612-13.

159. Corrective advertising would eliminate the effects of delay during litigation. The advertiser, facing the prospect of being required to undo his advertising at a later date, would not be able to continue using the advertisement with impunity during litigation. *See* Note, *The Federal Trade Commission and the Corrective Advertising Order*, 6 U. SAN FRANCISCO L. REV. 367, 379 (1973); *see also* Note, *supra* note 139, at 334.

160. Campbell Soup Co., [1967-70 Transfer Binder] TRADE REG. REP. ¶ 19,261 (FTC 1970).

161. *Id.* at 21,423. The practice of the Commission staff in such cases had originally been to seek corrective advertising, which would disclose that former advertising practices had been found to be deceptive. In later proceedings, the staff has sought only orders requiring that advertisers correct the false impressions which might linger in the mind of the public. Thain, *Corrective Advertising: Theory and Cases*, 19 N.Y.L.F. 1, 7-8 (1973). *See also* Firestone Tire & Rubber Co., [1970-73 Transfer Binder] TRADE REG. REP. ¶ 20,112 (FTC 1973), *aff'd on other grounds*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973). To avoid the appearance of issuing a punitive order, which would have been beyond the power of the FTC, the Commission required a high degree of proof that a "residual effect" in fact existed. *Firestone* did not estab-

Affirmative disclosure of material facts so as to indirectly admit past misrepresentation is another type of remedy available to the FTC. In the case of *J. B. Williams Co. v. FTC*,[162] for example, the FTC sought to require the maker of Geritol to affirmatively disclose in its advertising that the majority of people who are physically tired do not suffer from "iron poor blood" and that Geritol is effective only for a minority of iron anemia sufferers, thus indirectly admitting that its previous advertising to the contrary had been deceptive.[163] This type of affirmative disclosure has not been a favorite remedy of the FTC, and part of the problem may be the lengths to which advertisers will go to avoid it. *J. B. Williams* is notorious for the duration of the litigation.[164]

Finally, the FTC has proposed counter-advertising to offset effects of advertising. Counter-advertising invokes the "fairness doctrine" of the Federal Communications Commission (FCC), which requires that the broadcast media balance its programing by presenting both sides of controversial public issues. A familiar example of the doctrine's application to advertising is the recent series of anti-smoking commercials. But the FCC has never been anxious to cooperate with the counter-advertising proposal, and has recently decided to reject it.[165] In addition, the recent decision in *Miami Herald Publishing Co. v. Tornillo*[166] suggests that there may be constitutional obstacles to mandatory counter-ad-

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lish criteria for proof of a "residual effect," however, and it will be for later cases to determine this criteria. *See* Thain, *supra*, at 14. In ITT Continental Baking Co., [1970-73 Transfer Binder] TRADE REG. REP. ¶ 20,242 (FTC 1973) a motion to intervene was denied to three consumer groups who advanced the proposition that once deception had been shown, a prima facie case of residual effect had been made and the burden of proof should then shift to the advertiser to refute. *Cf.* Dyer & Kuehl, *The "Corrective Advertising" Remedy of the FTC: An Experimental Evaluation*, 38 J. MKTG., Jan., 1974, at 48, 53-54 (advertisement to correct the false impression without disclosing that a deception had been perpetrated may not be effective).

162. 381 F.2d 884 (6th Cir. 1967).

163. *See also* Keele Hair & Scalp Specialists, Inc. v. FTC, 275 F.2d 18 (5th Cir. 1960) (advertiser of remedy for baldness ordered to affirmatively disclose that most cases of baldness cannot be cured).

164. In the most recent episode in the ongoing struggle between the FTC and J.B. Williams, the Court of Appeals for the Second Circuit ruled that the issue of noncompliance with an FTC order is a jury question. U.S. v. J.B. Williams Co., 498 F.2d 414 (2d Cir. 1974).

165. 671 BNA ANTITRUST TRADE REG. REP. A-16 to -17 (July 9, 1974). FTC Chairman Engman is reported to have observed that the advertisements to which counter-advertising could have been applied are those which cannot be regulated by usual methods because of the first amendment. *Id.*

166. 94 S. Ct. 2831 (1974).

vertising. The Court struck down the Florida "right-of-reply" law,[167] which required newspapers to print replies to editorials.[168] This holding might be limited to editorials or limited to the print media, but the critical factor of compulsory publication[169] would also be present in any counter-advertising order.

IV. CONCLUSION

Regulation of corporate image advertising is a delicate matter because it involves a potential for infringement of first amendment freedoms. The delicacy is increased by the fact that the only agency likely to be entrusted with such regulation is the Federal Trade Commission. Both the philosophy and the procedures of the FTC have been shaped in the context of commercial affairs[170] and, without modification, are not necessarily suitable for the regulation of noncommercial corporate image advertising. Thus, while the first amendment undoubtedly permits some measure of FTC regulation, it is necessary that appropriate limitations be recognized. Generally, insofar as regulation is patterned after the regulation of conventional product advertising, it should be limited to the sales-oriented variety of corporate image advertising, while regulation of issue-oriented advertising should be limited to a determination of the truth or falsehood of express factual representations. Such limitations, coupled with strict judicial review to enforce procedural safeguards against arbitrary administrative action,[171] should result in the

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167. FLA. STAT. ANN. § 104.38 (1973).

168. 94 S. Ct. at 2838-39.

169. [T]he Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such compulsion to publish that which " 'reason' tells them should not be published" is unconstitutional.

Id. *See also* Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (no obligation under the FCC "fairness doctrine" for broadcast media to accept paid "advertorials"); Chicago Joint Bd., Amalgamated Workers v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1973) (no obligation for print media to accept paid editorial advertisements).

170. For a discussion of the framework of commercial advertising into which the FTC fits, see, *e.g.*, *Developments in the Law—Deceptive Advertising*, *supra* note 122, at 1008-12.

171. For example, in NLRB v. United Steelworkers, 357 U.S. 357 (1958), the Court required the NLRB to consider all relevant factors in deciding future cases involving "no-solicitation" rules, because of the first amendment questions involved. *Cf.* National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974), which upheld the power of the FTC to establish trade regula-

proper balance between the consumer's need for protection and the advertiser's freedom of speech. Within such limitations, there is no reason why all of the remedies now available to the FTC in a commercial context should not also be available for use against the careless corporate image advertiser.

tions. The court was of the opinion that judicial review of FTC action would suffice to prevent arbitrary or discriminatory regulations. First amendment rights, however, were not involved in that case.

Exhibit 78: "Public Service Oriented Advertising: A Regulatory Dilemma," Speech by Mary Gardiner Jones



FEDERAL

TRADE

COMMISSION

WASHINGTON, D. C. 20580

For release upon delivery at 11:30 a.m.,
Friday, April 30, 1971

PUBLIC SERVICE ORIENTED ADVERTISING:
A REGULATORY DILEMMA

Address by

Commissioner Mary Gardiner Jones
Federal Trade Commission

Before the

Corporate Counsel Association
of Minnesota

The Normandy Hotel
Minneapolis, Minnesota

33-291 O - 78 - 66

Public Service Oriented Advertising: A Regulatory Dilemma*

You have asked me to address myself to the general subject of advertising and the social responsibility of business. It is a tall order and one which too often lends itself simply to meaningless preachments. So let me deal with this general subject matter within a slightly different framework. This morning I would like to focus my remarks on the issues of social responsibility of both business and government on what appears to be an accelerating trend in commercial advertising towards the use of public interest oriented themes and claims.

It is perhaps the most significant development of the past decade that Milton Friedman stands virtually alone among responsible members of the business community, as well as among those scholars and commentators specializing in the problems of business, in his insistence that the business of business is exclusively the maximization of profits. I know of no other single individual of Friedman's stature who would today enunciate in public

* While this text forms the basis for Miss Jones' oral remarks, it should be used with the understanding that paragraphs of it may have been omitted in the oral presentation and, by the same token, other remarks may have been made orally which do not appear in the text.

as he did recently in a New York Times magazine article that the drive for social responsibility in business is "pure and unadulterated socialism" and that businessmen who talk this way are "unwitting puppets of the intellectual forces that have been undermining the basis of a free society." 1/

In sharp contrast to this early 19th century voice of doom are the words of F. Ritter Shumway, President of the Louisville Chamber of Commerce, who just two months after Friedman's article, said in a speech:

> "Business is one of the great institutions of American society. Our triumphs and accomplishments have helped make America what it is. And our mistakes and shortcomings have also had their impacts. We can glory in the one, and try to remedy the other, but the good as well as the bad are the unerasable evidence that business is embedded in the social as well as the economic fabric of our nation. Business can no more live apart from society than society can live apart from business. We interact constantly with other great [illegible] institutions: Education, government, the family and labor, among others, are as much a part of our social and economic environment as air, water, and

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1/ Friedman, "The Social Responsibility of Business is to Increase Its Profits", N.Y. Times Magazine, Sept. 13, 1970, p. 32.

> land comprise our physical environment. Each of these institutions has responsibilities toward all the others and to the society we all belong to." 2/

The problem confronting all established institutions in this country is not whether they have a responsibility to grapple with the social problems which are threatening to tear us all apart but how best to discharge this responsibility. Many businesses are proceeding quietly on their own with manpower training programs designed to remedy the reading and other deficiencies of our public school system. Others are engaging in extensive minority hiring programs involving similar on-the-job training, as well as credit counseling and other "non-business" related activities on behalf of their employees, in order to assist them in making the transition into the world of work with which so few of them had had any hard experience. Some businesses have focussed their concerns on the deep-seated economic problems of the inner city, opening new plants or keeping old plants there which might have otherwise been shifted, and cooperating with the establishment of minority enterprise projects in these areas. The

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2/ "The Consumer Imperatives" speech by F. Ritter Shumway, President, Chamber of Commerce of the U.S., Louisville, Ky., Nov. 13, 1970 (emphasis in original).

programs are scattered and various. But whatever their scope or their success, they testify to business' increasing awareness that social responsibility is good business, as well as good citizenship, and that only by aggressively promoting genuine social change can we demonstrate to the "have nots" that their present condition is, at worst, a temporary phenomenon not condoned by the establishment, and, more importantly, actively being grappled with so as to facilitate the types of deep-seated changes which are required.

Business is relatively unheralded for these quiet acts of social responsibility. Indeed, it has not particularly sought publicity for these programs. In sharp contrast to this policy of quiet reticence, however, is the increasing use by business of advertising as a communication channel to publicize its awareness and public concerns with such matters as medical care, nutrition, [illegible] and the environment. 3/

3/ I am not considering here the separate problem of advertising by regulated industries. Many questions have been raised about the propriety of any advertising by these industries and also about the propriety of advertising their services or products when these are in short supply or cannot be delivered.

The following advertisements, selected at random, reflect this relatively new approach of business to its social awareness and public concerns:

A company full page ad listing in parallel columns the "good" and "bad" environmental features of their product and what they are seeking to do about the "bad" things;

Magazine ads by large multi-product companies, devoting a substantial portion of their copy to a detailing of factual data about the social environment in which the company's products are used;

Ads making direct product claims respecting the safety-related or non-polluting characteristics of their products;

Ads detailing the company's pollution measures or its efforts to promote greater safety, or improve individual health.

Unfortunately, instead of applause, many of these public service oriented messages are being met with vigorous criticism and loud protests:

A California Chamber of Commerce advertisement extolling the virtue of its city finds itself the target of a scathing editorial denouncing it for glossing over the effects of the recent oil spills which had fouled the city's beaches;

An oil company addressing itself to the future impact of automotive emissions on the smog problem, immediately becomes the subject of a Senator's protest to the FTC that the company was beguiling the public into underestimating the seriousness of the problem;

> A paper company telling its story of the anti-pollution measures which it is now taking, emerges as the shining example of one commentator's caustic comments about the recent "ain't we noble" school of advertising;
>
> A medical supply company lauding its newly introduced device for the relief of emphysema and other respiratory disease victims is met by the charge that its own plants were contributing more to the hazards creating these diseases than would ever be relieved by its device;
>
> A chemical company detailing the monies it is expending to clean up the environment, instead of public acclaim, evokes instead the cynical observation that the money spent was only for those steps which they were required to take by law.

The question immediately arises for the business executive as to how to interpret this criticism. Should the company simply disregard all such criticism as the product of perfectionists or paranoids, and proceed on its way responding to what it believes is the public's genuine concern with social and environmental issues? Or should it accept Milton Friedman's diagnosis as correct, abandon its concerns with these more public-oriented issues and concentrate instead on the quality of its production and the level of its sales as the only true, or at least, economically significant measure of the public's response to its products and, hence, as the

only real basis on which to measure prognostications of its continued future prosperity?

I do not believe that business can afford to, or should, drop its concerns with responding to the public's expectations of its conduct. Corporations are deeply involved in public issues regardless of whether or not they choose to make their concerns public. Their lobbyists are continually active in the halls of Congress, as well as in the offices of government administrators. The public is fully aware of these more "political" corporate activities. I think it is important for the business community to make its concerns public and to enter into the public dialogue on all of these vital issues respecting such matters as health, environment, safety and the like. Nor do I believe the public is opposed to genuine dialogue. Rather, the public outcry and unease at some of the recent public-oriented advertising is not directed to the efforts of business to grapple with and discuss possible solutions to these public issues. What is troubling to many is the apparent assumption underlying some of these advertising campaigns, that creating an appearance of public service orientation and concern can substitute for the reality of action and the very real question of whether this

most recent business response to the public's concerns is purely form rather than substance. E.B. Weiss is frankly and publicly skeptical. As he wrote about this recent spate of what he terms "~~corporate 'selfless'~~ advertising":

> "Just like the 'We care' advertising epidemic seeded by the A&P some years ago (at a time when the A&P could not have cared less!) - so now some corporations are publicizing their contributions to lifting the quality of life (whose degradation they helped to fashion).
>
> "Needless to say, the gap between corporate claim and performance is at least as sizeable as the generation gap -- and that's a whopper. And the total disregard for the role the corporation played in bringing about some of our major ecological problems has genuine Alice-in-Wonderland characteristics." 4/

In Weiss' opinion, public service advertising "on balance" is "excellent and performs unquestionably a valuable public service." The problem it creates, in his view, is the fear that "the advertising business will

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4/ Article in Advertising Age, Sept. 3, 1970. See also Weiss, "How Marketing Will Change: From Growthmania to Shrinkmanship" (pamphlet reprinted from Advertising Age, Crain Communications, Inc., 1971).

tend to look upon this as a passport into the public's graces, which it cannot be and should not be, because advertising is not coming into court with clean hands." 5/

Ralph Nader asks a different question. To him the so-called anti-pollution efforts in advertising themes are simply a "'new version' of deceptive advertising, resulting from the search for something new and eye-catching when products . . . are 'all the same and its pretty hard to find out distinctions between Tweedle-Dee and Tweedle-Dum.'" 6/

I have cited these two reactions to this type of advertising because they epitomize and delineate the dilemma which this type of advertising poses to the regulatory authority.

Should the Federal Trade Commission, for example, assert an active regulatory role vis-a-vis all corporate public-oriented claims or themes associated with the sale and promotion of its products, carefully scrutiniz-

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5/ Remarks attributed to Mr. Weiss in a report of his discussion with Ralph Nader during one of the weekly programs of the TV series "The Nader Report," Advertising Age, Dec. 28, 1970, p. 12.

6/ Ibid.

ing all parts of these messages to make certain that they do not run afoul of the statutory command that business not engage in unfair or deceptive acts or practices? Or should the Federal Trade Commission adopt a strictly hands-off policy towards these types of advertising themes, looking at them as essentially editorial speech of the type intended to be protected by the First Amendment of the Constitution and, thus, leaving it to the regulatory control of the Federal Communications Commission insofar as these messages involve controversial public issues subject to the protection of the fairness doctrine?

The constitutionality of the Federal Trade Commission Act's prohibition against deceptive and unfair acts or practices as it applies to advertising has been firmly established. The courts are clear that there is no constitutional right to make false and misleading state-

ments in advertising claims. 7/ Their general thinking is perhaps best reflected in the following excerpt from the District of Columbia Circuit Court's opinion in the recent suit of Banzhaf v. FCC, involving the application of the fairness doctrine to statements made in cigarette commercials:

7/ For a review of the case law on this problem of regulation and free speech as it applies to the advertising of books, see Commission's Opinion, 6/20/67, in Rodale Press, Inc., rev'd on grounds not related to the First Amendment issue, 407 F.2d 1252 (D.C. Cir. 1968), but see also concurring opinion by Judge Robinson, 407 F.2d at 1258. The courts have made it clear that even if the "speech" is cast in book form, the seller of a product does not thereby gain any First Amendment immunity because he has chosen to promote the sale of his products by means of booklets giving the appearance of free speech. See, e.g., Koch v. FTC, 206 F.2d 311 (6th Cir. 1953) and Perma-Maid Co. v. FTC, 121 F.2d 282 (6th Cir. 1941) cf. Scientific Mfg. Co. v. FTC, 124 F.2d 640 (3d Cir. 1941).

See also Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707-708 (1962) where the Court said:

> "In this case, respondents' conduct is wholly dissimilar to that of the defendants in Noerr. Respondents were engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws."

> "Many cases indicate that product advertising is at least less rigorously protected than other forms of speech. Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect. As a rule, it does not affect the political process, does not contribute to the exchange of ideas, does not provide information on matters of public importance, and is not, except perhaps for the ad-men, a form of individual self expression. It is rather a form of merchandising subject to limitation for public purposes like other business practices." 405 F.2d 1082, 1101-02 (D.C. Cir. 1968), cert. denied sub. nom. Tobacco Institute, Inc. v. FCC, 396 U.S. 842 (1969).

At the other end of the spectrum, the Courts have made it equally clear that the mere fact that speech is communicated by means of paid space or time or in a commercial format, does not diminish its constitutional protection. 8/ Thus, the Supreme Court said in New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964):

8/ Courts have traditionally distinguished between commercial and non-commercial advertising in dealing with the constitutionality of regulatory measures affecting such advertising. Cf. Valentine v. Chrestensen, 316 U.S. 52 (1942); Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied sub. nom. Tobacco Institute, Inc., v. FCC, 396 U.S. 842 (1969); and compare Ginzburg v. United States, 383 U.S. 463, 474 (1966) with New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964); Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir. 1968) and Cammarano v. United States, 358 U.S. 498, 513-15 (1959) (Douglas, J., concerning).

> "The publication here was not a 'commercial' advertisement in the sense in which the word was used in Chrestensen. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. See N.A.A.C.P. v. Button, 371 U.S. 415, 435. That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. Smith v. California, 361 U.S. 147, 150; cf. Bantam Books, Inc., v. Sullivan, 372 U.S. 58, 64, n. 6. Any other conclusion would discourage newspapers from carrying 'editorial advertisements' of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities--who wish to exercise their freedom of speech even though they are not members of the press. Cf. Lovell v. Griffin, 303 U.S. 444, 452; Schneider v. State, 308 U.S. 147, 164. The effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.' Associated Press v. United States, 326 U.S. 1, 20. To avoid placing such a handicap upon the freedoms of expression, we hold that if the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement."

The courts have not had before them yet the question of whether traditional commercial advertising designed to sell products which also contains public service oriented statements should be treated as commercial speech subject to regulation under the Federal Trade

Commission or as editorial speech and, hence, protected from regulation as to the truth and falsity of the claims, statements and opinions which are expressed.

I have neither special expertise nor inclination to analyse or predict the future course which the law may take in coming to grips with this type of advertising. Nor would it be appropriate for me in this forum to discuss the legal reach of either the Federal Trade Commission Act or the First Amendment to all of the various forms which these types of advertising representations can take. I would, however, like to spend a few minutes considering what appear to me to be the important policy implications of this recent trend in advertising

today, both for business and for government. 9/

I would also like to sketch out a few general standards which I believe advertisers should follow in framing their commercial messages so as to avoid the need, in large part, for either the Commission or the courts to have to make the difficult decisions in individual cases as to the precise

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9/ This issue is by no means theoretical. Recently, S. 927 (92d Cong., 1st Sess.) was dropped into the Senatorial hopper. This bill would make it a criminal act subject to fine and imprisonment for any person knowingly to make "any false or deceptive statement, representation or claim in advertising a product, service, system, or device of any kind or description with respect to the ability of the product, service, system, or device to prevent or control" air or water pollution. In introducing the bill, Senator Spong, on behalf of himself and Senators Baker, Bayh, Dole, Muskie and Randolph, gave as one of their reasons for proposing the bill the fact that:

> "The American public is being subjected to a flood of advertising on a wide range of products that are being introduced on the market with little--if any--consideration to their impact upon man or his surroundings.
>
> "Moreover, many industries apparently are placing more emphasis on advertising their abatement activities than they are on abatement itself. And the advertisements in some cases are worse than misleading--they are not even truthful." [Cong. Rec., Senate, Feb. 23, 1971.]

reach of the Federal Trade Commission Act and the First Amendment to the various forms which this type of advertising takes. 10/

In the first place, I am convinced that business must contribute to the public dialogue respecting all of the issues -- ecological, safety, public health, housing, employment and the like -- which are so much in the forefront of everyone's minds today. The nation faces a major challenge in grappling with these major

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10/ The advertising claims made today which can be loosely categorized as involving public-oriented representations are of various types. At one end of the spectrum is the traditional type of institutional advertising, which consists primarily of commercial sponsorship of public interest programs without any direct product or company promotional messages such as the sponsorship of such programs as Sesame Street, Kenneth Clark's Civilization and the like. Closely related to this institutional type advertising are those advertising messages which discuss the need for safety, the factors relating to good nutrition or the most recent thinking of experts on the seriousness or non-seriousness of certain asserted pollution problems. Also involved would be assertions made in advertisements detailing facts about the company's performance in these areas of public concern, the pollution measures it is taking, its contribution - apart from its products - to a greater understanding of nutrition or its own safety record, to name a few which come readily to mind. Finally, at the other end of the spectrum are those advertising claims respecting the performance of the product as safe, nutritious, healthy or as contributing less or not at all to pollution.

social and economic issues. It is essential that the public be able to understand the basic facts involved, and, more importantly, to isolate and identify the many complex values involved in trying to find solutions to them. Business has a unique opportunity to present many of the facts which bear on these issues and I believe it should place a high priority on its responsibility to contribute to - and stimulate - this public dialogue even assuming that it may thereby evoke the application of the fairness doctrine by the FCC and, thus, be subjecting its arguments and assertions to the rigors of the free marketplace of ideas. Government, on its part, in framing its regulatory policies must give realistic credence to this fundamental need for fair, factual and high level public dialogue.

The second standard I would advance to govern the public service portions of this type of advertising by the business community is their recognition of the need to make a careful delineation within their advertising messages as to those parts which go to the performance or ingredients of their products and those parts which

are designed to contribute facts, opinions or arguments to the debate on whatever public issue is being dealt with. 11/

The nature of print advertising usually makes such a demarcation fairly clear, assuming the message is sincere and that no effort is being made to obfuscate or mislead the readers as to the facts and opinions maintained with respect to both the product and the public service message. Moreover, the reader of print advertisements has a leisurely opportunity to examine all parts of the text, dwell on and consider at length those parts which are of special interest and, in general, approach such advertising with his own interests and intelligence clearly in command of his reaction to whatever is presented.

11/ The Commission has in several instances taken the position that all advertising messages must be clearly identified as such and cannot be presented in a format which would mislead a reader as to the author and purpose of the message. In a recent Affidavit of Voluntary Compliance involving this issue, the company agreed to cease the practice of presenting its advertisements as news features or in a manner having the appearance of an article for public information. (See, e.g., Affidavit of Voluntary Compliance, Parade Publications, Inc., File 672 3038, October 25, 1967.)

In TV, and to a lesser extent in radio commercials, the problem of differentiation is more acute. All parts of the message, the commercial and the editorial, if we can use these two terms to differentiate the two types of messages here being considered, do not necessarily hit the listener/viewer with equal force. Much can be done with intonation, positioning of the words and relative emphasis between the auditory and visual themes being simultaneously presented to influence in significant ways the psychological impact and penetration of the message on the listener/viewer's consciousness. 12/ From a regulatory standpoint, this intermixture of product claims and editorial speech would pose serious problems as to which aspects of these messages should and could properly be evaluated. From the listener/viewer's point

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12/ The effectiveness of the television commercial is hardly disputed, for it alone appeals to both of man's most receptive senses - hearing and seeing. Psychological memory experiments indicate strongly that people tend to remember advertising messages presented by a combination of visual and auditory methods significantly more than those presented by either method alone. See, e.g., Elliott, "Memory for Visual, Auditory, and Visual-Auditory Material," 29 Archives of Psychology No. 199, at 52-54 (1936). Note, "Illusion or Deception: The Use of 'Props' and 'Mock-Ups' in Television Advertising," 72 Yale L.J. 145, 156 n.46 (1962). See generally V. Packard, The Hidden Persuaders (1957).

of view, it is probably fair to assume that his credulity may be strongly influenced by his impression of what the purpose of the message is - to sell a product or to present a point of view. Hence, it would seem to me that clear separation, if not total divorcement, of the two types of messages is essential to avoid confusing the listener and diluting the effectiveness of the message. Moreover, without such a clear separation between traditional product claims and editorial opinion, the advertiser runs the risk of having the entire message viewed as simply different parts of the basic commercial and, hence, subject, in all respects, to the commands of Section 5 of the Federal Trade Commission Act.

By analogy, we in the legal profession know well the distinction between exposition and advocacy; between the dispassionate enumeration of facts and issues on the one hand, and argumentation in favor of a client-cause, on the other. The best of legal briefs, for example, sharply delineate between the dispassionate, thorough and objective statement of the case and the argumentative persuasion-oriented presentation of the proponent's side of the case. To the judge, the most

useful brief for decision making purposes is one which is totally trustworthy in the first aspect and honestly persuasive in the second. A bad brief confuses the two and is useless as an aid in the judgmental process.

Now substitute for the brief the public service oriented advertisement and for the judge the public to whom the advertisement is addressed. If the public can't perceive what is exposition and what is argumentation, or if the exposition is not trustworthy, the whole advertisement may lose its effectiveness as a public service advertising and be regarded simply as the usual self-serving advertising theme that disguises more than it reveals.

Third in my listing of standards to govern the use of commercial formats for communication of the company's concern with public issues, is the need for a clear and affirmative recognition by the advertiser in his message that the editorial comment being advanced represents the company's opinion and position on an issue which has many sides. I am convinced that advertisements - whether placed by a coal company dealing with the costs of mine

safety, or by a container company dealing with the problem of waste disposal or even by an automotive company discussing the need for some safety feature - must be clearly identified as presenting only one point of view on what is - if that be the case - a highly controversial issue. I personally see no need for the coal company or the container company to be under an obligation to present all sides of the issue. Indeed, I am doubtful that this is possible for anyone to do with total fairness and balance. But the important standard should be that no one is misled that the facts being detailed are only partial and the point of view communicated, one on which there is not unanimous agreement.

Business has sought to employ its undoubted expertise and financial resources, ordinarily devoted exclusively to the promotion of the sales of its products, to ensure that the public understands its concerns and contributions to the broader issues confronting our nation which are generally subsumed under the rubric, quality of life. It has determined to shape its advertising themes to this aspect of the public concerns. There is no doubt that there can be a place for this

type of communication. The success of the commercial format as a communication device suggests that it may have a greater potential for this purpose than the more traditional documentary or panel discussion. The responsibility which this communication form poses for business and for the regulatory agencies is a formidable one. Too rigid or inflexible a regulatory attitude could spell its death. On the other hand, abuse of this potent communication technique poses equally serious problems for the body politic and for the free marketplace of ideas. 13/ There is little

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13/ In Banzhaf v. FCC, supra, the court outlined some of its concerns about the use of advertising as a form of public debate. As the Court observed:

> "Debate is not primarily an end in itself and a debate in which only one party has the financial resources and interest to purchase sustained access to the mass communications media is not a fair test of either an argument's truth or its innate popular appeal.
>
> "Countervailing power on the opposite sides of many issues of public concern often neutralizes this defect. In many other cases, the courts must act as if such an interest balancing mechanism were at work in order to avoid either weighing the worth of conflicting views or emasculating the robust debate they seek to promote. . . . But where as here one

(Footnote 13 continued on page 24.)

doubt that some period of experimentation is necessary in order to assess the relative values involved in regulation of this type of communication by either the Federal Trade Commission or the Federal Communications Commission. Business, therefore, has an important opportunity through its own conduct to influence the determination of whether a real need for regulation exists and, if so, what form it should take.

There is a strong dynamic move today within the business community and among some government agencies towards industry self-regulation. 14/ I can think of no more important area for clear affirmative thinking on the part of the business community and their counsel as to the standards which should govern their advertising

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(Footnote 13 continued from page 23.)

> party to the debate has a financial clout and compelling economic interest in the presentation of one side unmatched by its opponent, and where the public stake in the argument is no less than life itself - we think the purpose of rugged debate is served, not hindered, by an attempt to redress the balance." 405 F.2d at 1102-1103.

14/ See Miles W. Kirkpatrick, speech before the Antitrust Law Section of the New York State Bar Association, Jan. 28, 1971; Elisha Gray II, speech to the Cleveland Advertising Club, Feb. 25, 1971, and Samuel J. Rozell, speech before the Law Committee of the Electronic Industries Association, March 9, 1971.

in this broad area of the marketplace and the quality of life. Accordingly, I believe that business should explore very carefully its role in this area with a view to creating its own standards which should govern its approach to this type of public service advertising quite apart from and beyond the obligations which may be imposed on it by government regulation. I am convinced that public dialogue on these major issues must go forward in the media, both print and broadcast, if this country is to deal with all of the issues involved in a way which will enhance both our material and spiritual well-being and contribute to the development of our natural environment and not to its destruction. Business has very real responsibilities to stimulate and shape the form of this public dialogue. If it honestly believes in self-regulation, here is an area in which business should devise its own standards of advertising for these types of messages which will contribute to rather than obfuscate the public interest.

Exhibit 79: "Advertising and the First Amendment," 33 *Food, Drug, Cosmetic Law Journal*, 12 (1978)

Advertising and The First Amendment

By PHILIP ELMAN

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IN 1942, IN A RULING that Mr. Justice Douglas (who concurred in it) was later to characterize as "casual, almost offhand,"[1] the Supreme Court in *Valentine v. Chrestensen*, 316 U. S. 52, held that the First Amendment imposes no restraints on governmental regulation of commercial advertising. There was no dissent in the Court, no cries of protest from businessmen, advertisers, lawyers, civil libertarians, or anyone else.

Looking back, we should not be surprised that *Chrestensen* was so little noticed and stirred not even a ripple of controversy. The decision came in the midst of a great war, when the country was preoccupied with far more important matters. Beyond that, it came in a period of constitutional history when the Supreme Court, dominated by appointees of Franklin D. Roosevelt, was sweeping away the debris of substantive due process in the area of economic regulation. In that historical context, advertising promoting the sale of goods or services was perceived as purely a business activity subject to legislative and administrative regulation in the public interest.

The fact that advertising is a form of speech, a means of communicating ideas or information or opinions, and literally within the First Amendment's protection of freedom of speech was totally ignored. For a quarter-century before *Chrestensen* and even longer thereafter, almost everyone accepted as gospel that the Amendment was irrelevant to the Federal Trade Commission's (FTC) regulation of adver-

[1] *Cammarano v. United States*, 358 U. S. 498, 514 (1959) (concurring opinion).

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tising.[2] Even Mr. Justice Black, for whom the First Amendment almost always came first, said that it did not extend to the solicitations of "a 'merchant' who goes from door to door 'selling pots.' "[3]

Unprotected Commercial Speech

Thus, despite occasional rumblings, it was not until the 1970's that the notion of unprotected "commercial speech" was critically reexamined by the Supreme Court.[4] In *Bigelow v. Virginia*, 421 U. S. 809 (1975), the publisher of a Virginia newspaper ran an ad announcing the availability of abortions in New York. Such advertising was illegal under Virginia law, and the state contended that the publication was constitutionally unprotected because it was commercial. Reversing the conviction, the Supreme Court noted that abortions were legal in New York and that the ad "did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.' " Without overruling *Chrestensen* the Court's opinion dealt it a grave, if not mortal, wound by observing that the "relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas." (421 U. S. at 822, 826)

The coup de grâce was delivered the following term of Court in *Virginia State Board v. Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976), which involved a statute prohibiting pharmacists to advertise prices of prescription drugs. In *Virginia State Board*, the Court stated that

"the question whether there is a First Amendment exception for 'commercial speech' is squarely before us. Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. . . . The 'idea' he wishes to communicate is simply this: 'I will sell you the X prescription drug at the Y price.' " (425 U. S. at 760-61)

Assuming that an advertiser's interest is "a purely economic one," the Court held that this "hardly disqualifies him for protection under the First Amendment." It noted that a "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate. . . . Advertising, however tasteless and excessive it sometimes may seem," the Court continued.

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[2] *But see Rodale Press, Inc.*, 71 FTC 1184, 1247-54 (1967) (dissenting opinion).

[3] *Breard v. Alexandria*, 341 U. S. 622, 650 (1951) (dissenting opinion).

[4] In a series of earlier cases involving political or editorial advertising, the Court made clear that the *Chrestensen* doctrine was limited to advertising proposing commercial transactions. *E. g., New York Times Co. v. Sullivan*, 376 U. S. 254, 265-66 (1964)

"is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. . . . It is a matter of public interest that [private economic] decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . [E]ven if the First Amendment were thought to be primarily an instrument to enlighten public decision-making in a democracy, we could not say the free flow of [commercial] information does not serve that goal." (425 U. S. at 763-65)

Valentine v. Chrestensen was thus gently put to rest. The Court emphasized, however, in *Virginia State Board* that its decision that "commercial speech, like other varieties, is protected" does not mean "it can never be regulated in any way." It is a cliché in constitutional law that the First Amendment's protection of freedom of speech is not absolute. For example, reasonable "time, place, and manner" restrictions on speech are valid. There is no constitutional right to send a sound truck into a residential neighborhood at midnight, blaring political or other messages. "Some forms of commercial speech regulation," the Court declared,

"are surely permissible. . . . Untruthful speech, commercial or otherwise, has never been protected for its own sake. . . . Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem." (425 U. S. at 770-71)

Footnote 24

At this point in its opinion, the Court dropped footnote 24. Footnotes in Supreme Court opinions are often more important than the text. Footnote 24 in *Virginia State Board* will undoubtedly be analyzed and dissected for years to come, and it deserves careful scrutiny.

The Justices were obviously concerned that their decision might be misconstrued as giving commercial speech the same degree of constitutional protection as, say, political or literary speech. The Court quickly aborted any foolish notion that it was repealing the Federal Trade Commission Act and other laws prohibiting false and deceptive advertising.

Footnote 24 begins with an incontestable proposition:

"There are common sense differences between speech that does 'no more than propose a commercial transaction' . . . and other varieties. . . . Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. . . . They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, *as are necessary to prevent its being deceptive*. . . . They may also make inapplicable the prohibition against prior restraints." (425 U. S. at 771-74, emphasis added)

Footnote 24 clearly should not be regarded as a comprehensive delineation of the scope of valid governmental regulation of advertising under the First Amendment. But its importance is reflected in the evident care with which it was written. The Court plainly intended to define at least the general direction it would follow in future cases. Some basic points were made crystal clear. The constitutional principle that a prior restraint on speech "bears a heavy presumption against its constitutional validity" does not apply to an FTC advertising cease-and-desist order. Moreover, in contrast to political speech, commercial speech, if false or misleading, loses First Amendment protection.

Truthfulness in Advertising

Its holding that the claim of advertising to constitutional protection is wholly dependent upon its truthfulness was reaffirmed by the Supreme Court in its most recent decision in this area, *Bates v. Arizona*, 97 S. Ct. 2691 (June 27, 1977). Again in that case, which held that advertising by lawyers is protected by the First Amendment and may not be subjected to blanket suppression, the Court spelled out "some of the clearly permissible limitations on advertising not foreclosed by our holding." (97 S. Ct. at 2708)

As a general rule in First Amendment cases, an overbroad statute or regulation is invalid on its face because it "might serve to chill protected speech." The Court held, however, that

"the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context. . . . Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that *regulation to assure truthfulness* will discourage protected speech. And any concern that *strict requirements for truthfulness* will undesirably inhibit spontaneity seems inapplicable because commercial speech is generally calculated. Indeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena." (97 S. Ct. at 2708-09, emphasis added)

These passages in the Court's opinions suggest a paraphrase of George Orwell's remark: All First Amendment rights are created equal, but some are more equal than others. Advertising is constitutionally protected speech, but advertisers don't need or deserve as much protection as politicians and editorial writers. Advertisers cannot complain about infringement of their First Amendment rights if all that is asked of them is that they tell the truth, the whole truth, and nothing but the truth.

In his recent article on regulation of advertising, Professor Robert Pitofsky, whose views are entitled to the greatest respect, writes: "It is unlikely that either *Bigelow* or *Virginia State Board* will appreciably circumscribe FTC regulation of advertising."[5] It is dangerous to prophesy in constitutional adjudication, especially where as here the Court has just set sail on an uncharted sea. My own view is that, while there may be no immediate or dramatic changes, the law of advertising regulation will inevitably be affected by the introduction of the First Amendment as a relevant and important factor. At the very least, the context—and certainly the vocabulary—of legal analysis in this area will be substantially enlarged.

"Radiating Potencies"

Mr. Justice Cardozo said that "the radiating potencies of a decision may go beyond the actual holding."[6] I, for one, cannot dismiss the "radiating potencies" of these recent Supreme Court decisions establishing a constitutional right to advertise. False and deceptive advertising will, of course, remain constitutionally unprotected. But it is not at all clear to me that the Commission should, or will, be allowed to outlaw claims which, though wholly truthful, might mislead "the ignorant, the unthinking, and the credulous."[7] In almost every advertising case a critical issue is the "meaning" of the ad and its impact on the public. That issue has now acquired a constitutional dimension upon which the courts, not the FTC, will have the final say. Judges who think they can read or look at an ad just as well as anyone else are not likely to defer to the Commission's oft-proclaimed but non-existent "expertise."

Inevitably, advertisers will enjoy more freedom to say what they want to say, in the words they want to use, without worrying about the FTC looking over their shoulders as an ever-present, nitpicking censor—but, I emphasize again, only if they stick to the truth, the whole truth, and nothing but. I predict, further, that the most serious impact on the FTC of these recent First Amendment decisions will be in curbing issuance of unjustifiably broad "fencing in" rules and orders against advertisers and advertising agencies.

Consider some of the fundamental principles of the First Amendment, and how novel and even startling they seem in the context of

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[5] "Beyond Nader: Consumer Protection and the Regulation of Advertising," 90 *Harv. L. Rev.* 661, 672 (Feb. 1977).

[6] *Hawks v. Hamill*, 288 U.S. 52, 58 (1933).

[7] *Aronberg v. FTC*, 132 F.2d 165, 167 (CA-7 1942).

traditional advertising regulation. The basic and overriding premise of the Amendment, as the Court has said, is that freedom of speech "is the matrix, the indispensable condition, of nearly every other form of freedom."[8] Accordingly, any regulation restricting speech must be subjected to strict judicial scrutiny. The courts will ask, what is the governmental interest that requires the regulation of speech? The interest must be compelling, and it must be articulated. Moreover, the method of regulation used must be the least restrictive alternative available; the net of control can be cast no more broadly than necessary. Because of the danger of "chilling effect" upon the exercise of vital First Amendment rights, regulations cannot be vague and must be drawn with narrow specificity, and the burden of justification of a restriction upon speech rests upon the government.[9] Moreover, the right to speak includes the right not to be compelled to speak that which one does not believe.[10]

The law of advertising regulation, on the other hand, has proceeded on a wholly separate and different constitutional track. For more than 60 years the FTC has gone its way, oblivious to the First Amendment. Conceived as an antitrust agency, the FTC understandably has drawn upon antitrust principles and remedies in regulating advertising. In fashioning relief, for example, the Commission has issued broad "fencing in" orders to advertisers and price-fixers alike, and these orders have generally been upheld by the courts.[11] But advertisers are now in a different category: there is no constitutional right to price-fix, but there is a constitutional right to advertise truthfully, and any governmental restrictions upon that right must be strictly scrutinized and justified under the First Amendment.[12]

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[8] *Palko v. Connecticut*, 302 U. S. 319, 327 (1937).

[9] *See, e. g., NAACP v. Button*, 371 U. S. 415 (1963); *United States v. O'Brien*, 391 U. S. 367 (1968); *Keyishian v. Board of Regents*, 385 U. S. 589 (1967).

[10] *Wooley v. Maynard*, 97 S. Ct. 1428 (April 20, 1977); *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241, 257 (1974); *West Virginia Board of Education v. Barnette*, 319 U. S. 624, 633 (1943).

[11] *E. g., FTC v. National Lead Co.*, 352 U. S. 419, 431 (1957); *FTC v. Colgate-Palmolive Co.*, 380 U. S. 374, 394-95 (1965).

[12] *See also* the Court's decisions last Term in *Carey v. Population Services, International*, 97 S. Ct. 2010 (June 9, 1977), and *Linmark Associates, Inc. v. Township of Willingboro*, 97 S. Ct. 1614 (May 2, 1977), holding laws banning contraceptive and realty advertising to be unconstitutional on First Amendment grounds. Moreover, even as to price-fixers the D. C. Circuit Court recently modified a district court decree on the ground that it would "encroach on that sphere of free thought and expression protected by the First Amendment." *United States v. National Society of Professional Engineers*, — F. 2d — (Mar. 14, 1977), *cert. granted*, 46 U. S. L. W. 3179 (U. S. Oct. 3, 1977).

Affirmative Disclosures

In regard to affirmative disclosures required in future advertising, the Federal Trade Commission should have no problems where it finds—in the language of footnote 24 of *Virginia State Board*—that the disclosure is "necessary to prevent its being deceptive." Note that the touchstone of constitutionality is *deception*. What if an advertisement is not deceptive and makes no claims whatever (for example, one which simply says "Brand X Toothpaste—available at your local drugstore"?) To justify a corrective advertising order, does not the First Amendment require the Commission to make an express finding, supported by substantial evidence, that even so bland an ad would impliedly repeat a continuing prior deception and therefore a corrective statement is "necessary to prevent its being deceptive"? *Cf.* the *Listerine* case, *Warner-Lambert Co. v. FTC*, (CA DofC Sept. 14, 1977) supplemental opinion on petition for rehearing.

Besides deception, there are other valid governmental interests that footnote 24 fails to mention. I have no doubt that the Court will uphold affirmative disclosures necessary to warn consumers of dangers to safety and health. Such requirements surely do not raise serious First Amendment questions. In the same category I would also put affirmative disclosures designed for the protection of especially vulnerable consumers, like children. Provisions of this kind are intended to promote *fairness*—a standard difficult to define but not open-ended. As to every such restriction upon the constitutional right to advertise, I emphasize that the burden of justification will rest upon the Commission.

Another question that may arise is whether, under the standards laid down in footnote 24, the Commission may prohibit a *wholly truthful* claim simply because the advertiser fails to use exact words or phrases prescribed by the Commission. Can the Commission insist that an advertiser may use only precise, technical terminology decreed by it, and prohibit synonymous language more readily understood by the public? The First Amendment clearly requires the Commission to satisfy the heavy burden of showing that such a prohibition is necessary to prevent deception, that it is the "least restrictive remedy available," and that it does not unduly restrict the right to advertise truthfully. The Commission might be able to meet that burden in fashioning a cease-and-desist order against a particular firm found guilty of deceptive advertising. I doubt, however, that it could succeed in a general trade regulation rulemaking proceeding involving industry members who have violated no laws.

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Ad Substantiation Program

Another area of advertising regulation that may be affected by the First Amendment is the FTC's ad substantiation program. I agree with Professor Pitofsky that the Commission should have no serious problems—but only so long as it does not push the program too far, to the point of inhibiting or "chilling" the dissemination of truthful claims and restricting the flow of accurate commercial information to the public. The objectives of the ad substantiation program are fair and sensible. It would be regrettable if the program were to be jeopardized by extreme and unjustifiable Commission rulings.

A serious problem would certainly arise if the Commission should define "reasonable basis" too narrowly, and routinely insist that adequate substantiation for every kind of advertising claim must take the form of expensive and burdensome scientific studies, laboratory tests, and the like. A "reasonable basis" should mean exactly that, and no more. It would be ironic—and, perhaps, unconstitutional—for the Federal Trade Commission itself to become the instrumentality for suppressing or "chilling" truthful advertising claims.[13]

Beyond that, there are constitutional dangers in applying the ad substantiation program too stringently to advertising agencies. As an example, does the First Amendment allow the Commission to place an ad agency under a comprehensive order, with broad claims and product coverage applicable to all of its clients, requiring it to possess and rely upon adequate substantiation for every advertising claim, including one which is truthful or which the agency has no reason to question? It is hard to imagine how any advertising agency could live with an order of such astonishing breadth. The Commission should have the heavy burden of showing that so sweeping an order is required by the public interest and does not unduly "chill" dissemination of truthful commercial information.

Recent Cases

Recent cases in the Courts of Appeals for the Third and the District of Columbia Circuits[14] clearly indicate that the lower federal

[13] Its final order in *National Commission on Egg Nutrition*, Dkt. 8987, July 20, 1976 (CCH TRADE REGULATION REPORTS ¶ 21,184), provides some basis for optimism.

[14] *See also FTC v. Simeon Management Corp.*, 532 F.2d 708 (CA-9 1976), where the Ninth Circuit, relying in part on the First Amendment, held that a temporary injunction under Section 13(a) of the FTC Act could not be issued against allegedly deceptive food, drug, or cosmetic advertising unless the Commission demonstrates likelihood of success on the merits.

courts, if not the Federal Trade Commission, have gotten the message that the First Amendment applies to advertising.

In *Beneficial Corp. v. FTC*, 542 F. 2d 611 (CA-3 1976), the Third Circuit held that a total ban on a loan company's use of the slogan "Instant Tax Refund", even with appropriate qualifiers, exceeded the Commission's remedial authority, because the First Amendment requires a "more searching" examination of its orders. The Commission petitioned for certiorari, asserting—correctly, I'm sure—that the order was not essentially different from the "fencing in" orders upheld in a long line of cases. But those cases were all decided before *Bigelow* and *Virginia State Board*, and certiorari was denied, 97 S. Ct. 1679 (1977).[15]

In *Chrysler Corp. v. FTC*, (CA DofC July 6, 1977) the D. C. Circuit struck down two provisions of an order. One prohibition—against misrepresenting the purpose, content, or conclusion of any test—was held to be "potentially limitless". The other—prohibiting misrepresentation of test results concerning "any performance or other characteristic" of automobiles—was held "almost equally wide-ranging." The court did not mention the First Amendment, but I have little doubt that the order would have been sustained in full had the case arisen a few years ago.

In *Warner-Lambert Co. v. FTC* (CA DofC Aug. 2, 1977, rehearing denied, Sept. 14, 1977) the D. C. Circuit modified a required corrective statement by deleting the preamble "Contrary to prior advertising." The court, while not mentioning the First Amendment, held that the preamble was "not necessary". The Commission's petition for rehearing, arguing that it and not the court should decide what was necessary, and that the corrective statement would be ineffective without the preamble, was denied without comment.

Warner-Lambert's petition for rehearing, while also denied, elicited an opinion in which the court went to some length in reconciling the Commission's order with *Virginia State Board* and the other First Amendment cases. Without intruding on a case still in litigation, I suspect even Commission counsel would concede that the court's

[15] Nothing in the Third Circuit's opinion, as I read it, would permit use of the "Instant Tax Refund" slogan in any ad which in its totality (or, as some at the FTC might say, "total sensory experience") is deceptive. For more than a half-century the courts and the FTC have recognized that (a) an ad must be viewed in its entirety, and (b) visual images and effects may convey a deceptive message where the words do not. *E. g.*, the sandpaper-shave case, *FTC v. Colgate-Palmolive Co.*, 380 U. S. 374 (1965). The recent First Amendment cases cast not even a shadow upon these ancient but vital principles of advertising law.

supplemental opinion on petition for rehearing is more responsive to First Amendment concerns than the Commission's. The court, while obviously troubled, apparently felt that—whatever the deficiencies in the Commission's findings and opinion—if ever there was a case for a corrective advertising order, *Listerine* is it. And it is by no means unusual for a reviewing court to walk an extra mile with a regulatory agency it believes to be on the right track.

Corrective Advertising Order

The supplemental opinion on petition for rehearing in *Listerine* analyzed the issue in traditional First Amendment terms: whether the governmental interest involved, that is, "protecting citizens against deception", is "substantial and important", and whether a corrective advertising order is "the least restrictive means of achieving" the objective. The court concluded that "on balance, it [the Commission's order] must be upheld." Whether that conclusion will survive Supreme Court review remains to be seen. Of two things we may be sure: despite the inadequacies of the Commission's opinion, the Court of Appeals did a heroic job patching it up; and on its facts *Listerine* is the best test case for corrective advertising that the Commission could hope for.

In sum, while we have yet to see any real evidence that the FTC is seriously troubled by the First Amendment,[16] the Supreme Court and the Courts of Appeals are showing increasing awareness of their responsibility to safeguard the constitutional right to advertise truthfully. So the message to the members of the Commission must be, "Wake up—the First Amendment is here to stay, but don't worry about it—the Supreme Court will back you up if you regulate advertising with common sense and good judgment, and don't go overboard on any fancy or wild notions that stray too far from your basic statutory mission of preventing deception and unfairness." And the message to advertisers and advertising agencies is, "Cheers—you've won a great victory—the Supreme Court has recognized your constitutional right to advertise, but don't abuse it or you'll lose it—the FTC is still around, and it's still a good idea to stay out of trouble—when in doubt, remember that you'll always be safe if you advertise truthfully, honestly, and fairly—and you might even make more money that way." [The End]

[16] *But see* Reich, "Consumer Protection and the First Amendment: A Dilemma for the FTC?," 61 *Minn. L. Rev.* 705 (1977).

Exhibit 80: "Yes, FTC, There Is a Virginia . . .," 57 *Boston University Law Review* 833 (1977)

NOTES

YES, FTC, THERE IS A *VIRGINIA*: THE IMPACT OF *VIRGINIA STATE BOARD OF PHARMACY v. VIRGINIA CITIZENS CONSUMER COUNCIL, INC.* ON THE FEDERAL TRADE COMMISSION'S REGULATION OF MISLEADING ADVERTISING

I. Introduction

Since its inception in 1914, the Federal Trade Commission (FTC) has regulated misleading commercial advertising without having to conform to the requirements of the first amendment.[1] The Supreme Court did not consider the first amendment status of commercial speech until 1942 when, in *Valentine v. Chrestensen*,[2] the Court held that the amendment's protection did not extend to commercial speech. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[3] however, the Court reconsidered the issue, declaring unconstitutional a statute that penalized druggists for advertising prescription drug prices. The Court held that commercial speech is not "wholly outside the protection of the First Amendment,"[4] that it does not lack "all protection."[5] That language and other aspects of the opinion lend some support to Justice Rehnquist's conclusion that the decision affords commercial speech only "second class" protection.[6]

Although dicta in the opinion suggest that the first amendment has no application to regulation of misleading advertising,[7] the Court of Appeals for the Third Circuit has relied upon *Virginia* in refusing enforcement of an FTC order.[8] Because several FTC practices do not comport with traditional first amendment standards, further constitutional challenges to FTC orders are certain to follow. Whether courts will hold that various practices employed by the FTC are unconstitutional will depend upon how those courts interpret the ambiguous *Virginia* opinion.

Although the holding of *Virginia* is narrow, the Court, equating the importance of advertising and political speech, invoked broad policies to justify protecting commercial speech. Therefore, the decision is susceptible of at least two interpretations. If *Virginia* is interpreted in accordance with its

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[1] The Commission was created by the Federal Trade Commission Act, Act of Sept. 26, 1914, ch. 311, § 5, 38 Stat. 717 (codified at 15 U.S.C. § 41 *et seq.* (1970)). The FTC began regulating advertising almost immediately. Millstein, The Federal Trade Commission and False Advertising, 64 Colum. L. Rev. 439, 451 (1964).

[2] 316 U.S. 52 (1942).

[3] 425 U.S. 748 (1976).

[4] *Id.* at 761.

[5] *Id.* at 762.

[6] *Id.* at 788 (Rehnquist, J., dissenting).

[7] *Id.* at 771-72 & n.24. *See also* Young v. American Mini Theatres, Inc., 427 U.S. 50, 68-69 n.35 (1976) (plurality opinion) (referring specifically to FTC regulation).

[8] Beneficial Corp. v. FTC, 542 F.2d 611, 619-20 (3d Cir. 1976), *cert. denied*, 97 S. Ct. 1679 (1977) (first amendment requires that FTC use the least restrictive remedy available).

broad rationale, FTC regulation of advertising will have to meet first amendment standards. On the other hand, an interpretation predicated upon the opinion's limiting dicta would permit the FTC to continue to exercise considerable discretion, but would also allow courts to give only "second class" protection to commercial speech. To discriminate against commercial speech in this manner would be only to recreate the commercial speech doctrine of *Valentine* in another form. Therefore, before determining how *Virginia* applies to misleading advertising, it is appropriate to examine the commercial speech doctrine and the extent to which it furthered first amendment interests.

The theses of sections II-IV of this Note are: (1) that the commercial speech doctrine has proven incapable of principled application; (2) that first amendment interests are best served by resolving the ambiguities in *Virginia* in favor of full protection for commercial speech; and (3) that regulation of misleading advertising is permissible because misrepresentation is unprotected speech. From those premises follows the conclusion that regulation of misleading advertising must comport with first amendment requirements for separating protected speech from unprotected speech. Section V measures current FTC practices against first amendment standards, concluding that several elements of the regulatory scheme are unconstitutional, but that the FTC can cure the infirmities without vitiating the policies of the Federal Trade Commission Act.

II. The Commercial Speech Doctrine[9]

A. *Origin of the Doctrine*

In *Valentine v. Chrestensen*,[10] the Supreme Court first considered the important question whether the first amendment protects commercial advertising. Plaintiff had distributed handbills advertising tours of a submarine until police informed him that he was violating an ordinance that prohibited public distribution of commercial advertisements.[11] Plaintiff then distributed a revised handbill with the tour advertisement on one side and a protest against the city's wharfage regulations on the reverse. When police again intervened, plaintiff obtained an injunction from the district court against enforcement of the ordinance.[12] The circuit court affirmed.[13]

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[9] While a brief discussion of some of the cases decided after Valentine v. Chrestensen, 316 U.S. 52 (1942), serves as background for the proposition that Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), should be read broadly, comprehensive analysis of the commercial speech doctrine is beyond the scope of this Note. The doctrine has been the subject of much criticism elsewhere. *See, e.g.*, Gardner, The Sp[illegible]n Public Places, 36 B.U.L. Rev. 239 (1956); Redish, The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression, 39 Geo. Wash. L. Rev. 429 (1971); Note, The Commercial Speech Doctrine: The First Amendment at a Discount, 41 Brooklyn L. Rev. 60 (1974).

[10] 316 U.S. 52 (1942).

[11] *Id.* at 53.

[12] 34 F. Supp. 596 (S.D.N.Y.), *aff'd*, 122 F.2d 511 (2d Cir. 1941), *rev'd*, 316 U.S. 52 (1942).

[13] 122 F.2d 511 (2d Cir. 1941), *rev'd*, 316 U.S. 52 (1942).

The Supreme Court reversed, dismissing plaintiff's first amendment challenge in two paragraphs devoid of analysis or citation to precedent.[14] The Court held that the Constitution imposed no restraint upon the regulation of commercial advertising in public ways. Ironically, the most influential aspect of *Valentine* stemmed from the Supreme Court's casual reference to the circuit court's opinion: "The court below . . . adverts to the difficulty of apportioning . . . the contents of the communication as between what is of public interest and what is for private profit."[15] Assuming that the commercial message was not of public interest, the Court found it unnecessary to attempt apportionment because it concluded that plaintiff had appended the protest for the sole purpose of evading the ordinance.[16]

In the decisions that followed, the Court distinguished *Valentine* in order to protect speech more often than it relied upon the case to uphold regulation.[17] However, the importance ascribed to motive and to the lower court's distinction between speech of public interest and speech of a commercial nature proved to be *Valentine*'s most durable legacy—one that may yet survive.

More than thirty years after *Valentine* was decided, the Court characterized the case as upholding "a reasonable regulation of the manner in which commercial advertising could be distributed."[18] During the intervening years, however, the Court extended the reasoning of *Valentine* to cases involving speech that was not commercial but that was related to commercial activity.[19]

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[14] Nor did explanation of the far-reaching doctrinal statement emerge in later cases. Justice Douglas, a member of the unanimous *Valentine* Court, later described the decision as "casual, almost offhand." Cammarano v. United States, 358 U.S. 498, 514 (1959) (concurring opinion). An explanation of *Valentine* may be in its historical background. Less than a decade earlier, the Court in Nebbia v. New York, 291 U.S. 502 (1934), had laid to rest the idea that the due process clause imposed substantive restraints upon state regulation of economic activity. *See* Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 534-36 (1949). By 1942, when *Valentine* reached the Court, speech had attained a "preferred position" in the Court-defined hierarchy of constitutional values. Kovacs v. Cooper, 336 U.S. 77, 88 (1949); *see id.* at 90-96 (Frankfurter, J., concurring). Protection for advertising in 1942 would have meant subjection, of government regulation to the "clear and present danger" test. *See* Schenck v. United States, 249 U.S. 47, 52 (1919). *See generally* McKay, The Preference for Freedom, 34 N.Y.U.L. Rev. 1182, 1203-12 (1959). Confronted with both the specter of an application of the first amendment that would parallel substantive economic due process decisions and the strong state interest in regulating advertising on the one hand, and with the apparent frivolity of Chrestensen's first amendment challenge on the other, the Court may have decided that the wisest course was to follow the approach of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), which recognized that certain categories of speech are exempt from the purview of the first amendment. *See* text accompanying notes 96-97 *infra*.

Unlike the categories of speech held to be exempt from first amendment protection in *Chaplinsky*, however, commercial speech does not "by [its] very utterance inflict injury." 315 U.S. at 572. Moreover, now that first amendment analysis has developed beyond the "clear and present danger" test, whatever justification there may have been for the *Valentine* holding no longer exists.

[15] 316 U.S. at 55; *see* Valentine v. Chrestensen, 122 F.2d 511, 515-16 & n.5 (2d Cir. 1941).

[16] *Id.*

[17] *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 759 (1976).

[18] Bigelow v. Virginia, 421 U.S. 809, 819 (1975).

[19] Breard v. Alexandria, 341 U.S. 622 (1951) (door to door sales of magazines); *cf.* Thomas v.

B. *Application of the Commercial Speech Doctrine*

Shortly before *Valentine* was decided, the Court held that ordinances requiring individuals to obtain a permit before distributing handbills could not be applied to bar distribution of religious materials involving the solicitation of funds.[20] After *Valentine*, the Court upheld an ordinance that required all door to door salesmen to pay license fees before soliciting;[21] on rehearing, however, the Court held that such ordinances could not constitutionally be applied to vendors of religious literature.[22] The Court conceded that the line between commercial and religious activity was difficult to draw.[23] On the other hand, the Court held in *Breard v. City of Alexandria*[24] that a city could completely proscribe door to door sales of secular magazines.

The Court could have resolved the conflict between these cases by holding that the free exercise clause protects nonexpressive conduct as well as speech, while the freedom of expression clauses do not.[25] Instead, the Court relied upon both guarantees to protect the sale of religious speech and invoked the commercial speech doctrine to justify regulating the sale of secular speech. Because religious speech in a commercial context was protected while secular speech was not, the cases, taken together, implied that religious speech was more protected than secular speech. Thus, the decisions unnecessarily suggested that the government must favor religious speech over speech unrelated to religion—a suggestion potentially incompatible[26] with the values underlying the establishment clause.[27]

In cases that sought to hold a newspaper civilly or criminally liable for printing advertisements, the Supreme Court delineated the scope of the public interest test that had originated with the lower court in *Valentine*. In

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Collins, 323 U.S. 516 (1945) (invalidating requirement that salaried union organizer obtain permit before soliciting union membership and concomitant membership fees).

[20] Schneider v. State, 308 U.S. 147 (1939); *cf.* Jamison v. Texas, 318 U.S. 412 (1943) (protecting handbill with invitation to religious meeting on one side and advertisement of religious work for sale on reverse).

[21] Jones v. Opelika, 316 U.S. 584 (1942), *vacated on rehearing*, 319 U.S. 103 (1943).

[22] Jones v. Opelika, 319 U.S. 103 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (door to door sales of religious books and pamphlets).

[23] Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943).

[24] 341 U.S. 622 (1951).

[25] The first amendment is not absolute in its protection of either freedom of speech or freedom of religion, except insofar as it protects freedom of religious belief. Reynolds v. United States, 98 U.S. 145 (1878). Nonetheless, conduct rooted in religious belief may be protected even when the government interest in regulation is both legitimate and substantial. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish refusal to comply with compulsory school attendance laws protected); Sherbert v. Verner, 374 U.S. 398 (1963) (Seventh Day Adventist refusing to be available for work on Saturdays entitled to unemployment benefits). In contrast, the presence of a minor element of conduct associated with speech may subject speech to regulation. *See* Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284 (1957) (picketing involves nonexpressive conduct as well as speech).

[26] *Cf.* Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 728 (1976) (Rehnquist, J., dissenting); Watson v. Jones, 80 U.S. (13 Wall.) 679, 714 (1872) ("[r]eligious organizations come before us in the same attitude as other voluntary associations").

[27] "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I.

New York Times Co. v. Sullivan,[28] the Court invoked the first amendment to bar a libel action based upon an advertisement in which the NAACP had appealed for funds to combat the effects of alleged racial discrimination by Alabama police. Although the Court could have held that the commercial speech doctrine did not apply to advertising placed by nonprofit organizations, it instead elected to distinguish *Valentine* by adopting the content-based public interest test. The Court determined that the information in the advertisement, albeit inaccurate, was information of public interest and thus held that the advertisement was protected by the first amendment.[29]

In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,[30] however, the Court's 5-4 majority relied upon *Valentine* to affirm an order that prevented a newspaper from classifying its "Help Wanted" advertisements according to sex. The Court held that the newspaper was subject to regulation because its sex-designated headings facilitated violation of an ordinance that forbade discrimination in employment. More significantly, the Court characterized the classified advertisements as proposing an ordinary commercial transaction.[31] In so doing, the Court did not consider the public interest in information regarding the availability of jobs during a recession. In *Bigelow v. Virginia*,[32] on the other hand, the Court held that an advertisement placed by a profit-making abortion referral service did satisfy the public interest test and was therefore protected by the first amendment.

Lehman v. City of Shaker Heights[33] produced yet another anomalous result. Plaintiff, a political candidate, brought suit when he was unable to purchase space on the city's transit system for his campaign advertisements because the city barred all political advertising from the system. Relying upon the first amendment and the equal protection clause of the fourteenth amendment, plaintiff argued that, inasmuch as the city permitted commercial advertising, the city had established a public forum and had failed to make the forum available without discriminating on the basis of the content of the advertising.[34] The unprotected status of commercial speech led the Court to conclude that the city had not created a first amendment forum on its transit system.[35] Thus, because commercial speech was *un*protected, the city could afford it more exposure than protected political speech without unlawfully discriminating on the basis of content.

C. *Results of the Commercial Speech Doctrine*

Although the policies underlying the commercial speech doctrine may not be readily discernible, its vices are apparent. Application of the doctrine in

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[28] 376 U.S. 254 (1964).
[29] *Id.* at 266.
[30] 413 U.S. 376 (1973).
[31] *Id.* at 389.
[32] 421 U.S. 809 (1975).
[33] 418 U.S. 298 (1974).
[34] *Id.* at 301. *See also* Police Dep't v. Mosley, 408 U.S. 92 (1972).
[35] 418 U.S. at 304.

Breard suggested that secular speech was less protected than religious speech, a result inimical to the neutrality demanded by both the establishment and the freedom of expression clauses of the first amendment. In *Lehman*, the doctrine provided a basis for restricting protected political speech. The most objectionable aspect of the commercial speech doctrine, however, was its application in the newspaper cases. The public interest test permitted courts to grant certain advertisements preferential treatment on the basis of a subjective assessment of the interest that the public might have in the advertisement's message. A test that allows judges to apply their own values in determining whether content is of public interest is too precarious a measure of first amendment rights.[36] The prohibitions of the first amendment suggest that the power to determine whether information is of interest is a power that the framers reposed in the people, not in the government. The Court's decision in *Virginia*, holding that commercial speech is within the ambit of the first amendment, therefore occasions some optimism. But *Virginia* is almost as much a conundrum as *Valentine*. While equating the importance in first amendment analysis of commercial and political speech, the *Virginia* opinion nevertheless attempts to cling to some basis for disparate treatment of the two classifications.

II. THE *Virginia* DECISION

A. *The Opinion*

In *Virginia*, the Court confronted a statute that imposed sanctions upon pharmacists who advertised drug prices. Plaintiffs, who characterized themselves as a group of prescription drug consumers, sought an injunction against enforcement of the statute, claiming that it violated the first and fourteenth amendments. A three-judge district court granted the injunction, declaring the statute unconstitutional; the Supreme Court affirmed.[37]

The Court first considered whether the plaintiff consumers had standing to challenge a statute that penalized only pharmacists for publishing drug prices. The majority resolved that issue by holding that the plaintiffs had an independent first amendment right to receive advertising that another wished to convey.[38] Next, in order to demonstrate the limited application of the commercial speech doctrine, the Court reviewed the cases that had carved out the doctrine's many exceptions.[39] Finally, the majority gave its

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[36] Justice Douglas has remarked:

> [The public interest test,] as Justices Harlan, Marshall, and Stewart recently observed, will further require this Court to poll itself with increasing regularity to determine what events are of sufficient general or public interest to deserve protection .... It is evident that this *ad hoc* approach has backed the Court into the same subjective quagmire which has trapped the judiciary in obscenity cases.

Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898, 904 (1971) (dissenting from the denial of certiorari) (citations omitted).

[37] 373 F. Supp. 683 (E.D. Va. 1974) (three-judge court), *aff'd*, 425 U.S. 748 (1976).

[38] 425 U.S. at 757.

[39] *Id.* at 758-61.

reasons for extending first amendment protection to "an ordinary commercial proposal."

The Court explained that, although an advertiser's motive may be purely economic, the societal and individual interests in commercial speech justify its protection. For the consumer, the personal interest in the product advertised may be greater than the interest in political debate.[40] For society, commercial speech is "indispensable to the proper allocation of resources in a free enterprise system [and] to the formation of intelligent opinions as to how that system ought to be regulated or altered."[41] The Court noted that a factory's existence might depend upon its ability to advertise, and "the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing."[42] The majority concluded its argument by explicitly recognizing that commercial speech and political speech further the same ends:

> Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.[43]

Chief Justice Burger and Justice Stewart wrote concurring opinions. The Chief Justice emphasized that, because drug manufacturers pre-fill about ninety-five percent of prescription drug units, the Court's decision did not implicate advertising of prices of services that involve a high degree of professional skill—specifically, advertisement of doctors' and lawyers' fees.[44] Justice Stewart explained that the holding did not reach misleading advertising.[45] Justice Rehnquist filed the sole dissenting opinion. Doubting that the holding could be limited to truthful, nonprofessional advertising, he urged that the majority should have distinguished between ideological advertising and commercial advertising.[46]

Because the straightforward offer of drugs for sale is prototypical of an ordinary commercial proposal, *Virginia* goes beyond the protection afforded

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[40] *Id.* at 763; *accord*, Linmark Assocs., Inc. v. Township of Willingboro, 97 S. Ct. 1614 (1977).

[41] 425 U.S. at 765.

[42] *Id.* at 763, *quoting* Thornhill v. Alabama, 310 U.S. 88, 103 (1940).

[43] 425 U.S. at 765 (footnotes omitted). The Court here cited A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948). 425 U.S. at 765 n.19. Professor Meiklejohn, a philosopher and leading first amendment theorist, contended that the first amendment protects any communication necessary to self-government: speech pertaining to voting, education, the study of art, literature, philosophy and the sciences, and public discussion of public issues. To Meiklejohn, any regulation in those spheres is unconstitutional. *See* Meiklejohn, The First Amendment Is an Absolute, 1961 Sup. Ct. Rev. 245.

[44] 425 U.S. at 773-75. Subsequent to *Virginia*, the Chief Justice dissented from a decision that the first amendment protects advertising that includes prices of routine legal services. Bates v. State Bar of Arizona, 97 S. Ct. 2691, 2710 (1977) (Burger, C.J., concurring in part, dissenting in part).

[45] 425 U.S. at 775-80.

[46] *Id.* at 781-90. Alternatively, Justice Rehnquist argued that the Court should have struck the first amendment balance in favor of the state's interest in protecting the public from the threat of excessive promotion of drugs. In Bates v. State Bar of Arizona, 97 S. Ct. 2691, 2719 (1977) (Rehnquist, J., dissenting), Justice Rehnquist adhered to the position that commercial advertising is beyond the purview of the first amendment.

commercial speech in previous cases. Yet *Virginia*'s holding is a narrow one: the state may not completely suppress accurate, empirically verifiable information about products essential to health when the sale of the products involves only minimal skills. Thus, even if *Virginia* ended the notion that commercial advertising is wholly unprotected by the first amendment, it left open the possibility that commercial speech will receive less protection than other categories of speech. The opinion, however, does not provide a convincing rationale for such a distinction.[47]

B. *Critique*

1. The "Different Degree of Protection" Commercial Speech Doctrine

In *Virginia*, the Supreme Court acknowledged that, to the individual, commercial speech might be of greater importance than political debate. After ascribing to commercial speech an impact equal to that of political speech, however, the Court proceeded to limit the potential scope of its decision.[48] By discoursing in terms of whether commercial speech is "wholly outside the protection of the First Amendment,"[49] the Court indicated that selective protection for commercial speech based upon an examination of the content of advertisements may survive *Virginia*. A footnote to the opinion reinforces the suggestion:

> In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does "no more than propose a commercial transaction," *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S., at 385, and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.[50]

Before the decision in *Virginia*, advertising that, in the Justices' opinion,

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[47] *See* 425 U.S. at 785 (Rehnquist, J., dissenting).

[48] The Court explicitly reserved the questions of the constitutionality of restrictions upon speech in the labor context; regulation of advertising in broadcast media; suppression of advertising related to illegal activity; suppression of advertising by professionals, such as doctors and lawyers, whose services involve considerable skill; and regulation of misleading advertising. *Id.* at 770-73. Despite both the majority's caveat as to the distinction between standardized products and professional services and the Chief Justice's suggestion that advertising the prices of professional services might be inherently misleading, *id.* at 775 (Burger, C.J., concurring), the Court in Bates v. State Bar of Arizona, 97 S. Ct. 2691 (1977), held that state bar prohibitions on the advertising of prices of routine legal services violated the first amendment. Thus, when actually confronted with the question of misleading advertising, the Court adopted an approach that is different from the one suggested both by the *Virginia* dicta, *see* 425 U.S. at 771-72 & n.24; text accompanying note 50 *infra*, and by Justice Stewart's concurrence, 425 U.S. at 775-81.

[49] 425 U.S. at 761.

[50] *Id.* at 771-72 n.24. Although *Pittsburgh Press* supports the proposition that advertising of illegal conduct is regulable, the *Virginia* Court's characterization of the listing of employment opportunities in *Pittsburgh Press* as a proposal of a commercial transaction suggests that the most troublesome aspects of the commercial speech doctrine may survive *Virginia*.

contained speech of public interest was protected by the rigorous requirements of the first amendment, while regulation of other advertising was accorded only minimum scrutiny under the due process[51] and equal protection[52] clauses. It is difficult to know precisely how far beyond prior case law *Virginia* ventures.[53] Undoubtedly, advertising of prices of goods and routine services involving only comparatively little skill[54] cannot be completely suppressed when the government has only paternalistic reasons for acting.[55] In cases that do not fall into that limited category, *Virginia* permits courts to continue to separate "ordinary" commercial proposals from commercial speech deemed to have greater significance. Although courts must adhere to orthodox first amendment doctrines in scrutinizing the latter category, they apparently may follow the dictates of their "common sense" in dealing with the former.

The dicta by which the Court sought to limit its holding is incompatible with the expansive rationale that the Court provided for protecting commercial speech. If, as the *Virginia* majority suggested, advertisements indeed affect decisions fundamental to our free enterprise system, it is difficult to apprehend why advertising should receive less protection than other forms of speech. On the other hand, if most commercial speech does not have sufficient social significance to merit full protection, a new doctrinal statement seems to have been unwarranted. The Court could have reached its result by concluding that the sale of prescription drugs is as much a topic of public interest as is the sale of abortion referrals, and rested its decision on *Bigelow v. Virginia*. If the Court's departure from the commercial speech doctrine of *Valentine v. Chrestensen* is to be meaningful, *Virginia* must be

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[51] *E.g.*, Head v. New Mexico Bd. of Examiners on Optometry, 374 U.S. 424 (1963) (advertising eyeglass prices); Thomas Cusak Co. v. City of Chicago, 242 U.S. 526 (1917) (billboards); Rockville Reminder, Inc. v. United States Postal Serv., 480 F.2d 4 (2d Cir. 1973) (advertising circular). Unless a fundamental right is implicated, the due process clause requires only that regulation not be wholly arbitrary or irrational. *See* Railway Express Agency, Inc. v. New York, 336 U.S. 106, 109 (1949).

[52] *E.g.*, Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) (advertising on vehicles); Packer Corp. v. Utah, 285 U.S. 105 (1932) (billboards).

[53] The circuit courts seem uncertain. *Compare* Beneficial Corp. v. FTC, 542 F.2d 611, 619 (3d Cir. 1976), *cert. denied*, 97 S. Ct. 1679 (1977) (first amendment requires that FTC use least restrictive remedy available in regulating misleading advertising slogan), *and* Nickens v. White, 536 F.2d 802, 804 (8th Cir. 1976) (first amendment protects prisoner's right to receive office supply catalogue), *with* Warner-Lambert Co. v. FTC, No. 76-1138, slip op. at 15-16 (D.C. Cir. Aug. 2, 1977) (first amendment imposes no restriction on remedies for misleading advertising), *and* Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976) (state college newspaper may refuse advertisement offering homosexuals counseling, legal aid and access to library of homosexual literature on the ground, *inter alia*, that sodomy is prohibited by state law).

[54] 425 U.S. at 766-67, 773 n.25. *See also* Bates v. State Bar of Arizona, 97 S. Ct. 2691, 2694, 2703 (1977) (advertising in issue involves prices, not quality of services; only routine services, such as changes of name, uncontested divorces, simple adoptions and uncontested bankruptcies lend themselves to advertising).

[55] *See* 425 U.S. at 766-70; *cf.* Bates v. State Bar of Arizona, 97 S. Ct. 2691, 2703-04 (1977) (assumed naivete of public an insufficient justification for repressing legal advertising); Linmark Assocs. v. Township of Willingboro, 97 S. Ct. 1614, 1620 (1977) (fear that homeowners will act contrary to their self-interest insufficient justification for banning real estate "For Sale" signs).

applied so as to give force to the Court's reasoning. Speech that serves the important interests that *Virginia* recognized will still be subject to suppression if courts may continue to use their discretion to distinguish between ordinary advertisements and those of public interest in order to determine which "degree of protection" to grant.

2. Protected Speech vs. Degree of Protection

Until *Virginia*, speech had been classified as either protected or unprotected. Under this traditional analysis, regulation of all protected speech must comport with first amendment standards, while unprotected speech may be proscribed as the legislature wills.[56] For example, the Court has long held that sexually explicit speech that is not obscene is fully protected,[57] while obscenity is wholly unprotected.[58] Of necessity, courts must scrutinize the content of sexually explicit speech in order to separate protected from unprotected speech. Consequently, the Court developed procedural safeguards to ensure that an examination of content is conducted in a manner compatible with the first amendment.[59] Once the examination is completed, any additional issues of the constitutionality of government regulation must be resolved without further consideration of content.

The Court in *Virginia*, however, introduced a new concept—different degrees of protection—and, in *Young v. American Mini Theatres, Inc.*,[60] the Court's plurality opinion clarified the meaning of that phrase. *Young* departs from content-neutral treatment of protected speech. *Young* upheld a zoning ordinance that required theaters showing sexually explicit films to be more than one thousand feet apart.[61] Plaintiffs desired to show adult films that were not obscene but that fell within the proscriptions of the ordinance. The Court held that the regulation was permissible under the first amendment because the ordinance limited only the place where speech could occur and did not completely suppress protected speech.[62] The plurality[63] also held that the zoning scheme did not violate the equal protection clause because the state was not discriminating among sexually oriented films on the basis of their underlying social, philosophical, or political messages.[64] Finally, the

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[56] Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441 (1957).

[57] Winters v. New York, 333 U.S. 507, 510 (1948): "Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." *See also* Roth v. United States, 345 U.S. 476, 487 (1957) (sexually explicit speech and obscenity not synonymous).

[58] *See, e.g.*, Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 345 U.S. 476 (1957).

[59] *E.g.*, Blount v. Rizzi, 400 U.S. 410, 417-21 (1971); Freedman v. Maryland, 380 U.S. 51, 58-59 (1965).

[60] 427 U.S. 50 (1976).

[61] *Id.* at 52-53.

[62] *Id.* at 62-63.

[63] Justice Stevens wrote for the Court. Chief Justice Burger and Justices Powell, Rehnquist and White formed a majority on Parts I and II of the opinion, which held that the challenged ordinance was neither vague nor violative of the first amendment. Justice Powell did not subscribe to the rationale set forth in Part III of the opinion, leaving only a plurality to support the analysis of the equal protection issue.

[64] 427 U.S. at 70.

plurality upheld the ordinance's distinction between sexually explicit films and films without explicit sexual content, citing *Virginia* for the proposition that some classes of protected speech are less important, and therefore less protected, than others.[65] Justice Stevens, writing for the plurality, elaborated:

> [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . . [F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.[66]

Apparently, implicit in the concept of "a degree of protection" is the view that there is to be a sliding scale of protection for protected speech. Protected social, philosophical and political expression will be at the apex, with protected sexually explicit speech and commercial speech at the base.

Young does not indicate that the Court is abandoning the protected-unprotected dichotomy;[67] rather, the Court is permitting a second content-based discrimination. As always, courts must examine content in accordance with procedural safeguards to ensure that no protected speech is totally suppressed. In order to ascertain the applicable degree of protection, however, judges, or possibly administrators, may now examine content further to decide whether speech associated with labor affairs is social or political; whether sexually explicit literature has more than "some arguably artistic value";[68] and whether advertisements contain political, social, or philosophical speech, or are just ordinary commercial proposals. Neither *Young* nor *Virginia* mandates any procedural safeguards for making this determination.

To regulate fully protected speech, government must establish the existence of a compelling interest in the regulation. If speech falls into a category that receives only a degree of protection, however, the strength of the government interest required to suppress speech may vary with a court's perception of the value of the particular speech. Regulation that is rationally related to a police power goal that is less than compelling may or may not successfully infringe upon the right to freedom of expression. For example, in *Virginia*, the Court struck down suppression of advertising by pharmacists despite an asserted state interest in the quality of health care services and of

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[65] *Id.* at 68-69 & n.32.

[66] *Id.* at 70.

[67] Professor Kalven thought that New York Times Co. v. Sullivan, 376 U.S. 254 (1964), presaged the end of what he termed the "two-level speech theory" in libel and obscenity cases. In his view, abolition of the unprotected status would be "a happy revolution of free-speech doctrine." Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191, 205.

[68] For an observation that certain sexually explicit literature, such as Aristophanes' *Lysistrata*, Chaucer's *Canterbury Tales*, and the Bible, enjoy a "classic privilege" in obscenity law, see Kalven, The Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1, 13-15. Presumably, the classic privilege will still have to be recognized under the degree of protection analysis.

professional standards.[69] Similarly, in *Linmark Associates v. Township of Willingboro*,[70] the Court invalidated a ban upon the posting of real estate "For Sale" signs on front lawns while recognizing that the town had promulgated the regulation in order to achieve the "vital" goal of stable, racially integrated housing.[71] In *Bates v. State Bar of Arizona*,[72] the state cited several substantial reasons for its prohibition against legal advertising, among which were concerns about consumer deception, barratry and the quality of legal services.[73] In each instance, the Court held that the regulations were either inappropriate or unnecessary to attainment of the state's objectives.[74] On the other hand, the government interest that sufficed to uphold regulation in *Young* was the preservation of the character of neighborhoods.[75] The lower court in *Young* had held that, while the interest was a compelling one, the ordinance was not an appropriate means of achieving that end.[76] Characterizing the state's interest as one meriting "high respect," the Supreme Court determined that the city must have an opportunity to "experiment" in order to preserve the quality of urban life.[77]

Thus, although the Court apparently conceived the degree of protection doctrine as a means of reconciling first amendment protection for commercial speech with regulation of misleading advertising,[78] the Court has not yet used the doctrine for that purpose. Instead, the doctrine has been invoked only to uphold restrictions on sexually explicit speech in *Young*, thereby demonstrating that the doctrine is both susceptible to ad hoc application and capable of diluting protection for classes of speech that heretofore have been fully protected by the first amendment.

Some protected speech undoubtedly proves to be of greater social value than the rest. If, as *Virginia* reasoned, however, the rationale for protecting speech is to enable society to receive information that aids in decision making, the hierarchy contemplated in *Young* will not serve first amendment interests. A blunt classification of speech cannot accurately reflect its potential value: the most banal, trivial message with some relation to politics simply is not more important than all other forms of speech. Moreover, in a complex society, speech does not fall neatly into categories. A sexually explicit film, for example, may be advocating a more sexually permissive society.[79] There may be no *underlying* social message because the medium *is*

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[69] 425 U.S. at 767-68.

[70] 97 S. Ct. 1614 (1977).

[71] *Id.* at 1616, 1619.

[72] 97 S. Ct. 2691 (1977).

[73] *Id.* at 2701-06.

[74] *Id.*; Linmark Assocs., Inc. v. Township of Willingboro, 97 S. Ct. at 1619-20; Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 768-70.

[75] 427 U.S. at 71-72 (plurality opinion).

[76] American Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014, 1019-20 (5th Cir. 1975), *rev'd sub nom.* Young v. American Mini Theatres, Inc., 425 U.S. 50 (1976).

[77] 425 U.S. at 71 (plurality opinion).

[78] *See* 425 U.S. at 771-72 & n.24.

[79] *Cf.* Brief for Petitioner at 2-5, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

the message. Labeling a film pornography rather than speech of social value, and then allowing that nomenclature to determine the applicable degree of protection, serves only to preserve the status quo and to ensure that such speech does not become an effective instrument of social change.[80] Thus, by the very process of singling out certain kinds of speech for greater protection, government can subtly influence thought. Constitutional adjudication should not serve to order the people's priorities.[81] The first amendment entrusts that function to the free, unselective flow of information and ideas.

The optimistic view of *Young*'s approval of twofold content discrimination is that the opinion only exemplifies the Court's special sensitivity to the problems of local land use regulation.[82] Perhaps broad generalizations regarding the value of classes of speech are necessary in zoning law, which is directed at land use and not at expression.[83] Whatever the merits of allowing reasonable regulation of speech in the zoning context, the value of commercial speech cannot be measured by the test applied in *Young*—an assertion that is supported by considering commercial speech in conjunction with the recipient's interest in receiving advertising.

3. The Right to Hear

An advertiser's interest in speaking is principally economic, and the first amendment does not insulate economic interests from government regulation. Therefore, whether the first amendment right lies with the speaker or with the listener is particularly significant in the sphere of commercial speech. Although a number of Supreme Court decisions have accorded great weight to the interest of the recipient of speech,[84] *Virginia* is the first case to hold that, when a willing speaker exists, a willing listener has a first amendment right to receive information.

The goal of the first amendment is to ensure the free flow of information

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[80] "There is danger in that course, the danger of bending the popular mind to new norms of conformity." United States v. Twelve 200 Ft. Reels of Super 8MM. Film, 413 U.S. 123, 137 (1973) (Douglas, J., dissenting).

[81] *Cf.* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (prohibition against placing politics above religion).

[82] *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (associational rights not invaded by zoning ordinance limiting to two the number of unrelated persons who may occupy a dwelling); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (zoning ordinance that reduces property values not violative of due process). In *Linmark*, the Court was careful to note that the town had not banned signs on lawns for aesthetic reasons—as would have been the case had the ordinance been a true zoning regulation. Linmark Assocs. v. Township of Willingboro, 97 S. Ct. at 1619; *cf.* John Donnelly & Sons v. Outdoor Advertising Bd., 1975 Mass. Adv. Sh. 3450, 339 N.E.2d 709 (aesthetically motivated ban on commercial billboard advertising upheld against first amendment challenge).

[83] Justice Powell, who cast the decisive vote in *Young*, disagreed with the plurality's application of the degree of protection doctrine. He viewed the zoning ordinance as "an example of innovative land-use regulation, implicating First Amendment concerns only incidentally and to a limited extent." 427 U.S. at 73 (Powell, J., concurring in part and dissenting in part). *See also* Linmark Assocs. v. Township of Willingboro, 97 S. Ct. at 1619.

[84] *See, e.g.*, Procunier v. Martinez, 416 U.S. 396 (1974); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

necessary for competition in the marketplace of ideas.[85] The right to hear is as essential to this goal as is the right to speak, for the right to speak is hollow unless someone can listen.[86] First amendment interests can be served only by protecting more than the act of mouthing words or setting them down on paper.[87] There must be a right to reach others, to persuade others, to debate. Safeguarding the speaker's right to reach a willing audience may adequately protect those rights; however, the first amendment also protects an individual's interest in learning.[88] There must be a right to the information necessary to formulate new theories, to reevaluate old ones, to make important social and personal choices.

Pre *Virginia* cases demonstrated that, under certain circumstances, safeguarding the listener's interest might require that speech receive greater protection than it would if only the speaker's interest were implicated. When assessing the validity of prison mail regulations in *Procunier v. Martinez*,[89] for example, the Court found it unnecessary to decide whether an individual's first amendment rights survived his incarceration. Instead, the Court held that arbitrary censorship of both incoming and outgoing mail infringed the first amendment rights of noninmate correspondents. Under *Procunier*, then, the legitimate interests of recipients provide sufficient reason for

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[85] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[86] *Cf.* Stanley v. Georgia, 394 U.S. 557 (1969) (right to possess obscene literature in one's home). There are no correlative rights to receive or purchase obscene literature, to transport it in interstate commerce, or to import it from another country for personal use. United States v. Twelve 200-Ft. Reels of Super 8MM. Film, 413 U.S. 123, 128 (1973). Justice Black observed that the right defined in *Stanley* therefore consisted only of the right to compose an obscene tract in the attic, print it in the basement and read it in the living room. United States v. Thirty-Seven Photographs, 402 U.S. 363, 382 (1971) (Black, J., dissenting).

[87] *Cf.* Procunier v. Martinez, 416 U.S. 396, 408 (1974).

[88] In Thornhill v. Alabama, 310 U.S. 88, 102 (1940), the Court perceived that the goal of individual education is embodied in the first amendment:

> The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. The Continental Congress . . . referred to the "five great rights" and said: "The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs." . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

Id. at 102 (footnote and citations omitted).

Professor Meiklejohn viewed education of the individual as the source of the citizenry's capacity for self-government, which in turn he considered to be the essence of the first amendment. Meiklejohn, *supra* note 43, 1961 Sup. Ct. Rev. at 255, 257. Although a majority of the Court has never wholly adopted his views, the Court seems to have been greatly influenced by the concept of the first amendment as a guarantor of self-government in democracy. Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965). Professor Meiklejohn was a leading exponent of the right to hear, but he too looked to the motive of the speaker: "The constitutional status of a merchant advertising his wares, of a paid lobbyist fighting for the advantage of his client, is utterly different from that of a citizen who is planning for the general welfare." A. Meiklejohn, *supra* note 43, at 39.

[89] 416 U.S. 396 (1974).

protecting speech, whether or not the speaker can assert a first amendment right. Therefore, insofar as the recipient's right to information is at issue, the identity of the speaker—whether prisoner or seller—should not be a fact of constitutional significance.

While protecting the right of recipients, *Virginia* also recognized that the potential for social impact is an independent justification for protecting speech.[90] Because the Court identified recipients' rights and social impact as discrete first amendment concerns, its determination that truthful commercial speech is less important than speech with ideological content is unpersuasive. After conceding that "an ordinary commercial proposal" has the capacity to trigger fundamental socioeconomic change, it is inconsistent to evaluate advertising solely on the basis of its facial content. That truthful speech appears in the form of advertising, that the speaker's interest is purely economic, that speech superficially appears to be "an ordinary commercial proposal" should not determine the degree of protection that speech receives. Disparate treatment of commercial speech is unjustifiable when the commercial speech interests of individual recipients and of society as a whole may be identical to the interests implicated in speech with more readily recognizable ideological content. Thus, assuming the existence of both a willing speaker and truthful speech, first amendment analysis should focus, as *Virginia* did initially, upon the listener and upon the potential impact of advertising. Such analysis reveals that commercial speech does, in fact, belong in the realm of "ideas."

For the recipient, the content of advertising may in fact be exclusively ideological. For example, a political candidate may claim that inflationary fiscal policies have placed basic necessities beyond the reach of the average American laborer. The listener needs information to evaluate the assertion, to respond to it, to vote intelligently. First amendment policies are served if the listener is able to obtain that information. That the information reaches the listener in the form of an ordinary commercial proposal disseminated for profit motives rather than in the form of a partisan, and possibly unreliable, speech by a political candidate is irrelevant to both the individual and society.

In addition to its value for individual recipients, commercial speech has the potential for substantial social impact. Ecology-minded citizens might wish to purchase those products that are least harmful to the environment. The straightforward offer for sale of a refillable pump spray bottle could have greater impact upon the proliferation of disposable aerosol cans than would a bumper sticker with an environmentalist slogan that is protected by the first amendment. Information about the price and availability of products and services may lead to rationing, to government regulation of industry, to the development of new economic and social theories or, as the Supreme Court recognized in *Bates*, to increased use of judicial machinery.[91]

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[90] 425 U.S. at 763, 764.

[91] 97 S. Ct. at 2705.

All are subjects of political debate. Thus, it may well be that, from the recipient's perspective, no commercial proposal is "ordinary." If commercial speech generates ideas and affects public and private decision making, it has the same value to society as does any other category of speech. Therefore, suppression of commercial advertising must be justified under traditional first amendment principles, rather than rationalized through creation of the subjective "degree of protection" doctrine.

IV. Misleading Advertising as Unprotected Speech

A. *Misleading Advertising as Part of a Course of Nonexpressive Conduct*

Granting full protection to truthful commercial speech does not preclude regulation of misleading advertising. Despite the Constitution's unequivocal prohibition against laws abridging freedom of speech, all scholars and jurists agree that "[t]he First Amendment was obviously not intended to give immunity for every possible use of language."[92] If interpreted literally, the first amendment would render unconstitutional all laws against crimes like perjury and blackmail. Recognizing that no sovereign would so disable itself that it could not prohibit such speech,[93] the Court has always denied protection to speech that is incidental to a course of nonexpressive conduct that government can legitimately proscribe. Prohibiting fraud is within the police power of the states, and Congress can prohibit fraud that affects interstate commerce. Thus, misleading advertising, whether viewed as misrepresentation[94] or as an attempt to obtain money by false pretenses, is speech mingled with conduct, a class of speech that has long been subject to regulation.[95]

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[92] Frohwerk v. United States, 249 U.S. 204, 206 (1919). *See also* Dennis v. United States, 341 U.S. 494, 524 (1951) (Frankfurter, J., concurring).

[93] "We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech." Frohwerk v. United States, 244 U.S. 204, 206 (1919) (Holmes, J., concurring).

[94] Misrepresentation and false advertising were classed with perjury, conspiracy and complicity by encouragement in Konigsberg v. State Bar, 366 U.S. 36, 49 n.10 (1961), as speech that could be regulated despite the absolute prohibitions of the first amendment. *See* Comment, Free Speech and the Regulation of Labeling and Advertising, 30 Food Drug Cosm. L.J. 512, 523-24 (1975).

[95] Obtaining money by false pretenses was a crime as early as 1541, especially if the misrepresentation affected the public. Pearce, Theft by False Pretenses, 101 U. Pa. L. Rev. 967, 969 & n.10 (1953). A later English statute, 30 Geo. II c. 24 (1757), was reenacted in all American jurisdictions. Pearce, *supra* at 968 & n.6. The common law of deceit and misrepresentation had begun developing by 1201. W. Prosser, Handbook of the Law of Torts 685 (4th ed. 1971). Moreover, equity provided relief for mistake and innocent misrepresentation at a very early date. *Id.* at 687-90.

The court has used such historical data in determining whether speech is unprotected. On finding that a class of speech had been regulated under Anglo-American law before 1787, the Court has on occasion concluded that the framers did not intend to protect such speech. Roth v. United States, 354 U.S. 476 (1957) (obscenity); *cf.* Beauharnais v. Illinois, 343 U.S. 250, 258 (1952) (libel regulated "time out of mind"). *But cf.* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (libel of public officials that is not reckless or malicious false held protected even though historical evidence equivocal as to whether framers intended that the first amendment

B. *Defining Misleading Advertising*

In *Chaplinsky v. New Hampshire*,[96] the Court balanced the value of several categories of speech against the state interest in regulation:

> It has been well observed that such utterances [lewdity and obscenity, profanity, libel and insulting or "fighting" words] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[97]

In decisions since *Chaplinsky*, the Court has concentrated upon arriving at a constitutional definition of each of the categories of unprotected speech,[98] a process some commentators have called "definitional balancing."[99] Definitional balancing involves weighing the conflicting interests in a class of speech and then fashioning a definition of unprotected speech that incorporates the resulting balance. Once the definition is formulated, the Court refrains from case by case reexamination of the interests.[100] In *New York Times Co. v. Sullivan*,[101] for example, the Court arrived at a definition of libel of public officials—recklessly or intentionally false speech—that reflects a balance between an individual's interest in his reputation, a publisher's interest in being able to disseminate false speech, and society's interest in not discouraging free criticism of public officials.

The *Virginia* decision was the product of "categorical" balancing of the kind that occurred in *Chaplinsky*. In protecting commercial speech, the *Virginia* Court weighed the competing interests and determined that the interests in regulating advertising do not outweigh the interests in truthful commercial speech; but the Court has not as yet articulated a constitutional definition of misleading—and therefore unprotected—commercial advertising.[102] A definition that delineates the boundaries of permissible regula-

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abolish law of seditious libel). Thus, historical analysis, as applied in *Roth*, offers additional support for the proposition that misleading advertising is unprotected speech.

[96] 315 U.S. 568 (1942).

[97] *Id.* at 571-72.

[98] Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (libel); Miller v. California, 413 U.S. 15 (1973) (obscenity). *Compare* Feiner v. New York, 340 U.S. 315 (1951) (fighting words), *with* Edwards v. South Carolina, 372 U.S. 229 (1963) (same).

[99] G. Gunther, Constitutional Law 1270-71 (9th ed. 1975); Nimmer, The Right to Speak from *Times* to *Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy, 56 Calif. L. Rev. 935 (1968).

[100] Contradistinctively, ad hoc, or case by case, balancing involves particular restrictions upon a communication that falls within one of the classes of protected speech. In case by case balancing, the Court examines the competing interests as they are presented by the facts in each case. When the government interest in regulation is great and the restriction upon first amendment rights is comparatively slight, the Court upholds regulation. *E.g.*, American Communications Ass'n v. Douds, 339 U.S. 382, 397-99 (1949). *See generally* Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 912-14 (1963).

[101] 376 U.S. 254 (1964).

[102] Neither *Virginia* nor *Linmark* presented the issue of misleading advertising. In *Bates*, the state argued that advertising the prices of legal services would be inherently misleading because (1) legal services are unique in both content and quality and cannot be compared meaningfully on the basis of cost; (2) prices of services do not reflect the attorney's diagnostic role; and (3) fees alone are not adequate criteria for selecting an attorney. 97 S. Ct. at 2703-05. Although it

tion is required. That definition should accommodate, to the extent possible, the interest in commercial speech that *Virginia* and its progeny identified, as well as the legitimate regulatory objectives of government.

The recipient of commercial speech has an interest in obtaining information for personal, social and political decision making. The advertiser has an interest in disseminating that information and, when advertising is creative, in self-expression. Truthful advertising implements those goals. When advertising misleads, however, it loses its informative value and first amendment interests attenuate. Although an advertiser's desire to persuade others to purchase his product remains, that concern is economic rather than expressive and warrants no first amendment protection. Moreover, misleading advertising directly implicates the government's interest in preventing sales induced by means of misrepresentation. Reliance on misleading advertising that implies, for example, that proprietary drugs will cure disease may lead a purchaser to forego medical treatment. Reliance on false representations that toys are safe can result in serious injury. In each instance, the purchaser may be induced to part with his money by false pretenses; and in each instance, honest competitors may lose business because of misrepresentation.[103] Moreover, misleading advertising invites competitors to respond in kind. Thus, the government interest in preventing the harm to consumers, competitors, society and commerce that can result from misleading advertising is substantial. Therefore, the government interests in regulation outweigh any residual interest that a speaker or a recipient may have in a misleading advertisement.

So that the interests remain balanced, however, the definition of misleading advertising must be qualified. To ensure that speech is not suppressed solely because an inappreciable minority might misconstrue an advertisement, regulation of misleading advertising should be confined to advertising that a reasonable person[104] could interpret as making a false assertion. There are two justifications for the qualification of reasonableness. First, the Court has held that the response of the particularly impressionable person is too restrictive a standard to apply in determining whether speech is protected.[105] Second, when the likelihood of misinterpretation is slight, the detriment to consumers, competitors and com-

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reiterated that misleading advertising is subject to restraint. *Id.* at 2702, the majority responded that (1) so long as attorneys performed services at the rate advertised, the consumer would not be misled; (2) attorneys rarely function as diagnosticians; and (3) the preferred remedy for inadequate information is greater disclosure rather than suppression of all facts. *Id.* at 2703-05. Thus, the Court in *Bates* employed an ad hoc analysis rather than a definitional balancing approach. *See also id.* at 2709.

[103] *See* G. Henderson, The Federal Trade Commission 166 (1924).

[104] *Cf.* Bates v. State Bar of Arizona, 97 S. Ct. at 2704 (state cannot prohibit legal advertising on the assumption that the public is too unsophisticated to be trusted with incomplete information). The constitutional standard for advertising directed at children may be different. *Cf. id.* at 2709 & n.37 (whether legal advertisement is misleading requires consideration of legal sophistication of audience); Ginsberg v. New York, 390 U.S. 629 (1968) (different standard of obscenity for juveniles permissible). *See also* note 153 *infra*.

[105] Roth v. United States, 354 U.S. 476, 488-89 (1956) (obscenity), *rejecting the rule of* Regina v. Hicklin, [1868] L.R. 3 Q.B. 360.

merce is too insignificant to outweigh the first amendment interests in commercial speech. The suggested standard would permit regulation of advertising that is literally true but nonetheless misleading as well as of advertising that misleads through inadequate disclosure, but would proscribe regulation in which the government interest is insubstantial.

The definition of misleading advertising should be further limited to assertions of fact[106] that could be material in eliciting an economic response. If a reasonable recipient necessarily understands that an advertiser is only stating an opinion, the recipient is in a position to assess advertising independently and to accept or reject its claim. To deprive the recipient of the opportunity to think for himself by forbidding the advertiser to state an opinion would be to adopt the same paternalistic posture that *Virginia* and its progeny denounced. The final requirement, that misrepresentation be material in inducing an economic response,[107] ensures that regulation is directed at conduct rather than at expression and that regulation is necessary to further the government interest in preventing an advertiser from obtaining money by false pretenses or misrep-

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[106] The distinction between statements of fact and statements of opinion is made at common law. When a misleading statement is capable of being reasonably understood as an assertion of fact rather than of opinion, the question whether the misrepresentation is actionable is for the jury. W. Prosser, *supra* note 95, at 723. Under the suggested standard, the finding that a statement is capable of being understood as a misrepresentation of fact justifies a conclusion that the advertising is misleading.

[107] This standard allows for differentiation between product and service advertising on the one hand and advertising directed toward a political response and advertising that seeks to enhance the public's conception of a company or an industry on the other. *See generally* Bird, Goldman & Lawrence, Corporate Image Advertising: A Discussion of the Factors That Distinguish Those Corporate Image Advertising Practices Protected Under the First Amendment from Those Subject to Control by the Federal Trade Commission, 51 J. Urb. L. 405, 419 (1974); Ludlam, Abatement of Corporate Image Environmental Advertising, 4 Ecol. L.Q. 247, 247-62 (1974).

The FTC uses an economic response test. Ludlam, *supra* at 266. The test is closely related to the government interest in regulation and is, for that reason, superior to the "market appeal" test proposed in Bird, Goldman & Lawrence, *supra* . . 117-18. The authors posit that misleading advertising that has no appreciable effect on the market appeal of an advertiser's product or service, such as misrepresentation of the advertiser's personnel policies, should be protected. Because an advertiser is in the best position to know what its personnel policies are, any misrepresentation would be either intentional or negligent. Requiring that such assertions be truthful would chill only negligently or deliberately misleading advertising, and there is little reason to protect deliberate or careless misrepresentation. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) (falsehood not protected for its own sake but only when necessary to protect speech of value). On the other hand, if an assertion were misleading but would not be material in a reasonable consumer's decision to purchase, there would be little government interest in regulation, irrespective of the advertiser's culpability. Therefore, the market appeal test is not effective in protecting either first amendment or governmental interests.

The economic response test has the virtue of removing from the purview of the FTC misstatements of fact about subjects other than the advertiser's business. For instance, an advertiser, like any other speaker, should be able to err about the quantity of pollution in the atmosphere; he should not, however, be able to misrepresent the impact of his business activity on the environment if that misrepresentation could increase sales of his product. This distinction does not imply that social generalities are more important than economic speech. Rather, it recognizes that the reasons for protecting falsehood may not apply to all commercial advertising. *See* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 777-78 (Stewart, J., concurring).

resentation. Thus, only advertising that a reasonable person could interpret as making a false assertion of material fact should be subject to regulation.

V. The Federal Trade Commission and the First Amendment

A. *The Commission's Statutory and Constitutional Power to Regulate Deceptive Advertising*

In 1914 Congress created the Federal Trade Commission, giving it broad powers to regulate unfair competition.[108] The Commission soon asserted jurisdiction over deceptive advertising.[109] After the Supreme Court held that the FTC could not regulate false advertising that affected only consumers and not competitors,[110] Congress enacted the Wheeler-Lea amendments[111] to the Federal Trade Commission Act. The amendments explicitly recognized the Commission's jurisdiction over misleading advertising.[112] The legislative history of the amendments evinced a clear intent to grant the Commission the authority and the responsibility for protecting both consumers and competitors from the effects of deceptive advertising.[113] Although such diverse critics as the American Bar Association,[114] corporation counsel,[115] consumer advocates[116] and at least one former Commissioner[117] have disapproved of the FTC for being at once overzealous and ineffective,[118] Congress has continued to expand the Commission's role.[119] Surviving initial judicial resistance and flourishing

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[108] Congress created the Commission to enforce antitrust laws, leaving to the agency the protean task of defining "unfair methods of competition." 51 Cong. Rec. 11084 (1914) (remarks of Senator Newlands); S. Rep. No. 597, 63d Cong., 2d Sess. 13 (1914); H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess. 19 (1914). *See also* FTC v. R.F. Keppel & Bros., 291 U.S. 305, 310-12 (1934); G. Henderson, *supra* note 103, at 1-48 (1924); Baker & Baum, Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition, 7 Vill. L. Rev. 517 (1962).

[109] 1916 FTC Ann. Rep. 6; Handler, The Jurisdiction of the Federal Trade Commission over False Advertising, 31 Colum. L. Rev. 527 (1931). Three of the five complaints that the FTC issued in its first full year of activity involved false advertising. Millstein, *supra* note 1, at 451.

[110] FTC v. Raladam Co., 283 U.S. 643 (1931). *But cf.* G. Henderson, *supra* note 103, at 34-35.

[111] Act of Mar. 21, 1938, ch. 49, 52 Stat. 111.

[112] 15 U.S.C. §§ 45, 52, 53, 54, 55 (1970).

[113] H.R. Rep. No. 1613, 75th Cong., 1st Sess. 3 (1937).

[114] ABA Report of the Special Commission to Study the Federal Trade Commission (1969).

[115] E. Rockefeller, Desk Book of FTC Practice and Procedure 6 (2d ed. 1976); Barton, The Federal Trade Commission and the Need for Procedural Impartiality, 64 Colum. L. Rev. 390 (1964).

[116] E. Cox, R. Fellmeth & J. Schultz, The Consumer and the Federal Trade Commission (1969). *See also* Time, Feb. 14, 1977, at 67.

[117] Austern, What Is "Unfair Advertising"?, 26 Food Drug Cosm. L.J. 659 (1971).

[118] *See, e.g.*, Report of the Special Commission, *supra* note 114, at 10 ("[t]he FTC all too often has shown an unfortunate tendency to become involved in protracted litigation or administrative proceedings concerning relatively trivial controversies").

[119] Specific statutes, such as the Fur Products Labeling Act, 15 U.S.C. § 69 (1970), increase the Commission's responsibilities. For a comprehensive list of those statutes, see E. Rockefeller, *supra* note 115, at 98-99 & nn 4-17. Amendments to the Federal Trade Commission Act have expanded the Commission's jurisdiction as well as its rule-making and enforcement powers. 15 U.S.C. § 45(a)(1) (Supp. V, 1975), *amending* 15 U.S.C. § 45 (1970) (jurisdiction changed from "in

despite its many detractors, the FTC now faces a new opponent—the first amendment.

Fortunately, first amendment doctrine will not unduly restrict the Commission's role in controlling misleading advertising. The Commission's substantive standards need not change appreciably. Conformity with first amendment doctrine will, however, entail some changes in the FTC's procedures to ensure that restraints on speech do not go beyond the extent necessary to accomplish legitimate governmental objectives.[120] The Supreme Court has held that the first amendment requires procedures with "built in safeguards against curtailment of constitutionally protected speech."[121] Although the doctrine that the first amendment mandates certain procedures evolved primarily from obscenity cases,[122] the principle that protected speech should not be clumsily muted in the course of legitimate regulation applies equally to commercial speech.[123]

Procedural safeguards are required even under the "degree of protection" analysis suggested by *Virginia*. In *Young v. American Mini Theatres, Inc.*, the plurality afforded only a degree of protection to pornography, analogizing pornography to commercial speech.[124] Because the procedural safeguards developed in the obscenity cases operate to protect pornography that falls short of obscenity, presumably the regulation of commercial speech must, like obscenity censorship, comport with first amendment standards. Under any analysis, then, the Commission's practices must be tailored to protect first amendment freedoms as well as the government interest in regulating deceptive advertising.

B. *Administrative Proceedings*

1. Adjudicatory Hearings

After issuing a complaint, the FTC holds an adversary hearing at which a respondent may be represented by counsel.[125] Section 5(b) of the Federal Trade Commission Act provides that a respondent shall have the right to appear at the hearing and show cause why a cease and desist order should not issue.[126] Thus, under the statute, the advertiser bears the

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commerce" to "in or affecting commerce"); 15 U.S.C. § 53 (Supp. V, 1975), *amending* 15 U.S.C. § 53 (1970) (authority to seek injunctions); 15 U.S.C. § 56 (Supp. V, 1975) (authority to commence, defend or intervene in actions when the Attorney General fails to take timely action); 15 U.S.C. § 57a (Supp. V, 1975) (power to promulgate enforceable rules); 15 U.S.C. § 57b (Supp. V, 1975) (authority to bring civil actions on behalf of consumers).

[120] *See* Procunier v. Martinez, 416 U.S. 396 (1974).

[121] Blount v. Rizzi, 400 U.S. 410, 416 (1971). *See generally* Monaghan, First Amendment "Due Process," 83 Harv. L. Rev. 518 (1970).

[122] Speiser v. Randall, 357 U.S. 513 (1958), which did not involve obscenity, held that the party asserting the first amendment right must not bear the burden of proof. Most first amendment safeguards, however, derive from Freedman v. Maryland, 380 U.S. 51 (1965), and its progeny. *See* text accompanying notes 132-41 *infra*.

[123] *Cf.* Monaghan, *supra* note 121, at 519 (extension of first amendment due process beyond obscenity cases).

[124] 427 U.S. at 68-69.

[125] 16 C.F.R. § 3.1 (1976).

[126] 15 U.S.C.A. § 45(b) (Supp. I, 1976).

burden of proof in a deceptive advertising hearing. This allocation of the burden is inconsistent with Supreme Court rulings that a speaker must not bear the burden of proving that his speech is protected.[127] Although section 5(b) is therefore facially invalid, the Commission's own rules allocate the burden of proof to the Commission's counsel.[128] Inasmuch as the statute is not unconstitutionally applied, a successful first amendment challenge is unlikely.

2. Injunctions and Cease and Desist Orders as Prior Restraints on Speech

Since 1938, the FTC has had statutory power to seek temporary injunctions against potentially misleading advertising of food, drugs, cosmetics, or certain medical devices defined by statute. Congress amended section 13 of the Act in 1973[129] to permit the Commission also to seek an injunction whenever it has reason to believe:

> (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public.[130]

Other provisions of this section reduce the possibility that an injunction will issue on the basis of an unimportant or frivolous complaint. In reviewing an FTC petition, a district court must make its own determination whether an injunction is in the public interest, and it must also estimate the likelihood that the Commission will ultimately succeed on the merits.[131]

Although the statute contains substantive checks, it does not embody the procedural safeguards that the Supreme Court requires before the imposition of prior restraints. The Court has held that a prior restraint procedure must (1) place the burdens of proof and of initiating judicial review on the administrative agency; (2) require prompt judicial review within a brief, specified time; and (3) limit to the preservation of the status quo any restraint imposed in advance of a final judicial determination in an adversary proceeding.[132] Although the Court has struck down as facially invalid one federal statute that did not explicitly provide these safeguards,[133] the Court

[127] New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (civil liability); Smith v. California, 361 U.S. 147 (1959) (criminal liability); Speiser v. Randall, 357 U.S. 513 (1958) (tax liability).

[128] 16 C.F.R. § 3.43(a) (1976).

[129] Act of Nov. 16, 1973, Pub. L. No. 93-153, tit. IV, § 408(f), 87 Stat. 592, *amending* 15 U.S.C. § 53 (1970).

[130] 15 U.S.C. § 53(b) (Supp. V, 1975).

[131] An adversary hearing assists the court in making its determinations and is required unless considerations of time make notice impossible. Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968).

[132] Freedman v. Maryland, 380 U.S. 51, 58-60 (1965).

[133] Blount v. Rizzi, 400 U.S. 410 (1971).

has construed another so as to incorporate the requirements.[134] Therefore, the constitutionality of section 13 may well depend upon its future construction by the courts.

Section 13 directs the district court to dissolve an injunction within twenty days if the Commission does not issue a complaint.[135] If the Commission does file a complaint, however, the Commission's rules for administrative proceedings govern. These rules impose no time limits for completion of an administrative hearing; the Commission's stated policy is to hold hearings "expeditiously,"[136] but in no case does a hearing begin until thirty days after service of the complaint.[137] Inasmuch as a state administrative procedure similarly capable of extending over an indefinite period was struck down in *Freedman v. Maryland*,[138] the FTC's practices do not meet traditional constitutional standards.

Section 13 also authorizes the Commission to seek an injunction on the basis of a reasonable belief that a violation has occurred or is about to occur.[139] Although the section gives the court considerable discretion to withhold an injunction, a section 13 proceeding is not a final judicial determination on the merits. In *Blount v. Rizzi*,[140] the Court invalidated an analogous scheme that permitted the Postmaster General to seek a district court order to detain allegedly obscene mail on the basis of probable cause. The "fatal procedural flaw" in *Blount* was that the statute permitted the Postmaster General to detain the mail upon a showing of "mere probable cause," but did not require him to seek prompt judicial review.[141]

Thus, both the potential for indefinite delay in the administrative hearings and the allocation of the burden of seeking review render the injunction procedures of section 13 deficient under *Freedman* and its progeny. Although courts can construe the statute so as to incorporate the *Freedman* requirements, the Commission must change its rules to conform to constitutional standards. If the Commission decides to issue a complaint, proceedings must begin within a few days of the injunction. The Commission should give priority on its calendar to cases in which advertising has been enjoined, and it should develop a streamlined adjudicatory hearing procedure that permits timely[142] judicial review.

If the Commission does not seek an injunction before issuing a complaint, the length of the administrative proceedings loses constitutional significance

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[134] United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971).

[135] 15 U.S.C. § 53(b) (Supp. V, 1975).

[136] 16 C.F.R. § 3.1 (1976).

[137] *Id.* § 3.11(b)(4). Even a decision on a pre-hearing motion for summary judgment can take as long as thirty days. *Id.* § 3.24(a)(2). *See also id.* §§ 3.12, 3.15, 3.21-.24, 3.31, 3.41, 3.42(g)(2), 3.51(a), 3.52, 3.55.

[138] 380 U.S. 51 (1965).

[139] 15 U.S.C. § 53(b) (Supp. V, 1975).

[140] 400 U.S. 410 (1971).

[141] *Id.* at 418-20.

[142] The Court has not yet defined "prompt," but it upheld a procedure wherein a final judicial decision would be rendered within seventy-four days after the imposition of a restraint. United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971). It is not clear whether a longer period would be constitutional.

because speech is not restrained during the proceedings. The advertiser may continue to disseminate the advertising unless and until the Commission issues a cease and desist order at the close of the administrative proceedings.[143] Under section 5 of the Act, such an order becomes final after sixty days[144] unless the advertiser files a timely appeal with the appropriate circuit court of appeals.[145] Section 5 thus fails to satisfy constitutional standards in that it permits an administrative hearing to impose a final restraint upon speech without requiring the Commission to initiate judicial review.

By instituting a new procedure, the Commission could satisfy the requirements of the first amendment without increasing its workload appreciably. Existing procedures permit a respondent to negotiate a consent order in which he voluntarily agrees to modify the advertising before the administrative hearing has begun,[146] or to move during the hearing to settle the complaint by consent agreement.[147] In either case, the respondent must waive the right to all further proceedings, including judicial review.[148] The FTC could add a similar procedure whereby an advertiser could waive his right to review of an injunction or of a cease and desist order. Inasmuch as an advertiser can waive his rights before and during the administrative proceedings, he should also be able to execute a knowing waiver of the right to review after the Commission has found against him.

Unlike an author or film producer whose speech has been enjoined, an advertiser may be able either to produce an inexpensive, effective and immediate substitute for restrained speech or to reinstate a former advertising campaign while an acceptable new one is being prepared. If his interest in using the enjoined advertisement were slight, the advertiser might well prefer signing a waiver to further litigation of the issue. If the advertiser's interest were substantial, he would be likely to appeal under any circumstances. Thus, the practical effect of conforming with the first amendment would be only that the Commission would be the movant in those cases in which the advertiser would ordinarily seek review.

C. *Substantive Standards*

The Commission has considerable freedom to find that an advertisement is misleading. Section 5(c) of the Act provides that the Commission's findings are conclusive if supported by evidence.[149] The Commission decides precisely which representations have been made, and the decision need only be supported by a reasonable inference to survive review.[150] The Commission also applies a strict standard of truth in its scrutiny of advertising. For example, one advertisement asserted in part that "[t]he special conditioners

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[143] 15 U.S.C.A. § 45(b) (Supp. I, 1976).
[144] 15 U.S.C. § 45(e) (1970).
[145] *Id.* § 45(c).
[146] 16 C.F.R. § 2.31 (1976).
[147] *Id.* § 3.25.
[148] *Id.* § 2.32.
[149] 15 U.S.C. § 45(c) (1970).
[150] FTC v. Colgate-Palmolive Co., 380 U.S. 374, 386 (1965).

Clairol puts in Great Body Protein Conditioning Shampoo helps [*sic*] replace the natural oils in your hair that many shampoos can strip out."[151] The FTC decided that the advertisement claimed, *inter alia*, that the shampoo contained conditioning ingredients that no other shampoo had. The consumer who understands "special" in advertising copy to mean "literally unique" may be singularly naive. Nonetheless, courts permit the FTC to proscribe advertising that has a capacity to deceive only the "ignorant, the unthinking and the credulous."[152] Apparently, only the adult with a "propensity for unbounded flights of fancy" has been adjudged to be beyond the protection of section 5.[153]

The Commission need not show that the advertising actually deceived anyone, but only that the advertising had a capacity or tendency to deceive.[154] Nor must the FTC show that the deceptive tendency derives from false assertions: the advertising may be literally true but misleading because it fails to disclose sufficient information.[155] The Commission must, however, show that the misrepresentation could be a material factor in influencing the consumer to buy,[156] but the misrepresentation need not involve the substantive qualities of the product. The Supreme Court has held that "[t]he public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance."[157] Once the Commission finds deception, it may also infer "within the bounds of reason" that the deception is material.[158]

Tested against the proposed definition of misleading advertising—advertising that a reasonable person could interpret as making a false assertion of material fact—the only FTC standard that is constitutionally infirm is that of the ignorant, unthinking and credulous consumer. Both advertising that has a capacity to deceive and advertising that misleads through inadequate disclosure can reasonably be interpreted as making false assertions. In addition, any misrepresentation that induces purchases directly implicates governmental interests whether or not the misrepresentation involves the qualities of the product. The substantive deficiencies of the present regulatory scheme lie not in the FTC standards themselves, but in the extreme judicial deference accorded the FTC's application of those standards.

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[151] Alberto Culver Co., [1973-1976 Transfer Binder] Trade Reg. Rep. ¶ 20,357, at 20,241 (FTC 1973).

[152] Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942). *See also* FTC v. Standard Educ. Soc'y, 302 U.S. 112, 115-17 (1937) ("the trusting as well as the suspicious").

[153] FTC v. Sterling Drug, Inc., 317 F.2d 669 (2d Cir. 1963). Advertising aimed at children is judged differently. ITT Continental Baking Co., 83 F.T.C. 165 (1973), *modified and enforced*, 532 F.2d 207 (2d Cir. 1976). *See generally* Thain, Suffer the Hucksters to Come unto the Little Children? Possible Restrictions of Television Advertising to Children Under Section 5 of the Federal Trade Commission Act, 56 B.U.L. Rev. 651 (1976).

[154] Montgomery Ward & Co. v. FTC, 379 F.2d 666 (7th Cir. 1967).

[155] P. Lorillard Co. v. FTC, 186 F.2d 52 (4th Cir. 1950).

[156] FTC v. Colgate-Palmolive Co., 380 U.S. 374, 386 (1965).

[157] *Id.* at 387, *quoting* FTC v. Algoma Lumber Co., 291 U.S. 67, 78 (1934).

[158] FTC v. Colgate-Palmolive Co., 380 U.S. 374, 392 (1965).

D. *Judicial Review*

The Supreme Court has held that only a court can determine whether speech is constitutionally protected.[159] Despite language traceable to older decisions asserting that deception is a legal standard whose final meaning is supplied by the courts,[160] courts most often accept the Commission's finding that advertising is misleading. Some courts have even indicated that advertising capable of being interpreted in a misleading way must be construed against the advertiser.[161] Because the issue of misrepresentation is dispositive of the first amendment claim, the court must make its own determination on the issue.[162]

In older cases, court review of FTC action was stringent, including trial de novo on some issues;[163] but even the procedural constraints of the first amendment do not require such careful scrutiny of FTC action. The record of the Commission's adversary administrative hearings obviates the need for de novo fact finding by a circuit court.[164] It is sufficient that courts independently review the record in light of first amendment standards. In so doing, however, courts should consider that an advertisement that does not deceive well-educated judges who are highly skilled in separating fact from opinion may nonetheless deceive consumers. Moreover, the obligation to make an independent determination on the issue of misrepresentation does not preclude a court from giving weight to the Commission's familiarity with consumer responses. Finally, if a court finds that speech untruthful, and therefore unprotected, the court may defer to the Commission's findings on all other issues.[165] Because first amendment interests, such as the

[159] Freedman v. Maryland, 380 U.S. at 58; *accord*, Blount v. Rizzi, 400 U.S. at 418.

Professor Monaghan suggests that the Court's insistence upon judicial determinations of first amendment questions derives from "the inherent institutional differences between courts and administrative agencies, no matter how judicial the administrative proceedings may be." Monaghan, *supra* note 121, at 522. He points out that tenured judges are more likely to be impartial and to place first amendment concerns in proper perspective. Administrative bodies, on the other hand, are more subject to political pressure and suffer from institutional myopia, tending to focus excessively upon their own areas of expertise. *Id.* at 522-24. Such single-mindedness has been attributed to the FTC. *See* ABA Report, *supra* note 114, at 82-84.

[160] FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965), *quoting* FTC v. R.F. Keppel & Bros., 291 U.S. 304, 314 (1934).

[161] Resort Car Rental Sys., Inc. v. FTC, 518 F.2d 962, 964 (9th Cir. 1975). Construing advertising against an advertiser is inconsistent with the principle that government must bear the burden of proving that speech is unprotected. *See* note 127 and accompanying text *supra*.

[162] Whether speech is protected by the first amendment is a "constituuonal fact" that must be found by a court and that remains subject to de novo fact-finding at every level of review. *See* Freedman v. Maryland, 380 U.S. at 739; *cf.* Fiske v. Kansas, 274 U.S. 380, 385 (1927). Although *Virginia* had intimated that first amendment protection for commercial speech would not necessitate any change in the regulation of misleading advertising, 425 U.S. at 771-72 & n.24, in *Bates* the Court approached the question of misrepresentation in the same manner as it does issues of obscenity: the Court examined the suppressed speech and decided de novo whether the speech was protected. *See* note 102 *supra*. Thus, the *Bates* Court accorded commercial advertising the same degree of protection that traditionally has been afforded other classes of speech.

[163] *E.g.*, FTC v. Gratz, 253 U.S. 421 (1920) (de novo review of determination that practice constitutes unfair competition).

[164] Monaghan, *supra* note 121, at 526.

[165] Such issues include whether there is a public interest in regulation under 15 U.S.C. § 45(b)

interest in informed decision making, attenuate when speech is misleading, statutory rather than constitutional standards apply to the regulation of untruthful commercial speech.

E. *Enforcement*

The Federal Trade Commission Act provides for criminal penalties,[166] injunctions,[167] civil actions to impose penalties[168] and civil actions on behalf of individuals for equitable relief and damages.[169] At least one court has held that there is also an implied private right of action under section 5.[170] All these means of proceeding against unprotected speech are constitutionally permissible. As stated by Justice Frankfurter in the context of obscenity regulation:

> Whether proscribed conduct is to be visited by a criminal proceeding or by a *qui tam* action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice.[171]

However, because all these enforcement methods are capable of unconstitutional application, it is necessary to examine the FTC's present use of each to determine whether the Commission's practices conform with constitutional standards.

1. Criminal Penalties

Section 14(a) of the Act provides that it is a misdemeanor to disseminate false advertising of food, drugs, or cosmetic or medical devices that may be injurious to health when used as advertised or as customary.[172] The section does not require that such advertising be intentionally or negligently misleading. This provision conflicts with the Supreme Court's holding that the first amendment requires that criminal statutes prohibiting dissemination of unprotected speech make scienter an element of the crime.[173] Because the FTC has not yet invoked the criminal sanction, the constitutionality of section 14(a) has remained untested.

2. Civil Actions

(a) *Cease and Desist Orders.* The Commission issues cease and desist orders after the completion of administrative proceedings. A cease and

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(Supp. V, 1975), *see* FTC v. Algoma Lumber Co., 291 U.S. 67 (1934), and whether the remedy is appropriate. *See* ITT Continental Baking Co., 83 F.T.C. 865 (1973), *modified and enforced*, 532 F.2d 207 (2d Cir. 1976).

[166] 15 U.S.C. § 54 (1970).

[167] 15 U.S.C. § 53 (Supp. V, 1975).

[168] *Id.* §§ 45(*l*), (m).

[169] *Id.* § 57b(b).

[170] Guernsey v. Rich Plan of the Midwest, 408 F. Supp. 582, 586-88 (N.D. Ind. 1976), *noted in* 29 Vand. L. Rev. 1077 (1976).

[171] Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441 (1957).

[172] 15 U.S.C. § 54 (1970).

[173] Smith v. California, 361 U.S. 147 (1959) (obscenity).

desist order must bear a reasonable relation to the respondent's conduct and must be remedial rather than punitive.[174] Apart from those limitations, the FTC has wide discretion in fashioning cease and desist orders.[175] If, for example, an advertisement falsely claims that a product is unique, the order may direct the manufacturer and the advertising agency to cease and desist from making false claims of uniqueness for any product or service. If the same advertising agency later made a claim that suggested the uniqueness of another manufacturer's product, the FTC might find a violation, unless the product were in fact unique.[176] Section 5(*l*) provides a penalty of $10,000 for each violation of an order but does not include a requirement of scienter or negligence.[177] The violator is also subject to a civil suit brought by the FTC to redress injury to consumers or other persons, partnerships and corporations injured by the deceptive practices.[178]

Respondents have frequently attacked FTC orders as being vague,[179] thereby creating doubt as to precisely what kind of speech is forbidden. Although the Supreme Court has remarked that it does not seem "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line,"[180] this reasoning should not apply in the context of a vagueness challenge under the first amendment. The Court has held that a speaker cannot be made to stay wide of the zone of unprotected speech.[181] An advertiser subject to a vague cease and desist order may cling to the bland and unimaginative or refrain from disseminating helpful information rather than risk violating the order and incurring potentially limitless liability. Although the FTC issues advisory opinions as to whether a proposed scheme would violate a cease and desist order,[182] the availability of advisory opinions does not sufficiently obviate the undesirable effect of a vague order. An advertiser may be reluctant to use the procedure because submission of a proposal would give the FTC notice that a violation may be imminent. Therefore, an adverse ruling would be, for all practical purposes, a prior restraint.[183]

Some of these constitutional difficulties could be diminished by reading section 5(b) as requiring some culpability on the part of the advertiser. Such a

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[174] FTC v. Rubberoid Co., 343 U.S. 470, 473 (1952).

[175] FTC v. Colgate-Palmolive Co., 380 U.S. 374, 392 (1965). *But see* Beneficial Corp. v. FTC, 542 F.2d 611, 618 (3d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3707 (U.S. Apr. 26, 1977).

[176] *Cf.* text accompanying notes 151-52 *supra*.

[177] 15 U.S.C. § 45(*l*) (Supp. V, 1975).

[178] *Id.* § 57b.

[179] *E.g.*, FTC v. Colgate-Palmolive Co., 380 U.S. 374, 392-93 (1965).

[180] *Id.* at 393.

[181] *See* Shuttlesworth v. Birmingham, 394 U.S. 147 (1969).

[182] 16 C.F.R. § 3.61(d) (1976). Although regulations stipulate that advisory opinions are not binding, *id.* § 3.61(e), the FTC seldom reverses itself. E. Rockefeller, *supra* note 115, at 76. Advisory opinions, however, are available only in limited situations. 16 C.F.R. §§ 3.61(d)(1)-(3) (1976).

[183] *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); E. Rockefeller, *supra* note 115, at 49.

reading would be consistent with the rest of the statutory scheme, which conditions most liability on intent or negligence.[184] More importantly, a negligence requirement would comport with Supreme Court rulings that strict liability cannot be imposed for the use of unprotected speech.[185] A requirement of negligence would not unduly hamper enforcement, so long as the Commission frames a clear order, thereby giving the advertiser reason to know what conduct will be unlawful. Furthermore, even if the order were vague, the Commission could still proceed against a violator who had other cause to know that the advertising was unlawful.[186] Thus, the requirement that an advertiser know or have reason to know of the illegality of his activity will not serve to shield misrepresentation from legitimate regulation but would only safeguard against imposition of strict liability for the innocent use of speech.

(b) *Violation of Rules.* The FTC has the power to promulgate and enforce rules that define "with specificity" deceptive acts or practices.[187] The Commission may seek a penalty from the advertiser for engaging in these specifically prohibited acts only if he knew or had reason to know that his advertising violated the rules.[188] Lack of scienter or negligence does not, however, bar the Commission from suing on behalf of consumers and others injured by the deceptive practice.[189] The court may grant equitable relief and actual damages, but not punitive or exemplary damages.[190]

Granting equitable relief from a sale induced by innocent misrepresentation certainly does not burden first amendment rights.[191] The constitution-

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[184] *See* 15 U.S.C. § 45(m)(1)(A) (Supp. V, 1975) (violation of rule: actual knowledge or knowledge fairly implied); *id.* § 45(m)(B)(2) (violation of cease and desist order directed to another: actual knowledge); *id.* § 57b(a)(1) (suit on behalf of consumers or others for violation of cease and desist order: reasonable man would have known that practice was dishonest or fraudulent).

[185] Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (civil liability); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (same); Smith v. California, 361 U.S. 147 (1959) (criminal liability).

[186] When the violator is an advertising agency, the agency's inability to learn all the attributes and characteristics of all products and industries should be considered in determining whether the agency was negligent. *Cf.* FTC v. Colgate-Palmolive Co., 380 U.S. 374, 382 n.8 (1965). Although a manufacturer may perhaps be placed under a duty to know all that he can reasonably learn about his product or service, the manufacturer's knowledge should not be imputed to his advertising agent.

[187] 15 U.S.C. § 57a(a)(1)(B) (Supp. V, 1975). Violation of the rules constitutes an unfair or deceptive practice. *Id.* §§ 45(a)(1), 57a(d)(3). The Commission may therefore issue a complaint against the violator or seek temporary injunctive relief. *See* text accompanying notes 129-42 *supra*.

[188] 15 U.S.C. § 45(m)(1)(A) (Supp. V, 1975). This section allows the Commission to seek a penalty without instituting antecedent administrative proceedings.

[189] *Id.* § 57b(a)(1). The lack of a requirement of knowledge or negligence in subsection (a)(1) seems inconsistent with subsection (a)(2), which provides that one who violates a final cease and desist order cannot be sued under section 57b unless the violation is one "which a reasonable man would have known under the circumstances was dishonest or fraudulent." Perhaps the disparate treatment stems from the fact that cease and desist orders are frequently broad, while 15 U.S.C. § 57a(a)(1)(B) (Supp. V, 1975) requires that rules be specific. The requirement thus ensures that the rules provide a reasonable man with notice.

[190] *Id.* § 57b(b).

[191] *Cf.* FTC v. Algoma Lumber Co., 291 U.S. 67, 81 (1934) ("[i]ndeed there is a kind of fraud

ality of imposing liability for damages, however, would depend upon the circumstances. A consumer is unlikely to be damaged by misrepresentation alone. If a consumer's cause of action arose from a purchase of a misrepresented product, the remedy would be for false pretenses, product liability, breach of warranty, or other business practices that are subject to economic regulation. If rescission were not an adequate remedy, an award of damages stemming from the advertiser's economic conduct would not implicate the first amendment.

Different considerations apply to actions brought by the FTC on behalf of a competitor claiming damages resulting from trade libel. The imposition of strict liability for damages would conflict with Supreme Court decisions in the area of private libel.[192] The rigor of common law libel standards is likely to prevent competitors from disputing each other's claims. The FTC's high standard of truth may still apply, but Supreme Court decisions require that the advertiser not be liable absent intent or negligence.[193]

VI. Conclusion

The commercial speech doctrine apparently developed solely because the question of first amendment protection for advertising arose in an unfortunate fact pattern at an inauspicious juncture in the course of constitutional adjudication. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Supreme Court acknowledged that the doctrine and its subjective standards had produced results that were irreconcilable with the policies of the first amendment. The Court recognized that, because purely commercial speech may have an impact equal in magnitude to that of political speech, the motives of the speaker and the form in which speech appears cannot be determinative of the status of speech. Nothing in the Court's rationale justifies perpetuating the commercial speech doctrine by continued discrimination against commercial speech, and courts should proceed to grant commercial speech full protection under the first amendment.

Placing commercial speech within the protection of the first amendment requires that the FTC proscribe only advertising that a reasonable person could interpret as making a false assertion of material fact. The first amendment further requires that the FTC initiate judicial review of prior restraints on advertising and that liability for speech be imposed only upon a showing of negligence or intent.

The constraints of the first amendment need not, however, jeopardize the interests served by the Federal Trade Commission's regulation of deceptive advertising. Although the Commission should be required to initiate judicial

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as courts of equity have long perceived, in clinging to a benefit which is the product of misrepresentation, however innocently made").

[192] For an analysis of trade libel under the doctrine of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and its progeny, see Note, The First Amendment and Consumer Protection: Commercial Advertising as Protected Speech, 50 Ore. L. Rev. 177 (1971).

[193] Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-48 (1974).

review, the institution of a new waiver procedure would reduce the likelihood of unmanageable administrative or judicial caseloads. Further, because of the availability of injunctive relief and equitable remedies, the principle that neither civil nor criminal liability may be imposed for the innocent use of speech will not present a significant barrier to enforcement of the Federal Trade Commission Act. Finally, the issues that bear on the constitutionality of suppressing speech are already within the scope of circuit court review of the Commission's decisions. Therefore, the requirement that these issues be resolved judicially will not impose an additional or an unfamiliar burden upon the courts. Institution of procedures that prevent unnecessary regulation and insistence upon judicial review that applies existing standards in a manner sensitive to first amendment rights will adequately safeguard freedom of expression. Because it is possible to preserve both principled first amendment adjudication and the government interest in advertising regulation, there need be no hesitancy about finally interring the last vestiges of the commercial speech doctrine.

ROSEMARIE SBARATTA

Exhibit 81: Petition to FTC of Bayh, McIntyre, Moss, Aspin, Rosenthal, and Young, January 9, 1974

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

PETITION TO THE FEDERAL TRADE COMMISSION (1) FOR RULES TO EXTEND THE ADVERTISING SUBSTANTIATION CAMPAIGN TO ALL COMMERCIAL ADVERTISING (2) TO REQUEST SUBSTANTIATION FOR CERTIAN COMMERCIAL ADVERTISEMENTS BY CERTAIN ADVERTISERS (3) AND TO COMMENCE GENERALLY AN ADVERTISEMENT SUBSTANTIATION CAMPAIGN IN THE OIL, UTILITY AND ELECTRIC APPLIANCE INDUSTRIES IN REGARD TO ENVIRONMENTAL OR ENERGY-RELATED CLAIMS IN COMMERCIAL ADVERTISEMENTS.

I. INTRODUCTION

This petition filed on behalf of the petitioners described in Part II, seeks (1) the extension of this Commission's advertising substantiation rules to all commercial advertising (2) the production to this Commission and subsequent public inspection of all information relied upon by certain advertisers who have made claims in specific advertising attached to this petition and (3) the requirement that environmental and energy-related claims in all commercial advertising by oil, utility and electric appliance firms be substantiated.

II. PETITIONERS

The petitioners in this matter are Senator Birch Bayh (D.-Ind.), Senator Thomas McIntyre (D.-N.H.), Senator Frank Moss (D.-Utah), Representative Les Aspin (D.-Wisc.), Representative Benjamin Rosenthal (D.-N.Y.), and Representative Andrew Young (D.-Ga.).

III. PROPOSED RULES FOR SUBSTANTIATION OF ALL COMMERCIAL ADVERTISEMENTS

Petitioners propose that the following rules, reflecting an extension of the Commission product advertising substantiation campaign, 36 Fed. Reg. 12058 (June 24, 71), amended 36 Fed. Reg. 14680 (Aug 7, 1971), be adopted and applied to the advertisements attached to this petition, and to the commercial advertising of oil, utility and electric appliance firms.

> Definition: Commercial advertisements are those advertisements sponsored directly or indirectly by corporations or other businesses organized primarily to sell goods or services for profit and which have, as their dominant theme, (1) the promotion of the advertiser's goods or services, (2) the promotion of the advertiser's operations, activities, or policies or (3) the giving of advice or information in connection with the use of the advertiser's products or services. [New]
>
> Substantiation Rule: Advertisers shall be required, on demand by the Commission, the owner of any medium which the advertiser proposes to use, or any other interested person to submit to the Commission with respect to any commercial advertisement such tests, studies or other data or information (including testimonials or endorsements) as they had in their possession prior to the time claims, statements or representations were made and which purport to substantiate any claims, statements or representations made in the advertisement regarding (1) the safety, performance, efficacy, quality or comparative price of the product or service advertised, (2) the operations, activities or policies of the advertiser or (3) any advice or information given to persons in connection with the use of any product or service sold, leased or otherwise provided by the advertiser. [Amendment underlined]

Prohibition: Any commercial advertisement which makes any affirmative misstatement, fails to disclose any material fact, or makes any unsubstantiated claim shall be deemed to be in violation of the prohibition in 15 U.S.C. § 45(a)(6) against "unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." [New]

Exemption: Advertisements which (1) express, as their dominant theme, one side of a controversial issue of public importance and (2) contain the following explicit statement, prominently displayed: "This is a political advertisement intended to present this business' views on a controversial issue of public importance", shall not be subject to these rules. [New]

IV. RATIONALE

While non-product/service advertising[1/] is not a new phenomenon[2/] the surging environmental movement of the late 1960's[3/] and the current energy crisis have added new dimensions to such non-promotional industry advertising campaigns

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1/ Commercial advertising which does not concentrate on the sale of any specific good or service has been, at times, classified as either institutional image, advisory and informational, public service, etc. See, e.g., Address by Commissioner Dennison, "Corporate Image Advertising", presented at Fortune Corporate Communications Seminar, Tuxedo, New York (May 3, 1973) at p. 6. Petitioners' proposed rules do not inflexibly classify non-commercial advertising in that manner since such refinements seem most difficult to make in regard to many ads. Where, however, such classification seems possible, petitioners have separately discussed institutional image and advisory/informative ads in this petition.

2/ See, e.g., Modern Institutional Advertising, George A. Flanagan (1967).

3/ Several important environmental laws, on state and federal levels, were passed in the period from 1968-1972. See, e.g., National Environmental Policy Act of 1969, 42 U.S.C. § 4331 et seq; Clean Air Act Amendments of 1970, 42 U.S.C. § 1857 c-5 et seq.

in light of rising public concern.

The degree of public concern about the environment is revealed by a May 1970 Readers Digest survey which found that 52% of those polled thought pollution was the first or second most important domestic problem. Over 70% thought industry was largely responsible for pollution problems, and about half thought that industry was doing a "poor or very poor" job of solving these problems. As for the energy crisis, which has dramatically touched the lives of all Americans, not only has public opinion put industry on the defensive, but several companies have been chided by government officials[1/] and formally charged by government agencies, including this Commission[2/] with unwise, unethical or illegal practices which have contributed to, or caused, energy shortages in order to increase their economic stranglehold on the energy industry and undermine the recent successes of the environmental movement.[3/]

The industry responses to these pressures have included a massive advertising campaign with at least three goals:

1/ See, e.g., "Moss Lays Shortage to Oil Firms", Washington Post, November 29, 1973, p. A-18; "Oilmen Defend Their Holdings in Other Fuels", Washington Post, December 7, 1973, p. A-9 (remarks of Senator Haskell).

2/ See Exxon Corp., [1973 Transfer Binder] TRADE REG. REP. ¶20, 388 (F.T.C. 1973) (complaint against eight oil companies). See also "Trust Suit Cites 20 Oil Companies", New York Times, July 27, 1973, p. 39; "Florida Charges 'Gas' Conspiracy", New York Times, July 10, 1973, p. 55.

3/ See, e.g., "Environmental Gains Threatened by Crisis," Washington Post, December 11, 1973, p. A-1.

(1) creating a more favorable attitude towards a company or an entire industry on environmental and energy-related issues (2) furnishing users of a company's or industry's goods and services with information and advice in connection with those goods and services in an attempt to solve environmental or energy problems (3) lobbying for certain governmental actions which the company or industry supports.

A. INSTITUTIONAL/IMAGE ADVERTISEMENTS.

1. Environmental Ads. The industry's attempt to create good will for its alleged anti-pollution efforts and thereby to improve the corporate image is typified by the 1971 advertisements of Bethlehem Steel, Potlatch Forests, Inc. and St. Regis Paper Company which sought to portray those companies as committed, in theory and in practice, to environmental protection.[1/] The primary goal of these advertisements was, as Readers Digest noted in a promotion piece for a 1971 environmental advertising supplement, "to explain what business is doing to solve pollution problems" in order to eliminate business' "black eye in the view of most Americans."[2/] A successful public relations effort could win an advertiser (1) additional sales of its products and services to environmental-

1/ Advertisements by these companies are described in Advertising 1972, Hearings before Senate Commerce Committee, 92nd Congress, 2d Session 111-232 (May 16, 18, 31, 1972) (hereafter, "Advertising Hearings") and are the subject of complaints filed with this Commission by Senator Philip Hart and Public Action to Protect Environmental Resources.

2/ Advertising Hearings, supra at 111.

conscious consumers (2) increased investments in its business by environmental-conscious investors or others who wish to invest in a company with environmental practices which make it less likely that the company will be subjected to lawsuits, other official proceedings, picketing, etc. and (3) new employees to work for a company with a good environmental reputation.

The environmental campaign is on-going in 1973. Shell Oil Company, in a November 21, 1973 ad[1/] in the Washington Post wants to dispel any notions that "offshore oil platforms are ruining the waters around them." It claims that "we at Shell have a fact for you. . .[w]e're taking so many precautions to try to keep the waters around our operation clean." (emphasis added). Shell is "taking every reasonable precaution we can to lessen the chance of something going wrong " and boasts of high fish yields near its oil rigs. (emphasis added). Shell also touts its "Shell Oil Herder," widely shown to television viewers in a 1973 ad[2/] as sucking up oil spills "like a vacuum cleaner."

The Shell ads are, however, very misleading and difficult to substantiate. For example, the implication that the presence of oil platforms has led to increased fish yields in the Gulf of Mexico is an untrue assertion of a cause and effect relationship. An increase in the number of fishing boats and innovative fishing techniques may be the sole reason for such increased yields. Moreover, the types of fish caught may be of poorer

1/ Exhibit A.

2/ Exhibit B.

quality than those previously caught and which were less able to survive under increased pollution. To the extent that fish congregate around Shell's platforms, we aren't told that even a junked car deposited on an ocean bottom will serve to attract fish who naturally seek protection from swift ocean currents or other forces. Additionally, insofar as Shell tells us that its offshore oil efforts don't "ruin the waters", there has been little work done on the long-term effects of regular low-level oil and chemical discharges on the reproduction of fish, and on young fish or eggs. The mere fact that adult fish of certain species can survive tells far less than the entire story.

The Shell Oil Herder is also unfairly described. Shell tells viewers that the herder is being shown "under a controlled situation. The fact is, they work best only under the right conditions", impliedly the real-life conditions at sea, and not in the television studio. However, there are numerous conditions under which use of this product, a chemical collecting agent, can cause even more difficult spill problems than might already exist -- for example, where there are low temperatures, choppy waters, wind, or debris in the water. Thus, standards suggested by the Council on Environmental Quality sharply limit use of Shell's touted Oil Herder.

Middle South Utilities System, advertising in the November 6, 1973 New York Times,[1/] tells of its "effort to improve the quality of our river, the mighty Mississippi." The System's "companies are implementing a detailed study. . .to determine [the river's] present ecological status. . ." Although it claims that other "large industrial concerns that require large quantities of fresh water for processing have located facilities on river sites. DuPont, Shell, Kaiser, Texaco, Gulf, to name a few," it focuses on Middle South's impliedly unique motto of "Use, Not Abuse" - "So that the mightiest of America's rivers can keep rolling along. Unharmed." (emphasis added). We are not told, however, that the Mississippi Power and Light Baxter Wilson Plant, controlled by Middle South, is currently discharging thermal and chemical wastes into the Mississippi River without ever having had a permit as required by law.[2/] Moreover, it is certainly false to imply that the Mississippi River is "unharmed" by the enormous amount of wastes now dumped into it.

1/ Exhibit C.

2/ The utility never obtained a permit under the Rivers and Harbors Act, 33 U.S.C. §407 (Refuse Act), though it currently has a permit application pending under the 1972 Amendments to the Federal Water Pollution Control Act. When, and if that permit is granted, it appears likely, according to the Region IV office in Atlanta of the Environmental Protection Agency, that more sophisticated pollution control equipment than currently is being used will be required.

Teneco, in a two page ad[1/] in the December 10, 1973 issue of U.S. News & World Report talks of "Clean, clear, fresh air" being "one of [Teneco's] healthiest new markets." Its efforts to eliminate noise pollution have led to new mufflers which "are turning roars into purrs in one out of every four cars on the road today." It has more that "40 patents for auto emission control devices" and has developed "a new offshore Platform Mounted Nuclear Plant whose impact on the landscape will be reduced to an unobstrusive silhouette on the ocean's horizon." (emphasis added).

It seems presumptuous and misleading for Teneco to state definitively what the impact of offshore nuclear plants will be when the Atomic Energy Commission itself is unsure of that impact. In a notice in the Federal Register, 38 Fed. Reg. 34008 (December 10, 1973) and the Wall Street Journal[2/] the AEC invited public comments on proposals to build such plants, with questions under the National Environmental Policy Act, 42 U.S.C. §4331 et seq. relating to environmental impact as yet unanswered.

Champion International, in an ad[3/] in the July 23, 1973 issue of U.S. News & World Report touts its "careful review of

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1/ Exhibit D.

2/ Exhibit E, "Notice of Opportunity For Public Participation in AEC Public Hearing on Floating Nuclear Power Plants", Wall Street Journal, December 13, 1973, p. 29.

3/ Exhibit F.

conservation and forest management plans" before building "the largest plywood plant in North America." It claims that its expansion and other practices mean that "we are well protected from future increases in the cost of timber." (emphasis added). Champion alleges that its "reforestation program is one of the most advanced in the industry" and that "taking care of our timberlands is a major goal at Champion International."

Unfortunately for readers, Champion does not mention how its reforestoration and other practices can lead to stable prices, nor that they have been insufficient to prevent plywood prices from rising 56% in the past three years.[1/] Moreover, while Champion was guaranteeing no future increases in the cost of lumber, it did not tell readers that it had recently pursued a request for such an increase before the Cost of Living Council and wanted more than it was given.[2/]

To read the bare allegations presented by these and many other companies, the average person cannot help but wonder whether we have any environmental problems in the U.S. In short, the corporate images created by industry advertising campaigns present the advertisers as blameless and environmentally concerned.

1/ "Lumber Keeps Lifting Home Costs", New York Times, April 1, 1973, Section VIII, p. 1.

2/ New York Times, January 16, 1973, p. 51.

2. Energy Crisis Ads. A similar image advertising campaign has been recently initiated in regard to the energy crisis. Companies in the energy producing business -- oil, gas, and utility companies for the most part -- have taken to the print and broadcast media to prove that they have not caused our energy shortfall and/or are making every effort to solve that problem.

This attempt to promote the corporate image and win friends is exemplified by an Amoco Oil Company advertisement 1/ in the May 7, 1973 New York Times, when the country was plagued with gasoline shortages. Amoco told us that it was "making more gasoline than ever before in our history, up 15% in the last two years"; that its "refineries are running at over 95% capacity (the practical minimum with available crude) [and]. . .well above the industry average"; that it was "importing more foreign crude than in any time in our history"; that it was "working on new refining and conversion processes and new pipeline capabilities that will increase our output even more. . ." and that it was "intensifying our search for crude oil to supply our refineries". Amoco claimed that with its affiliates, it will "spend more on expansion, exploration and crude oil production than in any year before." Certainly, the reader is expected to conclude that Amoco was doing

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1/ Exhibit G.

all it could do to help solve our gasoline shortage, and it was hoped that Amoco customers, investors and employees would stick with the company while new customers, investors and employees would come over to Amoco.

However, the company's presentation of these "facts" is deceptive, and possibly false. For example, despite Amoco's touting of its refining practices, it, like all major oil companies except Mobil, had not built a new refinery in five years and none are presently under construction 1/ even after warnings as early as 1971 that there would soon be a severe shortage of refinery capacity. 2/ Nor did Amoco tell readers that no new refining capacity had been planned for 1973, or that no new refineries would be completed before 1975. 3/ Moreover, although Amoco praises its allegedly high level of imports, the company hasn't explained why, in late 1972, it failed to import even more by utilizing its permissible 1973 10% borrowing allowance. 4/

Institutional image advertisements related to the energy crisis proliferated as the crisis worsened. A spate of recent

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1/ See, e.g., "Oil firms plan new refineries", Chicago Sun Times, December 9, 1973, p. 127.

2/ Staff Study of the Oversight and Efficiency of Executive Agencies With Respect to the Petroleum Industry, Especially As It Relates to Recent Fuel Shortages, Permanent Subcommittee on Investigations of the Senate Committee on Government Operations (hereafter, "Senate Study") 93rd Congress, 1st Session at 8 (November 8, 1973).

3/ Senate Study, supra, at 8.

4/ Senate Study, supra, at 82.

ads is flooding our airwaves, newspapers and magazines, and includes a Mobil television ad[1/] that expresses Mobil's regrets that it is "sorry to have to tell [us] that most oil fields in the U.S. today are past their prime [and] that there's a worldwide shortage of crude oil today." The ad ends by asking "What's Mobil doing about it?" and answering, "Our crews are working twenty-four hours a day all over the world to bring you more oil."

Unfortunately Mobil does not tell us that, in the words of Senator McIntyre,[2/] "proven world reserves of crude oil statistically assessed by the Oil Committee of the Organization for Economic Cooperation and Development (OECD) for 1973, from figures obtained by the oil industry itself, show that there are 583.5 billion barrels of proved world reserves which means that at the present world crude oil consumption rate, there is over 100 years of proven reserves". In short, there is no "worldwide shortage of crude oil."

Numerous other companies, oil and utility in particular, have similar ads which seek to assure us that each is doing certain specific things, and working hard in general, to solve our energy problems and win or retain our trust, and our business.

1/ Exhibit H.

2/ Letter from Senator McIntyre to Commission Chairman Engman, November 21, 1973, p. 2.

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For example, in July 1973 Exxon[1/] told us that it "wants [us] to know that they are doing their best to provide more gasoline for [us]." The ad claimed that "in the first six months of [1973], Exxon's refineries produced considerably more gasoline than they did in the first half of 1972," and that each "Exxon dealer is receiving his fair share of this production." An earlier Exxon ad[2/] claimed that America was "using more oil and gas than the existing fields under the U.S. can supply", so that Exxon was searching offshore, though it was alleged that "it's not any easier or cheaper. . . to drill under water. Just the opposite. . .[but that] we don't have much choice. Our men have to go where the energy is."

Exxon, however, like Amoco and other oil companies, had not been "doing its best" to provide us with gasoline, for its refining practices were similarly inadequate to prevent gasoline shortages. In fact, Exxon's April 1972 refinery production was significantly lower that it had been one year earlier[3/] and it too had not built a new refinery in five years. Moreover, Exxon's claim that "we don't have much choice" but to seek oil under the sea is particularly puzzling, given the abundance of other untapped resources, especially coal. But we are not told these and other vital facts, despite

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1/ Exhibit I.

2/ Exhibit J.

3/ Senate Study, supra, at 24.

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Exxon's motto "We'd like you to know", simply because these facts contrast sharply with the misleading picture presented by the Exxon ads.

In the December 10, 1973 issue of Barrons, Pacific Power and Light Company placed an ad[1/] extolling its impliedly unique position during the energy crisis. "Pacific Power controls extensive reserves of low-sulfur coal in Montana, Washington, and Wyoming that it can depend upon for fueling its own plants and for sale to other utilities." Not only investors and prospective coal purchasers, but also the utility's customers, must feel confident that this utility, in contrast with others, is a well-run operation meriting public support and increased business. But the facts may actually tell a different story. In September, Pacific Power and Light had submitted to Oregon and Washington state regulatory agencies a conservation plan which included a 10% mandatory cut on customers using more than 75,000 Kilowatt-hours a month.[2/] Apparently, because of badly depleted hydroelectric generating capacity, the utility was unable to provide sufficient electric power even with its "extensive reserves of low sulfur coal" which it claimed it could "depend upon." Moreover, it is misleading for the utility to tout any dependability upon whatever coal may be in the ground, since shortages of material

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1/ Exhibit K.

2/ "Power Crisis in Pacific Northwest Eases Due to Heavy Rains, Consumer Cooperation", Wall Street Journal, December 5, 1973, p. 6.

used in mining and a chronic shortage of coal-hauling rail cars has created a scarcity of coal on the market.[1/]

But advertising claims are not limited solely to the energy issue. Many companies, sensitive to suggestions that the energy crisis was in part an industry conspiracy to undermine environmental laws, are attempting to create the impression that they are solving the energy crisis without much damage to the environment. The Investor-Owned Electric Light and Power Companies, for example, in a September 12, 1973 ad[2/] in the Wall Street Journal entitled "Why does my electric bill keep going up year after year?", answer the question by reference to burgeoning costs "of fuels, building materials, all kinds of supplies, wages, interest on borrowed money, everything." They tout their "huge expenses for research and development efforts aimed at finding new methods of power generation that conserve scarce fuels." (emphasis added). They explain that "these research efforts and environmental control mean greatly increased costs. . ." (emphasis added). In short, we are told that enormous rate increases are needed to insure that energy is supplied adequately and environmental goals are met. However, the industry's position is extremely misleading when one considers that "major utility companies are expending seven times the amount of money for the advertising of electricity and gas than they are expending on

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1/ "Coal to the Rescue This Winter. Maybe so. But It's Scarce, Too, and May Get Scarcer." Wall Street Journal, November 12, 1973, p. 30.

2/ Exhibit L.

research and development."[1/] It could hardly be maintained, therefore, that such research efforts mean "greatly increased costs" or represent "huge expenses."

Wheelabrator-Frye, Inc. took a full page ad[2/] in the December 5, 1973 Wall Street Journal to express its pride in its processes for producing "POWER FROM GARBAGE - an endless source of clean energy." (emphasis added). The company claims that "producing clean energy from garbage has been a reality for twenty years. There's a proven system that does it [with] sixty plants" all over the world. (emphases added). The company's first U.S. plant is under construction in Massachusetts and the "energy value of the garbage [to be] burned per day is equivalent to 73,000 gallons of low sulfur fuel oil. . .garbage is an endless source of reliable fuel." (emphases added). But while Wheelabrator-Frye was praising its "proven", "clean" and "reliable" system to potential customers and investors, a report prepared by the Council on Environmental Quality in August 1973 did not even mention "power from garbage" as a feasible and important alternative source of energy. Neither do other reports seem to recognize Wheelabrator-Frye's new method.[3/] Moreover, it is impossible that any system can produce "clean" energy -- that

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1/ Towards an Energy Policy, K. Roberts, editor (Sierra Club, San Francisco, 1973) p. 471.

2/ Exhibit M.

3/ See, e.g., Towards An Energy Policy, supra, at 35 - 62.

is, "pure or "unadulterated" energy.[1/] Every energy producing system has some degrading effect on the environment.

The General Electric November 1973 ad[3/] in Fortune uses the same misleading technique as the Wheelabrator-Frye ad. The General's two page ad tells us that "In ten years, we'll need enough electricity to run two Americas" and that "General Electric is doing something about it." It claims that "the best way to provide large amounts of clean energy in the next decade is nuclear power" (emphases added) with G.E. designed plants that add "no smoke or harmful oxides to the air." It praises its new fossil fuel plant designs, and powerful gas turbines which "can be set up almost anywhere in a matter of months [and] . . .turned on in minutes to help meet peak demand. And a single gas turbine can make enough power for 25,000 people." The General misleads us to believe that there is such a thing as "clean energy." We are not told that thermal pollution remains a problem with nuclear plants or that radiation safety levels are thought by many persons to be inadequate.

1/ "Clean" is both understood by most persons, and so defined, as meaning "pure" or "unadulterated." Random House Dictionary of the English Language (Random House, New York, 1970) at 274.

2/ See, e.g., Energy and the Environment, Electric Power, supra, at 14.

3/ Exhibit N.

As many of these latest ads show, now more than ever prospective and current customers, investors and employees are the targets of many companies seeking to convince these business prospects that each company is solving the energy crisis and environmental problems at the same time. These companies are spending millions of dollars to create good corporate images by their massive advertising campaigns. In short, according to these and many other advertisements, no company has contributed to the environmental or energy crisis, but all are helping to meet our needs in these areas. As the American Petroleum Institute said in a brochure entitled "API Ad Program," the industry's advertising programs must "serve as constant reminders to employees, dealers, annuitants and customers that the job ahead [for solving our problems] is a major one" which requires our understanding and financial support.

B. INFORMATIONAL ADVERTISEMENTS.

In addition to exculpating themselves from blame for environmental or energy problems and thereby creating a good corporate image, companies have offered numerous suggestions for solving our environmental and energy crises in their advertisements. Many of these solutions involve advice on how users of the goods and services of the company can make sacrifices to overcome or alleviate the crises, and almost all of them put the onus on the individual.

Some ads indicate that little or no individual sacrifices are involved in solving our problems as long as customers follow the company's suggestions.

An example of the "no sacrifice-trust over judgment" approach is typified by the Southern Company's ad[1/] in the October 2, 1973 Wall Street Journal. The Southern Company seeks to eliminate this "MISCONCEPTION: It doesn't make sense for utilities to promote the use of electricity in the face of an 'energy crisis'". The alleged "FACT" is that the utility must "level the highs and lows" of its customer usage "in order to achieve the most economical use of costly electric power facilities." Thus, such uses as "electric heating in the winter" are promoted with the result that "this balancing of electric energy requirements helps the operating companies achieve better plant utilization. This, in turn, helps keep electric rates lower than they would be otherwise." In short, "customers as well as stockholders benefit" and even though there is an energy crisis, we should solve it by using more, not less, electricity this winter. The Southern Company's corporate image could well benefit by this bit of advice to its customers who might desire

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1/ Exhibit O.

otherwise to seek alternative power sources or threaten to press for changes, including lower profits, in the monopolistic utility industry. But Southern's assurances to its customers are misleading since the current rate structures do not take into consideration such factors as environmental degredation and shortage of resources caused by increased electrical generation. Consequently, the true costs of increased generation are higher than customers are led to believe, and the customers may not therefore "benefit" from increased generation. As the Sierra Club Electric Power Task Force concluded, formal "rate structure revisions [are necessary] to adequately reflect the costs of power generation."[1/] Otherwise, while rates may be lower in the short-run, they will become higher in the long-run, another fact which conflicts with Southern's statement to the public. Not suprisingly, Southern's pronouncements stand alone in sharp contrast to otherwise unanimous calls for conservation from industry, consumer/environmental groups, and the government. Moreover, Southern does not tell us that the electric heating in winter which it seeks to promote is almost unanimously recognized as the least efficient source of heating.[2/]

1/ Towards an Energy Policy, supra, p. 62.

2/ See, e.g., Towards an Energy Policy, supra, at 352; Energy and the Environment, Electric Power, supra, at 27 - 30.

Most of the informational ads, however, take the approach that Americans should sacrifice certain comforts to combat our energy crisis. These companies give advice which is self-serving in terms of corporate profits and public image. For example, the Amoco Oil Company ad of last May[1/] encourages several gasoline-saving measures including car pools, car tune-ups and fifty miles per hour speed limits. Exxon, in a television ad,[2/] advises to "use your storm windows. Be sure your oil burner is operating at peak efficiency. Turn the thermostat down. And don't forget to close your fireplace flue when not in use." Mobil promoted "8 ways to get along" during the Spring 1973 gas shortage.[3/] All of these suggestions are presented as viable solutions to the energy crisis. The American public was expected to follow this corporate advice by changing its life style while the industry was winning goodwill for its high-cost campaign to educate consumers on how they could do their part in the crisis. It is imperative that these advertisers be able to substantiate this advice.

1/ Exhibit G.

2/ Exhibit P.

3/ Exhibit Q.

C. EXEMPTED ADVERTISEMENTS.

Certain advertisements may have, as their dominant theme, the expression of a corporate viewpoint on controversial issues of public importance facing our government officials. No matter how false or misleading they might be, petitioners do not think that this Commission, at this time, should attempt to apply the advertising substantiation campaign to such advertising. Examples of this "political advertising" include the December 7, 1973 Wall Street Journal ad[1/] sponsored by the American Electric Power System addressed to "Mr. President" and calling upon the President to act in certain ways on matters now facing him.

Although there is some "element of the commercial" even in this ad, there is greater reason to give it First Amendment protection. Compare Valentine v. Chrestensen, 316 U.S. 52 (1942); Breard v. Alexandria, 341 U.S. 622 (1951) with New York Times v. Sullivan, 376 U.S. 255 (1964). However, in order that purchasers, investors and employees do not confuse such political discussion with advertiser attempts to create a better corporate image for commercial gain, such political advertising, if it is not to fall within these proposed rules for substantiation and prohibition,

1/ Exhibit R.

should be expressly labeled as follows: "This is a political advertisement intended to present this advertiser's views on a controversial issue of public importance."

V. THE COMMISSION'S LEGAL AUTHORITY TO ADOPT THE RULES PROPOSED BY PETITIONERS

This Commission is given broad powers under §5(a)(6) of the Federal Trade Commission Act, 15 U.S.C. §45(a)(6), and was directed by Congress, "to prevent persons, partnerships or corporations. . .from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." Section 5 makes of equal concern to this Commission the consumer injured by unfair or deceptive acts or practices as well as the merchant or manufacturer injured by unfair methods of a dishonest competitor. See F.T.C. v. Sperry & Hutchinson Co., 405 U.S. 233 (1972). Towards these ends the Commission may promulgate rules such as those proposed by petitioners, F.T.C. v. National Petroleum Refiners' Ass'n, __ F.2d __ (D.C. Cir. 1973), petition for cert. filed, 42 U.S.L.W. __, and has the obligation to "give an interested person the right to petition for the issuance. . .of a rule." 5 U.S.C. §553(e).

It is clear that unfair or deceptive advertising practices fall within the broad prohibitions of Section 5. See, e.g., Giant Food, Inc. v. F.T.C., 322 F.2d 977, 981, note 9 (D.C. Cir. 1963), dismissed, 376 U.S. 967 (1964). Traditionally, advertising which contains affirmative misstatements or fails to disclose a material fact,

see, e.g., F.T.C. v. Sterling Drug, Inc., 317 F.2d 669 (2d Cir. 1963); P. Lorillard Co. v. F.T.C., 186 F.2d 52 (4th Cir. 1950), has been found to constitute a violation of Section 5. More recently, however, the Commission has recognized that unsubstantiated claims similarly may violate Section 5. See, e.g., Firestone Tire & Rubber Co. [1973 Transfer Binder] TRADE REG. REP. ¶20, 112 (F.T.C. 1973), affirmed 1973 TRADE REG. REP. ¶74, 588 (6th Cir.), cert. denied, 42 U.S.L.W. 3361 (1973).

The Commission's advertising substantiation campaign, inaugurated in 1971, 36 Fed. Reg. 12058, amended 36 Fed. Reg. 14680, represented a milestone in its effort to prevent claims that have no "foundation in fact." Advertising Hearings, supra, at 39. Although it was to be applied only to product claims,[1/] one theory behind the campaign was that the Commission and the public would be aided "in distinguishing between the seller who is advertising truthfully and one who is unfairly treating both consumers and competitors by representing, directly or by implication,

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1/ Petitioners also request that the Commission extend its advertising substantiation rules to claims for services as well as products. The Advertising Evaluation Policy Statement of the National Advisory Review Board, an industry-established self-policing mechanism, already recognizes the need to apply the substantiation policy to ads for services. Advertising Hearings, supra, at 246.

that it has proof [for a claim] when in fact there is none or the proof is inadequate." 36 Fed. Reg. at 12058. Replies to Commission requests for substantiation would therefore be made public in order to assist consumers in making a rational choice among competing claims, / to encourage advertisers to have adequate substantiation before claims are made, and to encourage consumers, business people and public interest groups to aid the Commission, which has limited resources, in detecting violations of Section 5.

In short, as the Commission already recognizes, corporate honesty is an important ingredient of a successful business from dual viewpoints: (1) product performance is a factor relied upon by purchasers, and hence product claims should be true and (2) purchasers (or others entering into financial relationships with a company) prefer to do business with an honest advertiser. This rationale for applying the advertising substantiation policy to product ads has even greater force when institutional image or informational ads are involved. The public's general disapproval of industry's environmental and energy-related efforts is a significant indication that the public would regard with disfavor any attempts of a company to gain or retain purchasers, investors or employees by extolling the company's environmental or energy-related

policies and practices if such were incapable of being substantiated. Industry itself knows that its environmental and energy-related image is important for financial success as evidenced by its expenditures of millions of dollars to promote good images for each individual company or an entire industry. Additionally, as with product (or service) claims, the public would be more willing to favor the honest company which presents a true, substantiated picture of itself and its policies, rather than the dishonest advertiser which makes similar, but unsubstantiated claims.[1/]

There is a great need for this Commission to act immediately. First, as a ranking Justice Department official recently indicated,[2/] companies can be expected to make fraudulent claims in connection with the energy

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1/ Petitioners also believe that the rules herein proposed need not be limited to environmental or energy-related claims. For example, if a company advertised in "The Amsterdam News", a black New York newspaper, and touted its employment practices by claiming that 20% of its employees were black, and that it had sought to raise the number to 25%, but didn't have enough applicants, the Commission might, under these proposed rules, be able to request substantiation for such claims which, if incapapable of substantiation, would be unfairly winning black financial support for the advertiser.

2/ "Justice Aide Sees Fuel Crisis Spurring an Increase in Crime", Washington Post, December 6, 1973. p. A-15.

crisis in order to obtain new customers. The proliferation of institutional image ads and informational ads in recent weeks lends weight to those fears. If this Commission refuses to act now against any company which seeks to win financial gains by unsubstantiated claims about the company's goods, services, policies or practices (or in regard to informational claims or advice made for such reasons), it implicitly gives all companies carte blanche to injure in the future more purchasers and competitors by using such unfair and deceptive advertising practices. Second, although Senator McIntyre has already drawn this Commission's attention to one allegedly deceptive oil company ad,[1/] he has sought long-term relief from the industry's National Advertising Review Board which, after receiving his comments, indicated that it was unable to tackle the problem on as large a scale as requested.[2/]

Last, petitioners are not suggesting any radical changes from present Commission policy, if the Commission has the authority and expertise (or can rely upon expert

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1/ See, "Senator has NARB support against 'deceptive' energy ads", Advertising Age, December 3, 1973, p. 1.

2/ See, "NARB steps into energy ad situation via McIntyre note", Advertising Age, December 10, 1973, p. 1.

help from sister agencies) to evaluate environmental or energy claims in regard to product performance, then it certainly can scrutinize a claim that an advertiser is acting in specific ways to solve environmental or energy problems. For example, there would seem to be little difference in evaluating a claim relating to auto emissions 1/ and another relating to emissions from the advertisers' plants or other equipment. In fact, a claim that a nuclear power plant manufactured by General Electric produces clean energy seems indistinguishable from a similar claim that a car manufactured by Chevrolet produces cleaner exhausts -- both are products of the advertiser. The Commission must act immediately to require substantiation of all such claims regarding environmental or energy issues.

VI. CONCLUSION

For the aforementioned reasons, petitioners request this Commission:

(1) to adopt the proposed rules regarding commercial advertisements in accordance with the procedures outlined in the Administrative Procedure Act, 5 U.S.C. § 553.

1/ See, e.g., General Motors, [1973 Transfer Binder] TRADE REG. REP. ¶19,698 at 21, 744 (F.T.C. 1971) where Chevrolet was asked to substantiate its claim that "Impala's new built-in emission controls have helped reduce air pollution."

(2) to seek immediate substantiation for the advertisements attached to this petition.

(3) to conduct immediately an advertising substantiation campaign of environmental or energy-related claims in commercial ads presented by oil, utility and electrical appliance firms.

Respectfully submitted,

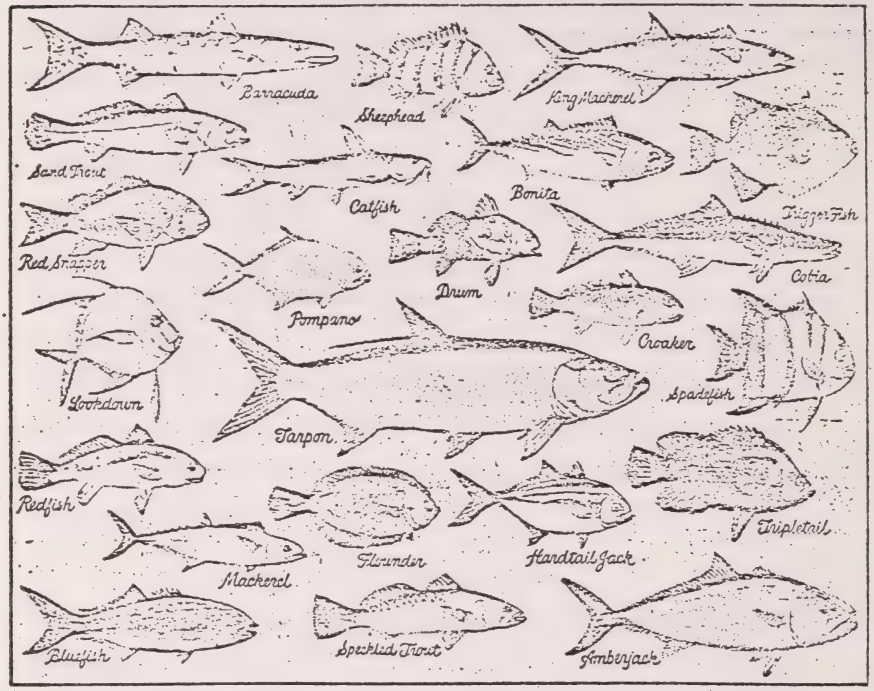
Harvey J. Shulman

Harvey J. Shulman
Attorney for Petitioners

MEDIA ACCESS PROJECT
1910 N Street, N.W.
Washington, D.C. 20036

33-291 O - 78 - 72

How 23 kinds of fish can help change your mind about the waters around our offshore oil platforms.



If you think that offshore oil platforms are ruining the waters around them, we at Shell have a fact for you.

Today, it's possible to catch more than 23 different kinds of fish under our platforms in the Gulf of Mexico. Of course, we do have a great many platforms located there. So naturally, the kinds of fish you can catch will depend on which platforms you're fishing from. And whether they're biting. And how good a fisherman you are.

We can tell you this, though. Lots of fishermen catch a lot of these fish right in these waters.

And here's another fact that really might surprise you.

Because we're taking so many precautions to try to keep the waters around our operation clean, the oilmen who work on our platforms often grab their rods and reels during their time-off. (And sometimes haul in some of the most terrific fish you've ever seen.)

They store their catch in the deep freeze (with the cook's permission, of course) and when they head home after their 7 day shift, take along a couple of good fish suppers for their wives and kids.

It could be a 6 pound speckled trout or a 20 pound red snapper. Matter of fact, most of the snapper served in gulf area restaurants comes from these same waters.

Shell is trying to supply a lot of people with the energy they need—and trying to respect the environment around us.

Taking every reasonable precaution we can to lessen the chance of something going wrong.

That way, we hope more people can have their energy and enjoy their fish, too.

SHELL

Exhibit A

We're trying to make things better.

re: What Ad Council? Jan 22, 1975

TELEVISION

OIL SPILL "MAN IN TANK" SECO - 3604

SHELL

Date: JAN. 2, 1973
Time:
Network: A/R

SHOT-E. MILZ IN TANK.

E. MILZ O.C.: I'm Elmer Milz. I work for Shell In Oil Spill Research. Here in this tank, I'd like show you some of the things we've come up with in case a spill occurs.

LS IL IN WATER.

We call this Shell Oil Herder. When it surrounds a slick under the right conditions it gathers it together and contains it.

ILZ BARGE.

Now this is a model of an Oil Recovery Barge. It skims the surface and sucks up oil like a vacuum cleaner.

FOAM

We also have polyurethane foam -- it can soak up

OAM CHUNK.

to forty times its own weight.

WALKING IN TANK.

I've shown you these devices under a controlled situation. The fact is, they work best only under the right conditions. But even if we discover the perfect device this is still not the ultimate answer, because the ultimate answer it to prevent oil spills from happening.

OGO

ANNCR. V.O.: At Shell, we believe the best oil spill device is the kind that never has to be used.

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Exhibit B

An industrial report from the Middle South states of Arkansas, Louisiana & Mississippi.

So that the mightiest of America's rivers can keep rolling along. Unharmed.

Too frequently, we Americans have abused our free flowing rivers and streams. Unintentionally. Gradually. A little industrial waste, a little raw sewage, a little household refuse have combined over the years to cause serious water pollution problems.

In an effort to improve the quality of our river, the mighty Mississippi, the Middle South Utilities System companies are implementing a detailed study of the lower Mississippi River to determine its present ecological status and, importantly, the parameters for its proper use in the future. This study will be conducted by research biologists from state colleges and universities in the bordering states of Arkansas, Louisiana and Mississippi, and the study's findings will be made available to interested parties.

A number of major industrial concerns that require large quantities of



fresh water for processing have located facilities on river sites. DuPont, Shell, Kaiser, Texaco, Gulf, to name a few. The area's natural resources—including fresh water—insure a continuation of industrialization *if these natural resources are intelligently utilized.*

Use, Not Abuse is the basis of this ecological study of the lower Mississippi. We fully appreciate that the 300-billion-gallon-per-day fresh water stream is one of our area's most valuable industrial assets, an asset that should be protected for this and future generations.

MIDDLE SOUTH UTILITIES SYSTEM Middle South Utilities, Inc.
Arkansas Power & Light Company/Arkansas-Missouri Power Company
Louisiana Power & Light Company/Mississippi Power & Light Company
New Orleans Public Service Inc.

Exhibit C

Clean, clear, fresh air.

It'll be one of our healthiest new markets.

When "noise pollution" was the gremlin that lurked inside every car's engine, Tenneco's Walker Manufacturing responded.

The result: Walker mufflers are turning roars into purrs in one out of every four cars on the road today.

Now that "air pollution" is a major concern, Walker has responded again. At the moment, we hold more than 40 patents for auto emission control devices.

And Walker will supply a substantial portion of a new car manufacturer's catalytic converter hardware requirements for 1975-77 model cars.

We are now prepared to market such products as: the monolithic platinum catalytic converter, the pelletized catalytic converter, the thermal reactor, and mufflers and pipes to operate in conjunction with these new emission control systems.

It's just another example of how Tenneco is helping to come up with the answers to today's problems.

And it makes sense that those who come up with the answers are those who'll come up with the business.

In another area, we have developed, with Westinghouse, a new offshore Platform Mounted Nuclear Power Plant whose impact on the landscape will be reduced to an unobtrusive silhouette on the ocean's horizon.

In petroleum, we are successfully exploring the most promising areas of the world. And we are expanding our shipbuilding capacity to help meet the growing demand for large commercial ships.

We are also building better construction and farm equipment. Marketing premium quality, fresh fruits and vegetables. Developing whole new communities. Finding new ways to package the nation's goods. And in chemicals we are continuing to test and develop many specialties for industry including an incredibly long-lasting synthetic lubricant.

All good prospects for a healthy and promising future.

Tenneco

Exhibit D

NOTICE OF OPPORTUNITY FOR PUBLIC PARTICIPATION IN AEC PUBLIC HEARING ON FLOATING NUCLEAR POWER PLANTS

The Atomic Energy Commission will hold a public hearing to be conducted by an Atomic Safety and Licensing Board to determine whether a manufacturing license should be issued to Offshore Power Systems authorizing the manufacture of eight floating nuclear power plants to be manufactured on a repetitive assembly line basis in Jacksonville, Florida. After assembly, the plants will undergo testing (without nuclear fuel) at the manufacturing site, and subsequently will be towed to selected sites. The hearing will be scheduled to begin in Washington, D. C, or such other location as may be determined by the Atomic Safety and Licensing Board. Issues to be considered at the hearing include both radiological safety and environmental. These issues are specified in a FEDERAL REGISTER notice to be published on December 10, 1973. This notice is being published in this area because the plants may be sold to electric utilities for siting along or near the Atlantic and Gulf Coasts of the United States. At present it appears that most of the plants will likely be sold to electric utilities for siting along or near the Atlantic Coasts of New Jersey and Florida and the Gulf Coast of Louisiana. The issues under the Atomic Energy Act and the National Environmental Policy Act will not involve consideration of the particular sites at which any of these reactors to be manufactured will be located and operated. These will be the subject of construction permit proceedings associated with the particular sites. In any such construction permit proceeding, the Commission will treat as resolved those matters which have been resolved in this manufacturing license proceeding unless there exists significant new information that substantially affects the conclusions reached at the earlier stage or other good cause. No construction permit for a particular site will be issued until the relevant manufacturing license has been issued.

Members of the public who wish to participate in the hearing may do so in one of two ways:

1. They may make a limited appearance. A person making a limited appearance does not become a party to the proceeding but may state his position and raise questions which he would like to have answered to the extent that the questions are within the scope of the hearing and are permitted by the Licensing Board. Persons desiring to make a limited appearance are requested to inform the Secretary of the Commission and others in the manner specified below. Limited appearances will be permitted at the time of the public hearings at the discretion of the Licensing Board.

2. They may petition for leave to intervene. A person permitted to intervene becomes a party and has a right to participate in the conduct of the hearing. For example, he may present evidence and examine and cross-examine witnesses.

Any person whose interest may be affected by the proceeding who wishes to participate as a party must file a petition for leave to intervene under oath or affirmation setting forth the interest of the petitioner in the proceeding, and any other contentions of the petitioner including the facts and reasons why he should be permitted to intervene, with particular reference to the following factors: (1) the nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. Any such petition shall be accompanied by a supporting affidavit identifying the specific aspect or aspects of the subject matter of the proceeding as to which the petitioner wishes to intervene and setting forth with particularity both the facts pertaining to his interest and the basis for his contentions with regard to each aspect on which he desires to intervene. A petition that sets forth contentions relating only to matters outside the jurisdiction of the Commission will be denied.

Papers required to be filed in this proceeding shall be filed in accordance with the above-referenced FEDERAL REGISTER notice and must be filed with the Secretary of the Commission, U. S. Atomic Energy Commission, Washington, D. C. 20545, Attention: Chief, Public Proceedings Staff. Petitions for leave to intervene must be filed by January 9, 1974. A copy of any petition for intervention or request for limited appearance should also be sent to the Chief Hearing Counsel, Office of the General Counsel, Regulation, U. S. Atomic Energy Commission, Washington, D. C 20545 and to Vincent W. Campbell, Esq., Vice President and General Counsel, Offshore Power Systems, P. O. Box 8000, 8000 Arlington Expressway, Jacksonville, Florida 32211, attorney for the applicant.

A copy of the FEDERAL REGISTER notice is on file for public inspection at the Commission's Public Document Room, 1717 H Street, N. W., Washington, D. C. 20545; the Jacksonville Public Library, 122 North Ocean Street, Jacksonville, Florida 32202; the Wallace R. Holst Community Library, North School, Lafayette and Evans Avenues, Brigantine, New Jersey 08203; and the New Orleans Public Library, Business and Science Division, 219 Loyola Avenue, New Orleans, Louisiana 70140. Other documents and correspondence relating to this application are also available at these same locations.

Exhibit E

Champion International, in June 1972, acquired over 670,000 acres of richly forested land in Montana. With this acquisition, we increased the amount of timberlands we own outright in the U.S. by over one third, bringing the total to over 2.4 million acres. Also, we have effective use of another 5 million acres.

Our objective was to turn this new Montana timberland into a productive asset, and after a careful review of conservation and forest management plans, we decided to build the largest plywood plant in North America.

We began construction almost immediately at a site on the edge of the forest. When Mr. Willers visited the site in September 1972, foundations were being poured, and annual production of 600 million square feet of plywood will begin late in 1973.

With much of the wood for this production supplied from our own forestlands, we are well protected from future increases in the cost of timber. And the plywood from this plant will help us keep pace with the demand for building materials that will grow as more and more families improve or build homes in the future.

Taking good care of our timberlands is a major goal at Champion International—and with good reason. After all, the healthier our forests are, the stronger we are.

We need the trees we grow for building materials and paper and allied products, which, along with furnishings, comprise the three major businesses of Champion International.

Within our divisions are such well-known names as U.S. Plywood, Champion Papers, Drexel, and Heritage. And our products include plywood, lumber, particleboard, sidings, panelings, adhesives, fine printing and business papers, packages, envelopes, quality home and leisure furniture, carpeting, and accessories for places where people live, work, and play.

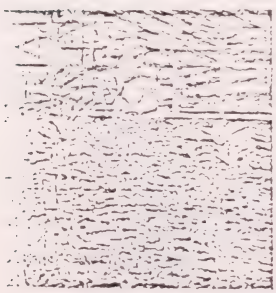
Altogether, with 48,500 employees in 400 different locations, and with sales of $1.8 billion in 1972, Champion International is the 62nd largest manufacturing company in the United States.

For more information about Champion International, write Public Affairs Department, 777 Third Avenue, New York, New York 10017.



Fred, the squirrel, and Wayne Hite, silviculturist, help keep our Montana timberlands producing abundantly.

Our reforestation program is one of the most advanced in the industry. Last year we planted over 21 million seedlings. But while this program makes extensive use of computers and other sophisticated techniques, we are not above accepting help from our friends in the forest. Fred lives in a seed production area where the trees are particularly healthy. He spends his time in the very tops of these trees, dropping cones, some of which Mr. Hite gathers and grows into seedlings.



Champion International

July 23, 1973 U.S.A.W.U.R. Exhibit F

OUR COUNTRY'S GASOLINE SHORTAGE

PROGRESS REPORT NUMBER 1 FROM AMOCO OIL COMPANY

New York Times
5/7/73

Exhibit G

THE GREAT AMERICAN APPETITE.

America has a tremendous appetite. Not just for food, but for the natural resources that produce energy: gas and petroleum.

And we're running short of them, because the country is growing so fast, and using up its currently available resources even faster. People call it the Energy Crisis, and the current gasoline shortage is part of that crisis.

WHAT AMOCO IS DOING ABOUT THE SHORTAGE.

We want you to know that we're doing all we can to get as much gasoline to you as possible. In fact, we're making more gasoline than ever before in our history, up 15% in the last two years.

Amoco refineries are running at over 95% of capacity (the practical maximum with available crude). This is well above the industry average.

What's more, our refinery throughput is up about 100,000 barrels a day since 1971. And we're now importing more foreign crude than any other time in our history. Even though foreign crude is becoming more and more difficult to get.

Also, we want you to know we're working on new refining and conversion processes and new pipeline capabilities that will increase our output even more. And we're intensifying our search for crude oil to supply our refineries. This year, Amoco and its affiliates will spend more on exploration and crude oil production than in any year before.

We wish we could say we'll solve the problem soon—and all by ourselves. But we can't do it alone. We need everyone's help in the oil industry, in business, in government. And in every walk of American life.

WHAT YOU CAN DO.

If every American used just one gallon of gasoline less every week, there wouldn't be a shortage.

And there are many ways you can cut back. Walk a little more. Many times you can walk to the store when you have small purchases to make.

Form car pools. You and your neighbors probably go to a lot of the same places regularly. Why not go together? To work. To the train. Even to meetings, parties and get-togethers.

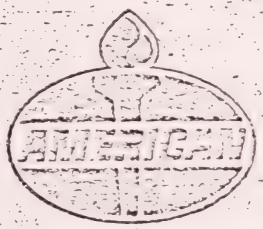
Combine trips. Plan ahead so you don't have to make separate trips to the cleaners, and the drug store, and the grocery store.

Keep your car in top shape. A poorly tuned engine can reduce your gas mileage up to 10%.

Slow down. If you drive 50 miles an hour instead of 60, you can save about one gallon in ten. And take it easy when you start up. Jackrabbit starts eat up gasoline, too.

In summary, the gasoline shortage is no one individual's fault, but a combination of events. And it's up to all of us to find the solutions. And all at once.





Amoco Oil Company

Exhibit "G" (cont.)

10/2 Chase

DOYLE DANE BERNBACH INC., ADVERTISING 20 WEST 43rd STREET, NEW YORK N.Y. 10036

CLIENT: MOBIL OIL COMPANY, 150 E. 42ND ST., NYC PRODUCT: ENERGY CAMPAIGN

TITLE: "LIFE AND DEATH" CODE NO: MBEN3146 LENGTH: 60 SEC.



1. ANNCR: There are three stages in the life of an oil field.



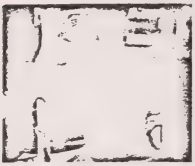
2. It has a beginning, a middle, and an end.



3. (MUSIC)



4. (MUSIC)



5. (MUSIC)



6. (MUSIC)



7. (MUSIC)



8. A field that's been fully developed



9. will usually produce at its peak for a relatively few years,



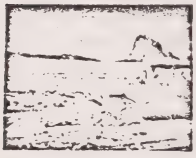
10. and then decline by as much as ten percent a year.



11. And we're sorry to have to tell you



12. that most oil fields in the U.S. today are past their prime.



13. It takes nature millions of years to create an oil field.



14. It takes man only twenty or thirty years to use it up.



15. That's one of the reasons why



16. there's a worldwide shortage of crude oil today.



17. What's Mobil doing about it?



18. Our crews are working



19. all over the world to

1ST AIR DATE:
PROGRAM:
TIME:
1ST AIR DATE ON:
ABC
CBS
NBC

Exhibit H

CAHN-ERICKSON, INC.
Home Office: 485 LEXINGTON AVE., NEW YORK 17, N.Y.

Television—Radio

nt EXXON COMPANY, U.S.A.
uct
W.O. no. 3-83-1343
length :60 TV Video Tape

script title "SPOKESMAN"
rev. no. "AS PRODUCED" 7/2/73
film or el code no. SJXG3624
air date 7/7/73

VIDEO	AUDIO
1. CLOSE UP OF BUD WILKINSON	I'm Bud Wilkinson with a message for Exxon customers. You've been hearing a lot lately about the gasoline situation and how it might affect the use of your automobile. You're probably concerned and understandably so. Well, -- Exxon wants you to know that they are doing their best to provide more gasoline for you. In the first six months of this year, Exxon's five refineries produced considerably more gasoline than they did in the first half of 1972. And barring any unforseen interruption, these refineries will continue to produce gasoline at record levels. Your Exxon dealer is receiving his fair share of this production. But, the tight industry supply situation has brought demands on Exxon is excess of their supply capability. If everyone would drive more efficiently, it would help ease the problem.

Exhibit I

-214-

485 LEXINGTON AVE., NEW YORK 17, N.Y.

client EXXON COMPANY, U.S.A.
product
O. no. 3-83-1343
length :60 TV Video Tape

script title "SPOKESMAN"
rev. no.
film or et code no. #SJXC3624
air date 7/7/73

"AS PRODUCED" 7/2/7

VIDEO	AUDIO
PULL BACK TO REVEAL STATION.	If you multiply any gas savings by the 85,000,000 cars on the road today ... well, we think you get the idea. Exxon believes that together we can keep things moving.
DISS. TO EXXON LOGO AND "TOGETHER WE CAN KEEP THINGS MOVING"	

Exhibit I
(cont'd)

Exxon Corp. :60 TV #SICM6441

VIDEO:	AUDIO:
OPEN ON MEN BOARDING HELICOPTER.	SFX: MOTOR NOISES
	ANNCR VO: These oil men are commuting to work...
CUT TO INSIDE OF PLANE.	...30 miles out in the Gulf of Mexico.
CUT TO DOOR OF PLANE BEING SHUT.	
CUT TO HELICOPTER LIFTING OFF.	SFX: BEGIN MUSIC AND CONT. THROUGHOUT.
CUT TO VARIOUS AERIAL SHOTS OF HELICOPTER IN FLIGHT.	They're working offshore because our country is using more oil and gas than the existing fields under the United States can supply. Exxon has been searching for oil and gas out here for over 25 years.
CUT TO MEN INSIDE 'COPTER.	
CUT TO MORE AERIAL SHOTS OF 'COPTER IN FLIGHT.	You see, in many places the

Exhibit J

VIDEO:	AUDIO:
	ANNCR. VO: ...same rock formations that contain oil and gas under the land, extend out under the sea for hundreds of miles. It's not any easier or cheaper..
CUT TO AERIAL VIEW OF HELICOPTER LANDING.	...to drill under water. Just the opposite. But as long as our job is to...
CUT TO GROUND SHOT OF PLANE LANDING.	...help meet the growing need for more oil and gas, we don't have much choice.
CUT TO MEN LEAVING PLANE.	Our men have got to go where the energy is.
MEN GO DOWN FLIGHT OF STAIRS.	Exxon -- we'd like you to know.
EXXON LOGO. "WE'D LIKE YOU TO KNOW" SUPERED UNDERNEATH.	

Exhibit J (cont)


This is the "High, Wide and Handsome" Service Territory of
Pacific Power & Light Company
WASHINGTON
MONTANA
IDAHO
WYOMING
OREGON
CALIFORNIA
A map of the service territory of Pacific Power can only suggest the dimensions of this utility system, which does business in 240 communities and surrounding environs in thriving areas of six western states.
The utility supplies electricity to 530,000 customers, water to 24,000 consumers, central steam heat service to 633 office and mercantile buildings in two cities and controls telephone operations with 101,000 telephone stations. Only one city served is a metropolitan area, Portland, Oregon, where it has its general offices, and only 22 have populations ranging from 5,000 to 50,000. The remainder are under 5,000. Their size is a factor in providing opportunities for employees to share in civic responsibilities and leadership for planning and directing constructive growth for the future.
The territory encompasses areas in both the Rocky Mountain and Pacific Northwest regions, and the Company thus benefits from a great variety of natural resources that support a diversity of industrial, agricultural and commercial activity. Because of the spread of power demand through two time zones, power operations can achieve optimum utilization of the output of steam-electric plants in Washington, Wyoming and Oregon and hydro-electric plants in Oregon, Washington, Montana and northern California.
Pacific Power controls extensive reserves of low-sulphur coal in Montana, Washington and Wyoming that it can depend upon for fueling its own plants and for sale to other utilities.
Investor inquiries are welcome – Write
Room 1307, 920 S.W. Sixth Avenue
Portland, Oregon 97204

Exhibit K

Why does my electric bill keep going up year after year?"

Two things are pushing electric bills up. First, you are probably using electricity in more ways in your home year after year. Second, all of the costs involved in providing you with electric service have been rising steadily.

High use means higher bills

For many years, your increased use of electricity was totally responsible for increases in your bills. Higher bills weren't the result of any increases in price. In fact, the average price paid per kilowatt-hour for residential electricity in the U.S. dropped steadily from the middle 1920s to the middle 1960s—from more than 6 cents a kilowatt-hour in 1925 to less than 3 cents a kilowatt-hour in 1965. So during that period, the average price for electricity used in America's homes was actually being cut in half.

All the while, your use of electric service was going up. And it probably still is. If yours is the average home, you're still adding new electric appliances and equipment every year or so. For example, air conditioning, color TV, additional TV sets and radios, hi-fi systems, central vacuum cleaning systems.



Exhibit L

Rates now going up

Unfortunately, higher rates as well as higher use will now be pushing electric bills up. As everyone knows from his own experience, almost all the costs of living and doing business have been going up substantially in recent years—the cost of fuels, building materials, all kinds of supplies, wages, interest on borrowed money, everything.

Our costs increasing

Two other cost factors have also entered the picture. One, the supplies of some of the world's fuels are growing more scarce. This is requiring us to pay much more for fuels. And it also necessitates huge expenses for research and development efforts aimed at finding new methods of power generation that conserve scarce fuels. Research and development in nuclear fuels and nuclear power plants, for example.

A second consideration is environmental control. It has become such a problem that all manufacturers—including the electric companies—are increasing efforts to help control it. We are adding equipment that removes pollutants from our smokestack emissions. We are buying and using fuels that are cleaner but much more expensive.

These research efforts and environmental control efforts mean greatly increased costs for the electric company that serves you.

When you add all the other increased costs of bringing you dependable electricity, you can see why rates must go up. And so long as these costs continue to rise, your electric rates must continue to rise along with them.

Electricity still a good value

Your electric rates still have a long way to go before they catch up to almost everything else. Think of how much and how long electricity works for you for the price you pay each month. Then compare that price with anything else you have to buy. Even with increased rates, the electricity you use in your home remains an exceptional value.

The people at your Investor-Owned Electric Light and Power Companies

For names of sponsoring companies, write to Power Companies, 345 Avenue of the Americas, New York, New York 10019

Exhibit L (cont)

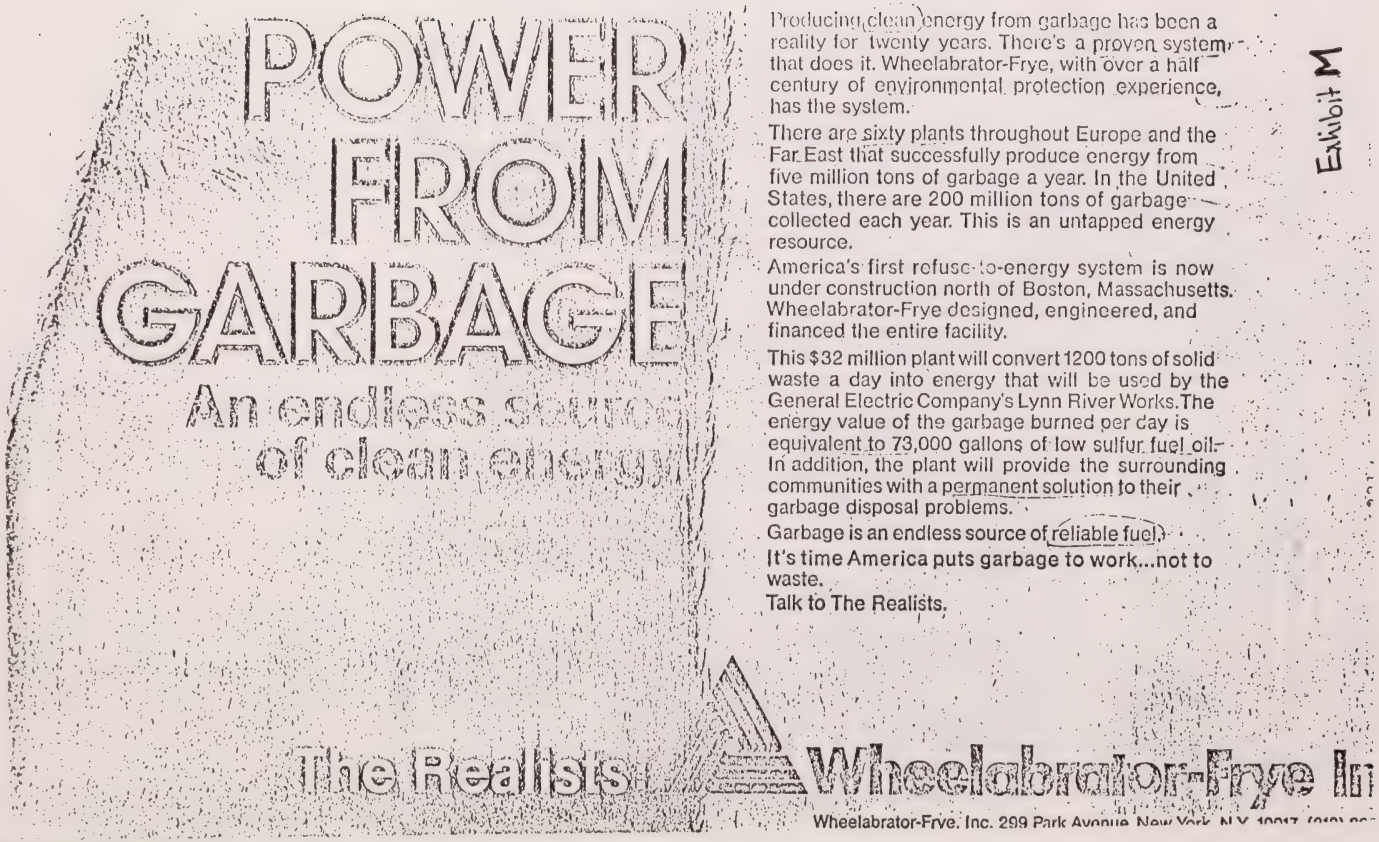

POWER FROM GARBAGE
An endless source of clean energy.
Producing clean energy from garbage has been a reality for twenty years. There's a proven system that does it. Wheelabrator-Frye, with over a half century of environmental protection experience, has the system.
There are sixty plants throughout Europe and the Far East that successfully produce energy from five million tons of garbage a year. In the United States, there are 200 million tons of garbage collected each year. This is an untapped energy resource.
America's first refuse-to-energy system is now under construction north of Boston, Massachusetts. Wheelabrator-Frye designed, engineered, and financed the entire facility.
This $32 million plant will convert 1200 tons of solid waste a day into energy that will be used by the General Electric Company's Lynn River Works. The energy value of the garbage burned per day is equivalent to 73,000 gallons of low sulfur fuel oil. In addition, the plant will provide the surrounding communities with a permanent solution to their garbage disposal problems.
Garbage is an endless source of reliable fuel.
It's time America puts garbage to work...not to waste.
Talk to The Realists.
The Realists.
Wheelabrator-Frye In
Wheelabrator-Frye, Inc. 299 Park Avenue, New York, N.Y. 10017

Exhibit M

In ten years, we'll need enough electricity to run two Americas.

General Electric is doing something about it.

GE is working to meet America's need for electricity. With a new design to make five GE nuclear plants do the work of six. With a new kind of fossil fuel plant that can be built in half the time. With gas turbine power plants to help meet today's shortage.

Every day, electricity is being called on to do jobs never dreamed of years ago.

Electricity is cleaning our air and water. Reducing crime and accidents. Fighting disease.

If electricity is going to keep doing all these jobs, we need more power plants. Now. But because of today's concern for our energy resources and the environment, efforts to build new plants are often blocked.

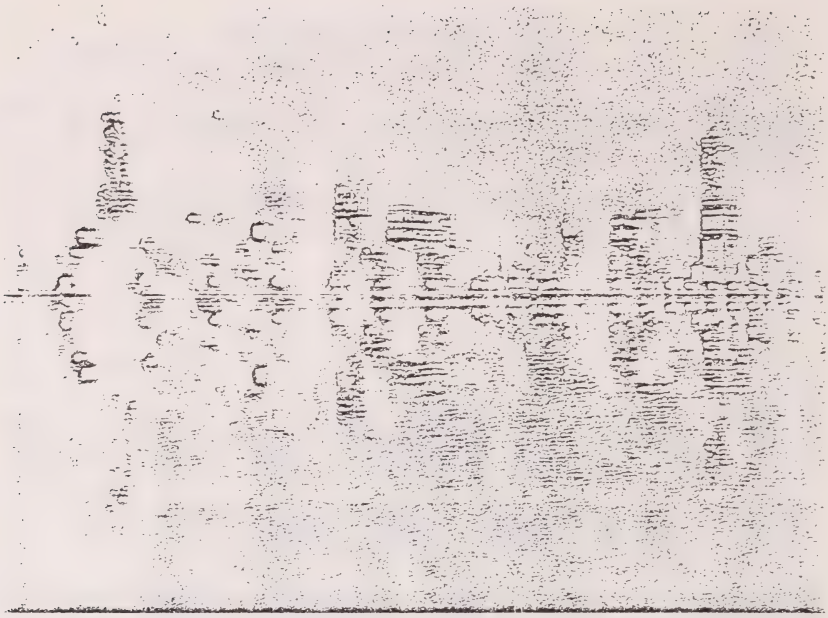
GE is trying to solve this dilemma. With new thinking. New ideas. New technology.

Nuclear power is one answer. Many experts feel the best way to provide large amounts o clean energy in the next decad is nuclear power.

General Electric has a ne design for nuclear plants. Th BWR/6.

It's designed to produce mor electricity for its size than an GE nuclear plant yet. Five c them will be able to do the wor of six of our earlier nuclea plants. And like all nuclea plants, it adds no smoke c harmful oxides to the air.

Exhibit N



But nuclear power is just one answer.

More efficient fossil fuel plants.

Over 80% of the electricity in this country is generated by fossil fuel plants.

GE has a totally new design for such plants. It's a combination steam and gas turbine—called STAG for short.

In a STAG plant, up to 70% of the heat from the gas turbine exhaust is used to make more electricity. Another advantage: STAG plants can also be built in half the time of conventional plants. They can be built in 2½ years instead of 5.

Power for today's needs.

But some utility companies can't even wait 2½ years for new power plants. They need them right now.

GE has a way to help right now. Use powerful gas turbines to generate electricity.

Gas turbines can be set up almost anywhere in a matter of months. They can be turned on in minutes to help meet peak demands. And a single gas turbine can make enough power for 25,000 people.

There's a tremendous need for electricity in this country. GE and the utility companies are coming up with new technology to help meet this need.

Today, tomorrow and ten years from now.

Progress for People.

GENERAL ELECTRIC

Exhibit N (cont)

MISCONCEPTION
It doesn't make sense for utilities to promote the use of electricity in the face of an "energy crisis."
FACT
Electricity must be available whenever—and in whatever quantity—customers require it. Since it can't be stored in large amounts, generating facilities must be available to meet the period of highest use. Since the use fluctuates greatly, part of an electric utility's marketing job is to try and level the highs and lows as much as possible in order to achieve the most economical use of costly electric power facilities. For customers of The Southern Company system,

Exhibit O

Part of 1,183-ton turbine generator being installed. Completed plant will cost over $440 million.

the peak period of use is the summer—primarily because of air conditioning. Therefore, the system promotes the use of electric heating in the winter—the major off-peak period. The system also promotes the off-peak use of security lighting at night. This balancing of electric energy requirements helps the operating companies achieve better plant utilization. This, in turn, helps keep electric rates lower than they would be otherwise. Thus, customers as well as stockholders benefit. If you'd like to know more, write for our pamphlet on electric utility marketing. The Southern Company, Dept. 342DW, P.O. Box 720071, Atlanta, Georgia 30346.

The Southern Company system working toward tomorrow, today.

Alabama Power Company Georgia Power Company Gulf Power Company Mississippi Power Company Southern Services, Inc. Southern Electric Generating Co.

-225-

Exhibit O (cont)

McCANN-ERICKSON, INC.
Home Office: 485 LEXINGTON AVE., NEW YORK, N.Y. 10017

Television - Radio

client EXXON COMPANY, U.S.A.
product
T.C. no. #8JH03635
length :60 Color TV

script title "WARM HOUSE"
rev. no. 7/31/73;8/3/73-R.1
film or tape code no. 8/7/73-R.2;8/8/73-R.3
air date 8/9/73-R.4;8/15/73R.5
8/15/73R.6;8/16/73R.7
8/16/73R.8;8/20/73R.9
8/23/73-R.10;9/18/73-R
AS PRODUCED

VIDEO	AUDIO
1. OPEN ON STOCK SHOTS OF FOOTBALL FAME BEING PLAYED IN F TALLY COLD, INCLEMENT WEATHER.	SFX: CROWDS ROARING AND GUN SFX FOR END OF GAME. ANNCR: (V.O.) Another bone-chilling games's over ... another upset... (... ad lib sports announcer's remarks.)
2. CUT TO NEW ANGLE TO REVEAL BU WILKINSON IN COMFORT OF DE WATCHING FOOTBALL GAME ON TE VISION. 3. CUT TO TIGHT SHOT OF BUD.	BUD WILKINSON: (ON CAMERA) I'm Bud Wilkinson for Exxon.
4. CUT TO NEW ANGLE AS BUD GETS UP TO TURN OFF TV SET. 5. CUT TO NEW ANGLE AS BUD INDICATES GROWING STORM OUTSIDE OF DEN WINDOW.	You know, the next best thing to being at a game is watching it in a warm, comfortab home.
6. CAMERA FOLLOWS BUD AS HE WALKS TO BOOKSHELVES AND STANDS NEXT TO THEM.	Exxon wants you to know it will do its best this winter to meet the heating oil needs of the homes it serves directly and to supply the many independent compani who sell Exxon heating oil to their custo
7. CUT TO NEW ANGLE AS BUD WALKS TO WINDOW. WE SEE IT HAS STARTED TO SNOW.	But even if we have a normal winter, home heating fuel is likely to be in tight supply. And one unpredictable factor is the severity of the winter itself.

Exhibit P

McCANN-ERICKSON, INC.
Home Office: 485 LEXINGTON AVE., NEW YORK, N.Y. 10017

Television - Radio

client: EXXON COMPANY, U.S.A.
product: #SJR03636
W.O. no.
length: :60 Color TV

script title "WARM HOUSE"
rev. no. 8/23/73-R.10
film or tape code no.
air date Page 2

VIDEO

8. CUT TO NEW ANGLE AS BUD WALKS TOWARD CAMERA.

That's why Exxon suggests a few efficiency tips that can help you get the most from your fuel and your dollars. Be sure to use your storm windows. Be sure your oil burner is operating at peak efficienc

9. CUT TO SHOT OVER BUD'S SHOULDER AS HE ADJUSTS THERMOSTAT.

Set the thermostat in the daytime to as low a degree as is comfortable and leave it there.

10. CUT TO CU OF THERMOSTAT AS BUD'S HAND TURNS IT DOWN TO ABOUT 65°.

Turn the thermostat down a few degr at bedtime.

11. CUT TO MEDIUM SHOT AS BUD CLOSES FLUE.

And don't forget to close your firepl flue when not in use.

12. CUT TO NEW ANGLE AS BUD TURNS AND WALKS TO TV SET.

Exxon will continue to do its best to satisfy its customers' needs. But if all of us would use heating oil a little more sparingly ... it would b a big help.

13. AS BUD TURNS ON TV, WE CUT TO SCREEN AND SEE: EXXON EMBLEM.

Exhibit P (cont)

You've heard gasoline is short. Here are 8 ways to get along.

There's a lot we all can do to make our gasoline supplies go farther this spring and summer.

If each of America's 85 million cars consumes a little less fuel, we may get through the heavy driving season with only occasional local gasoline shortages.

But that's a big if.

To minimize the gasoline shortage, we need to take action now. Here are eight important ways to help:

1. Slow down to 50
If we limit our maximum speed to 50 mph, the overall gasoline savings can be enormous. The slower you drive, the less fuel you use. At 50, about 11 percent less fuel is used than at 60. Many highway drivers can save as much as one gallon in seven by cutting back to 50. In both mileage and money, "fifty is thrifty."

2. Encourage car pools
Car pooling can be pushed hard by state and local governments, together with business and labor. A third of all automotive travel is to and from work, but most of it involves just one person per car. Reduced tolls on bridges and highways, special parking arrangements, and other incentives can stimulate multiple occupancy of cars used for commuting. Possible savings run to many millions of gallons a day.

3. Improve driving habits
Avoid jackrabbit starts. Drive at steady, moderate speeds without sudden acceleration or braking. Don't let your engine idle more than a minute or so. These and other gasoline-conserving practices should be heavily promoted by public and private organizations. The accumulation of little savings can add up to impressive volumes of gasoline conserved

4. Go easy on the air conditioning
Don't forget you're paying for that cool air with gasoline—up to 15 percent more in cars equipped with air conditioners. Avoid use of air conditioning on days when the heat is only marginally uncomfortable. Save fuel by moderating the temperature from the "coldest" setting.

5. Improve car maintenance
Get an engine tuneup for better mileage. Keep tires inflated to proper pressure and wheels aligned. Radial tires save gasoline. Again, the little savings add up to a lot

6. Plan the use of your car
Cut down on unnecessary trips by combining several errands in one. Get the groceries on the way home from school. Make shopping lists to avoid extra trips. Eliminate short rides by bicycling or walking; the garaged car gets unbeatable mileage.

7. Consider other ways to travel
Before starting a trip, look into alternate means of transportation. Can you take the train, bus, subway, or plane and leave the driving—and fuel problems—to someone else?

8. Stagger work hours in cities
If urban workers didn't all travel at the same time, traffic would flow faster and smoother, thus reducing fuel consumption. Municipal authorities can work with business and labor to accomplish a good deal in this direction.

By and large, these are painless ways to reduce gasoline consumption. As dividends, they offer the possibility of attractive money savings, lessened air pollution, and even some preservation of life and limb.

As we enter the vacation driving season, it seems likely that even though gasoline supplies are short, there are things we can do to get along.

Mobil®

This ad appeared in the New York Times on April 26, 1973.

Exhibit Q

THE WALL STREET JOURNAL, FRIDAY, DECEMBER 7, 1973

MR. PRESIDENT

We Agree With Your Messages On the Energy Crisis

You ordered a number of measures to conserve energy and to make more energy sources available. You called upon the Congress and the entire nation to take other steps to solve the energy crisis. We applaud your directive banning the conversion of power plants from coal to oil. We endorse your efforts to speed up nuclear power plant construction and licensing. In fact, we agree wholeheartedly with what you said.

But, Mr. President, You Omitted Two Imperative Steps

Exhibit R

Immediate action on these two steps, by both you and the Congress, will go a long way toward resolving our energy crisis—particularly in the assurance of an adequate electric power supply.

I Action: Modify the Environmental Protection Agency requirements which would measure power plant sulfur-dioxide emissions at the top of the chimneys. The emissions are not going to stay there. They will be dissipated. Instead, measure them realistically, at ground level . . . where people, animals and plants live and grow!

Result: Power plants could then burn the billions of tons of mineable, higher-sulfur Eastern coal now available. This coal—when used in conjunction with extra-high chimneys ("tall stacks") and air monitoring devices, and burned at reduced levels during periods of poor atmospheric conditions—represents the most workable and satisfactory answer to the sulfur problem at this time. With these controls it can be burned without violating air-quality standards.

II Action: Make available for leasing for mining the large reserves of Government owned low-sulfur coal in the Far West. At the same time add strict but attainable standards for reclamation of the land after mining.

Result: These coal reserves, withheld from use several years ago by the Department of the Interior, would provide billions of tons of critically needed low-sulfur coal for the nation's power supply. And the land would be restored for as good a use as at present. Possibly better.

These two steps will benefit the nation immediately in several ways:

- Consumers will continue to receive the electric power they need.
- The use of dwindling oil and gas supplies by electric power plants will be sharply reduced, making these fuels available for other critical needs.
- A reasonable balance between the need for energy and the need for a wholesome environment will be maintained.
- The economy of the nation will be safeguarded.
- And a long step forward will have been taken toward your goal of making our nation self-sufficient in energy by 1980.

Exhibit R (cont)

Mr. President, Here's What We're Already Doing

As a major producer of electricity, we're taking positive action to serve our 1,700,000 customers in the states of Ohio, Indiana, Michigan, Virginia, West Virginia, Kentucky and Tennessee.

Capacity: We now have under construction additional generating capacity of 4,800,000 kilowatts, both coal-fired and nuclear, and have plans to start construction of another 2,600,000 kw in the near future.

Fuel: We are mining, or contracting for, the additional tons of coal required to fuel these plants. And we are arranging the means to assure its delivery.

Environment: We are spending $300,000,000 in the next two years alone to protect the environment by:

1. Building giant cooling towers.
2. Building plant chimneys over 1,000 feet high.
3. Installing highly efficient dust-collecting equipment.
4. Installing elaborate systems to monitor the air at ground level near our power plants.
5. Pursuing our exploration of other clean-air systems.

Conservation: We ar ur customers not to waste electricity and to use only what they need. We are also cutting back our own thermostats, reducing vehicle speeds, and turning off our outdoor decorative lighting.

Our Efforts Have Produced Results

No electric power shortage exists anywhere on the seven-state American Electric Power System.

No shortage will ever exist as long as we are permitted to build, without unreasonable delay, the new facilities required for the generation and delivery of electric power.

And as long as we are permitted to use, without unreasonable restriction, the nation's most abundant, most available fuel . . . coal.

To Do Our Job All We Need Is Half A Chance

An electric power shortage exists in some areas of the country now. It can be prevented from spreading across the entire country—and, indeed, can be solved where it now exists—if the electric utility industry is given a reasonable chance to do its job.

In short, let us burn coal, the available fuel. Let us burn it without unnecessary re such as unreasonable EPA emission standards and the unrealistic proposal for short-term variances. A short-term variance which permits a power plant to use available coal, instead of unavailable oil, on a temporary basis is no answer at all. No coal supplier could possibly develop the necessary mining facilities under such an uncertain, short-term proposition.

Unless coal can be used as more than an interim fuel, this abundant resource cannot solve our present or future energy problems.

Mr. President, we do have an energy crisis of the greatest seriousness on our hands. Fortunately, the Federal government itself has the means immediately at hand to largely deal with it. *Won't you please take the necessary steps by modifying the EPA regulations and making government-owned, low-sulfur, Western coal available?*

In your second energy message you said, "We need new rules if we are to meet this challenge." We could not agree more. Immediate action toward new rules is action in the national interest.

Donald C. Cook
Chairman

American Electric Power System

Appalachian Power Co., Indiana & Michigan Electric Co., Kentucky Power Co., Kingsport Power Co., Michigan Power Co., Ohio Power Co., Wheeling Electric Co.

Exhibit

Exhibit 82: FTC Memorandum—Corporate Image Advertising, Division of National Advertising, March 18, 1974

CORPORATE IMAGE ADVERTISING

* * * * *

MEMORANDUM TO THE COMMISSION

SUBMITTED BY:

THE DIVISION OF NATIONAL ADVERTISING

MARCH 18, 1974

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* See exhibit 81

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OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : Commission

DATE: March 18, 1974

FROM : Ted Garrish, Chuck Ludlam, Paul Foldes, Marvin Lange, Heidi Sanchez, Bruce Parker, Craig Annear and Ellis Ratner

SUBJECT: Corporate Image Advertising.

I. INTRODUCTION

On January 9, 1974, a Petition (Appendix A) was filed with the Commission on behalf of three United States Senators and three Representatives demanding Commission initiative to deal with corporate image advertising which includes claims and representations concerning environmental and "energy crisis" issues. 1/ Specifically, petitioners requested (1) amendment of the Commission's Ad Substantiation Resolution [36 Fed. Reg. 12058, amended 36 Fed. Reg. 14680 (1971)] to reach non-product advertising and to require advertising documentation to be submitted to the Commission at the instance of any consumer, as well as the Commission; (2) that sub-

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1/ The Commission has received numerous complaints over the past two and a half years: Caterpillar Tractor ad on the interstate highway system, complaint filed by Center for Science In The Public Interest, July, 1971; Bethlehem Steel Company ad on strip mining, Senator Phillip Hart, August, 1971; Potlatch, Inc., ad regarding pulp mill pollution and St. Regis Paper Company ad regarding water pollution control, complaint filed by Public Action to Protect Environmental Resources, May, 1972; Westinghouse Corporation ad on breeder reactors, Senator Mike Gravel, October, 1972; Commonwealth Edison Company ad on its conservation program, Citizens for a Better Environment, January, 1973; and Chrysler Corporation ad on auto emissions, Center for Science in the Public Interest, April, 1973. The staff has investigated the facts upon which these complaints are based as well as the nature and extent of image advertising but has until now been unable to reach agreement on the applicable Constitutional standards.

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

stantiation for public disclosure be required of 16 selected ads appended to the petition; (3) and that environmental and energy-related claims in all commercial advertising by oil, utility and electric appliance companies be substantiated.

In addition to the above petition, the Commission has in the past four months received complaints from Senator Thomas McIntyre regarding "energy crisis" advertising (November 21, 1973), Mr. John R. Quarles, Deputy Administrator of the Environmental Protection Agency, regarding advertising by PPG Industries on leaded gasoline (November 29, 1973), and Mr. Russell E. Train, Administrator, Environmental Protection Agency, regarding an advertisement by the Chevrolet Dealers Association on removal of vehicle emission control systems (January 17, 1974).

Both the petition and the complaints raise serious and unresolved issues, both statutory and constitutional, concerning the Commission's jurisdiction over corporate image advertising. This memorandum, after a brief description of the subject area, will address itself to those issues (Sections IV and V). We believe that our research on these issues provides a sound basis for investigating certain image advertisements relating not to the energy crisis but to the environment. We have analyzed these ads, drawn primarily from our monitoring, both from a legal and factual viewpoint, and have recommended that investigational letters be sent to four advertisers (Sections VI and VII). Drafts of the investigational letters the staff recommends be sent are then presented (Section VIII). With regard to the ads in the petition and the complaining letters, we have concluded that the ads (with two exceptions) are not appropriate subjects for further investigation.

Our reasons are discussed in Sections IX and X. While the petition's other proposals require some more evaluation, our recommendation as discussed in Section XI, is that the petition not be granted at this time. Finally, we have attached draft replies to the petitioners and the complainants (Appendix B, C, D, and E).

II. THE NATURE, EXTENT AND FUNCTION OF CORPORATE IMAGE ADVERTISING

Corporate image advertising 2/ is that which describes the corporation itself, its activities or its views, but does not explicitly describe any products or services sold by the corporation. The term is therefore sufficiently broad to include on the one hand ads that indirectly promote a product, and, on the other, political lobbying. Gasoline company ads that describe the careful training of service-station owners are a familiar example of the former; ads by the same companies that asked Congress to pass the Alaska Pipeline bill are an equally familiar example of the latter. Between these extremes lies an extensive middle ground of ads which describe the corporation's behavior in such diverse areas as employment policies, new product research or pollution control.

The benefits which companies expect from the ads are as diverse as the ads themselves. A recent survey indicated that corporate executives, engaged in image advertising, hoped to benefit their company in the following areas:

2/ The terms "corporate" or "general promotion" advertising are sometimes used to describe such advertising. Leading National Advertising (a service that tabulates expenditures) groups under the latter heading ads that do one or more of the following: (cont'd

Product sales - 47%

Stockholder/financial relations - 64%

Consumer relations - 55%

Trade (i.e., supplier or business customer) relations - 46%

Government relations - 32% 3/

But despite the variety of motivations behind them and the diversity of the ads themselves, two trends have become clear. First, the amount spent on corporate image advertising has increased dramatically in the past few years. By a conservative estimate, $268 million was spent in this area in 1972, up 20% from 1970. More than half ($161 million) of this was spent in television, up about 55% from 1970. Second, this rise in expenditures has been accompanied by a similar rise in corporate interest about the impact on product sales

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2/ (cont'd) 1. It must educate, inform, or impress the public regarding the company's policies, functions, facilities, objectives, ideals, and standards;

2. It must build favorable opinion about the company by stressing the competence of the company's management, its scientific know how, manufacturing skills, technological progress and product improvements, and its contribution to social advancement and public welfare, and on the other hand, to offset unfavorable publicity and negative attitudes;

3. It must build up the investment qualities of its securities, or improve the financial structure of the company; or

4. It must sell the company as a good place to work. Publishers Information Bureau, Inc., Magazine Service, 1972. We are primarily concerned with the second of these features.

3/ "Are Public Relations Executives Becoming More Involved With Corporate Advertising?" Public Relations Journal, November 1973; at 29 (some respondents gave multiple responses).

of image advertising.[4/]

In our view, this increasingly powerful force on the national advertising scene can no longer be ignored.

III. THE ECONOMIC IMPACT OF IMAGE ADVERTISING

Any Commission action concerning corporate image advertising must of course be consistent both with the statutory mandate of Section 5 and with the First Amendment's protection of speech, press, and petition. Those issues cannot be appropriately resolved by abstract legal discussion. Rather, it is critical to address those issues in light of the economic effects on consumers and businessmen of image advertising. These economic effects are well documented, and are the key to determining the status under the First Amendment of particular corporate image advertisements. Accordingly, we shall discuss the literature relating generally to the economic effects of corporate image advertising, and then turn immediately to discussion of the First Amendment.

Extensive research confirms the effectiveness of corporate image advertising in furthering the corporation's economic interests, whether in increasing sales, fostering investment in the corporation's stock, or encouraging recruitment. We have already noted that these are the purposes of executives who engage in such advertising. A variety of sources confirm that these purposes are being achieved.

4/ "How Public Relations Executives View Their Image Advertising Roles," Public Relations Journal, November 1971, at 28; "Are Public Relations Executives Becoming More Involved With Corporate Advertising," Public Relations Journal, November 1972; at 25.

In one study corporate image advertising was found to be more effective than product advertisements in inducing favorable purchase attitudes 5/ among industrial purchasers. Eighty businessmen responsible for making industrial purchases were shown both product and image advertising, and asked which was more likely to induce them to solicit a bid from the sponsoring company. Image advertising was found to be the more effective. The image advertisement was also superior at inducing interest in the company as a future supplier and belief in supplier dependability and product quality.

Other research has also found image advertising effective in creating favorable attitudes towards the sponsoring corporations. 6/ A major, eight year, five part study conducted by Thomas E. Ryan, Inc., for Time magazine, between 1964 and 1972 7/ found that men in upper income, managerial and professional areas who have seen one or more of a company's image advertisements have more favorable opinions about that company than those who have not read any of the company's image advertising. Specifically, exposure to corporate image ads was found

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5/ Lehman, Martin A. and Richard N. Cardozo, "Product or Industrial Advertisements?" 13 Journal of Advertising Research 43 (April, 1973).

6/ See Grass, Robert C., et al., "Measuring Corporate Image Ad Effects," 12 Journal of Advertising Research 15 (December, 1972) (DuPont Advertising tested before and after first image advertising in several years found to be effective).

7/ "A Pilot Survey to Test Techniques of Measuring the Effects of Corporate Advertising," July 1964; "Corporate Advertising Effectiveness," Fall 1965; "Measuring Corporate Advertising Effectiveness," 1966; "Measuring Strategic Advertising Effectiveness," 1971; "Strategic Advertising and Attitudes toward Corporations." 1972.

to enhance the believability of new product claims, interest in investing in the company's stock, respect for the company's research and development capacities, and favorable recruitment referrals. Indeed, in the 1972 Ryan study corporate image advertisements emphasizing corporate social responsibility -- notably pollution control -- favorably influenced even individuals opposed to the theory of corporate social responsibility.

Similarly, a Barron's study found that corporate image advertising had induced the interest in, and the purchase of, the advertiser's stock by 60% of the sophisticated money managers surveyed.8/

Extensive anecdotal evidence confirms the economic impact of corporate image advertising.9/ There is general acknowledgement in the business community that image advertising brings long range economic benefits to a company.10/

8/ "The Impact of Corporate Advertising on the Institutional Money Manager," Erdos and Morgan, Inc., 1971.

9/ "Corporate Advertising: Those who Try It...Like It," Public Relations Journal, November 1972, 43-58 (Tenneco, Burlington Northern, Liberty Mutual, Sperry Rand, Chrysler Motors, State Farm Insurance Companies, Metropolitan Life, Trans Union, North American Rockwell); "Communicating the Total Corporate Personality," Magazine Publishers Association, Inc. 24-28 (I.B.M., Northeast Airlines, St. Regis, Olin Corporation, Wilson Sporting Goods, Atlantic Richfield, American Can, International Paper); "Accountability," Newsweek Magazine, 1965 (Monsanto, Westinghouse); "Texaco--'Putting Aesop to work'," Public Relations Journal, November 1973, at 44; "RCA--'The Electronic Way'," Public Relations Journal, November 1973, at 49.

10/ Harding, Murray, "Corporate v. Product Advertising," Industrial Marketing, September 1967, at 59; Skylar, David "A Quiet Revolution...The Rise of the Corporate Image," Industrial Marketing, September 1967, at 63.

Corporate image advertising has long been recognized as particularly valuable during times of shortages, including wars and recessions, when it may not be appropriate directly to advertise products but nevertheless highly desirable to maintain reputation for when the shortages are past. Among the "Thirty Essential Jobs for Advertising when the Product is Oversold" are: to maintain customer good will and acceptance of brands, to enhance the reputation of the company for making quality products, explain the shortages, and to speed the news of innovations or efforts to ease the shortages. 11/ Studies of advertising before, during and after the 1949, 1954, 1958, and 1961 recessions found that firms which did not cut their advertising during the recession did much better in sales and profits in the year following these recessions than those who had cut their advertising budgets. 12/ Testimonials of advertising executives obtained over a seventeen-year period substantiate the value of corporate image advertising during times of shortage, including wartime. 13/ These data indicate the economic reasons while oil companies are engaging in image advertising, even while gas station lines increase.

11/ "Advertisers Express Belief in Values of Continued Advertising," Printers' Ink, September 8, 1950 at 4 (including "30 Essential Jobs for Advertising When the Product Is Oversold," at 67). (This issue was published at the height of concern over shortages engendered by the Korean War).

12/ Advertising In Recession Periods, The Buchen Company, 1958; Advertising In Recession Periods -- Revisited, The Buchen Company, 1970; Speech by J. Wesley Rosberg, President, Buchen Advertising, Inc., before the American Business Press, Inc., October 20, 1970.

13/ "Comments on The Value of Advertising in Time of Shortages," Elmo Roper Survey for the American Association of Advertising Agencies, 1947-1964. (World War II).

IV. IMAGE ADVERTISING AND THE FIRST AMENDMENT

A. The Ambiguous Advertisement

Any evaluation of the First Amendment issues raised by corporate image advertising must recognize that such advertising has a strong commercial element. As noted in the preceding section, there is a substantial body of evidence that corporate image advertising can affect consumer and business purchases, investment decisions, and employee recruitment, especially in times of shortage or in periods of recession. Corporate image advertising may therefore be seen as a species of "commercial" speech. But while the courts have frequently held that "purely commercial" speech is not protected by the First Amendment, Valentine v. Chrestensen, 316 U.S. 52 (1941); Pittsburgh Press Co. v. Pittsburgh Human Relations Commn., 413 U.S. 376 (1973); Banzhaf v. FCC, 405 F.2d 1052 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969); Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D. D.C. 1971), aff'd mem. sub nom., Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972), the cases are of limited use in locating the point at which image advertising becomes constitutionally protected.

The cases which have relegated commercial speech to inferior status have rarely given reasons, and the reasons advanced by the commentators for the lesser protection of commercial speech are of little analytic utility. One opinion suggests that the free marketplace model of the First Amendment, that "speech can rebut

speech [and] propaganda will answer propaganda" are not satisfied by "commercial" advertising (Banzhaf, supra at 1102). Some commentators have also stressed that commercial advertising is "the handmaiden of economic activity already subject to extensive regulation." 1/ As such, advertising is said to belong in the area of activity involving property rights, an area in which the government has a distinct and legitimate interest in protecting individuals from deception. 2/ Other commentators have maintained that the government can act with relative impartiality where commercial advertising is concerned because, in regulating commercial advertising, the government is not ordinarily attempting to vindicate any particular substantive policies of its own and because (so the argument goes) advertising claims, unlike claims concerning desirable social policy, are capable of objective evaluation. 3/ Finally, commercial advertising is considered less subject to "chilling" than

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1/ "Developments in the Law - Deceptive Advertising," 80 Harv. L. Rev. 1005, 1027 (1967).

2/ T. Emerson, "Toward a General Theory of the First Amendment," 72 Yale L.J. 877, 948-949 n. 93 (1963).

3/ Id at 921; "Note, Freedom of Expression in a Commercial Context," 78 Harv. L. Rev. 1119, 1197 (1965).

individual expression, and therefore is believed to need less of the "breathing space" normally accorded to individual expression. 4/

The above rationales are abstract, and the courts have rarely been presented with the close questions as to what is "commercial" that require a more detailed articulation of a theory. In the leading Supreme Court cases on the issue, the line between unprotected and protected speech has been relatively easy to draw. Thus in the recent case of Pittsburgh Press Co. v. Pittsburgh Human Relations Commission, 413 U.S. 376 (1973), there was little question that the advertisements in question, sex-designated want ads, were "no more than a proposal of possible employment." Id. at 385. In Valentine v. Chrestensen, supra, the Court simply found that the protest was a calculated effort to evade an otherwise lawful prohibition against commercial handbills, thereby avoiding the difficult question of whether a two-sided handbill, one of whose sides contained a sightseeing ad for a submarine and the other which contained a protest against a denial of mooring privileges for the sub, was sufficiently commercial to be unprotected or sufficiently political to be protected. Supra, at 55. Conversely, in New York Times v. Sullivan, 376 U.S. 254 (1964), the Court needed little analysis to find that the civil rights protest against police brutality was purely political, even though it took the form of a newspaper

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4/ "Developments", supra at 1031.

advertisement. Finally, in Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961), a public relations campaign launched by railroad interests against rival trucking interests was - according to the trucker's own complaint - "designed to foster the adoption and retention of laws and law enforcement practices." Although the motive for the campaign, destruction of the trucking business, was economic, the Court found that speech so predominantly political on its face was protected. Id. at 129. It can be seen from these four principal cases that the Court has not confronted speech which was especially difficult to classify.

More particularly, the Court has not discussed the particular type of corporate image advertisement which is most widespread, and which drew the bulk of our effort in formulating a response to the Rosenthal Petition. We have already defined corporate image advertising as advertising which, while describing the corporation's own activities or views, does not explicitly describe any products or services sold by the corporation. Certain advertising fitting this definition does make express reference to political issues or figures; other such advertising does not. Corporate image advertising which does not -- which makes no express reference either to products or services of the company or to any political issue or figure -- we have termed the ambiguous corporate image ad.

The ambiguous ad, despite its demonstrable economic impact, does not fit smoothly into either the "commercial" or the "political" categories recognized by the Supreme Court.

The claim of First Amendment protection for the ambiguous advertisement arises because, notwithstanding the absence of express reference to any political issue, such an advertisement may contain information which arguably is relevant to some issue of public importance. For example, that an oil company has a blow-out preventer on its oil rigs may enhance its image as an environmentally concerned corporation; it may also impress -- upon a highly informed viewer -- the governmental wisdom of permitting offshore drilling on the Continental Shelf. Therefore, while such an ad may not be expressly directed to the legislature or executive as, for example, in Noerr, neither is it a "classic example . . . of commercial speech," like the want ads in Pittsburgh Press, which presented "no more than a proposal of possible employment." 413 U.S. at 385.

In light of the image advertisement's potential for both economic and political effect, our argument will be that a proper disposition requires a close analysis of each advertisement's dominant effect. Our conclusion will be that claims describing corporate activity, when they appear in an advertisement whose dominant effect is economic, may be regulated, notwithstanding that the ad may have a political effect which is greater than de minimis.

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Dominant economic effect, we will argue, can be found where (a) the ad is run by a commercial corporation; (b) elements typically found in the corporation's product advertisements - for example, logos, tag lines - are also present in the ad; (c) the corporation sells consumer products under the same brand name as appears in the ad; (d) the claims in the ad consist of description of activities of the corporation (as distinguished from assertions of fact or opinion about subjects other than the corporation's own activities); (e) the ad is oriented toward the corporation's activities rather than a general subject; e.g., Shell's oil spill clean up device, rather than oil spills generally; and (f) the ad does not expressly link the claim concerning the corporation's own activity to some political issue.

This last element -- that the ad does not expressly mention any political issue -- emphasizes the limited nature of the regulation here proposed. Dominant economic effect can under our analysis be found only in an ad descriptive of corporate behavior and making no express mention of any political issue. Thus, while claims of corporate behavior may be regulated when they appear in an ad whose dominant effect is economic, we cannot ban any claim altogether. Any claim could, notwithstanding our regulation, be made without regulation in an advertisement whose dominant effect is political (again, notwithstanding that the economic effect may be greater than de minimis). No claim or bit of information is therefore banned by our regulation; our power to regulate depends

upon the context of the claim in the advertisement in which it appears.

The conclusion that speech may be regulated in one context and not in another is not novel in First Amendment analysis. In NLRB v. Gissel Packing Co. 395 U.S. 575, 617-618 (1969), the Court recognized that antiunion statements that might otherwise be protected could be regulated when made by an employer to his employees during a labor dispute. In Ginzburg v. United States, 383 U.S. 463 (1966), the Court held that sexually suggestive materials may be banned as obscene when presented in a titillating manner "even though in other contexts the material would escape such condemnation." Id at 475-476. In New York State Broadcasters Assn. v. United States, 414 F.2d 990 (2d Cir.), cert. denied, 396 U.S. 1061 (1969), the Court recognized that information concerning the benefits to be realized from a lottery could be prohibited in advertising, even though they might be protected when part of a newscast.

Given that our power to regulate depends upon the context of the claim, any argument that speech has been abridged, even to the limited extent of being chilled, falters if the corporation wishing to make claims about its behavior in an advertisement has available a simple technique for insuring that the claim will be accorded protected status. Such a technique is readily discernible here. All that the corporation must do is make express mention of the public issue to which its claim of corporate behavior relates. The chilling effect of such regulation is slight -- perhaps nonexistent.

This limited regulatory focus, which bans no claim and regulates only in the ambiguous context where the dominant effect is economic, together with the slight chilling effect of cease and desist orders, is to be contrasted sharply in its impact upon speech with regulation which results in an absolute prohibition (that is, in any and all contexts) against dissemination of specified information, as well as with regulation resulting in criminal penalties or massive money judgments. The corporation's interests -- whatever they may be -- in making wholly unfettered claims as to corporate behavior by way of the ambiguous ad do not, we will contend, outweigh the governmental interest in preserving the integrity of regulation of advertising generally by way of cease and desist orders.

B. Intrinsic Relevance

Merely because corporate image ads do not expressly sell a product, it is not necessarily true that they cannot, in fact, have such effect, and, indeed, such effect can be their intended effect. As shown above, the indirect selling approach taken by corporate image ads may under certain circumstances be even more effective in promoting a company's product sales than an express sales effort. The Commission can clearly regulate an advertisement which accomplishes indirectly what could be regulated if accomplished directly.

In terms of the First Amendment, however, it can be argued that despite its commercial aspects corporate image advertising often contains raw information of intrinsic relevance to public

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issues and for that reason alone should be protected. Because we anticipate that the recipients of our demand letters may advance such an argument, we will evaluate it here. As we will show below, although this argument finds some support in the cases, it is an overly simplistic rationale for distinguishing commercial from protected advertisements of the corporate image type.

Simply stated, the "information theory" holds that even though an advertisement has a commercial aspect and even though it is not presented in the form of a protest, argument, or editorial, the mere fact that information it contains is relevant to a public issue raises the advertisement containing such information to the status of protected speech. The "information theory" would therefore protect corporate image advertisements - and even product ads - with any relevance to any matter of public interest or, in other words, to virtually any subject of sufficient topical interest for the advertiser to expect that the advertisement can rouse the interest of his audience.

The "information theory" finds some support in New York Times where the Court distinguished the civil rights advertisement from the handbill in Valentine partly on the basis that the former "communicated information." New York Times, supra, at 266. Similarly, in Banzhaf Judge Bazelon asserted that one reason why commercial advertising is not "associated with any of the interests the First Amendment seeks to protect [is that a]s a rule, it does not...provide information on matters of public importance ..." Banzhaf, supra, at 1101-1102.

Finally, in Capital Broadcasting, supra, Judge Skelly Wright in dissent argued that because cigarette advertising had earlier been held to relate to a "controversial matter of public importance" within the meaning of the FCC's Fairness Doctrine, it was protected by the First Amendment, even though cigarette advertising "involves expression which is ostensibly apolitical..." Capital Broadcasting, supra, at 590 (Wright, J., dissenting).

From these cases, at least one commentator has concluded that the First Amendment must necessarily protect all advertising whether for products or otherwise, or at least that advertising that communicates information. 5/ This view was explicitly rejected by the Commission in the Firestone case, at least insofar as product claims are concerned. To hold that such claims are protected merely because they contain information "of importance to consumers" would, the Commission held, "make a mockery of the ... Congressional mandate to the Federal Trade Commission to prohibit advertising claims which are unfair or deceptive." 81 F.T.C. at 472. The Courts have been similarly unreceptive. In Curtis Pub. Co. v. Butts, 388 U.S. 130, 150 (1967), a case following New York Times, Justice Harlan pointed out that:

> "Federal securities regulation, mail fraud statutes, and common-law actions for deceit and misrepresentation are only some examples of our understanding that the right to communicate information of public interest is not 'unconditional'". (Emphasis added.)

Furthermore, the Court in Pittsburgh Press explicitly declined the newspaper's invitation, based on the asserted value of commercial

5/ Redish, "The First Amendment in the Marketplace", 39 Geo Wash. L. Rev. 429 (1971).

advertising as a medium for "exchange of information," to "abrogate the distinction between commercial and other speech." 413 U.S. at 388.

In Capital Broadcasting, Judge Wright's view did not prevail, and many other cases have likewise held that commercial speech may be regulated even if it contains information relevant to a public issue. See, e.g., Texas Gulf Sulphur Co. v. SEC, 446 F.2d 1301 (2d Cir. 1971) (major mining discovery); New York State Broadcasters Assn. v. United States, 414 F.2d 990 (2d Cir.), cert. denied, 396 U.S. 1091 (1969) (lottery information). Compare Perma-Maid Co. v. FTC, 121 F.2d 282 (6th Cir. 1941) with Scientific Mfg. Co. v. FTC, 124 F.2d 640 (3d Cir. 1941) (ad containing identical health information unprotected when disseminated by businessmen, protected when disseminated by non-commercial publicist). Indeed, even Judge Skelly Wright, the leading judicial proponent of the "information theory," would have applied the theory only to a statute banning speech (cigarette ads), not to regulation of the speech. That even the most forceful advocate of the information theory acknowledges a power to regulate so long as the information is not totally banned is of special significance in light of the conclusion we will reach, which is that the Commission can regulate certain corporate image claims which appear in a predominantly commercial advertisement, but cannot regulate such claims when they appear in a predominantly political advertisement. Thus, there is no total ban of any information under the regulatory approach which we recommend to the Commission.

C. Economic Effect

In our view, a determination of whether an advertisement which contains information relevant to a public issue is subject to regulation will turn largely on the dominant effect of the advertisement. If the dominant effect is to induce economic behavior, then the traditional governmental interest in preventing economic injury or unjust enrichment will justify regulation. Alternatively, where the dominant effect of the ad lies in the political area, the governmental interest in regulation is, at best, suspect. 6/

The need to focus on the effects of speech to determine whether the speech is protected is recognized in many cases. The classic exceptions to the First Amendment, obscenity and "fighting words", are rooted in a recognition that the likely effects of such speech are subject to regulation. See Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (obscenity and crime); Gooding v. Wilson, 405 U.S. 518, 524 (1972) (words are unprotected when they have "direct tendency to cause acts of violence" by individual addressee.) Similarly, the Courts in a variety of contexts have sanctioned regulation of speech, because of the speech's likely effects.

6/ This is not to say that the government has no interest in maintaining honesty in the political arena. The First Amendment has been held not to invalidate statutues requiring lobbyists to register, see United States v. Harriss, 347 U.S. 612 (1954), or that advertisements for political candidates identify their source. See United States v. Insco, 365 F. Supp. 1308 (M.D. Fla 1973). [Footnote continued]

6/ contd.

For the purpose of our discussion we assume that predominantly political speech, even if false, is fully protected by the First Amendment under the doctrine of New York Times v. Sullivan, 376 U.S. 254 (1964). While that case involved a massive money judgment rather than cease and desist order, we do not believe that this distinction could ever suffice to bring clearly political speech under the regulatory powers of the Commission. Even with respect to political speech, Times extends no protection to knowingly false statements or to statements made with "reckless disregard" of falsity. Id. at 279-280. Although Times and its progeny (e.g., Time, Inc. v. Hill, 385 U.S. 374 (1966)) involved compelling personal interests of reputation and privacy, Garrison v. Louisiana, 379 U.S. 64, 75 (1964) speaks in language so broad as to appear to exclude from any First Amendment protection, even in the absence of compelling personal interests, "the known lie" as an instrument of "economic, social or political change."

Even if the "known lie" exception might be extended to advertising, however, as a practical matter, a Commission case premised on knowing falsehood or reckless disregard appears extremely likely to fail. In only one case, Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967), has the Court ever affirmed a finding of reckless disregard, based upon an "extreme departure" from responsible publishing practices. Id. at 155. The facts which established in liability in Butts, a study based solely on the notes of an informant known to be of bad character, with no attempt to verify any of the facts, cannot be expected to be found in an FTC case involving energy or the environment, in which the issues will involve conflicting expert views or judgments as to what is a non-distorted corporate image. Moreover, any showing of "reckless disregard" must be made with "convincing clarity." New York Times, supra at 285-286. This additional burden would make a case, based solely on a "reckless disregard" theory, very doubtful.

In NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), the Supreme Court unanimously affirmed a finding that an employer's anti-union speech constituted an unfair labor practice. In so doing, the Court looked not only to the precise words spoken, but also to the likely effects of those words on the audience - employees who were "particularly sensitive to the rumors of plant closings." Id. at 619-620. In New York State Broadcasters, supra, the Circuit Court, in evaluating the constitutionality of the federal statute prohibiting the broadcast of "information concerning" lotteries, looked to whether the information (such as winner's lists) had the effect of "directly" promoting a lottery or merely "broadcasting about it." 414 F.2d at 997. In Pittsburgh Press, supra, the Supreme Court found that the grouping by a newspaper of want-ads in sex designated columns had the practical effect of "an overtly discriminating want-ad." 7/ Id. at 388.

Similarly, in the Noerr case, the Court cited the success of the railroad's lobbying campaign to support its conclusion that the railroad's principal effort had been a protected attempt "to influence legislation" rather than a prohibited attempt "to interfere with business relationships in a manner prescribed by the Sherman Act." Id. at 144.

While we emphasize the attention paid by the Courts to the effects of speech, we recognize that the effects of corporate image advertising may be mixed. Some viewers may respond to an

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7/ Although the record contained survey evidence as to the effects of the want ads, it is unclear whether the Court relied on the survey's findings. For detailed information about the survey, see 87 Harvard L. Rev. 156 n.21 (1973).

ad in economic terms and buy the company's products, others may write their congressmen.

In such a case, we believe that the dominant effect of the advertisement should be controlling. Our focus on dominance has some support in the cases, most recently in the obscenity area. In Miller v. California, 413 U.S. 15 (1973), the Court held that certain speech could be banned entirely if its "dominant theme" was prurient and the work "taken as a whole" lacked "serious literary, artistic, political or scientific value." Thus, under Miller, it is likely that books may be banned, even though they have "some value," if they "do not measure up to the standard of seriousness." 8/ Similarly, in New York State Broadcasters, the Court held that "news" concerning the amount a lottery realized for new school construction would be protected if it had only the "incidental effect" of promoting a lottery, but could be prohibited if integrated in a lottery "announcement" which "directly promot[es]" the lottery. Id. at 998. 9/

Finally, when the Valentine case was before the Circuit Court, Judge Jerome Frank in dissent would have determined the constitutional status of an ambiguous ad 10/ from the dominant purpose of the advertiser. 122 F.2d 511, 520-21 (2d

8/ Thus, words which "admittedly have some social importance" may nevertheless be unprotected because they come within the Miller definition of obscenity. "The Supreme Court - 1972 Term," 87 Harv. L. Rev. 164-165 (1973).

9/ That lottery proceeds go to a worthy cause may materially induce the purchase of lottery tickets, even by those without gambling blood.

10/ Since the Supreme Court found, unlike any of the Judges below, an intent to evade the statute, it did not have to undertake the close analysis undertaken by Judge Frank.

Cir. 1941). Rejecting the view of his brethren that such a task would be overly subtle, Judge Frank, who could scarcely be accused of insensitivity to free speech issues, stated:

> [W]e should not be disturbed because, in the future, cases may arise where there will be some difficulty in ascertaining the primary purpose in distributing a handbill, and, because, when such cases arise, the Courts may not be able to stop at locating merely the north and south poles of the subject matter, but may be required to do a more precise job of legal map-making and to fix a definite equatorial line. Where to draw such lines is the question in pretty much everything worth arguing about in the law" Mr. Justice Holmes often noted. 122 F.2d at 520.

While Judge Frank emphasized purpose, rather than effect, his observations are equally applicable to a dominant effect standard. Moreover, as we shall note below, an advertiser's purpose in creating an ad is relevant to determining the ad's effect.

If the dominant effect of an advertisement is controlling on the issue of whether an ad is protected, a question remains as to the type and degree of proof required to determine such effect. Consumer survey evidence, where it exists, will be useful, and as we have already noted, survey evidence as to effect was introduced in the Pittsburgh Press case. 11/ Our proposed demand letters call for all survey information on the effects of the ads we have selected.

11/ See note 7, supra.

Where survey evidence is lacking, however, we believe it both reasonable and constitutionally sound 12/ to infer a dominant commercial effect from the nature of the advertiser and the purpose and characteristics of the advertisement.

(1) Character of Speaker

The Supreme Court has frequently looked to the nature of the speaker as an aid in determining the nature of his speech. In New York Times v. Sullivan, for example, the Court's holding that the ad was protected rested at least in part on a finding that the "communicat[ion]", "opinion" and "protest" was made "on behalf of a movement whose existence and objectives, are matters of the highest public interest and concern." Supra, at 266 (emphasis added.)

Similarly, in Murdock v. Pennsylvania, 319 U.S. 105 (1943) the Court emphasized the sincere religious beliefs of the distributors in holding that a license fee could not constitutionally be imposed on the sale of books by Jehovah's witnesses. Just as the fact that the speaker is a Jehovah's witness tends to support the conclusion that the effect of his speech is non-commercial, the fact that the speaker is a corporation tends to support the conclusion that the effect of its speech is commercial.

12/ The Courts appear to have acknowledged the expertise of regulatory agencies in determining whether messages cross the line between protected speech and speech that can be regulated. See NLRB v. Gissel Packing Co., supra, New York State Broadcasters, supra (FCC); SEC v. Wall Street Transcript Corp., 422 F.2d 1371 (2d Cir.), cert. denied, 398 U.S. 958 (1970).

Conversely, in Gissel, supra, the Court recognized that what otherwise might be "predictions" about the economic consequences of unionization could become "threats" when the statements were made by the employer, since the future events in such circumstances were within the speaker's (the employer's) control. 395 U.S. at 619. In Valentine v. Chrestensen, Judge Jerome Frank, dissenting from the Court of Appeals decision that was ultimately reversed by the Supreme Court, inferred, from the commercial nature of the handbill's author, a dominant commercial effect from a handbill that "nowhere directly solicits patronage." 122 F.2d at 521.

(2) Purpose of the Advertiser

As with the character of the advertiser, the purpose of an advertiser is also relevant in determining dominant effect. 13/ As Judge Frank in Chrestensen noted, "Motive is a persuasive interpreter" of "equivocal conduct." 122 F.2d at 518 n. 7.

The Supreme Court has likewise recognized the relevance of motive in characterizing otherwise equivocal conduct. 14/ In

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13/ Although New York Times v. Sullivan is sometimes cited as holding purpose "immaterial" (365 U.S. at 266), the profit motive held immaterial was that of the medium (i.e., the New York Times), not the sponsor of the ad. As the Times Court recognized, to deny protection to an ad, merely because a newspaper profits from its placement, would severely limit the rights of industrial speakers who can't afford to buy a printing press. Id. As noted, above, the Times opinion suggests that the character of the sponsor is material.

14/ Where the speech is unequivocally political, economic motive will not of course subject it to regulation, unless the political element is a "sham". Noerr, supra.

Murdock, where the Court held protected speech "having the characteristics of advertising" 15/ the Court discussed at length the purposes of the handbill distributor, which were found to be "as evangelical as the revival meeting." 319 U.S. at 109. And in Ginzburg, supra, the Court stated that "if the object of a work is material gain for the creator through 'an appeal to the sexual curiosity and appetite' the work is pornographic," even though absent such pandering motive the conclusion would be "otherwise debatable." 383 U.S. at 471.

(3) Characteristics of the Advertisement

As we have already seen image advertising in general is considered by both advertisers and researchers to have a substantial impact on the economic behavior of those who read it. While this general learning may not suffice to demonstrate in a given case that a specific advertisement has a dominantly economic effect, various aspects of an advertisement may confirm that the ad speaks primarily to the economic rather than the political arena. 16/ For example, the ad may consist solely of descriptions of the corporation's own activities (e.g., its clean-up activities), rather than views about, or discussions of, general conditions (oil spills generally). Such an ad is more

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15/ Ginzburg v. United States, 383 U.S. 463, 474 n.17 (1966).

16/ The drawing of these inferences lies, to some extent within the Commission's expertise. See n.12 supra.

likely to focus the viewer's attention on the corporation, and his relationship with it, than on some public issue of general concern. This focus on the corporation will be further enhanced if the corporation's name is prominently featured in the ad, and that name (e.g., Shell) is that under which the corporation markets its products. When an oil company, such as Shell, which is known by consumers to sell gasoline, runs an ad describing its own activities, the viewer is likely to relate the ad to that which he is most familiar - Shell gasoline, not offshore drilling. A further link to the corporation and its products appears when elements typically found in the corporation's product advertisements, such as logos or tag lines, are featured in the image ad as well. These elements have been developed with great care and at great expense because they are known to have a commercial impact. 17/ When such elements appear in an image ad, they serve not merely to identify the sponsor, but more importantly to reinforce the connection between the sponsor of the ad and its products. Indeed, the source of the message may become more important to the viewer than the content of the message itself.

When these elements are present, the political effect of an otherwise ambiguous ad will be minimized. It will not alert the viewer to the existence of a controversy, let alone implore him to agree with or disagree with the advertiser's view. Nor will it indicate how political action may be taken.

17/ Rosen, The Corporate Search for Visual Identity (1970).

Other aspects of an image ad may, of course, rebut the inference of commercial effect. Ads that explicitly link a description of corporate activity to some generally recognized public issue may significantly increase the political response. Similarly, ads which speak in terms of an entire industry, rather than the advertiser itself, may at least alert the viewer that some broader interest than that of the advertiser is being advanced.

(4) Propriety of the Inference

It may be argued that the constitutional freedom of speech is too important to turn on an inference of dominant economic effect, and that if the message or its effects are ambiguous, any presumption must be in favor or protection, rather than regulation, in order to encourage an ample flow of information about public affairs, and to avoid chilling debate.

Such an argument is a more subtle variant of the "information theory" discussed above. It concedes that the intrinsic relevance of information in an ad to a public issue is not enough to achieve protected status where the ad expressly mentions a product or otherwise contains an express offer to deal (e.g., a help-wanted ad). Where, however, the ad is not expressly commercial in this sense--where, in other words, it is ambiguous--then, so the argument goes, the presumption must be in favor of protecting the speech. Ambiguities and marginal cases must be resolved in favor of protecting the speech to avoid chilling and to give maximum encouragement to robust debate and an ample flow of information into public affairs.

In assessing this position it should be borne in mind that the claim at issue is a claim which purports to describe the corporation's own activities. It will be

recalled that our (essentially factual) analysis led us to the view that it is only where an advertisement contains this particular type of claim, as well as certain other factors, that an inference can be reasonably be drawn (in the absence of actual survey evidence) that the dominant effect is economic. Thus, it is with reference to an ad containing claims by a corporation describing its own behavior that we assess the argument that such an ad, when it does not expressly mention any public issue or offer to deal commercially, must be presumed to be protected.

The first point to be made is that this argument would not protect speech in the presence of direct evidence that the dominant effect of the speech was economic. It is, in other words, an argument relating to the appropriate presumption in the face of ambiguity, and it goes to what inference is constitutionally permitted in the absence of direct evidence of effect. Thus, the argument does not represent a doctrinal bar to a Commission investigation for the very purpose, inter alia, of determining what the effects of an ambiguous ad are. (The demand letters which we would propose be sent to the oil companies do seek data, such as surveys, as to the effect of the ads.)

Moreover, the root premise of this position that ambiguities must be resolved in favor of protecting the speech seems, so far as we can determine, to rest on the premise that the presumption is necessary in order to avoid chilling. As we have emphasized, however, the standard we suggest prohibits no speech. To the

extent that an advertiser wishes to describe its own activities it may do so without FTC regulation so long as it expressly links the information to the public issue. Our approach cannot therefore be said to "chill" expression in any significant way. As the Supreme Court noted in NLRB v. Gissel, in rejecting the employer's argument that his anti-union speech did not lose constitutional protection by reason of its coercive effects, "[h]e can easily make his views known without engaging in 'brinkmanship'". Gissel, supra at 620. See also Ginzburg v. United States, supra at 471; Breard v. City of Alexandria, 341 U.S. 622, 644 (1951). As in Gissel, under our analysis the advertiser has available a clearly discernible technique for insuring the protected status of the claim. As we have indicated, he need only place his description of his corporate behavior in an ad which expressly links that behavior to the public issue to which it is related. 18/

18/ It is in fact not clear how the employer in Gissel could have "easily" made his views known without engaging in "brinkmanship". The views concerned the possibility that his plant would close if unionization did occur. Since a prediction that the plant would close was one which the employer himself could make happen, it is difficult to see how even honest prediction by the employer, particularly when made to employees who are "particularly sensitive to the rumors of plant closings," 395 U.S. at 619-20, would not by its very nature hover on the brink of a threat. In this practical sense, the argument that regulation will result in chilling is weaker in our case than in Gissel, and the argument that "brinkmanship" should not gain constitutional protection is stronger.

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To be sure, grounding the power to regulate speech on the context in which the speech appears may limit to some extent the manner in which a corporation's views or opinions are communicated. Corporations wishing to influence political opinion on matters of public importance must do so frankly, rather than by ads whose meaning is dimly perceived by its audience. But while a requirement of frankness may slightly limit creativity, the First Amendment interest in covert appeals is minimal. 19/ As the Supreme Court held in New York Times, "The central meaning of the First Amendment" lies in assur[ing] the unf[ettered interchange of ideas for the bringing about of political and social changes . . ." 376 U.S. at 273, 279. That central meaning is better served by encouraging as we do frank presentations of information that can be comprehended, discussed and debated by an audience, than by subliminal appeals. 20/

19/ In United States v. Insco, 365 F. Supp. 1308 (M.D. Fla. 1973), an indictment under 18 U.S.C. §612, which requires that statements about a candidate for federal office must identify their sponsor, was sustained over a First Amendment objection. The indictment charged that Insco, a Republican candidate for Congress had distributed bumper stickers linking the name of his Democratic opponent to George McGovern, without disclosing the source of the stickers. If Insco had, in a public speech frankly linked his opponent with McGovern, the statement would undoubtedly have been protected under New York Times v. Sullivan.

20/ In Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 128 (1973), the Court expressed distaste for the "subliminal impact of th[e] pervasive propaganda [in advertising, which] . . . may be greater than the impact of the written word." Indeed, that advertising generally "results to a lesser degree in a conscious choice among differing views", has been cited as a reason for denying First Amendment protection. "Freedom of Expression", note 3 supra at 1195 (emphasis added).

To resolve all ambiguities in favor of protection, moreover, would be to forego any real analysis of the effects of the ad, other than that necessary in the threshold determination that the political effect was greater than de minimis. That the dominant effect of the ad is economic would be irrelevant once it is decided that the political effect is greater than de minimis. Yet, as we have shown, a great deal of attention in constitutional analysis under the First Amendment is given to the effect of speech precisely in those instances where a determination is necessary as to whether the speech is or is not protected. Common law concepts which remove certain speech from constitutional protection, such as libel, fraud and assault, all look to effect. The constitutional concepts of obscenity and fighting words are linked to effect. 21/ Determinations are made in such instances--often without benefit of empirical evidence--that the likely effect of the speech renders it unprotected.

Finally, to accord protected status to descriptions of corporate behavior whenever they appear in an ambiguous advertisement would be to forego any effort at balancing the advertiser's interest in describing his corporate behavior by way of ambiguous ads against the longstanding and substantial government interest in regulating commercial conduct.

21/ In determining whether speech is obscene, Miller asks whether "the average person" would find that the work appeals to the prurient interest; whether the work describes sexual conduct in a "patently offensive way," and whether the work "lacks serious literary, artistic, political or scientific value." 413 U.S. at 24.

That the advertiser's interest is slight seems clear from the fact that, if his description of his own behavior is in fact related to some specific public issue, he can put that description in an ad which makes specific reference to that issue and thereby achieve protected status wholly insulated from any regulation. That the government interest in regulating commercial conduct is substantial need not be elaborated.

That a balancing of these interests is proper under the First Amendment can be seen in Gissel, where the Supreme Court recognized that an employer's speech rights must be weighed against the statutory rights of employees to associate, as protected by the National Labor Relations Act. 395 U.S. at 616. The propriety of balancing can also be seen in the draft card burning case of United States v. O'Brien, 391 U.S. 367, 377 (1968), where the Court stated that when mixed speech and nonspeech is involved:

> "[G]overnment regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

Two of the factors which appear in this passage deserve comment. The first is the requirement that the restriction on First Amendment freedom be no greater than is essential to the furtherance of the governmental interest. As we have shown, the regulation which we propose is regulation only where the dominant effect of the advertisement is commercial. Where

the commercial effect is significant but not dominant, our analysis would not support regulation. Moreover, no claim is totally banned under our approach if in fact there is a public issue to which it is relevant. Thus, we can satisfy this requirement that the restriction be no greater than is necessary to the "furtherance" of the government interest.

The second element which deserves comment is that the governmental interest be "unrelated to the suppression of free speech." We do not consider the governmental interest embodied in the Federal Trade Commission Act to be the suppression of free speech. Of course,the statute regulates a certain type of speech. The more reasonable reading of the criterion in O'Brien, however, is that the governmental interest not be an interest of the type embodied in statutes punishing seditious libel. The proscribed situation is where the speech suppressed is speech which is critical of a policy of the government. Regulation of a corporation's description of its own behavior in an ad which makes no express mention of any public issue cannot fairly be said to be action to vindicate or insulate from criticism a particular policy of this or some other government agency.

In sum, the view that such an ad (the ambiguous ad) should be presumed to be

protected would not bar a Commission investigation to determine if there is actual evidence of effect rendering inferences or presumptions unnecessary. The argument that in the absence of actual evidence the ambiguous ad must be accorded protected status appears to rest on the premise that protection is necessary in order to avoid chilling. The approach we suggest, however, prohibits no speech, and the chilling argument is not strong if there is a readily discernible way, as there is, for an advertiser to describe his corporate behavior in a wholly protected manner when in fact that behavior is relevant to some public issue. 22/ "Brinkmanship" has no more, and probably less, claim to constitutional protection here than in Gissel. To presume protection for the ambiguous ad would be to forego any real examination of the effects of the ad. Yet such examination is frequently undertaken in constitutional analysis under the First Amendment precisely where it is necessary to determine whether speech is or is not protected. To presume protection would also be to forego any balancing of the advertiser's interest in describing his corporate behavior by way of the ambiguous ad and the government interest in the regulation of economic behavior. Such balancing is proper under the First Amendment, and results here in the conclusion that the ambiguous ad should not be protected where it can reasonably be inferred that its dominant effect is economic.

22/ Justice Harlan, concurring in O'Brien emphasized that the defendant could have conveyed his anti-war message in many ways other than burning his draft card. 391 U.S. at 389.

(5) Propriety of Investigation

To this point we have focused on whether the Commission, consistent with the First Amendment, could prohibit false corporate image advertisements. All of the cases discussed have involved the propriety of imposing sanctions, whether criminal penalties or money damages, for the exercise of speech that is not "purely commercial". Whether by itself a Commission investigation of such ads, as opposed to issuance of a cease and desist order, would infringe on the constitutional right of image advertisers is a separate question. We believe there is authority to justify the issuance of demand letters to companies requesting data, part of which bears on whether the advertisements being investigated are subject to FTC jurisdiction. In SEC v. Wall Street Transcript Corp., 422 F.2d 1371 (2d Cir.), cert denied, 398 U.S. 958 (1970) the SEC was permitted to issue compulsory process to investigate whether a "newspaper" was unlawfully disseminating financial advice without registering under the Investment Advisers Act. The newspaper's claim that the investigation "chilled" its expression was specifically rejected. 23/ See "First Amendment Right Inferior to SEC Subpoena Power" 1971 Utah L. Rev. 132 (1971). In Laird v. Tatum, 408 U.S. 1 (1972) an on-going Army investigation into the activities of protest groups was held not to chill First Amendment Rights.

23/ Since the SEC investigation would have uncovered some of the transcript's news sources, its "chill" claim was scarcely frivolous.

Given what we now know about corporate image advertising, it cannot be said of certain types of image advertising that they are so clearly protected by the First Amendment that any investigation into such advertising would be in bad faith. Compare Gibson v. Florida Legislative Committe, 372 U.S. 539 (1963) (investigation into NAACP membership lists).

Furthermore, even if the advertisements to be investigated cannot be prohibited under Section 5, it is at least arguable that the Commission's authority under Section 6(a) of the Act, "to gather and compile information concerning, and to investigate. . . the . . . practices . . . of any corporation engaged in commerce . . .," and its authority under Section 6(f) to "make public" information obtained in an investigation, will permit an investigation even though a Section 5 proceeding would be improper. 24/ Whatever the merits of such an argument, however, we have proceeded at this stage, as common prudence demands, by selecting those advertisements for investigation for which a First Amendment claim would be least substantial.

24/ No Court has yet ruled on this statutory issue.

CONCLUSION

While the Constitutional issues are unresolved, the staff believes that the Commission may, consistent with the First Amendment, proceed against certain corporate image advertisements.

V. STATUTORY ISSUES RELATING TO IMAGE ADVERTISING

A. Section 5 Jurisdiction

Section 5 of the FTC Act is designed to protect both consumers and competitors from economic injury. As discussed in Part III, supra, corporate image advertising can induce economic behavior, favorable to the advertiser, from both consumers and investors or potential employees. When this behavior is induced by a misleading depiction of the advertiser's image, an unfair or deceptive act or practice in commerce has occurred. 1/

Advertising that seeks to elicit a consumer response, favorable to the corporation, by portraying in a favorable light the company's activities in the environmental or energy areas is but a variant of the practices which the Commission has dealt from the earliest years of its existence. Over fifty years ago, the Commission held unfair the practice of creating a "bogus independent" to lure customers who would be otherwise disinclined to deal with the parent. Thus in Armour & Co., 1 F.T.C. 430

1/ That the advertisements were disseminated interstate is itself sufficient to satisfy the "in commerce" requirement. Surrey Sleep Prods., 73 F.T.C. 523, 553-554 (1968); S. Klein Dept. Stores, Inc., 57 F.T.C. 1543-1544 (1960) (interlocutory order). In any event, as discussed in Section IV, infra, we have selected ads that we believe tend to promote the sale of products in commerce.

(1919) 2/ the Commission prohibited Armour from selling fertilizer through a subsidiary unless Armour's control of the subsidiary was disclosed. Cases prohibiting misrepresentation of the advertiser's activities, as distinct from the features of his products, go back almost as far. Thus, as early as 1929 it was held unfair for a company falsely to represent that its employees belonged to a labor union. Columbia Pants Mfg. Co., 13 F.T.C. 61 (1929). In finding that "a substantial proportion of the purchasing public . . . prefers to purchase . . . articles manufactured in factories . . . using . . . workers belonging to, or affiliated with, some union of organized labor" the Commission again recognized that consumers frequently will base a purchase decision on their perception of the company's activities as well as the characteristics of its products. See also The Blind Weavers, Inc., 22

2/ See also Fleischmann Co., 1 F.T.C. 119, 131 (1918). (Use of "bogus independent" to acquire "trade which respondent was in danger of losing.") These cases are sometimes viewed as antimonopoly cases, since Fleischmann controlled 90% of the yeast market under its own name and was engaged in commercial bribery and harassment as well as deception. In Armour, however, the Commission made no findings as to Armour's market power, and the only practice found unfair was concealment of Armour's control. Moreover, while the "bogus independent" in the Armour case was called a "cooperative", the thrust of the Commission's findings was that consumers might prefer not to deal with Armour, not that consumers would be likely to prefer a cooperative to a profit-making corporation. Significantly, the order did not disturb use of the term "cooperative", but rather required only that Armour's ownership be disclosed. For a discussion of these cases see E. Kintner, A Primer on the Law of Deceptive Practices 286-288 (1971). Compare Wayne Oil Tank & Pump Co., 1 F.T.C. 259 (1918) (unfair to falsely represent that a competitor has been found guilty of violating the Sherman Act).

F.T.C. 145 (1936) (misleading corporate name found to "divert trade from competitors of truthfully marked rugs who sell their products on their merits rather than on the basis of sympathy . . .").

To the extent that image advertising can affect consumer purchases, the Commission's Section 5 mandate to prevent unfair economic benefits to the company through deceptive descriptions of corporate behavior is the same as its mandate to prevent deceptive product claims. Moreover, to the extent that the products involved are non-fungible, consumers who are drawn to a specific product by a misleading depiction of the corporation may be deceived to their detriment into choosing products that are less suitable for them than competing products. In either case, an "unfair or deceptive act or practice or an unfair method of competition" has occurred. There is in any event no reason for the Commission, solely on jurisdictional grounds, to leave unregulated such a major area of advertising activity as that relating to the corporation's image.

B. Substantive Standards Applicable to Image Advertising

It is useful, even at this early stage, to give some consideration to the possible substantive standards which could properly be held to govern these advertisements under Section 5. The staff has examined the advertisements cited in the Rosenthal petition, as well as additional ads gathered through monitoring, in light of established Commission law -- that is, that representations explicitly or implicitly made must not be deceptive, and

must have a reasonable basis. These established standards are of course fully applicable to these advertisements.

In addition, however, consideration has been given to a significant refinement of these traditional theories. While the staff does not propose that the Commission necessarily endorse the theories of law set out below, we believe that the Commission should be aware that some of the cases which may develop out of our proposed investigation may be predicated in part on these or similar theories.

When advertisers make claims which raise issues of great public concern, Section 5 may impose an unusually high standard of accuracy. We have found, for example, in reviewing corporate image advertisements that frequently these advertisements choose to describe a single, narrow corporate activity, or instances of corporate behavior, which may very well be true but which are not at all typical of the corporation's activity or behavior in related or similar -- or, indeed, identical -- matters. A corporation might have restored one strip-mining area, while leaving numerous other such areas ruined. A corporation might tell about its oil spill clean-up device without saying that it has had numerous oil spills, has been cited many times for disregard of federal regulations concerning preventive measures for spills, or that the device is not ready for use and is currently not being used by the corporation itself.

These characteristics of image advertising suggest that when an advertiser wants to enhance his overall image concerning

matters of great public concern, Section 5 might require him to present a fairly complete picture; otherwise, corporate image advertising is no more than a vehicle for the dissemination of highly distorted corporate images. Many of the claims made in corporate advertising are so narrow that serious challenge of them will lie not in regard to their literal truth but, rather, with respect to the implication that somehow the instance described in the advertisement is typical, represents a long-standing feature of corporate behavior, is currently a major commitment of the corporation, is reproducible in other situations or has a broad applicability to the problem which is the subject of the advertisement.

A standard which requires a complete image may well be appropriate in this area to avoid distortion. In corporate image advertising, the field of relevance is the corporation, and not simply a particular product or service. When the Commission alleges deception or unfairness in the failure to state a material fact in an advertisement for a product or service, the field of relevance for determining the existence of material facts omitted is the product or service itself. That Dow Chemical Company was making napalm no doubt could have affected many consumers' decisions whether or not to purchase Saran Wrap, which Dow also made, and in that abstract sense the fact of napalm production satisfied the test of materiality. Nevertheless, because advertisements for Saran Wrap

concerned that product, and not Dow itself, the field of relevance in which we would look for deceptively or unfairly omitted material facts is the product itself and not the corporation. The basic teaching is clear: The advertiser ordinarily defines the field of relevance in which we determine the existence of omitted, material facts.

The application of this concept of materiality to corporate image advertising is equally clear. If the advertiser chooses to make a claim about the corporation, then it is the corporation, or that segment of the corporation substantially related to the particular subject of the advertisement, which constitutes the field of relevance in which we ascertain the existence of material omitted facts. The image is not of a particular oil clean-up device; the image is of the corporation which claims to have developed such a device, and it is that latter image whose distortion Section 5 may be able to reach.

Moreover, when claims in corporate image advertising touch upon matters of great public concern, Section 5 may require that the advertiser disclose the existence of substantial questions concerning those claims, or, indeed, at least, the existence of facts (as distinguished from the facts themselves) which tend to support the contrary viewpoint.

These concepts are already reflected in Commission cases and complaints 3/ and, indeed, have roots in the common law of misrepresentation.

3/ Although only Section 15 of the Federal Trade Commission Act explicitly adopts the deceptive half-truth concept in its definition of "false advertisement," the concept is equally applicable to Section 5 - See e.g., Manco Watch Strap Co., 60 F.T.C. 495 (1968) (disclosure of foreign origin of watch straps); Mohawk Refining Corp. v. F.T.C., 263 F.2d 818 (3d Cir.), cert. denied, 361 U.S. 814 (1959) (disclosure of fact that oil is reprocessed). The analgesics complaints now in litigation, (Bristol Myers Co., Dkt. 8917; American Home Products, Co., Dkt. No. 8918; Sterling Drug Inc., Dkt 8919) allege that respondents have violated the Act by failing to disclose that there exists a "substantial question" within the relevant scientific community as to the truth of the representations made in advertising. An additional statutory example of the deceptive half-truth theory may be found in the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §352(n), which requires advertising for prescription drugs to include information relating to side effects and contraindications.

Finally, that certain classes of claims may call for a particularly high standard of truthfulness is clear. In Rodale Press, Inc.," 4/ the Commission indicated that health care claims are subjected to such a standard. Similarly, it was held in Firestone Tire & Rubber Co. 5/ that safety claims must also be more closely scrutinized than other types of representations especially when such claims are the sort that consumers cannot test for themselves. The fact that reliance on false health and safety claims may lead to consequences more serious than the economic injury which typically results from false advertising justifies the imposition of exacting standards for determining their accuracy. The staff will consider the teaching of these cases in determining whether a similarly exacting standard of accuracy must be met by an advertiser who addresses himself to such issues of fundamental consumer concern as energy or the environment.

4/ 71 F.T.C. 1184, 1239 (1967), vacated on other grounds, 407 F.2d 1252 (1968).

5/ 81 F.T.C. 398, 451 (1972), aff'd, 481 F.2d 246 (6th Cir. 1973), cert. denied, 42 U.S.L.W. 3362 (Dec. 18, 1973).

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VI. ADDITIONAL CONSIDERATIONS IN SELECTING IMAGE ADS

As the previous discussion indicates, the staff believes that in a proper instance, Commission action against specific corporate image advertisements is fully consistent both with the First Amendment and with Section 5. We have selected eight advertisements, by four companies, for investigation. We will discuss each of these ads, both from a factual and constitutional standpoint, in Sections VII and VIII below. At the same time, we have excluded from further inquiry all but one of the ads submitted in the petition and have determined not to proceed further on the McIntyre, Quarles or Train complaints. Our reasons are stated in Sections IX and X below.

Before discussing specific advertisements, however, we wish to note briefly some criteria which we believe each ad selected for further consideration should meet. Some of these criteria relate rather directly to the constitutional and statutory constraints already discussed; others involve additional policy considerations, which at this early stage we believe are equally important.

A. Response Elicited - Political or Economic

As our discussion of the statutory and constitutional issues relating to image advertising indicates, the staff recognizes that the FTC has no legitimate concern with promoting general concepts of "truth" in the social or political arenas. However, where advertising, whether directly or indirectly affects economic decision-making -- decisions to deal or not to deal with

a particular company -- we believe that Section 5 requires that such advertising be truthful. Thus, we have examined all ads to determine what response the advertisement was likely to elicit.

A necessary prerequisite of finding a predominantly economic effect is, in our judgment, that the ad describe the corporation's own activity, rather than consist of assertions about a subject in general. Only if the ad describes the corporation's own activity does it appear possible to conclude that the viewer's response is likely to be in terms of his relationship to the corporation rather than to a subject in general.

At the outset, it should be kept in mind that here, as with the other criteria, there is often overlap and the specific message or themes in the ads are often difficult to segregate with precision and certainty. Some ads tended to speak in terms of general corporate activities aimed at alleviating the energy shortage or improving the environment. Given what we now know about image advertising, we believe these ads may be properly read as saying, "Buy our products because we're a good company looking out for your interests." The inference to be drawn from these ads is that the development of goodwill will have a favorable impact on sales for the corporation. This is especially true where the products are for the most part fungible, such as gasoline. This kind of advertising gives an environmentally or energy sensitive consumer a reason to choose between what would otherwise be

fungible products, the selling of which would often be difficult on the basis of valid brand differentiation advertising.

Many other ads were expressly addressed to a discussion of government regulatory behavior or presented the corporation's position on pending legislation. These ads were dismissed from further consideration because they seemed likely to elicit a predominantly political response and were therefore protected under the First Amendment.

B. Primarily Investor Response

Some of the ads, in addition to attempting to elicit consumer response, are intended to have an impact on corporate investors. These ads primarily appear in publications such as Fortune, The Wall Street Journal, etc., and are not primarily directed at the individual consumer. We did not consider ads which were directed primarily toward investors other than consumers. While investor response to a corporate image ad is an economic response, we believe that at this early stage deference should be given to the superior expertise of the SEC in evaluating the impact of image advertising on investors. 1/

1/ The SEC appears to have jurisdiction over corporate image advertising under both the Securities Act of 1933, 15 U.S.C. 77a et seq., and the Securities Exchange Act of 1934, 15 U.S.C. 78a et seq. The Securities Act confers jurisdiction upon the SEC to regulate advertising which might be construed as part of an "offer" to sell securities under Section 2(3) of that Act and to subject such advertising, inter alia, to its prospectus requirements. The Exchange Act enables the SEC to regulate corporate image advertising which constitutes a "manipulative or deceptive device" which affects the price of a stock being traded and which is employed in connection with the "purchase" or "sale" of securities under Section 10(b) and Rule 10(b)-5. (Footnote continued on next page.)

C. Other Pending Litigation or Regulation

Evaluation of the oil company ads requires a degree of caution to eliminate claims which relate to matters under litigation in Exxon, et al., Docket No. 8934. In those instances where there was an inevitable overlap, a joint effort with the Bureau of Competition was undertaken to resolve problems. Several ads were eliminated because the truth or falsity of the facts contained in the ads involved the same issues as the antitrust case. It did not seem

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Fn. 1 (continued)

Although the SEC has yet to pursue advertising, whether corporate image or otherwise, there is little doubt that it has sufficient authority to do so in a proper case.

Supervisory attorneys employed in the Division of Corporate Financial Review and the Division of Enforcement of the SEC have been contacted and have discussed the problems posed by corporate image advertising to both the SEC and the Commission. They have expressed interest in establishing a liaison with the Commission so that both agencies may be kept abreast of developments in this area.

Our discussions with the SEC staff indicate that the staff would not regard the First Amendment as an obstacle to their jurisdiction in a proper case. The limited case law appears to support this view. In the well-known case of SEC v. Texas Gulf Sulphur, 446 F.2d 1301 (2d Cir. 1971), liability under Rule 10(b)-5 was premised on a press release that deceptively minimized the likely success of ore drilling overtime. On appeal to the United States Court of Appeals for the Second Circuit, Texas Gulf Sulphur contended, among other things, that the press release was constitutionally protected under the First Amendment. The Court of Appeals rejected the claim, stating that "the First Amendment deals with the free exchange of ideas and not with commercial 'factual speech.'" 446 F.2d at 1306.

wise either to duplicate work being done in the antitrust case, or to bring about a situation whereby issues involved in this case could be litigated first in an advertising case.

In some instances there was an overlap with other regulatory agencies, such as the AEC, or state public service commissions. When the factual determinations in the ads were substantially the same as issues under consideration by other agencies, these ads were dropped from consideration.

D. Justiciability of Issues

Many of the ads examined contained very broad claims which if litigated would require massive investigations and litigation. The energy ads were particularly troublesome in this regard. In selecting ads for further action, an attempt was made to restrict our efforts to those claims capable of objective verification through a reasonably restricted factual inquiry.

E. Merits of Certain Ads During Energy Crisis

Some ads were eliminated from consideration because they provided useful information, apart from that concerning the ad's sponsor. This primarily involved ads giving consumers "helpful hints" about ways to conserve energy. We did not want to discourage this form of advertising and felt that any further efforts by us to regulate this kind of advertising would be counter-productive. In any event, it appeared from preliminary investigations that by and large, the helpful hints (e.g. turn down your thermostat) were not deceptive.

VII. ADS FOR WHICH STAFF RECOMMENDS ACTION

We turn now to the eight advertisements, by Shell, Texaco, Gulf and Exxon, which the staff believes are appropriate subjects for further investigation. For ease of reference, we have placed each ad before our discussion of that ad.

As our prior discussion of the general constitutional, statutory and policy considerations concerning image advertising indicates, our decision to recommend further action on these ads has required a rather detailed focus on the representations made in the ads, the likely effect of the ads on consumers as well as an analysis of the likely validity of the claims contained in the ads. Our conclusions at this stage are necessarily tentative. Responses to the demand letters which we recommend be sent will provide additional information going to both the validity of the advertising claims and the likely effect of the ads. In evaluating the likely validity of the claims, however, the staff has already read available literature and consulted with private and governmental experts.

As discussed in detail in the section on the First Amendment, the mere relevancy of information contained in an ad to a matter of public controversy should not result in the ad receiving First Amendment protection when the relevancy is latent rather than express, and the dominant effect of the ad is likely to be commercial. At this stage our conclusions are based largely on elements of the ads themselves that indicate a primary commercial orientation. We believe that the available literature discussed in Sections II and III supra is wholly consistent with our conclusions.

A. "Oil Herder" - Shell Oil Co.

CBS Radio, July 6, 1972

CB Radio news — 3, 4 pm
7/6/72

SHELL OIL CO.
GASOLINE
Oil Herder - S30-2321-R
31 SECONDS

(TAPE: #OM-1033 - cut 2)

C.T: #058

SFX: OCEAN SOUNDS IN & UNDER

VOICE: My name is Allan A. Allan. I'm not an authority on the Shell gasoline I use in my car, but as an oceanographer, I respect Shell Oil Co. I've witnessed a demonstration of Shell's Oil Herder. This unique chemical can actually push a spurting oil slick back together so it's more easily cleaned up. I figure if Shell can develop the Oil Herder, Shell gasolines must really be good too.

ANNCR: Get Shell, Super Shell or non-leaded Shell of the Future because...

SFX: ENGINE START

ANNCR: Shell products ... perform.

1. Commercial Effect

Of all the ads we have reviewed this "oil herder" ad makes the most explicit connection between the advertiser's image and retail product sales.

The ad opens with Mr. Allan A. Allan introducing himself as an oceanographer who has come to "respect" Shell after witnessing a "demonstration" of Shell's oil herder. The oil herder's purported ability to "push a spurting oil slick back together" is then described. In doing this, it is claimed to be possible to "more easily clean ... up" oil slicks. Although Mr. Allan had stated earlier that he was "not an authority on the Shell gasoline (he) use(d) in (his) car," the demonstration led him to "figure if Shell can develop the Oil Herder, Shell gasolines must really be good too." An announcer then tells the viewer to "Get Shell, Super Shell or non-Leaded Shell of the Future because (sound of car starting) Shell products perform" -- Shell's tag line for its product advertisements.

Although here expressed explicitly, Mr. Allan's conclusion is precisely that which may be inferred from all image advertising: A company, much like an individual, has character and personality, which are uniform throughout the company. If the company is socially responsible, all of its products will be of high quality.

Since Shell expressly links its activities to retail sales of a specific brand the ad cannot even be said to be "ambiguous."

Conversely, while the information contained in the ad may be "relevant" to the controversy regarding oil company pollution, this relationship is never made explicit. The "political" message is so indirect and so much overwhelmed by the hard sell message that it is extremely unlikely to be understood, let alone be effective. Because the ad so clearly relates the oil herder to Shell oil and Shell gasolines, any action on the part of the viewer is directed towards purchase of Shell products or services - not agreement or action in favor of the latent message.

Because the effect and purpose of this ad are expressly commercial, there is no difficulty classifying the ad as commercial speech.

2. Validity of Claim

Our initial investigation into the oil spill devices described in this and other 1/ ads indicates that the ads have failed adequately to describe the limitations of the products. The Shell approach has been instead to call them "promising." Usefulness of these products under ordinary open sea conditions is limited. These products are virtually useless in rough water, in ocean currents, with aged or weathered oil with debris among it.

The demonstration observed by Allan Allan was conducted in highly artificial conditions and it is staff's understanding from Mr. Allan that his scientific opinion on the usefulness of the product is limited to this demonstration. The particular demonstration he observed used an artificial lake with a depth of two feet and no wind, no currents, no waves.

1/ Both this ad and the following one cover the same subjects raised in Exhibit B of the Rosenthal Petition; however, the ads selected can be more clearly linked to a solicitation of economic response to buy Shell products, and the selected ads clearly omit material facts regarding the limitations of the devices mentioned.

As far as Shell Oil is concerned neither the oil herder nor the oil recovery barge are unique as represented. Most oil spills in the Gulf are cleaned up by a non-profit corporation owned by several oil companies and the techniques described in the advertising are in wide use by all oil companies.

Shell describes the oil herder as "promising," but it should be noted that the oil herder has been in existence for over 30 years with very few improvements. The primary improvements have been made by the Coast Guard but Shell still uses essentially the same product discovered 30 years ago.

Thus our letter initially seeks to obtain information about the limitations of the oil spill devices, and other related material facts omitted from the advertisement.

Because staff believes the ad more generally represents Shell Oil to be environmentally responsible our letter also requests general information about the company's history with oil spills and violations of existing regulations and laws. Our preliminary investigation has revealed many incidents when spills have occurred.

B. "Spending Lots of Time and Dollars" - Shell Oil Co.
Washington Post, Oct. 17, 1973

Shell is spending lots of time and dollars developing oil spill recovery devices, in the hope that they'll never have to be used.

We've got an Oil Spill Section at our Research Laboratory in Houston. And we've come up with some pretty promising oil spill recovery devices.

One's called Shell Oil Herder," Surface Chemical Collecting Agent. You might have seen it demonstrated in a TV commercial. Under the right conditions it can gather spilled oil together and contain it. Which makes removal easier.

Our scientists and engineers in Houston have also come up with a unique oil recovery barge. It's a strange looking thing that skims along the water. And once again, under the right circumstances, it sucks up the oil. Like a huge aquatic vacuum cleaner.

A material we're working with is polyurethane foam. What we do is cut it into strips or chunks and drop them on a spill. They can soak up to 40 times their own weight in oil that's still on the water. Then we remove the oil-soaked foam from the water.

We're constantly trying to come up with new oil spill control devices. Since as we mentioned earlier, each device works best only under the right conditions. That is, the right water temperature, the proper wind conditions, and so on.

But the fact of the matter is, even if we discover the perfect oil spill control device, it won't be the ultimate answer.



Because the ultimate answer is preventing spills from happening. Reducing the constant possibility of human error or mechanical failure to harmless levels.

At Shell, we're working hard toward that ultimate goal.

Because we believe the best oil spill recovery device is the kind that never has to be used.

SHELL

We're trying to make things better.

1. Commercial Effect

The Shell newspaper advertisement regarding the "oil herder" and other "promising oil spill recovery devices" focuses on Shell's corporate activities to minimize the damage caused by oil spills. Although information contained in the ad has latent relevance to the public controversy regarding oil companies' pollution record, the ad does not link the information provided to the existence of such controversy. The ad, then like the previous ad has the effect of any description of corporate behavior - it enhances its economic relationships with its customers. To this extent, then, the ad is commercial.

This newspaper advertisement depicts a contented seagull on the shore under the caption "Shell is spending lots of time and dollars developing oil spill recovery devices, in the hope that they'll never have to be used." After describing the Oil Herder, oil recovery barge, and polyurethane foam, the company's motivation in developing such devices is described: "We're constantly trying to come up with new oil spill control devices... at Shell, we're working hard toward that ultimate goal (of preventing spills from happening.)" The company's logo "we're trying to make things better" emphasizes this attitude. Although this attitude is discussed in the context of the company's oil spill program, the attitude is stated in generalized terms. The prevention of oil spills is being done by "Reducing the constant possibility of human error or mechanical failure to harmless levels." The Shell Company as a whole is stated to be "working hard toward that ultimate goal."

33-291 O - 78 - 78

This attitude is underscored by the statement that Shell fully recognizes that the "ultimate answer is preventing spills from happening." Even Shell's development of "the perfect oil spill control device" is not enough. Shell has said "we believe the best oil spill recovery device is the kind that never has to be used." The ad closes with the Shell logo and the tag line "we're trying to make things better," both of which appear in Shell's express product ads.

The constant emphasis in this ad on the company's attitude and sincerity strongly leads the reader to respond in terms of his relationship with the company, not with respect to any broader controversy regarding oil spills. All gasoline companies attempt to distinguish themselves in terms of attitude, as superior service is one of the only ways to convince people to buy their version of an otherwise fungible product. Thus, the attitudes stressed in the ad are not those peculiar to the development of oil recovery devices, such as technical ability or experience with oil spills or expenditure of vast sums of money. The attitudes stressed are those readily applicable to the retail sales context: sincerity, idealism, understanding of human frailties, and efforts to reduce "mechanical failure to harmless levels." The gasoline purchaser can readily sympathize with such attitudes.

The emphasis on attitude serves to make obscure any relevance of the information to any broader environmental issue. The ad gives the average reader no hard information with which to evaluate the desirability of off-shore drilling except to the limited extent that a positive attitude towards the company tends to benefit the company

in whatever endeavors it pursues.

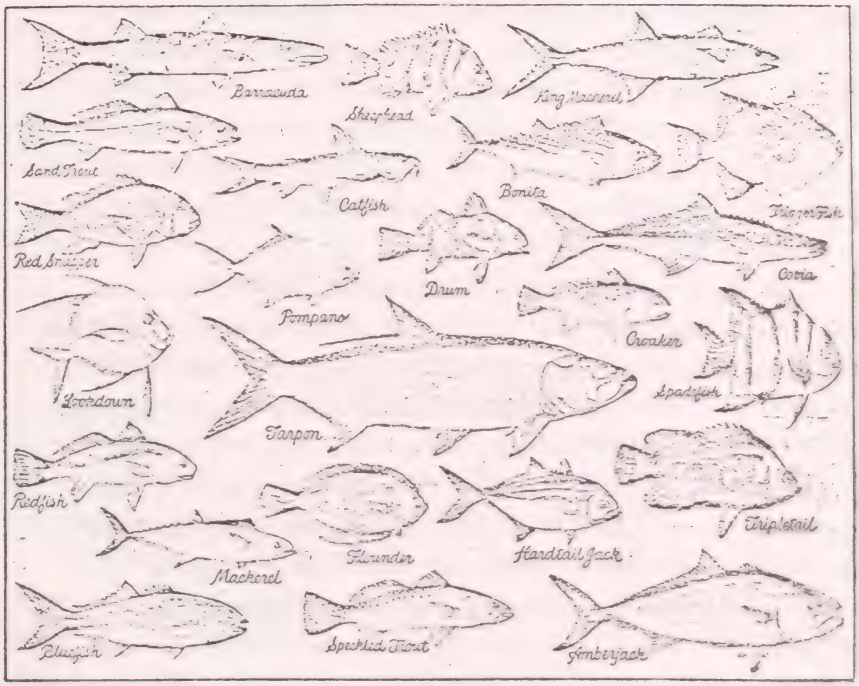
Because the ad does not relate the information it contains to any public controversy, and because the resulting effect of the ad is likely to be primarily economic, the ad is an example of speech which is subject to the FTC Act.

2. Validity of Claim

For the reasons discussed in our analysis of the Allan Allan ad, staff believes that Shell has exaggerated the utility of the oil spill device described.

C. "23 Kinds of Fish" - Shell Oil Co.
(Exhibit A of Petitioner's ads)

How 23 kinds of fish can help change your mind about the waters around our offshore oil platforms.



If you think that offshore oil platforms are ruining the waters around them, we at Shell have a fact for you.

Today, it's possible to catch more than 23 different kinds of fish under our platforms in the Gulf of Mexico. Of course, we do have a great many platforms located there. So naturally, the kinds of fish you can catch will depend on which platforms you're fishing from. And whether they're biting. And how good a fisherman you are.

We can tell you this, though. Lots of fishermen catch a lot of these fish right in these waters.

And here's another fact that really might surprise you.

Because we're taking so many precautions to try to keep the waters around our operation clean, the oilmen who work on our platforms often grab their rods and reels during their time-off. (And sometimes haul in some of the most terrific fish you've ever seen.)

They store their catch in the deep freeze (with the cook's permission, of course) and when they head home after their 7 day shift, take along a couple of good fish suppers for their wives and kids.

It could be a 6 pound speckled trout or a 20 pound red snapper. Matter of fact, most of the snapper served in gulf area restaurants comes from these same waters.

Shell is trying to supply a lot of people with the energy they need—and trying to respect the environment around us.

Taking every reasonable precaution we can to lessen the chance of something going wrong.

That way, we hope more people can have their energy and enjoy their fish, too.

SHELL

Exhibit A

We're trying to make things better.

1. Economic Effect

Although the Shell "Kinds of fish" ad takes the form of a defense of Shell's activities, this orientation only partly directs the reader towards action with respect to any controversy regarding such activities. The primary effect of the ad is still likely to be economic because of the ad's emphasis on Shell's activities. However, because of the difficulties raised by the ad, the staff prefers to request data from Shell regarding the effect of the ad before finally deciding whether the ad will receive First Amendment protection. As noted in Section IV, supra, such inquiry cannot itself be argued to have a chilling effect.

The First Amendment issue arises because the ad's title and opening statement imply that the ad is a defense to general criticisms of off-shore drilling, or at least Shell's drilling. The title of the ad is, in full: "How 23 kinds of Fish can help change your mind about the waters around our off-shore oil platforms." (emphasis supplied). By entitling the ad in this way Shell partially alerts the reader to the public controversy regarding off-shore drilling and states it will try to change the reader's mind regarding criticisms of off-shore drilling. The opening statement in the ad follows up on this theme: "If you think that off-shore oil platforms are ruining the waters around them, we at Shell have a fact for you." Later in the ad, Shell makes reference to its "trying to supply a lot of people with the energy they need."

Nevertheless, while the introduction to the advertisement refers to general criticisms of off-shore drilling, the title and

contents of the ad defend and describe only the activities of Shell. The title refers only to "the waters around our off-shore oil platforms" and the contents of the ad refer only to fish "under our platforms in the Gulf of Mexico. In this sense the ad describes only corporate behavior and should not be viewed as a defense of off-shore drilling generally. At the end of the ad the Shell logo and the same tag line seen on the previous ad -- "we're trying to make things better" -- is displayed, thus tying the ad into Shell's overall image program.

Moreover, the chatty discussion of Shell's activities tends to deflect attention from any relevance the information might have to a broader controversy. The pictures of the twenty-three fish, the cute reference to the variance in fishing conditions and fish in the cook's ice-box are at odds with a view of this ad as a serious political statement. Thus, except for the references in the ad's title and introduction, we believe viewers would not interpret the ad as a political argument. The primary emphasis of the ad remains that of describing Shell's corporate activities.

Furthermore, even if the ad does direct the reader's attention to a controversy, its conclusions are very general: "Taking every reasonable precaution we can to lessen the chance of something going wrong." The logo states "we're trying to make things better." These conclusions are applicable to all corporate activities. Nowhere does Shell say, "write your Senator" or "support off-shore drilling". In fact, the need for off-shore drilling to provide energy is only very vaguely implied: "Shell is trying to supply

a lot of people with the energy they need...We hope more people can have their energy..." Thus, although the ad arguably defends Shell in the context of the larger controversy, the ad only indirectly addresses the larger controversy.

The ad then is similar to an ad defending Shell from criticisms of bad service. That the ad is defensive rather than merely assertive should not render it more political.

Because the orientation of the ad is towards describing corporate behavior rather than making a direct argument regarding offshore drilling, the effect of the ad is more likely to be economic rather than political. While further investigation to test and confirm this judgment is necessary, staff believes that this ad provides sufficient basis for such an investigation.

2./ Validity of Claim

As noted in our discussion of the Allan A. Allan ad, Shell's claim of minimal environmental impact is questionable in light of its prior oil spill record. With regard to the effect of off-shore drilling on fish, the experts we have contacted are unaware of any studies in this area that might be required to provide a reasonable basis for Shell's claim. Although sport fishing may be good around off-shore drilling rigs, it is not at all clear, as Shell impliedly represents, that its drilling has generally been good for fishing and will cause no environmental damage.

D. "Back to the Sea" - Texaco, Inc.
NBC - TV, Jan. 1, 1974

STD-1009 (1/72)

TELEVISION NETWORK

DATE	ADVERTISER & ADDRESS
JANUARY 1, 1974	Texaco, Inc. 135 E. 42nd St. New York, NY 10017
SHOW CRAMER BOWL	AGENCY & ADDRESS Benton & Bowles 909 Third Ave. New York, NY 10022
TIME 8:06-11:06 P.M.	

POSITION	PRODUCT	CODE #	LENGTH
12	CORPORATE	TXPB1356	60

COPY STATUS:
(✓) AS-PRODUCED SCRIPT (✓) INITIAL SUBMISSION
( ) PHOTOBOARD ( ) FOLLOW-UP SUBMISSION

F.T.C. Reporting

B&B TELEVISION

Benton & Bowles, Inc. 909 Third Avenue, New York, N.Y. 10022 / 758-6200

Client: TEXACO, INC. **Date:** AS FILMED DECEMBER 1973

Product: CORPORATE **Station:**

Program: **Draft:** 1-12-21-73 sf/bc

1:00 COMMERCIAL "TXO-1314
("BACK TO THE SEA")

PICTURE	SOUND
OPEN ON OCEAN SCENE. SURF BEATING AGAINST THE SHORE.	NARRATOR: America needs oil. And the sea is sitting on vast amounts of it.
ACTUAL SHIP INVOLVED IN SEISMIC OPERATIONS.	To find it, we at Texaco first make scientific surveys.
OIL RIG IN THE MIDDLE OF THE SEA.	Where our geologists think there's oil, we bring out a drilling platform.
MONTAGE OF 3 SAFETY DEVICES.	From the start, dozens of safety devices keep an around-the-clock check on the drilling well.
CONTINUE ACTION.	And highly trained men always keep an eye on the safety devices.
CUT TO OUTSIDE RIG. CAMERA PANS DOWN FOLLOWING DRILL PIPE.	Where their eyes can't see...
PAN TO CAMERA; BACK TO DRILL PIPE.	TV cameras are watching for them.
CONTINUE PAN DOWN DRILL PIPE WE SEE BLOWOUT PREVENTER ATTACHED ON OCEAN FLOOR.	And sitting on each well...
MOVE IN ON BLOWOUT PREVENTER.	are blowout preventers...
CU OF BLOWOUT PREVENTER.	that can quickly close the well if necessary.

(CONT'D)

1:00 COMMERCIAL #TXDP-1356 (CONT'D) -2-
("BACK TO THE SEA")

PICTURE	SOUND
DISSOLVE TO ACTUAL FUNCTIONING CHRISTMAS TREE. WE SEE CABLE ATTACHED.	NARRATOR: (CONT'D) Once the wells are completed, all the drilling equipment is replaced with high pressure valves... called a Christmas tree.
CAMERA BEGINS TO PAN UP CABLE.	At Texaco...
CONTINUE TO PAN UP CABLE...	we do all this...
CAMERA BREAKS WATER.	(CLANGING) so that one day underwater wells producing thousands of barrels of much-needed oil...
WE SEE BUOY MARKER IN OPEN SEA WITH SEA GULLS.	could look like this. (DING, DING)
SUPER: WE'RE WORKING TO KEEP YOUR TRUST. TEXACO HEX.	At Texaco, we're working to keep your trust.

1. Economic Effect

The main thrust of "Back to the Sea" is that Texaco is "working to keep your trust." The description in the advertisement of the precautions taken by Texaco while drilling off-shore provides the example of how Texaco is "working to keep (the viewer's) trust" and why the reader should trust Texaco. In trusting Texaco, the viewer is directed towards purchase and patronage, not favoring off-shore drilling by Texaco, especially in light of Texaco's use of the same theme in its product advertising.

In addition to use of the Texaco logo, Texaco here employes the same theme used on regular product ads -- trust. The ad selected used the phrase "at Texaco, we're working to keep your trust." Product ads contain claims like "Trust your car to the man who wears the star," or "Texaco retailers are ready, willing and able to take care of your car, with Texaco Products you can trust." By capitalizing on the notion of "trust" this corporate ad should help sell all Texaco products.

The advertisement opens with the observation that "America needs oil. And the sea is sitting on vast amounts of it." This observation is presented as an introduction rather than as advocacy. At the end of the ad a reference is made to "much-needed oil." That America "needs oil" and that the sea is a fruitful place to find it also, in effect, justifies the fact that Texaco is exploring off-shore, however, that justification is not set in the context of the controversy surrounding off-shore drilling. The audio for this portion of the advertisement will confirm that the reference to America's needs and the presence of oil off-shore is spoken in a matter-of-fact and introductory tone of voice. The viewer is neither alerted to the existence or nature of the off-shore drilling controversy nor frankly presented Texaco's point of view.

Because Texaco makes the above described reference without specifying the controversy surrounding off-shore drilling, the reader is not likely to understand the reference as advocacy, not likely to relate it to that controversy, and not likely to take action with respect to the controversy as distinct from action with respect to Texaco itself. That oil is off-shore merely explains

the context for Texaco's actions, rather than stating a separate argument that America needs oil, and shows the social interest in what Texaco is doing, rather than presenting an argument about energy policy. The ad ran before the "energy crisis."

The remainder of the advertisement describes Texaco's off-shore drilling in some detail; "scientific surveys," "dozens of safety devices," "blowout preventers," "high pressure valves." The advertisement sums up the above by saying "we do all this..." Texaco's motivation in doing so is described elliptically; Texaco takes such precautions "so that one day under-water wells...could look like this ("see buoy marker in open sea with sea gulls")." The fact that the wells produce "thousands of barrels of much - needed oil" is deemphasized in relation to Texaco's concern for environmental protection. The ending emphasis is "at Texaco, we're working to keep your trust." The ending sums up the relevance of all the foregoing information, Texaco is to be trusted.

Because the ad describes Texaco's corporate activities without a frank reference to the relevance of such information to matters of public controversy and as the primary

effect of the ad is likely to be economic, the ad should be considered subject to the FTC Act.

2. Validity of Claim

Texaco discusses the use of dozens of safety devices to prevent oil spills on its off-shore rigs. The advertising implies a system of automated failproof devices to protect the environment when in fact these devices are almost completely manually operated and their successful operation is dependent on good human judgment which has to weigh the environment against high costs to the oil companies if the devices are activated. Texaco would have the reader believe that its company is always environmentally responsible when in fact the corporation has been involved in a number of significant violations of pollution laws.

E. "Roga" - Gulf Oil Corp.
NBC - TV, August 16, 1972

33-291 O - 78 - 79

TELEVISION NETWORK

DATE	ADVERTISER & ADDRESS
August 16, 1972	Gulf Oil Corporation Gulf Bldg. Pittsburgh, Pa. 15230
SHOW REPUBLICAN PLATFORM HEARINGS	AGENCY & ADDRESS Young & Rubicam International Inc. 285 Madison Avenue New York, New York 10017
TIME 1:00-1:30 P.M.	

POSITION	PRODUCT	CODE #	LENGTH
1	Corporate	870-120	120

COPY STATUS:
(✓) AS-PRODUCED SCRIPT (✓) INITIAL SUBMISSION
( ) PHOTOBOARD ( ) FOLLOW-UP SUBMISSION

F.T.C. Reporting

YOUNG & RUBICAM INTERNATIONAL

DATE : AUGUST 8, 1972

CLIENT: GULF OIL CORP.

STATUS:

PRODUCT: GULF OIL

TYPE:

LENGTH: :120

LIVE:

TITLE: "ROGA"

COMMERCIAL NO.
870-120

VIDEO	AUDIO
CU WATERFALL, ZOOM BACK TO SHOW CASCADE LAKE. DISS TO ECU WATER IN STREAM--MAN'S HAND ENTERS FRAME, SCOOPS UP WATER TO HIS MOUTH.	SFX: WATERFALL, BIRDS, SINGING.
CUT TO MS MAN TURNS TOWARD CAMERA	ANNCR: Boy that's good.
MS MAN WALKING AWAY FROM LAKE TO CLEAR PLASTIC TANK FILLED WITH WATER IN FOREGROUND.	This is Cascade Lake high in the Sierras. It has some of the purest water in the world, and I'm going to pollute it.
MAN REACHES TANK, POINTS TO WATER IN TANK.	Well, that is, some of it.
CU SHOVEL DIPPING INTO BAG OF SALT	First, salt--
MS MAN EMPTYING SALT INTO TANK	like you find in brackish water near the ocean.
CU SHOVEL DIPPING INTO BAG. CUT TO CU WATER SURFACE IN TANK AS CHEMICAL SINKS INTO WATER	Now some magnesium chloride.
	and sodium sulfate.
CU SCENE LOOKING THROUGH TANK OF WATER AS POWDERED CHEMICAL IS POURED INTO WATER.	SFX
CU MAN'S FACE	Minerals like these occur naturally in a lot of places and make water dangerous to drink.
MS MAN EMPTYING SALT INTO TANK.	Now some ferric sulfate.

CLIENT: GULF OIL CORP.

PRODUCT: GULF OIL

TITLE: "ROGA"

COMMERCIAL NO.
870-120

VIDEO	AUDIO
CU SCENE LOOKING THROUGH TANK OF WATER AS POWDERED CHEMICAL IS POURED INTO WATER	SFX
CU WATER SURFACE AS ACID IS POURED INTO IT."	and sulphuric acid.
MS MAN TALKING AND REACHING DOWN TO CHEMICALS NEAR TANK	That's what you find in the rivers and streams around many towns. And now to top it all off,
MAN EMPTYING SALT INTO TANK	chemical wastes
CU SCENE LOOKING THROUGH TANK OF WATER AS POWDERED CHEMICAL IS POURED INTO WATER.	SFX
MS MAN HOLDING UP TWO BEAKERS OF DYE.	and dyes,
CU LOOKING THROUGH TANK AS DYES HIT WATER ANDCLOUD DOWN THROUGH TANK	SEX
CU WATER SURFACE AS MAN STIRS WATER IN TANK WITH POLE.	SFX
MS MAN STIRRING WATER DROPS POLE AND WALKS TOWARD CAMERA	Pretty grim huh?
MS PAN AS MAN WALKS TOWARD MACHINE	But things like these can get into your water supply, and if you're not careful, into you.
ZOOM OUT TO SHOW MACHINE-- CONTINUE PAN	Well the people at Gulf have come up with a process that will take foul water, even this, and clean it up. It's called the Gulf Reverse Osmosis System. And in spite of its big name, it's simple and efficient.

CLIENT: GULF OIL CORP.

PRODUCT: GULF OIL

TITLE: "ROGA"

-3-

COMMERCIAL NO.
870-120

VIDEO	AUDIO
ECU GLASS FILLING WITH WATER FROM MACHINE'S TAP	Incredible, that's the water I just polluted, and when you think of all the bad water in the world...
MCU MAN LIFTS GLASS AND DRINKS WATER	SFX
MCU MAN TALKING TO CAMERA	It's a good thing.
FADE TO BLACK AND UP ON GULF LOGO WITH SUPER: "A PRODUCT OF GULF ENVIRONMENTAL SYSTEMS"	

1. Economic Effect

This ad about the dramatic "reverse osmosis" system is especially likely to be considered a "commercial" advertisement as it has no latent relevance - let alone express relevance - to controversies associated with oil companies generally or Gulf in particular. Notably absent from all of the pollutants poured into the Cascade Lake water is oil. If Gulf has been charged with dumping salt, magnesium chloride, sodium sulfate, ferric sulfate, sulphuric acid, chemical wastes, and dyes into unpolluted water, even the sophisticated reader would be totally unaware of such fact. Because the reader is left with absolutely no sense of the relevance of the disseminated information to any matter other than company goodwill, the reader can and will respond in terms of his economic relationship with the company. Because the ad is not amgibuous and because the likely effect is economic, the advertisement is not constitutionally protected.

"Roga" opens with a shot of a waterfall and Cascade Lake "high in the Sierras." After the announcer scoops up a mouthful of lake water (exclaiming "Boy that's good"), he announces that he is "going to pollute it. Well, that is some of it." He then proceeds to pour the above mentioned pollutants into a transparent tank filled with lake water. Some of the pollutants are said to "occur naturally" not as a result of any company's pollution, let alone Gulf's. The threat of dirty water is driven home as the announcer cautions that "if you're not careful" you might drink water containing such things. But, "the people at Gulf have come up with a process that will take foul water, even this, and clean it up." The man then fills a glass with water

evidently from the tank, drinks it, and announces that "Incredibl(y), that's the water I just polluted..." The relevance of that fact is implied: "When you think of all the bad water in the world, (the machine's) a good thing." The company logo is then flashed with "A Product of Gulf Environmental Systems" superimposed.

The entire focus of the ad is on Gulf's capacity as a company to respond to society's needs, cleaning up "the rivers and streams around many towns." This clean-up effort is not evidently related to the type of pollution associated with oil companies. Therefore, it is fortuitous that the company activity described is environmental - it could have been any activity related to the needs of society. Gulf's filling of this need is not related to its interests in defending its polluting record, except in the indirect sense that a company concerned about cleaning up others' pollution presumably prevents or minimizes its own pollution. Not only is there no latent relevance of the information contained in the ad to any controversial activity by Gulf, but the reverse osmosis technique is only indirectly tied to the country's consciousness about pollution generally. The ad focuses on Gulf, not the state of the environment.

In favorably describing a product of Gulf Environmental Systems, the company leads the reader to expect that the same sensitivity and technical ability will be demonstrated by Gulf in its other activities, notably its retail sales. The reader

is left with no other outlet for his heightened interest in the company. The dominant effect of this ad, therefore, is commercial.

2. Validity of Claim

The ad describes a device to convert water with metallic salts and other chemical wastes into pure drinking water as simple and efficient. In our preliminary investigation, however, staff has learned that this system is neither simple nor efficient and is only experimental. Virtually none of these devices is in use today.

F. "Blowout Preventer" - Exxon Corp.
NBC - TV, March 17, 1973

STD-1570 (4/72)

TELEVISION NETWORK

DATE	ADVERTISER & ADDRESS
March 17, 1973	Exxon, Corp. 30 Rockefeller Plaza New York, New York 10020
SHOW	**AGENCY & ADDRESS**
NBC NIGHTLY NEWS	McCaffrey & McCall, Inc. 575 Lexington Avenue New York, New York 10022
TIME	
6:30-7:00 P.M.	

POSITION	PRODUCT	CODE #	LENGTH
1	Corporate	SJCX6451	60

COPY STATUS:

(✓) AS-PRODUCED SCRIPT (—) INITIAL SUBMISSION

( ) PHOTOBOARD ( ) FOLLOW-UP SUBMISSION

F.T.C. Reporter

Exxon Corp. TV #SJCX6451
Blowout Preventer Rev. #4 (KMS) :60 1/26/73
As Recorded

VIDEO	AUDIO
OPEN ON LONG SHOT OF PLATFORM FROM HELICOPTER.	V.O: When you're miles out to sea, drilling for oil isn't the easiest job. There are bound to be some risks.
DIS. TO CLOSER SHOT OF PLATFORM.	This rig is run for Exxon. We're taking you aboard to show you one of the ways we guard against potential oil spills when we drill.
DIS. TO WORKMEN AT BASE OF BLOWOUT PREVENTER. PULL UP TO REVEAL ENTIRE BOP.	This 40 ton device is designed to prevent blowouts.
CUT TO WORKMEN ACTIVATING BOP.	It is lowered to the ocean floor and clamped over the mouth of the well before drilling begins.
CUT TO UNDERWATER SHOTS OF BOP.	If unexpected pressures are encountered, it will control them until normal drilling can be resumed.
CUT TO SCENE ON DRILLING DECK.	In completing over 1500 wells in U.S waters over the years, we've rarely had to call on our blowout preventer to do their job. But when we have, they've done it well.
DIS. TO HELICOPTER SHOT OF PLATFORM.	We can't promise that our men and equipment will always be infallible. But we can promise as long as we work
EXXON LOGO "WE'D LIKE YOU TO KNOW" SUPERED UNDERNEATH	off-shore, we'll do it in the most responsible way we know how. Exxon. We'd like you to know.

1. Economic Effect

The principal thrust of the Exxon "Blowout Preventer" advertisement is to describe the efforts that Exxon is taking to minimize the inevitable risks which result when fallible men undertake a difficult job. Although the task described in the ad is off-shore drilling, the characteristics of Exxon emphasized are also relevant to the service provided at a gas station or elsewhere - that is efforts to prevent mistakes. Nowhere in the ad is the country's need for oil or the controversy over off-shore drilling directly addressed. The ad should be considered subject to Section 5.

The ad is in some sense relevant to the issue of whether off-shore drilling is dangerous, at least when done by Exxon. That off-shore drilling isn't dangerous (as done by Exxon) could be an important argument for off-shore drilling in general. The focus of the ad, however, is towards Exxon's responsibility, not the desirability of off-shore drilling itself. The emphasis is on Exxon's promise to be responsible rather than the relationship between its promise and the desirability of off-shore drilling. Off-shore drilling is emphasized as an example of Exxon's responsibility, not as an issue in itself.

Nowhere in the ad does Exxon direct the viewer to consider the larger controversy over off-shore drilling. Instead the ad explicitly states that what Exxon wants the viewer "to know" is "one of the ways we guard against potential oil spills when we drill" - the blow-out preventer. The company's efforts are asserted to be so thorough that "in completing over 1500 wells

in U.S. waters over the years, we've rarely had to call on (the) blowout preventer to do their job." When they have had to use the preventer, "they've done (their job) well."

This description of Exxon's concern and technical ability reflects well on its abilities in manufacturing all of its products and in providing its services. This is likely to be what is remembered from the ad (Exxon is an active and responsible company) as the ad does not relate that information sufficiently to the off-shore drilling controversy to arouse attention or action with respect to that controversy.

In the present ad, as in the others we have selected, Exxon prominently displays its corporate logo, as well as the phrase, "we'd like you to know." Although Exxon has run very few product ads since their name change, the logo and tag-line appear in their extensive general corporate advertising. Moreover, one of the few product ads we have seen (for petro chemicals) uses the same logo and tag line. Given the weight of Exxon's image advertising and the continuties between the image advertising and product advertising, we believe that use of the logo and tag line in the present ad is a further indication that the principal response to the ad will be in terms of the viewer's economic relationship with Exxon, rather than in terms of any other public issue.

2. Validity of Claim

Like the Texaco ad discussed above, Exxon describes one of its principal safety devices, here the Blowout Preventer. Exxon makes strong statements that blowout preventers are in

well use and they can always close a well if unexpected pressures occur. However, blowouts have occurred due to a malfunction of the preventer or a failure to activate the system. Exxon like Texaco, has been involved in various violations of pollution laws. We therefore believe the claims for the preventer may be exaggerated and the overall impression of Exxon's behavior in this area distorted.

G. "Shrimping" - Exxon Corp.
NBC - TV, March 18, 1973

STD-1009 (4/72)

NBC TELEVISION NETWORK

DATE	ADVERTISER & ADDRESS
March 18, 1973	Exxon, Corp. 30 Rockefeller Plaza New York, New York 10020
SHOW NBC NIGHTLY NEWS	**AGENCY & ADDRESS**
TIME 6:30-7:00 P.M.	McCaffrey & McCall, Inc. 575 Lexington Avenue New York,New York 10022

POSITION	PRODUCT	CODE #	LENGTH
2	Corporate	SJCX6456	60

COPY STATUS:

(✓) AS-PRODUCED SCRIPT (✓) INITIAL SUBMISSION

( ) PHOTOBOARD ( ) FOLLOW-UP SUBMISSION

F.T.C. Report

Exxon Corp. TV #SJCX6456
"Gulf Fishing Rev. #4 (KWS) :60 1/26/73
As Recorded

VIDEO	AUDIO (MUSIC & SFX THROUGHOUT)
OPEN ON PAN OF BOAT	V.O: Off the coast of Louisiana
CUT TO DROPPING OF SLEDS INTO WATER	where people's livelihoods depend on shrimp.
CUT TO CU OF ROPE BEING PULLED	More than twenty years ago, shrimpers
SERIES OF QUICK CUTS OF MEN PULLING IN NETS OF SHRIMP AND WORKING ON BOARD.	thought they were seeing the end of an era -- and a way of life. They were concerned because oil drilling had just begun offshore. Shrimp are one of the most delicate marine creatures, and despite our assurances that the shrimp industry and oil industry
CUT TO CU OF FISH BEING PICKED.	could live together in harmony, few fishermen believed it.
CUT TO BASKET OF FISH BEING LOWERED INTO HULL.	Now the wells are here by the thousands. And the shrimp are still here by the millions.
CUT TO VIEW OF MEN ON BOAT.	Exxon doesn't claim credit for the good shrimping.
DIS. TO VIEW OF SHIP AND RIG IN SUNSET.	But we don't seem to have done it any harm.
EXXON LOGO. "WE'D LIKE YOU TO KNOW" SUPERED UNDERNEATH.	Exxon. We'd like you to know.

33-291 O - 78 - 80

1. Economic Effect

Like the previous ad, this ad's claims regarding the effect of off-shore drilling on shrimp has latent relevance to the off-shore drilling controversy. Again, the ad nowhere plays on that fact, but rather consists of a straight description of corporate behavior. Because the ad describes behavior, it is likely to be deemed "commercial" despite its latent relevance to the off-shore drilling controversy.

The principal messages conveyed by the ad are that Exxon "keeps its promises" and that it has not harmed the shrimp off the coast of Louisiana. According to the ad twenty years ago when Exxon began off-shore drilling, the shrimp industry was concerned that their livelihood was endangered. Shrimp are said to be "one of the most delicate marine creatures," highlighting the fears of the shrimpers. Back when the drilling began, Exxon gave "assurances that the shrimp industry and oil industry could live together in harmony." After twenty years, Exxon, in effect, claims to have made good on its assurances "we don't seem to have done (the shrimping) any harm." Thus, the ad tells a story about twenty years of relations between itself and the shrimpers. The conclusions to be drawn are that Exxon can be trusted, it is a sensitive and responsible company, and it is not polluting the Gulf. It is thus a classic image advertisement, taking an example of corporate responsibility

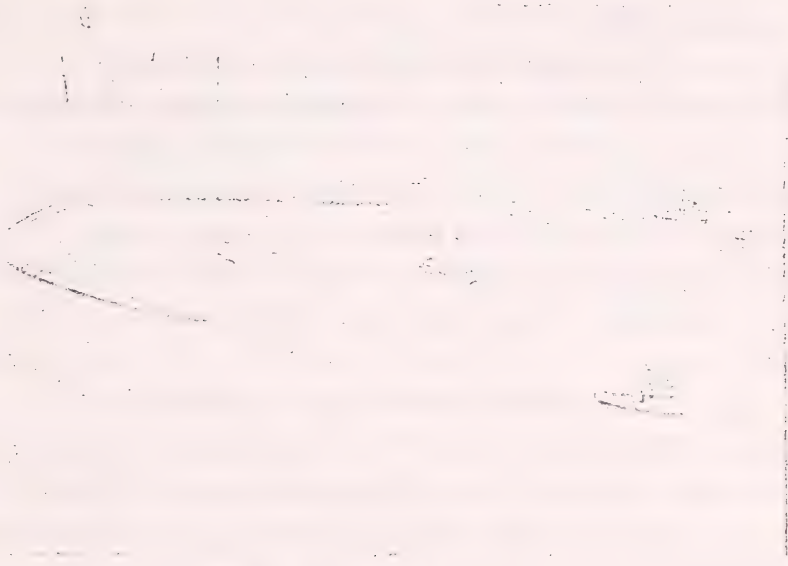
and describing it as if it typifies corporate behavior generally. It does not describe Exxon's beliefs with respect to any public controversy except to the extent that Exxon's activities speak as to such beliefs. As before, the Exxon logo and tag line are prominent.

The absence of any express relationship between the story about Exxon's activities and the off-shore drilling controversy makes it unlikely that the viewer will perceive that relevance let alone be affected by it. Rather, the ad directs the viewer to respond in terms of his relationship with Exxon - either to respect Exxon for "like (ing them) to know" or to more direct economic responses.

2. Validity of Claim

Exxon makes a strong statement that the corporation doesn't "seem to have done...[the shrimping]...any harm". But our preliminary inquries reveal that a substantial question exists as to the long term effect of off-shore drilling on the shrimp. Staff believes that Exxon does not have a reasonable basis for making this claim.

H. "Bottom-Tension Boom" - Exxon Corp. Commentary, February, 1974



How Exxon's new floating fence corrals oil spills.

Containing an oil spill in calm water can pose problems. The tough part is containing it in rough water. And we recently came up with Exxon has developed a device that can do just that in rough water.

It's called a Harbor Boom. Before it's put to work, a floating fence that is part of the boom is set out by helicopter. The fence, which ranges from a thousand feet to a mile in length, is made of a series of floating logs, each connected to the next by a chain.

What makes the Harbor Boom so unique is that it has a skirt that hangs down into the water. This keeps the water fence taut so oil can't escape underneath. Another important feature is that the boom is portable. It can be moved from one location to another by a floating tugboat.

As safe as offshore drilling is, we're always looking for ways to make it safer. But before we can do that, we have to find oil. And we've been doing so well, in fact, that we've decided to offer royalty-free licenses to anyone who may obtain oil on it.

EXXON

-99-

1. Economic Effect

Although the floating fence ad makes one reference to the general safety of offshore drilling and tanker operations, the primary focus of the ad is to favorably describe Exxon's concern and technical skill in the context of pollution control. As a description of corporate behavior it is likely to be found to be commercial speech. On a factual level, the staff has serious reasons to doubt the truth or basis for claims made in the ad.

Under the twin titles "We'd like you to know" and "How Exxon's new floating fence corrals oil spills" this ad describes a "Bottom - Tension Boom" which Exxon is "pretty sure...can be used in rough water" to "contain...an oil spill..." After describing the operation of the boom, Exxon reiterates that "tests have shown that the bottom - tension boom works." Exxon is so pleased with how "well" it works that they have decided to offer royalty-free licenses under any patents [they] obtain on it." Exxon explains that "[a]s safe as off-shore drilling and tanker operations are, there is always the possibility of a spill." The thrust of the ad is that if and when spills occur, Exxon is ready. Again, the Exxon logo is prominently displayed at the end of the ad.

The titles of the ad focus the reader's attention on Exxon's activities, not the controversy regarding off-shore drilling. The detailed description of Exxon's development of the tension boom, together with two pictures of the boom in operation, are all calculated to impress the reader with

Exxon's ingenuity in solving a difficult and important problem. That Exxon is undertaking such activity despite the safety of off-shore drilling and tanker operations attests to the company's intense concern about the "possibility" of polluting the environment. Exxon is said to be so concerned with the problem that it doesn't even desire to make money on royalties from any patents which the device might receive. This unselfish concern casts a favorable light on all of Exxon's activities, including product sales.

Although the ad makes no express reference to the public controversy regarding oil spills, the ad does assume that such spills are infrequent. In stating this fact as an assumption, rather than an argument, the ad may have a very subtle - almost subliminal - effect in creating a favorable climate for off-shore drilling. However, in the context of the explicit and detailed description of Exxon's corporate behavior which makes up most of the message the latent relevance of such information would not be substantial; rather the ad's principal effect is to generate favorable attitudes towards Exxon. The prominant display of the company name and logo reinforce this economic effect. Since the ad contains no express linkage between the information conveyed and any public issue, but rather focuses all the reader's attention on corporate behavior, the ad is likely to have a commercial impact and be found to be commercial speech.

2. Validity of Claim

The Exxon ad implies that the floating fence is a fail-proof way to contain oil spills even in rough waters. Even the Shell ads which we also believe are exaggerated do not go this far and staff believes that like the Shell devices the floating fence also has severe limitations under average open sea conditions.

VIII. Demand Letters the Staff Recommends Be Sent

Contained in this section are four demand letters which the staff recommends be sent with respect to the eight advertisements found in the preceding section to be subject to the FTC Act and with respect to which the staff has reason to question the validity of statements contained therein. The questions in these demand letters seek to elicit information in five major categories:

1. The extent and frequency of the dissemination of the ads.

2. The strategy behind the placement of the ads, e.g., whether the audience sought to be reached is consumers, dealers, legislators, potential investors etc., or other identifiable segments of the potential audience.

3. The content of the message actually communicated to the expected audiences and the effects thereof.

4. The relative weight of the company's advertising efforts and its efforts to develop technology of the type portrayed in the ad.

5. The accuracy of the company's description of its activities when viewed against other facts relating to its operations and their impact on the environment.

The rationale behind the requests in categories 1 and 4 is to better establish the dimensions of the company's advertising program in relation to the weight of its financial commitment to the corporate activities described. This is a matter of importance in establishing the public interest, materiality, and perhaps even the constitutional protection of such program. Questions described under categories 2 and 3 relate to the audience to which the ads are directed, the messages communicated, and the effects of these messages. These questions are important in confirming the staff's analysis of the representations contained in the ad and in confirming the staff's constitutional analysis. Category 4 questions relate to the accuracy of the implicit representation we believe is contained in each ad: that the described activity constitutes a major corporate committment. Category 5 questions touch upon the validity of the representations made in the advertising, including the implicit representation that the depicted activity is typical of the company's activities, in the environmental area. On the narrower level we have focused on whether the corporation's pollution-control device works as advertised or whether there are significant limitations to its effectiveness. Thus, in the Exxon letter, for example, questions 16-18 are directed to determine both possible limitations of the Bottom Tension Boom and the degree to which such a device has been used by disinterested parties.

On the broader level, questions, such as 19 and 20 in the Exxon letter focus on the company's overall record in preventing and containing oil spills.

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

Mr. Harry Bridges, President
Shell Oil Company
2 Shell Plaza
Houston, Texas 77001

Dear Mr. Bridges:

The Federal Trade Commission is presently considering various aspects of your company's advertising in the environmental and energy areas. In this regard, the following ads sponsored by your corporation are being considered:

	Ad Title	Publication/Network/ Program	Date
1.	"[L]ots of time and dollars..."	Washington Post	October 17, 1973
2.	"Oil Herder"	CBS Radio	July 6, 1972
3.	"23 Kinds of Fish"	Washington Post	November 21, 1973

In connection with our investigation and evaluation of these ads, we request that Shell Oil Company answer the questions listed below as they pertain to the claims stated.

When the name of your company is used herein, such reference is to be understood to refer to all forms of business organizations --

(i) which are wholly or partially controlled by you;
(ii) which were in the past wholly or partially controlled by you;
(iii) in which your company has any financial interest;
(iv) in which your company has had any financial interest in the past;
(v) which have a contractual relationship with your corporation.

Claim:

"Shell is spending lots of time and dollars developing oil spill devices."

1. A) How many man-years has the company spent on developing oil spill recovery devices at the Oil Spill Research Section of the Houston Laboratory in <u>each</u> fiscal/calendar year since 1965?

   B) What percentage of the total company effort in research to find, develop, produce, and distribute oil derived products is represented by <u>each</u> annual man-year figure?

2. A) How many dollars has the corporation spent to pay for all advertising containing any representations regarding the development of oil spill devices in <u>each</u> fiscal/calendar year since 1965?

   B) Indicate the percentage of total sales of the company the figure in (A) represents for <u>each</u> year.

3. Provide the date of the creation of the Oil Spill Section at Shell's Research Laboratory in Houston, and indicate the number of employees broken down by their various professional levels, employed in this Section at the time of the dissemination of the ad.

<u>Claim:</u>

"We've come up with some pretty promising oil spill recovery devices. -- Shell Oil Herder -- Oil Recovery Barge -- Polyurethane Foam."

* * *

"My name is Allan A. Allen. I'm not an authority on the Shell gasoline I use in my car, but as an oceanographer, I respect Shell Oil Company. I've witnessed a demonstration of Shell's Oil Herder. This unique chemical can actually push a spurting oil slick back together so it's more easily cleaned up. I figure if Shell can develop the Oil Herder, Shell gasoline must really be good too..."

4. A) Describe completely the nature of the operation of the Oil Herder, the Oil Recovery Barge and the use of Polyurethane Foam in the cleaning up of oil spills.

B) (i) Did Shell invent each device, if so when?

(ii) Did Shell develop each device for use on oil spills?

(iii) Has Shell applied for a patent on any of these devices? If so, has it been granted? If granted, cite patent number. If not, why not?

C) (i) Indicate the exact conditions under which the Oil Herder will push together an oil spill.

(ii) Define the word "push" and "together" as used in the context of the ad.

(iii) Similarly, discuss the exact conditions under which the Oil Recovery Barge and Polyurethane Foam can be used to effectively clean up oil spills.

D) (i) Indicate the extent of the effectiveness of Oil Herder in pushing together a) major and b) minor oil spills.

(ii) Define and discuss all relevant considerations which determine whether the spill is to be considered major or minor. (Indicate whether any governmental body having responsibility for the cleaning up of oil spills has defined any parameters for determining whether an oil spill is major or minor and list such parameters).

(iii) Discuss comprehensively the effect of each of the following:

(a) surface area of oil spill;
(b) quantity of spilled oil;
(c) density of spilled oil;

(d) degree of refinement of the oil spilled;
(e) age and "weathering" of spilled oil;
(f) atmospheric and water conditions in spill area, and currents in the water body;
(g) quantity of wavelet action and;
(h) number and size of debris floating in spill on the degree of effectiveness in completely cleaning up the spilled oil by use of (I) Oil Herder; (II) Oil Recovery Barge; (III) Polyurethane Foam, respectively.

E) Indicate the maximum dimensions of the area of (i) spurting (give rate of spurting) and (ii) non-spurting oil spills which have been successfully pushed together by the Oil Herder and the minimum dimensions of the same spills after being pushed "together." Similarly, state the largest area and percentage of quantity of any oil spill successfully cleaned up by the Oil Recovery Barge and by the use of Polyurethane Foam. Specify the date, the location and the name of any governmental investigative or policing agency present when each device was so used since 1965.

F) Specify all conditions which have been found to make the use of:

(i) Oil Herder
(ii) Oil Recovery Barge
(iii) Polyurethane Foam inadvisable or impossible.

G) All documentation and other substantiation for the claim that the demonstration depicted in the Allan A. Allen radio ad is representative of realistic open sea and moving inland water conditions under which the Shell Oil Herder is typically expected to be used as observed by and testified to by Mr. Allan A. Allen.

The submission should include a full discussion of the method by which the following factors were taken into account in the demonstration so as to make it representative of the conditions likely to be encountered during the expected use of the Oil Herder:

1. Size of water body;
2. Depth of water body;
3. Boundaries of water body;
4. Size of waves;
5. Wind conditions;
6. Frequency of waves;
7. Speed of current;
8. Quantity of oil spilled;
9. Degree of refinement of oil spilled;
10. Degree of age and "weathering" of oil spilled; and
11. Existence and size of debris among the oil spill.

H) As of the date of the first dissemination of the ads listed above:

(i) indicate the number of Oil Recovery Barges owned by Shell, their homeports, status of readiness, their minimum reaction time before departure, their geographic range of use, and any other limitations on their usefulness.

(ii) for both the Oil Herder and Polyurethane Foam, specify the volume of inventory in Shell's possession and the location and quantity of distribution thereof on said date;

(iii) submit copies of all operational contingency plans developed by Shell as of the above date, for the cleanup of oil spills resulting from its: (a) off-shore drilling and production, (b) off-loading, and (c) transportation operations both on the (I) open sea and (II) inland waterways.

I) Submit all substantiation for the claim that both the Oil Herder and the Recovery Barge are "unique", including a definition of the word "unique" as used in the context of the ad.

Claim:

"If you think that off-shore oil platforms are ruining the waters around them, we at Shell have a fact for you.

Today it is possible to catch more than 23 different kinds of fish under our platforms in the Gulf of Mexico.

* * *

And here's another fact that really might surprise you.

Because we are taking so many precautions to try to keep the waters around our operations clean, the oilmen who work on our platforms often grab their rods and reels during their time off. ..."

* * *

Shell is trying to supply a lot of people with the energy they need -- and trying to respect the environment around us.

Taking every reasonable precaution we can to lessen the chance of something going wrong."

5. (i) List all the different oil spill prevention devices used by Shell in the drilling, production, and transportation of off-shore derived oil, and

(ii) Provide a comprehensive explanation of their modes of operation.

(iii) For each device listed in (i) indicate whether it is specifically required to be used by the U.S. Geological Survey, the U.S. Coast Guard, the Environmental Protection Agency, or other governmental

agency (Federal or State or Local) regulations, insurance requirements, or union contracts.

6. A) For each device listed in question 5, indicate which, if any, of these devices have failed to operate according to their intended use since 1965 thereby causing oil spills of over 50 barrels.

   B) State how much oil was spilled in each instance.

   C) Describe what if any changes have been made to prevent repetition of the failure and state whether any government agency or private party required such changes.

7. Indicate what, if any, scientifically controlled studies have been conducted (cite their authors, date, professional qualifications, and relationship with Shell Oil Co.) to determine the effects of your operations aboard off-shore oil platforms in the Gulf of Mexico on all the different kinds of marine life in the (i) Gulf, (ii) estuaries thereof and (iii) its borders.

8. Indicate the source of your opinion (its author, professional qualification and relationship to Shell) that the mere identification of 23 different kinds of fish in the vicinity of your oil platforms conclusively proves that absolutely no damage has been done to the marine life surrounding such platforms.

9. For the period from January 1, 1969 to December 31, 1973, submit a copy, and make a list of all notices of non-compliance received by you, (eg., warnings, shut-ins) for the violation of any applicable OCS Order, relating to the prevention of oil spillage, promulgated by the U.S. Geological Survey under provision of 30 CFR 250 et seq.

(Group this list by OCS Order No., sub-section and sub-paragraph). State all relevant circumstances surrounding the issuance of each notice, including, but not limited to: the nature of any sanction applied, the date, the lease number, the platform number, and the well number. Specifically, explain all the circumstances surrounding the action of the Geological Survey in the matter of:

Shell OCS 0840, Well 10-C, West Delta Block 104.

10. Indicate how many (and the function of) new oil pollution prevention devices have been developed and tested by your company under provision of OCS Order No. 5(2) since June 5, 1972 and how many of these devices have been placed in use on drilling or producing wells.

11. Submit a copy of all quarterly failure analysis reports submitted to the Geological Survey pursuant to requirement of Order No. 5(8)(5) since June 5, 1972.

12. Submit copies of all written reports or memorandums of oral reports made pursuant to the requirement of OCS No. 7(2)(B) since August 25, 1969, broken down by -- (1) spills less than 15 barrels; (2) spills between 15 and 50 barrels; (3) spills more than 50 barrels.

13. Indicate whether your company submitted or expected to submit a bid for OCS Sale No. 33, Proposed 1974 Outer Continental Shelf Oil and Gas General Sale, Offshore Louisiana. If so, did the company itself, or in combination with others, submit any statement to the Bureau of Land Management, Department of the Interior, for inclusion in BLM's Draft Environemental Impact Statement on the sale? If it did submit such statement, submit a complete copy thereof.

In addition to the specific questions listed above, please provide the following general information regarding advertising by your corporation.

14. Specify the date, publications, programs and networks in which the paraphrased claims included in this letter appeared.

15. Submit copies of all documents prepared at any time: relating to the decision to disseminate, the intended audience for, effects or benefits to the corporation of, contents or images to be conveyed by, or understanding or recall of the claims referred to above, including but not limited to the budget justification either individually or in the aggregate thereto, board of directors' minutes relating thereto, and all documents showing the relationship between such advertising and retail or wholesale product or service sales both current and future, shareholder or investor relations, stock price or other capitalization or employee relations or recruitment, both managerial and non-managerial.

16. Submit copies of all documents which indicate the extent to which the claims were or were not disseminated in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums or to influence the actions of any agency of government, indicating with respect to such claims which of the aforesaid purposes was associated with each such section of the claim.

17. Specify how many dollars has the corporation spent to pay for advertising in all media for each fiscal/calendar year since 1965. Indicate the percentage of total sales this represents for each year.

18. Indicate how many dollars has the corporation spent for corporate advertising not expressly directed to the sale of any particular product for each fiscal/calendar year since 1965.

19. Specify how many dollars the corporation has spent for all advertising concerning research, development and implementation of methods and devices for the (a) prevention or (b) cleanup of oil spills for each fiscal/calendar year since 1965.

20. Specify how many dollars the corporation spent for research and development relating to:

a) exploration for oil
b) development and production from oil reserves
c) distribution of oil and oil derived products
d) refining of oil
e) prevention of oil spills resulting from causes listed in (a)-(d), respectively
f) cleanup of oil spills resulting from causes listed in (a)-(d), respectively, for each fiscal/calendar year since 1965.

Except for trade secrets, or other financial information which may be privileged or confidential, pursuant to Section 6(f) of the Federal Trade Commission Act, the answers to questions 1 to 13 in support of advertising obtained by the Commission pursuant to this letter will be made available to the public under such terms and conditions as the Commission may from time to time determine. In addition, the Commission may release summaries, reports, indices, or such other publications which will inform the public about material delivered or not delivered to it hereunder.

You are requested to provide your answers within 30 days.

Thank you for your cooperation.

By direction of the Commission.

Charles A. Tobin
Secretary.

Send answers to:

Richard B. Herzog,
Assistant Director for
National Advertising,
Federal Trade Commission,
Washington, D.C. 20580

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

Mr. John K. McKinley, President
Texaco, Inc.
135 East 42nd Street
New York, New York 10017

Dear Mr. McKinley:

The Federal Trade Commission is presently considering various aspects of your company's advertising in the environmental and energy areas. In this regard, the following ad sponsored by your company is being considered.

	Ad Title	Publication/Network/ Program	Date
1.	"Back to the Sea"	NBC - TV	January 1, 1974

In connection with our investigation and evaluation of this ad, we request that Texaco Corporation answer the questions listed below as they pertain to the claim stated.

When the name of your company is used herein, such reference is to be understood to refer to all forms of business organizations --

(i) which are wholly or partially controlled by you;
(ii) which were in the past wholly or partically controlled by you;
(iii) in which your company has any financial interest;
(iv) in which your company has had any financial interest in the past;
(v) which have a contractual relationship with your corporation.

Claim:

"...dozens of safety devices keep an around-the-clock check on the drilling well.

And highly trained men always keep an eye on the safety devices. Where their eyes can't see...

TV cameras are watching for them.

And sitting on each well ... are blowout preventers ...that can quickly close the well if necessary."

1. A) List all the different types of oil spill prevention devices used by Texaco in drilling and provide a comprehensive explanation of each of their modes of operation.

   B) Indicate which of the devices listed in (A) are required to be used by the U.S. Geological Survey, the U.S. Coast Guard, the Environmental Protection Agency, or other governmental regulations, insurance requirements or union contracts.

2. A) Indicate which of the listed devices in question 1 are manually operated and which operate totally automatically.

   B) Indicate which devices are kept under closed circuit TV surveillance.

3. A) Indicate the number of men employed on each drilling rig for the sole purpose of 24 hour a day monitoring of the various safety devices listed in paragraph 1.

   B) Indicate the level of training, experience, and any other special qualifications achieved by the men named in the answer to (A) above which qualify them to monitor and operate the cited safety devices.

4. Discuss fully all the circumstances which are considered in determining whether the closing of a well by the use of a blowout preventer is "necessary".

5. For each different type of device listed in question 1, indicate each of those instances since 1965 when that type of device has failed to operate as intended. Indicate whether any of those failures resulted in the spilling of oil, and the quantity of the spill in each case of such failure.

6. For the period from January 1, 1969 to December 31, 1973, submit a copy, and make a list of all notices of noncompliance received by you (e.g., warnings, shut-ins) for the violation of any applicable

OCS Order, relating to the prevention of oil spillage, promulgated by the U.S. Geological Survey under provision of 30 CFR 250, et seq. (Group this list by OCS Order No., subsection and subparagraph.) State all relevant circumstances surrounding the issuance of each such notice, the nature of the sanction applied, the date, the lease number, the platform number, the well number, and the location for each noncompliance listed.

7. Explain all the circumstances surrounding the recent action of the Geological Survey in the matter of:

/Texaco - OCS - 1310 So. Marsh Island Block 217, Platform A.

8. Submit a copy of all quarterly failure analysis reports on malfunctions submitted to the Geological Survey pursuant to OCS Order No. 5(8)(B)(5) since June 1972.

9. Provide a copy of all written reports or memorandums of oral reports made pursuant to requirement of OCS Order No. 7(2)(B) August 25, 1969, broken down in the following manner:

(1) spills less than 15 barrels; (2) spills between 15 and 50 barrels; (3) spills more than 50 barrels.

10. Indicate whether your company submitted or expected to submit a bid for OCS Sale No. 33, Proposed 1974 Outer Continental Shelf Oil and Gas General Sale, Offshore Louisiana. If so, did the company itself, or in combination with others submit any statement to the Bureau of Land Management, Department of the Interior, for inclusion in BLM's Draft Environmental Impact Statement on the sale? If it did submit such statement, submit a complete copy thereof.

In addition to the specific questions listed above, please provide the following general information regarding advertising by your corporation.

11. Specify the date, publications, programs and networks in which the paraphrased claims included in this letter have appeared.

12. Submit copies of all documents prepared at any time: relating to the decision to disseminate, the intended audience for, effects or benefits to the corporation of, content or images to be conveyed by, or understanding or recall of the claims referred above, including but not limited to the budget justification either individually, or in the aggregate therefor, board of director's minutes relating thereto, and all documents showing the relationship between such advertising and retail or wholesale product or service sales both current and future, shareholder or investor relations, lending and insuring company relations, stock price or other capitalization, or employee relations or recruitment, both managerial and non-managerial.

13. Submit copies of all documents which indicate the extent to which the claims were or were not disseminated in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums or to influence the actions of any agency of government, indicating with respect to such claims which of the aforesaid purposes was associated with each such section of the claim.

14. Specify how many dollars has the corporation spent to pay for advertising in all media for each fiscal/calendar year since 1965. Indicate the percentage of total sales this represents for each year.

15. Indicate how many dollars has the corporation spent for corporate image advertising not directed to the sale of any particular product for each fiscal/calendar year since 1965.

16. Specify how many dollars the corporation has spent for all advertising concerning research, development and implementation of methods and devices for the (a) prevention or (b) cleanup of oil spills for each fiscal/calendar year since 1965.

17. Specify how many dollars the corporation spent for research and development relating to:

a) exploration for oil
b) development and production from oil reserves
c) distribution of oil and oil derived products
d) refining of oil
e) prevention of oil spills resulting from causes listed in (a)-(d), respectively
f) cleanup of oil spills resulting from causes listed in (a)-(d), respectively, for each fiscal/calendar year since 1965.

Except for trade secrets, or other financial information which may be privileged or confidential, pursuant to section 6(f) of the Federal Trade Commission Act, the answers to questions 1 to 10 in support of advertising obtained by the Commission pursuant to this letter will be made available to the public under such terms and conditions as the Commission may from time to time determine. In addition, the Commission may release summaries, reports, indices, or such other publications which will inform the public about material delivered or not delivered to it hereunder.

You are requested to provide your answers within 30 days.

Thank you for your cooperation.

By direction of the Commission.

Charles A. Tobin
Secretary

Send answers to:

Richard B. Herzog
Assistant Director for National Advertising
Federal Trade Commission
Washington, D.C. 20580

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

Mr. E. P. Dorsey, President,
Gulf Oil Corporation,
Gulf Building,
Pittsburgh, Pennsylvania 15219

Dear Mr. Dorsey:

The Federal Trade Commission is presently considering various aspects of your company advertising in the environmental area. In this regard, the following ad sponsored by your corporation is being considered.

	Ad Title	Publication/Network/ Program	Date
1.	"Boga"	NBC - TV	August 16, 1972

In connection with our investigation and evaluation of these ads, we request that Gulf Oil Corporation answer the questions listed below as they pertain to the claims stated.

When the name of your company is used herein, such reference is to be understood to refer to all forms of business organizations --

(i) which are wholly or partially controlled by you;
(ii) which were in the past wholly or partially controlled by you;
(iii) in which your company has any financial interest;
(iv) in which your company has had any financial interest in the past;
(v) which have a contractual relationship with your corporation.

Claim:

> "I'm going to pollute ... some of the purest water in the world... First, salt -- like you find in brackish water near the ocean now some magnesium chloride and sodium sulfate ...now some ferric sulfate and sulfuric acid. and now to top it all off, chemical wastes and dyes.

The people at Gulf have come up with a process that will take foul water, even this and clean it up. It's called the Gulf Reverse Osmosis System. And in spite of its big name, it's simple and efficient."

1. A) Describe comprehensively the scientific principles on which the Gulf Reverse Osmosis System operates.

   B) Indicate the inventor thereof, whether he is affiliated with Gulf, the date of its discovery, and whether the system has been patented by Gulf, if so give its patent number.

2. List all presently known operating users of the Gulf Reverse Osmosis System.

3. List all known (i) commercial and (ii) experimental operations of reverse osmosis units, and describe the function (what chemicals it is used to filter out) of each respectively.

4. 1) Define the term "chemical waste" as used in the context of the ad.

   2) Submit a copy of the definition of "chemical waste" as used by the Environmental Protection Agency (EPA) or the Council on Environmental Quality (CEQ) in the context of water pollution.

5. A) Indicate specifically whether each such "chemical waste" mentioned in the ad is an organic or inorganic substance.

6. Indicate for each type of "chemical waste" listed in (5) the source from which it is derived.

7. Specify all known "chemical wastes" for which the process has been found to be effective, and the extent of such filtration in each case.

8. Specify any limitations which exist, on the use of the Gulf Reverse Osmosis System for the removal of pollutants, from (i) streams, (ii) rivers, (iii) lakes, (iv) oceans and (v) other water bodies, respectively.

9. Explain clearly and comprehensively how the Gulf Reverse Osmosis System "take[s] foul water containing salt, magnesium chloride, sodium sulfate, ferric sulfate, sulphuric acid and chemical wastes and clean[s] it up".

10. Describe comprehensively what, if anything, has to be done with each of the different pollutants after they have been removed from the "foul water" by the System, to enable environmentally safe disposal of them without further pollution of the environment.

11. A) State comprehensively all the reasons which serve as reasonable basis for your calling the operation of the Gulf System "simple".

    B) Specifically, discuss all the references considerations used by experts in the field of water pollution cleanup to determine the relative simpleness of the operation of a device or method used for the complete cleaning up of all the different types of pollution in water bodies.

    C) Indicate whether any scientific or governmental body officially concerned with the effective cleanup of polluted water has found this Gulf system "simple". If so, state the name of such organization, its professional credentials, the date of such finding and all relevant circumstances on which such finding was made.

12. A) Describe comprehensively all the reasons which serve as reasonable basis for your calling the system "efficient".

B) Specifically, discuss comprehensively all relevant reference considerations which enter into the determination that a water pollution cleaning system is "efficient".

C) Indicate specifically, whether such determination of "efficiency" takes into account the cost of operation of environmentally safe disposal of the removed pollutants.

D) Indicate whether any scientific or governmental body concerned with the effective cleanup of polluted water has found the system "efficient". If so, state the name of such organization, its professional credentials, the date of such finding and all relevant circumstances on which such finding was made.

13. A) Indicate whether any government agency concerned with the cleanup of polluted water bodies has analyzed the feasibility of using the Gulf Reverse Osmosis System for the elimination of pollutants from water. If so, identify the source making the analysis including its professional credentials, and the date of such analysis. Indicate whether such analysis has recommended use of the Gulf Reverse System in a planned operational commercial facility within 5 years from the date of such analysis.

14. A) Discuss the success of the operation of the Gulf Reverse Osmosis System to date.

B) Specifically, describe the longest period of time that the System has so far functioned continuously before being shut down out of necessity for any servicing.

C) Indicate the nature of the servicing done at each interval.

D) Indicate if there are any critical parts which have to be regularly changed due to corrosion or other chemical or biological attack necessitated by the nature of the operation or makeup of the System.

15. Indicate if there are any pollutants for whose removal the System is presently inoperative due to the inherent nature of the makeup of the System's constituent elements, such as the pump, or membrane construction.

16. Indicate whether Gulf uses the System to eliminate water pollution caused by any of its operations. If so, which ones, and with what result? If not, why not?

In addition to the specific questions listed above, please provide the following general information regarding advertising by your corporation:

17. Specify the date, publications, programs and networks in which the paraphrased claims included in this letter have appeared.

18. Submit copies of all documents prepared at any time: relating to the decision to disseminate, the intended audience for, effects or benefits to the corporation of, content or images to be conveyed by, or understanding or recall of the claims referred to above, including but not limited to the budget justification either individually, or in the aggregate therefor, board of directors minutes relating thereto, and all documents showing the relationship between such advertising and retail or wholesale product or service sales both current and future, shareholder or investor relations, lending and insuring company relations, stock price or other capitalization or employee relations or recruitment, both managerial and non-managerial.

19. Submit copies of all documents which indicate the extent to which the claims were or were not disseminated in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums or to influence the actions of any agency of government, indicating with respect to such claims which of the aforesaid purposes was associated with each such section of the claim.

20. Specify how many dollars has the corporation spent to pay for advertising in all media for each fiscal/calendar year since 1965. Indicate the percentage of total sales this represents for each year.

21. Indicate how many dollars has the corporation spent for corporate advertising not expressly directed to the sale of any particular product for each fiscal/calendar year since 1965.

22. Specify how many dollars the corporation has spent for all advertising concerning research, development and implementation of use of devices for the cleanup of water pollution for each fiscal/calendar year since 1965.

23. Specify how many dollars the corporation spent for research and development of water pollution control technology for each fiscal/calendar year since 1965.

Except for trade secrets, or other financial information which may be privileged or confidential, pursuant to section 6(f) of the Federal Trade Commission Act, the answers to questions 1 thru 16 in support of advertising obtained by the Commission pursuant to this letter will be made available to the public under such terms and conditions as the Commission may from time to time determine. In addition, the Commission may release summaries, reports, indices, or such other publications which will inform the public about material delivered or not delivered to it hereunder.

You are requested to provide your answers within 30 days.

Thank you for your cooperation.

By direction of the Commission.

Charles A. Tobin
Secretary

Send answers to:

Richard B. Herzog
Assistant Director for National Advertising
Federal Trade Commission
Washington, D.C. 20580

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

Mr. Randall Meyer, President
Exxon Company, U.S.A.
800 Bell Avenue
Houston, Texas 77002

Dear Mr. Meyer:

The Federal Trade Commission is presently considering various aspects of your company's advertising in the environmental and energy areas. In this regard, the following ads sponsored by your corporation are being considered:

	Ad Title	Publication/Network/ Program	Date
1.	"Blowout Preventer"	NBC - TV	March 17, 1973
2.	"Shrimping"	NBC - TV	March 18, 1973
3.	"Bottom-Tension Boom"	Commentary	February 1974

In connection with our investigation and evaluation of these ads, we request that Exxon Corporation answer the questions listed below as they pertain to the claims stated.

When the name of your company is used herein, such reference is to be understood to refer to all forms of business organizations --

(i) which are wholly or partially controlled by you;
(ii) which were in the past wholly or partially controlled by you;
(iii) in which your company has any financial interest;
(iv) in which your company has had any financial interest in the past;
(v) which have a contractual relationship with your corporation.

Claim:

"We're taking you aboard to show you one of the ways we guard against potential oil spills when we drill.

This 40 ton device is designed to prevent blowouts..."

* * *

"If unexpected pressures are encountered, it will control them until normal drilling can be resumed."

"In completing over 1500 wells in US waters over the years, we've rarely had to call on ourblowout preventers to do their job. But when we have, they've done it well."

1. Submit a complete definition of a "blowout", citing the source of such definition.

2. Indicate whether a blowout always results in an oil spill.

3. A) List all known devices which exist for the prevention of blowouts, with a complete explanation of their operation.

   B) Specifically, indicate whether each such listed device is fully automatic or is manually operated.

4. Specify whether Exxon has always used blowout preventers on (A) drilling and (B) producing, (i) on-land and (ii) off-shore rigs for the past 10 years to date.

5. A) Has Exxon ever had any blowouts on (A) drilling or (b) producing, (i) off-shore or (ii) on-land wells after its personnel activated the blow-out preventer?

   B) Explain all circumstances causing each such failure in the past 10 years.

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6. Has Exxon ever had any blow-outs on a (A) drilling or (B)producing rig, either (i) off-shore or (ii) on-land, because a blowout preventer was not activated when it was found later to have been necessary to do so? If so, explain all the relevant circumstances surrounding each such occurrence.

7. How many employees of Exxon for each of the past 10 fiscal/calendar years, have been disciplined for violation of either government promulgated regulations or company promulgated procedures relating to the prevention of oil caused pollution of the environment?

8. Explain fully how the blowout preventers used by Exxon operate so as to justify the following claim:

> "If unexpected pressures are encountered, it [the blowout preventer] will control them until normal drilling can be resumed."

Include in such explanation a complete definition of:

A) "control" as used in the (1) trade, and in the safety and environmental regulatory contexts and (2) how it is used in the context of the ad;

B) "unexpected pressures" as used in the context of the ad.

9. A) Indicate whether "unexpected pressures" are encountered only in drilling operations?

B) If not, explain whether they may also be encountered during production operations?

C) To the best of your knowledge, can blow-outs occur during production operations? If so, explain all circumstances which may cause such occurrences.

10. Does Exxon (1) now or (2) ever in the past use[d] blow-out preventers during production operations? If not, explain all reasons for nonuse.

11. A) For the period January 1, 1969 to December 31, 1973, submit a copy, and make a list of all notices of noncompliance received by you (e.g., warnings, shut-ins) for the violation of any applicable OCS Order, relating to the prevention of oil spillage promulgated by the U.S. Geological Survey under provision of 30 CFR 250, et seq. (Group this list by OCS Order No., sub-section and sub-paragraph.)

B) State all relevant circumstances of each notice, the nature of the sanction applied, the date, the lease number, the platform number, the well number, and the location of each noncompliance listed.

12. Explain all the circumstances surrounding the recent action of the U.S. Geological Survey in the matter of: Exxon - USA - OCS - 0421 South Timbalier, Block 55, Off-Shore Louisiana.

13. Submit a copy of all quarterly failure analysis reports on malfunctions submitted to the Geological Survey pursuant to OCS Order No. 5(B)(3)(5) since June 5, 1972.

14. Provide a copy of all written reports or memorandums of oral reports made pursuant to requirement of OCS Order No. 7(2)(B) since August 15, 1969, broken down in the following manner:

(1) spills less than 15 barrels; (2) spills between 15 and 50 barrels; (3) spills more than 50 barrels.

Claim:

"More than twenty years ago shrimpers thought they were seeing the end of an era -- and a way of life. They were concerned because oil drilling had just begun offshore.

Shrimp are one of the most delicate marine creatures and despite our assurances that the shrimp and oil industries could live together in harmony, few fishermen believed it.

Now the wells are here by the thousands, and the shrimp are still here by the millions.

Exxon doesn't claim credit for good shrimping, but we don't seem to have done it any harm."

15. Submit copies of all scientifically controlled studies done by or for Exxon in the past 20 years (specifying its author, his professional qualifications, the date of the study, the area studied, and such author's relationship with Exxon) to determine the effect of oil spills caused by Exxon's or any other company's oil drilling, production or transportation operations in the Gulf of Mexico, on (A) the well being of all the different species of shrimp broken down by different age groups thereof within (i) the open waters and (ii) the estuaries of the Gulf of Mexico; and (B) all the marine life within the Gulf of Mexico.

Claim:

"How Exxon's new floating fence corrals oil spills."

"Containing an oil spill in calm water is no great trick. The tricky part is containing it in rough water. And we're pretty sure that Exxon has developed a device that can be used in rough water.

It's called a Bottom-Tension Boom.

As safe as offshore drilling and tanker operations are, there is always the possibility of a spill. But tests have shown that the bottom-tension boom works."

16. Define what you mean by the following terms as used in the context of the ad and how such terms are defined by agencies of the government who, under pertinent contingency plans, are in charge of directing cleanups of oil spills on water:

    i) "rough"
    ii) "containing"

17. Indicate if there are any limitations to the use of this device for the containment of oil spills.

18. a) Indicate whether this device's use has been observed and/or approved by either the

    1. US Coast Guard

    or

    2. US Geological Survey

    or

    3. Enviornmental Protection Agency

    b) If the answer to part (a) of this question is affirmative, please submit copies of all reports and analyses based upon such observation or approval.

19. Indicate the number of oil spills which have occurred in each of the past 5 calendar/fiscal years in offshore operations around the coasts of the continental US involving tankers of your company.

20. Indicate whether your company submitted or expected to submit a bid for OCS Sale No. 33, Proposed 1974 Outer Continental Shelf Oil and Gas General Sale, Offshore Louisiana. If so, did it, or in combination with others, submit any statement to the Bureau of Land Management, Department of the Interior, for inclusion in BLM's Draft Environmental Impact Statement on the Sale? If it did submit such statement, submit a complete copy thereof.

In addition to the specific questions listed above, please provide the following general information regarding advertising by your corporation.

21. Specify the date, publications, programs and networks in which the paraphrased claims included in this letter have appeared.

22. Submit copies of all documents prepared at any time: relating to the decision to disseminate, the intended audience for, effects or benefits to the corporation of, content or images to be conveyed by, or understanding or recall of the claims referred to above, including but not limited to the budget justification either individually, or in the aggregate therefor, board of director's minutes relating thereto, and all documents showing the relationship between such advertising and retail or wholesale product or service sales both current and future, shareholder or investor relations, lending and insuring company relations, stock price or other capitalization or employee relations or recruitment, both managerial and non-managerial.

23. Submit copies of all documents which indicate the extent to which the claims were or were not disseminated in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums or to influence the actions of any agency of government, indicating with respect to such claims which of the aforesaid purposes was associated with each such section of the claim.

24. Specify how many dollars has the corporation spent to pay for advertising in all media for each fiscal/calendar year since 1965. Indicate the percentage of total sales this represents for each year.

25. Indicate how many dollars has the corporation spent for corporate image advertising not expressly directed to the sale of any particular product for each fiscal/calendar year since 1965.

25. Specify how many dollars the corporation has spent for all advertising concerning research, development and implementation of methods and devices for the (a) prevention or (b) cleanup of oil spills for each fiscal/calendar year since 1965.

26. Specify how many dollars the corporation spent for research and development relating to:

a) exploration for oil
b) development and production from oil reserves
c) distribution of oil and oil derived products
d) refining of oil
e) prevention of oil spills resulting from causes listed in (a)-(d), respectively
f) cleanup of oil spills resulting from causes listed in (a)-(d), respectively, for each fiscal/calendar year since 1965.

Except for trade secrets, or other financial information which may be privileged or confidential, pursuant to section 6(f) of the Federal Trade Commission Act, the answers to questions 1 to 21 in support of advertising obtained by the Commission pursuant to this letter will be made available to the public under such terms and conditions as the Commission may from time to time determine. In addition, the Commission may release summaries, reports, indices, or such other publications which will inform the public about material delivered or not delivered to it hereunder.

You are requested to provide your answers within 30 days.

Thank you for your cooperation.

By direction of the Commission.

Charles A. Tobin
Secretary

Send answers to:

Richard B. Herzog
Assistant Director for National Advertising
Federal Trade Commission
Washington, D.C. 20580

IX. EVALUATION OF ADS SUBMITTED IN PETITION

Although the staff has concluded that certain environmental ads warrant investigation, our analysis of the advertisements submitted by the Congressional petitioners leads us to conclude that no further action should be taken on most of these ads. Exhibit A is the only advertisement from the petition that has been selected for further action; Exhibit B is a less compelling version of an advertisement we have already selected. Our reasons are set forth below. Copies of all the ads referred to in the petition are appended to the petition itself, Appendix A of this memorandum. A draft letter to the petitioners explaining the actions proposed herein is attached as Appendix B.

Exhibit A - Shell Oil - 23 Kinds of Fish

As noted above, we have selected this ad for further action. Our reasons for so doing are discussed in Section VII(c), supra.

Exhibit B - Shell Oil - Man In Tank

This ad contains representations about three devices used to help clear up oil spills -- the oil herder, the oil recovery barge and polyurethane foam. Our preliminary investigation indicated that the usefulness of these devices is very limited because of the small range of conditions under which they will be effective. The conditions are never adequately explained in the ad. The ad attached to the petition uses some general qualifying language stating "the fact is ... (the devices) ... work best only under the right conditions." The staff believes that this qualifying language does not adequately state the limitations of the devices. These devices do not work well under conditions ordinarily encountered on the ocean. Even though this ad could be subjected to attack, staff is recommending that two other Shell ads on these same oil spill devices which make claims for their operation in much stronger, less qualified language be substituted for the ad in the petition.1/ Both of these additional ads make strong explicit and implicit statements regarding the "promising" nature of the devices without adequately discussing the limitations. One of these new ads uses no qualifying language whatsoever.

1/ These ads, "Oil Herder" and "Spending Lots of Time and Dollars," are discussed in Section VII(A),(B), supra.

The substituted ads appeal to an environmentally conscious public and should help to increase sales for all Shell Oil products.

Exhibit C - Middle South Utilities

No follow up on this ad is recommended because it is not primarily directed toward consumers. The ad seeks to present a message to potential business and industries who may contemplate moving to this region of the country. Ads which did not seek á consumer response were eliminated. Notwithstanding that an ad such as this one is likely to elicit economic behavior from those responding to it, we preferred that the first corporate image ads chosen for investigation be those which are likely to elicit consumer response, thus posing Wheeler-Lea questions, rather than simply unfair competitive practices.

Exhibit D - Tenneco Ad [1/]

Tenneco claims that it has developed a new off-shore platform mounted nuclear plant whose "impact on the landscape will be reduced on an unobtrusive silhouette on the ocean's

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1/ Exhibit E is a notice of public hearing regarding floating nuclear power plants and relates completely to Exhibit D.

horizon." The petitioners do not appear to question the scenic element, but rather cite the claim as a definitive statement on the impact of off-shore nuclear plants when the AEC has expressed concern about any such impact. We do not read this language as either expressly or impliedly claiming a benign effect on the overall environment but, rather only representing that the plant will not cause a scenic blight. We have no reason to suspect that this is not so.

Several other claims in this ad on mufflers and emission control devices are minor and provide nothing more than a simple and apparently accurate description of what the devices actually do. Thus, the Tenneco ad was eliminated because the message only described activities of the company which were apparently true, and did not carry implications which might be questioned.

Exhibit F - Champion International

The Champion International ad claims that "we are well protected from future increases in the cost of timber." Staff has concluded that the representation conveyed is literal. Whether the price of plywood has risen or whether Champion is likely to seek increased prices for lumber is not spelled out by the ad. Other claims in the ad -- not cited by the

petition -- generally focus on the representation that Champion is environmentally responsible. Any challenge that Champion is environmentally irresponsible would have to be based on the theory that the representations in the ad are not typical corporate behavior. This would probably be difficult to prove considering the conservation projects undertaken by Champion to assure a continuing supply of timber. Finally, Exhibit F was eliminated because the company sold virtually no products directly to consumers.

Exhibit G - Amoco Progress Report

The Amoco ad included in the petition discusses various aspects of the energy crisis, makes claims regarding refinery utilization and expansion for the last five years, and discusses the company's crude oil import record. Whether these representations are accurate is essentially at issue in the oil company anti-trust litigation and these matters can best be raised in the discovery of the anti-trust case. We are working with the Bureau of Competition to explore ways to deal with the advertising in the Bureau of Competition suit.

Exhibit H - Mobil-Life and Death

Several types of claims are made in this advertisement. The ad begins with a series of general statements relating to

the oil industry as a whole: Mobil's first type of claim describes changes in the life of an oil field; states that most U.S. fields are past their prime; notes the length of time it takes a field to develop and to be used up; and finally maintains there is a worldwide shortage of crude oil today. Of these claims, our preliminary investigation had indicated that the first three are supportable. The claim regarding a worldwide shortage of crude oil is highly controversial and currently at issue in our antitrust litigations.

The remaining claim relates to Mobil's actions, "Our crews are working twenty-four hours a day." The basic claim seems clearly supportable as a common industry practice. Even if the claim were interpreted as implying some extra-ordinary corporate effort, it is probable that Mobil could show substantially increased research efforts as compared with past years.

Thus this Mobil ad was eliminated because of the pending anti-trust case and claims that crews are working 24 hours are probably true.

Exhibit I - Exxon Spokesman

This ad offers several representations regarding Exxon's response to the energy crisis. These representations include

the comparative levels of gasoline production and refining capacity.

Factual determination of these issues takes us squarely into the teeth of the Bureau of Competition suit. Further action outside that litigation does not appear to be useful.

Exhibit J - Exxon-Helicopter Ride

This ad is comparatively sparse in claims. It primarily offers a description of off-shore drilling in the Gulf of Mexico. The ad states that Exxon has looked for oil for 25 years and pledges to continue the search. The only substantive claim is that Exxon has searched for oil in the Gulf for 25 years which is clearly supportable.

Exhibit K - Pacific Power and Light

The Pacific Power and Light Company advertisement claims that it "controls extensive reserves of low sulfur coal in Montana, Washington and Wyoming that it can depend upon for fueling its own plants and for sale to other utilities." The explicit claim is supportable. The petitioners read the statement as an assertion that Pacific Power and Light is unique and highly dependable and the petitioners cite a recent power cut. We do not agree that this implication is necessary or even particularly reasonable, and therefore do

not consider the claim worthy of further action.

In addition, this ad, appearing in Barron's, is explicitly directed at investors, not consumers, and we can identify no potential or actual consumer interests to be protected. Finally, this utility is regulated by state agencies and with little or no need for dual regulation by the FTC.

Exhibit L - Investor-owned Electric Light and Power

This advertisement is a justification for the present rate structure. If we were to question the representations made, we would be inextricably drawn into the complicated area of setting utility rates. Presumably this issue has been fully and fairly adjudicated by state public service commissions. The petition asserts that the ads are unfair because the companies advertise and pass on the cost for the advertising to consumers. However, the propriety of including this cost into the rate structure has already been considered during many rate hearings. State utility commissions have much more requisite expertise to consider such ads and make such determinations.

Exhibit M - Wheelabrator-Frye

The decision not to challenge this advertisement rests primarily on the fact that Wheelabrator-Frye does not

manufacture any consumer products. Since the entire subject of energy and environmental advertising poses new and serious questions for the Commission, we believe it is better at this stage to restrict any inquiry to claims which likely elicit a product-purchase response from consumers.

Exhibit N - General Electric

This ad was eliminated because its primary message is to tell the public that nuclear reactors are clean and safe, in order for GE to sell these plants to various power companies. The ad describes no behavior peculiar to G.E. and as such, the message is more likely to be protected by the First Amendment.

Exhibit O - Southern Company Justification For Electric Heat Due to Peak Load Consideration

This advertisement suggests that were consumers to use electrical power in the winter months, the net result would be a decrease in rates because plants could operate at peak efficiency on a yearly basis. Factual considerations to prove the truth or falsity of this advertisement would necessarily mean relitigating a rate case. Even putting aside the rate-making problem, we do not believe that this advertisement is deceptive on its face or by implication. The advertisement does not suggest that electrical heat is

better or cheaper than gas or oil. In fact, the underlying predicate of the advertisement is that electrical heat is more expensive than other types of energy but if more electrical energy were consumed on a steady basis, the cost would decrease in total, by spreading out the fixed costs. Finally, the message of the advertisement is not really addressed to consumers but is more a presentation of the electrical utility industry's side of a current issue of public controversy, (i.e., whether it is sound to promote the use of electricity in case of an energy crisis). Consequently, it is more of a political advertisement and, as such, more likely to be protected under the First Admendment.

Exhibit P - Exxon-Warm House

In this advertisement, Bud Wilkinson advises viewers to use storm windows, to keep burners operating at peak efficiency, to keep thermostats down, and to close flues when not in use. The petition objects to this advertisement on the ground that the advice which it contains "is self-serving in terms of corporate profits and public image."

We have decided not to investigate this advertisement because to do so would be counter-productive. We regard this type of advertising as very much in the public interest. The suggestions should in fact reduce consumption.

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Exhibit Q - Mobil-8 Ways To Save

In this advertisement, Mobil suggests eight ways to conserve gasoline. This advertisement is not being investigated for the same reasons set forth in connection with the advertisement designated as Exhibit P.

X EVALUATION OF MCINTYRE, QUARLES AND TRAIN COMPLAINTS

In addition to the ads submitted in the petition the staff has considered advertisements referred to us in complaints by Senator Thomas McIntyre, John R. Quarles and Russell Train of the Environmental Protection Agency. For reasons to be discussed, we have concluded that none of these advertisements warrants further investigation.1/ We have also continued to monitor recent image advertisements relating to the environment or the "energy crisis". We discuss one of these latter ads simply as further example of ads now running which should not be proceeded against.

1/We have drafted for the Secretary's signature responses to each of these letters. The letters appear as Appendices C, D and E.

A. "Life and Death" - Mobil

STD-1005 (1/72)

TELEVISION NETWORK

DATE	ADVERTISER & ADDRESS
OCTOBER 2, 1973	Mobil Oil Corporation 150 E. 42nd New York, NY 10017
SHOW	
CHASE	AGENCY & ADDRESS Dancer-Fitzgerald-Sample, Inc. 347 Madison Ave. New York, NY 10017
TIME	
8:00 8:30 P.M.	

POSITION	PRODUCT	CODE #	LENGTH
2	Corporate	MBEN3146	30

COPY STATUS:

( ) AS-PRODUCED SCRIPT (✓) INITIAL SUBMISSION

(✓) PHOTOBOARD ( ) FOLLOW-UP SUBMISSION

F.T.C. Reporting #

1012 Case

DOYLE DANE BERNBACH INC., ADVERTISING 20 WEST 43rd STREET, NEW YORK N.Y. 10036

CLIENT: MOBIL OIL COMPANY, 150 E. 42ND ST., NYC PRODUCT: ENERGY CAMPAIGN

TITLE: "LIFE AND DEATH" CODE NO: MBEN3146 LENGTH: 60 SEC.



1. ANNCR: There are three stages in the life of an oil field.



2. It has a beginning, a middle, and an end.



3. (MUSIC)



4. (MUSIC)



5. (MUSIC)



6. (MUSIC)



7. (MUSIC)



8. A field that's been fully developed



9. will usually produce at its peak for a relatively few years,



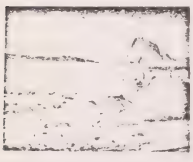
10. and then decline by as much as ten percent a year.



11. And we're sorry to have to tell you



12. that most oil fields in the U.S. today are past their prime.



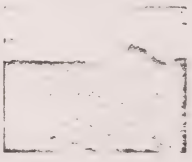
13. It takes nature millions of years to create an oil field.



14. It takes man only twenty or thirty years to use it up.



15. That's one of the reasons why



16. there's a worldwide shortage of crude oil today.



17. What's Mobil doing about it?



18. Our crews are working twenty-four hours a day



19. all over the world to bring you more oil

1ST AIR DATE:
PROGRAM:
TIME:
1ST AIR DATE ON:
ABC
CBS
NBC

In a November 21, 1973, letter to the Chairman, Senator Thomas McIntyre complained about "energy crisis" advertsiing generally, but making specific reference to a Mobil Oil Company Television ad claiming that "There is a world-wide shortage of crude oil."

The Commission has in its files an ad conforming to this description - "Life and Death" - which was also forwarded to us by the Petitioners, Exhibit H. As noted above, the staff recommends against pursuing that ad on other than first amendment grounds. However, difficult first amendment questions are raised by the ad as well.

Although the Mobil ad concludes by describing what Mobil is doing about the "worldwide shortage of crude oil today," the bulk of the ad describes why there is such a shortage. The gist of that message is that oil fields last only "twenty or thirty years" and "most oil fields in the U.S. today are past their prime." The ad contrasts the "millions of years [nature takes] to create an oil field" with the few years it takes man "to use it up." Mobil is said to be "working twenty-four hours a day all over the world to bring you more oil." The Mobil logo envelops the scene at the close of the ad.

Although the ad does not frankly state the relevance of the information contained in the ad, it does hint that Mobil at least is trying to alleviate the alleged world wide shortage of crude oil. The ad does not argue that such a shortage exists - it merely assumes that it does. The ad does not state that Mobil has been accused of creating the shortage - it merely states that the company is trying to alleviate the shortage. The ad does not argue that incentives for oil exploration are inadequate or that there is no more domestic oil to be discovered, it merely states that U.S. fields are past their prime. Although the ad describes an American and world wide problem over which it obviously has limited control, it emphasizes what it is doing about the problem while assuming the existence of the problem.

It is difficult to say whether the assumptions made in the ad are so obviously controversial that to state them is itself sufficient to alert the average viewer that they relate to a political issue. That a group of Senators and Congressmen perceived the relevance of this ad to a political issue is to be expected. Their antennae must be sensitive. The ad's effect in this regard is subliminal - assuming away a controversy, rather than frankly arguing in favor of a position. However, one may have to assume that the level of comprehension of these subtleties may be higher due to the timing of the ad during the heat of the "energy crisis". Whether such timing and its resulting impact on the actual effect of the ad is a matter of which the Constitution takes congnizance is extremely

difficult to determine. 1/ Because the ad is very subtle, however, a significant proportion of the viewing public is not likely to be fully cognizant of the political consequences of the assumptions made in the ad. Rather, the dominant impression of the ad is that at least Mobil is trying to alleviate the problem. There is a subtle implication that customers should at least not blame Mobil for the long lines at service stations and, in fact, should give Mobil credit for acting in the consumer's interest during perilous times.

The balancing described above is difficult to resolve without much more concrete evidence of the advertisement's effect and the advertiser's purpose. If the ad had not been rejected on non-constitutional grounds the staff would defer a resolution of the first amendment issue pending a more thorough investigation of these factors.

1/ In NLRB v. Gissel 395 U.S. 565 (1969) the Court recognized an economic effect flowing from the employer - employee relationship, but that does not require that every ad be analyzed in light of the front page news on each day when the ad is run.

B. LEADED GASOLINE -- PPG INDUSTRIES, INC.

NEW YORK TIMES

NOVEMBER 25, 1973

The energy crisis is bad enough without making it more critical.

Three years ago, Congress voted a number of amendments to the Clean Air Act which set extremely strict emissions standards for automobiles. The deadline, 1975, has since been extended one year, to 1976.

In compliance, automakers have been modifying existing engines and adding pollution-control equipment while researching catalytic converters, thermal reactors, reverters, and particulate traps, as well as other powerplants such as the stratified

The removal of lead from gasoline could have the net effect of dumping 1 million barrels of crude oil every day, a tragic waste of our natural resources.



Even if catalytic converters prove to be satisfactory in the new, lower-compression cars which operate on low-octane fuel, it would be an appalling energy waste to require existing, high-compression cars, which need high-octane fuel, to burn nonleaded or low-leaded gas because of the additional crude needed to produce it.

Major rethink required.

In light of the following, we believe that Congress should seriously re-examine the

charge engine.

The only major, new emission-control system scheduled for production in 1974 is the catalytic converter. It will not operate properly with leaded gasoline. Lead coats the catalyst, sharply reducing its performance.

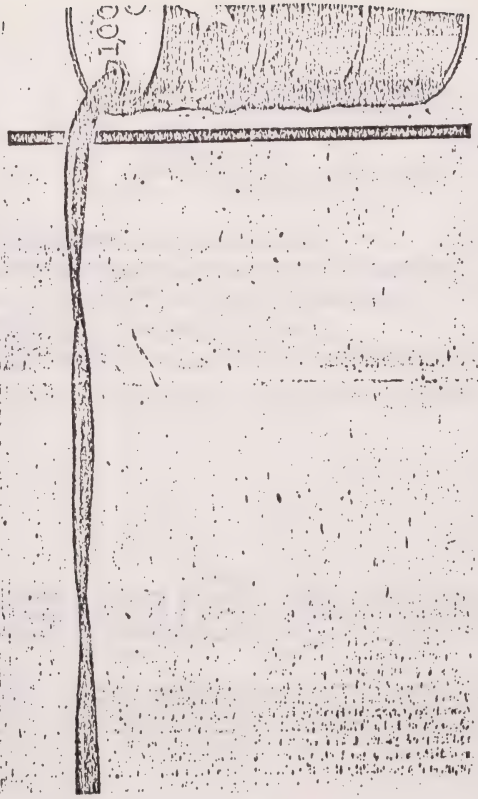
Thou shalt get the lead out.

In the meantime, the Environmental Protection Agency has published regulations that require major oil companies to offer non-leaded gas at most of their service stations, and is considering a phasedown program for lead in all gasoline.

The facts of life, as any refiner knows, are that you pay a significant penalty when you exclude lead from gasoline. There are other processes to achieve the same octane ratings that lead imparts, but these require more crude oil to make the same amount of gasoline, according to industry experts.

Without lead, the crude loss within a few years could be running about 1 million barrels a day.

This energy waste is unthinkable, particularly with our increasing dependence on oil imports (25% of our needs in 1972, an estimated 42% in 1980) and the uncertainties of



emissions-control standards, their deadline, and their impact on the energy crisis.

1. Making high-octane gasoline without lead wastes six percent of crude oil compared with using lead.

2. More costly refining processes are required, and the cost will be passed on to consumers.

3. While lead is not so important to the manufacture of low-octane gasoline, car engines that use low-octane gas waste crude, possibly in excess of six percent, due to their lower efficiency.

4. Emissions-control technology is still evolving and shows promise of meeting federal standards with conventional, leaded gas, thus minimizing energy waste.

Is lead a straw man?

Several governmental agencies have questioned the proposed lead phasedown regulations not only because of the energy drain, but because they have found no demonstrable proof that lead in the atmosphere is a hazard to health.

Also, Senate Public Works Committee hearings were held to investigate EPA

international oil supply. The current situation in the Middle East, for example.

PPG admits to a narrow interest in the matter since we manufacture lead antiknock compounds through Houston Chemical Company, a division of PPG. Our broader interest, however, has to be the conservation of valuable and limited energy resources which we all need.

Another way that works.

Ever since lead became an issue, we have felt that the problem is not what goes into the gas, but what comes out of the tailpipe.

That's why we're working on an emission-control system that's compatible with leaded gas.

Research to date indicates it can reduce total emissions to levels below EPA requirements, while using conventional leaded gasoline.

We may not have the perfect answer yet, but our findings and those of other companies studying exhaust-emissions problems suggest there may be a better solution than the catalytic converter and nonleaded gas.



findings that health hazards may be associated with catalytic converter use.

From all this, you can see there's a lot of contrary fact and opinion on the issues. So it seems to us at PPG that it may be a little foolhardy to shrink our national supply of petroleum when it may not be necessary.

For a lot of good reasons, including minimizing gasoline-price escalation and the conservation of as much as 1 million barrels of crude oil a day, we recommend that the present lead levels in leaded gasoline be maintained.

Let's take a little more time and think things through. Let's prevent what we desperately need—energy—from going down the drain.

PPG Industries, Inc., One Gateway Center, Pittsburgh, Pa. 15222.

PPG: a Concern for the Future

PPG INDUSTRIES

1309

On November 29, 1973, Mr. John R. Quarles, Jr., Deputy Administrator, Environmental Protection Agency, forwarded to the Chairman a copy of a letter to Mr. Joseph A. Neubauer, President, PPG Industries, Inc., regarding an ad entitled "The Energy Crisis Is Bad Enough Without Making It More Critical" which had appeared, inter alia, on November 25, 1973, in the New York Times. The staff is of the opinion that this ad is protected by the First Amendment.

Under the title to the ad quoted above, a subtitle in bold face type reads "the removal of lead from gasoline could have the net effect of dumping 1 million barrels of crude oil every day, a tragic waste of our natural resources." The body of the ad proceeds to criticize Congress's decision in the 1970 Amendments to the Clean Air Act to "set extremely strict emissions standards for automobiles." That decision is described as leading to the development of the catalytic converter which "will not operate properly with leaded gasoline." The ad then notes that "[i]n the meantime, the Enviornmental Protection Agency has published regulations that require major oil companies to offer non-leaded gas at most of their service stations, and is considering a phase down program for lead in all gasoline." (emphasis supplied). Because it takes more crude oil to "achieve the same octane ratings that lead imparts...the crude loss within a few years could be running about 1 million barrels a day." This "waste" is said to be "unthinkable" due to America's "increasing dependence on oil imports...and the uncertainties of international oil supply," specifically referring to the "current

situation in the Middle East..." Under a caption stating "Another way that works PPG"claims to be developing an emission control system that "can reduce total emissions to levels below EPA requirements, while using conventional leaded gasoline." This "suggest[s] that there may be a better solution than the catalytic converter and non-leaded gas." The ad then implores "Congress" to "seriously re-examine the emissions--control standards, their deadline, and their impact on the energy crisis," followed by four factual premises to support that plea. The ad then turns to the question of whether the "proposed lead phasedown regulations" have any basis in the hazards to health of lead in the atmosphere, citing "several government agencies" which "questioned" that premise and Senate Public Works Committee hearings "held to investigate EPA findings on the matter." These observations are noted to show that "there's a lot of contrary fact and opinion on the issue." PPG states its opinion that, therefore, "it may be a little foolhardy to shrink our national supply of petroleum when it may not be necessary...[W]e recommend that the present lead levels in leaded gasoline be maintained." The ad closes with PPG's address, tag line (PPG: A Concern For the Future), and logo. In the ad PPG "admits to a narrow interest in the matter since we manufacture lead antiknock compounds" through one of its divisions. Its "broader interest" however is stated to be the "conservation of valuable and limited energy resources..."

The advertisement is not ambiguous as to the relevance of the information contained therein to a public issue, indeed, an

issue which the ad indicates was at the time under consideration in Congress and the agencies. The ad specifically requests Congress take the action recommended. Although as one major premise the ad describes PPG's research efforts in developing emissions control devices, the principal focus of the ad is to describing PPG's views on the controversy. Although PPG admits to a "narrow" economic interest, it states its "broader" view to be conservation and makes other references to this broader purpose. To the extent that the company's concern is economic, under Noerr, supra, it cannot serve to transform this frankly political ad into commercial speech. The staff concludes that the ad is protected by the First Amendment.

C. "Relaxing Emission Controls"--

Chevrolet Dealer Association

33-291 O - 78 - 84

You're entitled to know!

By relaxing emission controls somewhat, we can start saving 5 billion gallons of gas right now.

Right now!

The things we've put in cars in recent years to cut air pollution are great.

Eventually they will lead to smog-free air.

But in the present emergency, by relaxing these controls to 1969 standards, we could save 5 billion gallons of gas.

The change in your car could be made in minutes and RIGHT NOW.

RIGHT NOW we could start saving 5 billion gallons of gas a year.

If you would like to bring this information to the attention of the law makers who represent you, please use the coupons below or write your own letter on the subject.

But do it RIGHT NOW. Because it could mean a saving of 5 billion gallons of gas per year and possibly a 25% increase in your own gas mileage.

A public interest message from your

Chevrolet Dealer

of Bare Hudson, Waldwick, Wyckoff, Hohokus, Allendale, Saddle River and Ridgewood, N.J.

Your Senators: [illegible]

Senator _____
Senate Office Building
Washington, D.C. 20510

Relaxing car emission controls to the 1969 standards, for the current emergency, could start saving 5 billion gallons of gas RIGHT NOW.
Canada has already legislated removal of gas-saving emission equipment.
I urge you to give it full consideration.

Name _____
Address _____

Senator _____
Senate Office Building
Washington, D.C. 20510

Relaxing car emission controls to the 1969 standards, for the current emergency, could start saving 5 billion gallons of gas RIGHT NOW.
Canada has already legislated removal of gas-saving emission equipment.
I urge you to give it full consideration.

Name _____
Address _____

Congressman _____
House of Representatives
Washington, D.C. 20515

Relaxing car emission controls to the 1969 standards, for the current emergency, could start saving 5 billion gallons of gas RIGHT NOW.
Canada has already legislated removal of gas-saving emission equipment.
I urge you to give it full consideration.

Name _____
Address _____

President Richard Nixon
White House
Washington, D.C. 20050

Relaxing car emission controls to the 1969 standards, for the current emergency, could start saving 5 billion gallons of gas RIGHT NOW.
Canada has already legislated removal of gas-saving emission equipment.
I urge you to give it full consideration.

Name _____
Address _____

On January 17, 1974, Mr. Russell E. Train, Administrator, Environmental Protection Agency, forwarded an ad to the Chairman regarding the relaxation of emission controls in order to save gasoline. This ad is the most frankly political ad herein considered and would clearly receive first amendment protection.

The ad opens with the bold face heading "You are entitled to know - by relaxing emission controls somewhat, we can start saving 5 billion gallons of gas right now. Right now!" The body of the ad then explains that these savings could be accomplished "in the present emergency" by relaxing emission controls to 1969 standards." The ad then instructs the reader, "[i]f you would like to bring this information to the attention of the law makers who represent you, please use the [attached] coupons below or write your own letter on the subject. But do it RIGHT NOW." The attached coupons have a place to fill in the names of the state's senators and the constituent's congressman (the Senators' names for New York and New Jersey are given for the reader's reference) and one for the President and a place to fill in the reader's name and address. The body of the

coupons all urge the recipient to "give...full consideration" to "relaxing car emission controls to the 1969 standards..." The logo on the ad is a "public interest message from your Chevrolet Dealer."

Although the dealers clearly have an economic stake in the relaxation of pollution standards as the effect thereof is more gasoline for cars and thus more car sales - their frank aim is to encourage citizens to write to Congress. That fact could not be more obvious. There is absolutely no description of the dealer's behavior although they present an excuse for the poor mileage of the autos they sell. These economic interests are, however, clearly insufficient to transform this blatantly political ad into one which the Commission can regulate.

D. "How in All Conscience"--Shell

The New York Times, January 18, 1974

"How in all conscience can anyone call these excess profits?"

-164-

The President of Shell speaks out on Shell's profits - where they come from, how big they actually are, and what Shell does with them.

Thousands of barrels of refined products Shell sold per day:

1. The tax reform bill of 1969 reduced the depletion allowance from 27½% to 22% and this, together with other changes, resulted in increased taxation.
2. Simultaneously, the worst petroleum products price war of the decade (the last, of course, from the consumer's short-term point of view) broke out, stimulated by excess producing and refining [illegible] of

refining capacity in excess of the crude oil available for processing even though we would like to see more of this located here instead of overseas.

Assuming that a permanent seller's market does develop, one can generalize as follows:

1. Petrochemicals. Overcapacity has virtually disappeared and feedstocks are scarce and more expensive so that [illegible]

dustry is admittedly appalling and there are many people who are ready to criticize us fairly or unfairly, knowledgeably or unknowledgeably.

We believe, however, that the vast majority of our fellow citizens are fair-minded. And we will [illegible] many other companies, we have also [illegible]

WHAT OTHER GUYS WON'T TELL.



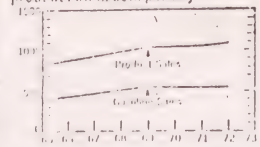
H. Bridges, Shell President

Amidst all the talk about the Energy Crisis there are frequently recurring themes which can be summarized by the headlines in most newspapers, such as "Oil Industry's Huge Profits" and "Growing Trend to 'Get Oil in Congress'." In Shell we think that these themes are gross distortions and I want to illustrate your attention to Shell Oil's performance over the past eight or nine years to see why.

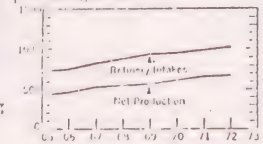
But first let me explain why I think it is important to look at Shell Oil's figures and not simply to consider the real profit picture of the U.S. oil industry. The reason is that unlike most oil companies overseas, Shell Oil is essentially a U.S. domestic company even though we are a subsidiary of a multi-national corporation.

The fact that some 30% of our shares are owned by the general public requires that we publish our results separately. Therefore, the performance of Shell Oil Company, for which I speak, is a matter of public record and the data I shall be using is available to anyone who wishes to study it.

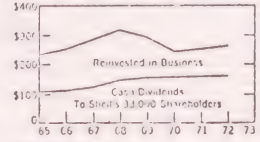
Thousands of barrels of refined products Shell sold per day*



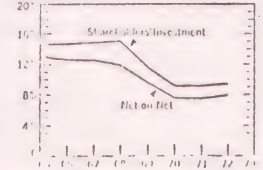
Thousands of barrels per day of crude oil and other liquid processing intakes.*



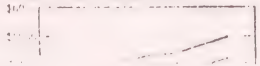
Shell's Net Income in Millions*



Rate of Return*



Shell Revenue in Millions*



Line (the best, of course, from the consumer's short-term point of view) broke out, stimulated by excess production and refinery capacity, which there was were partly the result of shortages.

3. Overcapacity in the chemical industry [illegible] and [illegible] from [illegible] to [illegible] [illegible] [illegible]

separately. Therefore, the performance of Shell Oil Company, for which I speak, is indicative of the performance of the domestic oil industry without the problems one subsidiary that may be introduced by large international transactions.

Other differences

The point, of course, other differences. For instance, we have a very large chemical division—the largest of the U.S. oil companies—and our corporate performance is the way affected by the performance of this division. I will tell you something about this later.

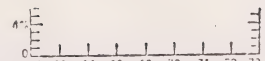
Then, also, we do have some interpretive activities—that is study in exploration ventures in Canada, South America, West Africa and the Far East. This is development relatively recent and accounts only about 2% of our total exploration and production annual investment internationally. As of now, we have no overseas production income.

My main point therefore is to be performance of Shell Oil is representative of a large integrated oil company operating in the United States, and we think that this is what you should be looking at.

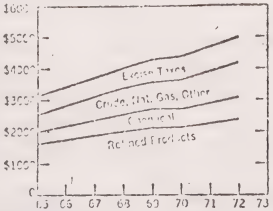
How did we fare?

I know that some people like looking at tables and some at graphs. I prefer graphs and I hope that those who prefer tables will forgive me when I show our performance over the period from 1965 to 1973 in graph form.

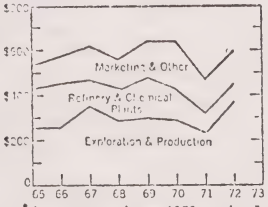
Although we are now in the year 1974, we still do not know our results for the 4th quarter of 1973, and later I shall be talking about our performance in the first nine months of 1973 and speculating about some aspects of the factors that could affect probable performance in the future.



Shell Revenue in Millions*



Shell's Capital Expenditure in Millions*



*As soon as we know 1973 results, I propose to show you in a subsequent advertisement these same graphs with the 1973 figures added.

Between 1968 and 1970

As you can see from the graphs, we made steady progress over the years in production of crude oil, refinery intakes and product sales, but our net income and our percentage return on investment dropped dramatically between 1968 and 1970. Many factors contributed, but the chief one were:

Excessive profits?

Our current profit level can then only be considered excessive if our 1968 profit level was excessive. And yet, during 1968, our return on capital employed was approximately equal to the average of all manufacturing industries in the United States.

As I mentioned above, our capital employed increased very considerably over this time period so that our income in the first nine months of 1973 would have had to be 50% or 60% higher to equal the 1968 return on investment.

How, in all conscience, this profit performance can be described as "reaping unjustified profits from the energy crisis" escapes me completely.

There is much talk of an excess profits tax but such a tax based, for example, on average corporate income over the last five or six years would deny us the legitimate benefits of our concurrent investments in the oil and chemical business and our expenditures to consolidate and increase the efficiency of our business, and would lock us into a very depressed period in our corporate performance.

And what next?

Predicting the future is much more difficult than analyzing the past. The $64 question is whether the U.S. and the world will ever get back to the consumers' paradise of excess crude oil production and excess refining capacity which the consumer has enjoyed for many years.

The stated intention of the OPEC organization whose members together control about 55% of the free world's crude oil reserves is that this will never happen again as far as crude oil is concerned. And there is no point in having

Dramatic changes have been thrust on the world by members of the OPEC organization. No one, even six months ago, would have predicted that the U.S.A. would now be a price leader in the world. Some price changes designed to stimulate the exploration for new domestic reserves, have been granted by the present pricing system and by the increase in the price of "old" oil.

These are only being their intended effect, but the indications for the U.S. are that in the short term there will be profit improvements from this segment of the business, which many will misinterpret as "windfall".

We must admit, however, that if overnight, the price of all U.S. crude were to rise to the levels which now prevail outside the U.S., increases in profit from production for many companies would be so large that they would provoke severe criticism from the government and the people of the United States alike. This could produce dangerous over-reaction from which

We believe that the oil industry must seek to balance the fact that for the next few years some form of control on domestic crude oil production profits may be in the general interest as prices rise to world levels.

We suggest that only that the type and form of the control be carefully considered to ensure that it will have the correct impact. It should not be a hasty, ill-conceived attack on the industry which would impose corporate excess profits taxes based on some arbitrarily chosen historical performance.

What are the conclusions?

Shell Oil does not pretend to speak for the industry. We speak only for Shell Oil Company. The paleolithic image of the industry should be made the scapegoat.

Statesman-like approach needed

There has probably never been a time before in the history of the industry when there was more need for a careful, patient, objective and statesman-like approach to the problems which face the American consumer and the nation by trying to relate to the energy crisis. Should there be a mistaken impression of anger or recrimination, it could be the worst of all worlds—for all of us.

We have read that the Federal Energy Office is making a study of the profitability of many of our companies compared with other industrial enterprises. We welcome this study and pledge our full cooperation in providing the information that we need to record them on a fair and equitable basis.

All we ask is that the Government and the public approach the subject with objectivity and a minimum of preconceived notions. As I said, we have basically the same end in mind; that is providing for the needs of the American consumer as well and fully as possible.



The Shell "conscience" ad ran in many national newspapers on January 18, 1974. The thrust of the ad is Shell's response to "headlines we often see in our daily newspapers" charging oil companies with "excess profits." Although one of the admitted concerns felt by Shell is to assure customers that the prices Shell charges are not excessive, the primary focus is on preventing government action damaging to such profitability. As such it is a form of lobbying and likely to be protected by the first amendment.

XI. The Petitioners' Rule Proposals

In this Section we turn to the proposed Trade Regulation Rule proposed by the Congressional petition. Because the rule could have a substantial impact on areas other than corporate image advertising, we believe that this aspect of the petition requires more careful analysis than we have been able to give in the content of this memorandum. Our conclusions, therefore, are somewhat tenative.

The petition proposes (at pages 2-3) that the Commission adopt a rule (1) defining "commercial advertisement" so as to include those ads which promote the advertiser's operations, activities or policies, or which give certain advice or information, as well as those promoting goods or services, (2) requiring substantiation of such advertising to be produced at the request of any interested person, (3) prohibiting misstatements, failures to disclose material facts, or unsubstantiated claims, and (4) exempting from this rule advertisements expressing as their dominant theme one viewpoint on an important controversial issue, and including a statement to the effect that the advertisement is political and presents the advertiser's views.

(1) The definition of "commercial advertisement" merely serves as a predicate to the operative provisions, and therefore requires no substantive comment. If any sort of rule which is intended to include the type of advertising discussed in

this memorandum is deemed desirable, a definitional section somewhat similar to that proposed in the petition will be required. A narrower definition may be advisable, however, in order to insure that protected speech is not included within the ambit of the definition. For example, some ads may promote a company's policy through direct political appeals to Congress or the Executive. Such ads are likely to be protected by the First Amendment. See Section (IV.)

(2) The petition proposes that the Commission amend its 1971 substantiation resolution to include not only product advertising, but rather all "commercial advertising".

In our view, amendment of the 1971 ad substantiation resolution would be inappropriate. That resolution has been regarded as the basis for a discrete program, which as revised by the Commission minute of December 11, 1973, includes the following elements: selectivity of claims; expert evaluation of claims by outside experts and notification of advertisers of the "tentative adverse conclusions of the Commission." We believe that to amend the resolution to include non-product advertising might unbalance the newly-structured substantiation program at a critical period in its development by adding a new and highly sensitive subject matter with which the program is not equipped to deal.

To the extent that the petitioners seek by their proposed amendment to notify advertisers of their obligation to substantiate "image" as well as product claims, this goal may be achieved by informal letter requests or a distinct

investigational resolution. If requests for voluntary compliance will be used exclusively it should be made clear to the corporations from which responses will be requested that those responses may be made public.1/ The Commission's Rules of Practice do not appear to prohibit the placement of these materials on the public record.2/ Following the latter course of action would provide the Commission with an opportunity to review the information provided before determining whether it should be made public.

The other feature of part (2) of the proposed resolution is that it would require the production of substantiating materials to the Commission at the request of any interested person. Since this suggestion has a potential impact far beyond the energy and environmental claims covered by the petition, staff requests additional time to consider it. The proposal is similar in many respects to the Truth in Advertising Bills 3/ which are

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1/ Our proposed letters so notify the companies. If the Commission chooses to amend the 1971 resolution, the resolution's provision for making requested material public will apply.

2/ Section 4.10 (a)(5) of the Rules exempts from disclosure under the Freedom of Information Act (5 U.S.C., §552) investigatory files compiled for law enforcement purposes, but does not prohibit their disclosure.

3/ S.1512 and H.R. 2282.

pending in both Houses of Congress, and upon which the Commission has yet to take a definitive position. Any response to this aspect of the petition should therefore await the Commission's decision on whether to support that legislation or similar legislation.

(3) The petition next calls for a rule provision declaring that Section 5 of the Federal Trade Commission Act is violated when an advertisement contains a misstatement, or fails to disclose a material fact, or is made without substantiation. This provision merely restates existing Commission law in the Pfizer case and elsewhere and is therefore unnecessary.

(4) Finally, the petition seeks approval of a provision exempting from the other provisions certain "political" advertisements which disclose that they are expressing the advertiser's views on an issue of public importance. The staff has not yet had an opportunity to adequately consider the arguments concerning the constitutionality and the desirability of such a rule. Although the following comments are therefore tentative, they do illustrate some of the difficulties in trying to cast constitutional distinctions in the mold of a rule.

The approach taken by the petition is to exempt certain political advertisements from other obligations imposed by the Commission if they contain the specified disclosure. Presumably, political advertisements whose dominant theme is one side of a controversial public issue which do not contain this disclosure are to be subject to the other provisions of the rule, including a substantiation requirement and liability for dissemination of deceptive or unfair advertising.

This disclosure provision accords to some degree with the staff's conclusion - that an advertiser may gain constitutional protection if he frankly relates his claims to the underlying political issue. Nevertheless the rule, like any rule in this difficult constitutional area, is too narrowly drawn. Under the rule, ads which "present" more than one side of an issue, or ads which speak of an issue which is not "controversial," would be covered regardless of any disclosure. In our view, the relevant First Amendment cases do not necessarily turn on the one-sidedness or the "controversiality" of the message. Moreover, the rule would cover ads which are predominantly political unless a very specific disclosure is included. While we have elsewhere argued that the "chilling effect" of regulation is slight where advertisers can insure regulation through a frank discussion of political issues, we question whether the Commission has the authority to require that the discussion be cast in a language as specific as that required by the rule. Finally, even if the disclosure provision is valid, the mechanical use of the disclosure is open to abuse. We believe that in the hands of a clever advertiser, a boilerplate disclosure could be used as a "sham" to insulate a predominantly commercial advertisement from effective regulation. See Valentine v. Chrestensen, 310 U.S. 52, 55 (1971) (appending a "civic appeal" or "moral platitude" to commercial advertising insufficient to avoid regulation).

CONCLUSION

For the reasons set forth in this memorandum, the staff recommends that the Commission approve an investigation into the specific advertisements described above in Section VII, that the demand letters described in Section VIII be sent, that petitioners Bayh, McIntyre, Moss, Aspin, Rosenthal, and Young be notified through the attached letter (Appendix B) of the Commission's interim action on their petition, and that Senator McIntyre, Mr. Train and Mr. Quarles be separately notified through the attached letters (Appendix C, D, and E) of the Commission's determination not to act on their complaints.

APPROVED:

Richard B. Herzog 3/15/74
Richard B. Herzog
Assistant Director
Division of National Advertising

J. Thomas Rosch 3/19/74
J. Thomas Rosch
Director
Bureau of Consumer Protection

APPENDIX A: Rosenthal Petition *

*/ See exhibit 81.

APPENDIX B: Letter to Petitioners

33-291 O - 78 - 85

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

Harvey J. Shulman, Esquire
Media Access Project
1910 N Street, N.W.
Washington, D. C. 20036

Dear Mr. Shulman:

The purpose of this letter is to advise you of the Commission's response to the petition, filed by you on behalf of six members of Congress, relating to environmental and energy-related claims in advertising.

The Commission has determined to investigate claims made in the advertisement attached as Exhibit A to the petition, and to investigate claims made in an advertisement which is another version of the advertisement attached as Exhibit B to the petition. In addition, the Commission has determined to investigate environmental claims in several oil company advertisements obtained through the Commission's own monitoring program and not by way of the petition. With the exception of materials which are exempted from disclosure by Section 6(f) of the Federal Trade Commission Act, substantiation materials submitted during the course of each of these investigations will be placed on the public record.

In determining not to investigate the other advertisements cited in your petition, the Commission has taken the following factors into consideration: (1) The First Amendment appears to preclude regulation of those advertisements which call primarily for a political, rather than an economic, response; (2) Preliminary investigation has revealed that some of the claims made in the advertisements are supportable; (3) Certain of the advertisements were sponsored by companies that offer no goods or services to the general public. The Commission prefers as a matter of policy at this time to give priority in its law enforcement efforts involving environmental advertising to claims by companies which do offer goods or services to the general public; (4) The Commission has issued a complaint against eight of the nation's major oil companies. Exxon Corporation, Docket No. 8934. The staff of the Comission is of the view that issues raised by certain advertisements of these companies are also raised by that complaint, and that additional investigation as those issues might prevent expeditious resolution of that proceeding; (5) In some cases, the Commission does not agree that the advertisements make the representations alleged in the petition;

(6) Certain issues presented by the claims are more properly adjudicated by other agencies, such as the Atomic Energy Commission or state rate-making bodies.

The Commission has also given consideration to the proposed rule set forth in Part III of your petition, but is not prepared finally to determine its course of action with respect to the entire proposal. The first element of your proposed rule would require that substantiating material for any advertisement, except certain advertisements said to relate to issues of public importance, be supplied to the Commission at the request of any interested persons. Because these provisions are not limited to energy advertising, and would necessarily affect the Commission's entire advertising substantiation program, additional time is required to evaluate the impact of your proposal on the substantiation program. Moreover, as you know, bills presently pending in both Houses of Congress (e.g., S. 1512 and H.R. 2282) would impose a similar obligation. The Commission is presently considering its position on this legislation, and in light of that position will furnish you with a report on its disposition of your proposals.

That portion of the rule which would prohibit affirmative misstatements, failures to disclose material facts or unsubstantiated claims, appears to do no more than restate existing law under Section 5 of the Federal Trade Commission Act. Such a restatement appears unnecessary. The exemption which the petition proposes, which we understand to be an attempt to resolve, in a single rule the constitutional questions raised by corporate image advertising, raises issues to which the Commission staff is giving some further consideration.

By direction of the Commission.

Charles A. Tobin,
Secretary.

cc: Senator Birch Bayh
Senator Thomas McIntyre
Senator Frank Moss

Rep. Les Aspin
Rep. Benjamin Rosenthal
Rep. Andrew Young

APPENDIX C: Letter to Senator McIntyre

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

Dear Senator McIntyre:

The purpose of this letter is to advise you of the Commission's response to your November 21, 1973, complaint regarding oil company advertising regarding responsibility for the "energy crisis."

As Mr. Robert J. Lewis and Mr. J. Thomas Rosch have informed you in letters of November 26, 1973, and January 28, 1974, respectively, the staff of the Commission has undertaken an intensive investigation of oil company advertising, and of the important policy, statutory, and constitutional issues raised with respect to such advertising. As you are aware, the Commission has issued a complaint against the nation's eight largest oil companies. Exxon Corporation, Docket No. 8934. The Commission has a strong interest in preventing any delays in the expeditious resolution of that litigation which might result from investigation of issues raised by the advertising by these companies, which issues are already raised by the pending complaint. As the staff of the Commission is of the view that the investigation of the advertisement about which you complained could result in such delay, the Commission has determined not to conduct an investigation. In reaching this determination, the Commission also took cognizance of the constitutional issues which would be raised by Commission action in regard to this advertisement.

The Commission has determined to investigate environmental claims made in several advertisements disseminated by four oil oil companies, including certain of the advertisements referred to in the Petition to the Federal Trade Commission of January 9, 1974, of which you were a sponsor. We have given Mr. Harvey J. Shulman of the Media Access Project a description of the Commission's action, a copy of which was forwarded to you.

By direction of the Commission.

Charles A. Tobin,
Secretary

Honorable Thomas McIntyre
United States Senate
Washington, D. C. 20510

APPENDIX D: Letter to Mr. John R. Quarles, Deputy Administrator, Environmental Protection Agency

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

Mr. John R. Quarles
Deputy Administrator
Environmental Protection Agency
Washington, D. C. 20460

Dear Mr. Quarles:

As Mr. J. Thomas Rosch indicated to you in his January 31, 1974, acknowledgment of your letter of the same date to the Chairman, the Division of National Advertising was assigned to review the advertisement by PPG Industries about which you have complained. That review began in late November when the Chairman received a copy of your letter of November 29, 1973, to Mr. Neubauer, the President of PPG Industries.

That review has been undertaken in the context of the other complaints we have recently received regarding "energy crisis" and environmental advertising, including an advertisement by the Chevrolet Dealers Association referred to us by Mr. Russell Train. The staff's review of such advertising has been comprehensive, as has been our analysis of the policy, statutory, and constitutional questions raised by the regulation of corporate image advertising.

Because of the particularly serious nature of the constitutional issues that would be posed by regulation of this advertisement, the Commission has decided not to invoke compulsory process in this instance. In reaching this conclusion, the Commission expresses no views with respect to the validity of the claims contained in the advertisement.

By direction of the Commission

Charles A. Tobin
Secretary

APPENDIX E: Letter to Mr. Russell E. Train, Administrator, Environmental Protection Agency

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

Mr. Russell E. Train,
Administrator,
Environmental Protection
Agency,
Washington, D. C. 20460

Dear Mr. Train:

As indicated to you in the Chairman's speech forwarded to you on February 14, 1974, the Commission has undertaken a review of corporate environmental advertising, which has included the Chevrolet Dealer's advertisement you referred to the Commission in your January 17, 1974, letter. That advertisement has been reviewed in the context of the Commission's comprehensive review of "energy crisis" and environmental advertising and the important policy, statutory, and constitutional issues raised with respect to such advertising.

The Chevrolet Dealer's advertisement raises especially difficult constitutional issues due to its express orientation toward generating public pressure on Congress to modify the 1970 Amendments to the Clean Air Act. Although the Commission has determined to investigate further other corporate advertisements concerning environmental matters, it is not inclined to pursue the advertisement to which you object due to the particular first amendment questions it raises. In reaching this decision the Commission expresses no position with respect to the legislative action advocated in the advertisement nor does the Commission indicate the balance it will achieve in determining first amendment issues with respect to other advertisements it will review.

By order of the Commission.

Charles A. Tobin,
Secretary.

Exhibit 83: FTC Memorandum—Corporate Image Adviserting, March 15, 1974

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : Commission DATE:

FROM : Richard B. Herzog, Assistant Director
for National Advertising RBH 3/15/74

SUBJECT: Corporate Image Advertising

The materials forwarded with this memorandum deal with corporate image advertising, that is, advertising which identifies the corporation but does not expressly mention a consumer product sold by it.

The materials consist of four main components. First, there is an extensive analysis of the economic effect of corporate image advertising, and of the constitutional and statutory issues which it raises. The basic conclusion is that certain narrowly defined types of corporate image advertising are within the jurisdiction of the Commission under Section 5 and that to proceed against such advertising would be proper under the First Amendment. As the broad issue of the Commission's power with respect to corporate image advertising has been periodically raised by petitions and applications received by the Commission for at least the past two years, these are major conclusions. I am in agreement with them.

The second component of these materials is a recommended disposition of the petition recently filed by three Senators and three Representatives (hereinafter the "Rosenthal petition") which requested the Commission to seek substantiation for 16 corporate image advertisements; to amend the 1971 general resolution authorizing the advertising substantiation program, and related rules, to require that substantiation for corporate image advertisements be provided to the Commission upon the request of any interested person; and to provide that the only advertisements which would be exempted from the regulatory powers of the Commission would be those carrying an express, general statement to the effect that "this is a political advertisement intended to present this advertiser's views on a controversial issue of public importance."

3010-104

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

The recommendation of the staff memorandum is that substantiation not be sought for 14 of the 16 advertisements which accompany the Rosenthal petition. Interestingly, as to virtually all of these 14 advertisements the conclusion not to seek substantiation is based on other than constitutional grounds. I agree with these recommendations.

The memorandum further recommends that the proposed changes relating to advertising substantiation (i.e., that substantiation be made available upon the request of any person) be resolved as part of the Commission's policy determination concerning bills presently pending in both Houses of Congress which would impose a similar obligation of substantiation. I agree. As to the Rosenthal proposal concerning the "political advertisement" label, the memorandum recommends that we give the proposal some further consideration. I am extremely doubtful that the rule or any variant of it should ever be adopted by the Commission. The particular rule proposed is not an accurate rendition of the constitutional boundaries, and the concept of reducing constitutional law to a rule seems inherently unworkable. Because, however, the major focus of the very extensive staff effort was on the broader constitutional issue and not on this particular proposal, it is reasonable to give it somewhat more consideration.

The third component in the attached memorandums consists of a recommendation that substantiation be sought from four oil companies for two of the advertisements included in the Rosenthal petition, 1/ as well as six other advertisements obtained by the Division through its own monitoring. Proposed demand letters, reflecting technical background acquired by staff through intensive research and consultation with other government agencies, accompany the staff memorandum. For reasons which I state below, I am in agreement that these demand letters should issue.

1/ More precisely, we would proceed against only one of the ads actually attached to the Rosenthal petition; in effect, however, we would proceed against two because one of the ads obtained through our own monitoring is simply another version of one of the Rosenthal ads, a version which was considered slightly better for our purposes.

The advertisements chosen as subjects for the demand letters all involve claims of corporate activity concerning the environment. None of them involves claims relating to the energy crisis. Several of the advertisements attached to the Rosenthal petition, as well as the advertisements complained about specifically by Senator McIntyre in an earlier letter to the Commission, did involve energy claims (the claims are that (a) there is a worldwide shortage of oil, (b) the oil companies did not, and other public and private parties did, cause the shortage, and (c) the oil companies are doing everything possible to mitigate the shortage). The first two of these claims were not proceeded against because of the Exxon litigation and constitutional considerations, and the last because of the Exxon litigation.

The fourth component of the attached materials consists of proposed letter responses by the Commission to letters filed with the Commission within the past two months by Senator McIntyre and by Administrator Russell Train and Deputy Administrator John Quarles of the Environmental Protection Agency, each of whom urged the Commission to proceed against certain advertisements. The proposed responses state that the Commission has decided not to proceed, and in each of these instances constitutional reasons lead in whole or in part to this recommendation. I agree with this recommendation as to each of these advertisements.

* * *

The decision to issue the four demand letters involves statutory, constitutional and policy considerations. The basic questions are whether the Commission can act, and if it can act, should it? The statutory and constitutional considerations are fully dealt with in the attached memorandum, and I will refer to them only briefly. Tbe policy considerations I will develop along a line not fully explored in the memorandum.

The memorandum makes reference to and summarizes a growing literature on the economic effects of corporate image advertising. I am convinced that at least certain types of corporate image advertising are capable of having a predominantly economic impact on consumers, investors and

prospective employees. 2/ As with any other advertising having such effects, issues can arise under Section 5 in both its components, that is, the Wheeler-Lea Amendment declaring unfair or deceptive acts and practices to be unlawful, and the unfair competitive practices prohibition.

If corporate image advertising is by a company manufacturing a non-fungible product, the advertising can lead a consumer to the purchase of products which are no better than, and maybe worse than, other products with respect to performance, price or other material features. If such an economic decision is made as a result of deception or unfairness, we have a legitimate statutory concern.

If the corporate image advertising is done by a company that manufactures a fungible product, then deception in such advertising becomes a type of specious product differentiation. Again, statutory concerns are present. In light of these concerns, it is of considerable interest that the Commission very early on appears to have recognized that characteristics of a corporation having no particular relevance to the characteristics of its products are fully capable of affecting consumer choices. 3/

2/ The importance of the environmental aspect of corporate activity to investors was recognized in 1971 by the Securities and Exchange Commission. In that year, it promulgated a release requiring disclosure to investors when compliance with environmental protection statutes may necessitate significant capital outlays, may materially affect the earning power of the business, or cause material change in the business being carried out or intended to be carried out. Securities Act Release No. 5170, Exchange Act Release No. 9252 (July 19, 1971), CCH Securities Law Reporter ¶ 78,150, as amended, Securities Act Release No. 5386 (May 9, 1973).

SEC

3/ In Armour & Co. and Farmers' Cooperative Fertilizer Co., 1 F.T.C. 430 (1919), the Commission issued a complaint against Armour for its failure to disclose its ownership of the fertilizer company. The order required Armour to disclose that fact, apparently because many people did not wish to deal with a monopolist. 1 F.T.C. at 436. Ten years later, in Columbia Pants Manufacturing Company, 13 F.T.C. 61 (1929), the Commission required a respondent to cease and desist from falsely claiming that his products are "union made." The Commission proceeded upon a finding that there is a "[p]ortion of the public [which] prefers" to purchase articles made by manufacturers employing union labor. 13 F.T.C. at 64. These cases take on particular

[Footnote continued]

As for the constitutional position developed in the attached memorandum, I will simply highlight two basic points about the conclusion reached. First, the approach contemplated does not ban any claim which is in fact relevant to a political issue. Under the analysis in the staff memorandum, the Commission can reach certain corporate image claims only when those claims appear in an advertisement having significant commercial components and making no express mention of a relevant political issue. Therefore, notwithstanding an order covering such claims when they appear in such an advertisement, exactly the same claim could be made in an advertisement which does expressly link the claim to a political issue to which it is relevant.

Second, this analysis deals with the ambiguous advertisement, that is, an advertisement which neither expressly makes a commercial offer nor expressly refers to political issues. 4/ The analysis looks to the dominant effect and

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[Footnote 3, continued] significance when seen against their historic background. Armour & Co. had in 1919, been for some time the subject of a great deal of public criticism by the muckrakers of that era, not only because it was part of the alleged meat "packing trust," but also because of the exposure of the terrible working and sanitary conditions in Chicago packing houses by Upton Sinclair's The Jungle. The Commission in 1919 would not have had to look far to conclude that many persons preferred not to give their dollars to Armour. Similarly, in 1929, when Columbia Pants Manufacturing Company falsely claimed that its products were union made, the union movement was a growing force in American life. Columbia's exploitation through deception of consumer feelings about the union movement seems no different from exploitation through deception of consumer feelings about the environmental movement.

4/ One of the ads chosen for a demand letter, the Shell "Oil Herder" ad, not only emphasizes an environmentally protective activity of the company but expressly mentions Shell gasoline as well. (See Staff Memo at pp.57 - 58 .) This ad is quite striking in that it expressly spells out one of the many possible links between corporate image advertising and product sales -- a particularly graphic instance of the economic logic which we find to be present in the other ads chosen for demand letters.

dominant purpose of the ambiguous ad. It argues that a predominantly economic effect may be inferred in certain circumstances relating to the nature of the ad and the character of the speaker. Among these circumstances are that the claims consist of a description of the corporation's own activities (as distinguished from assertions about subjects other than the corporation's own activities), and that the ad makes no express mention of any political issue to which such claims are relevant. This area is an uncharted area of constitutional law. Both those who agree and those who disagree with the analysis can draw support from the Supreme Court cases, but neither side can draw support from cases that actually have focused on the very issue of the ambiguous ad. It is my judgment that the position developed in the staff memorandum is a reasonable and responsible constitutional position.

If it is determined that we can proceed, the next question for the Commission is, should we proceed? The importance of this question goes beyond our interests in a sensible allocation of resources. We are dealing with a constitutional area. To be sure, the constitutional reasoning is quite limiting, and the result reached would not, as I have mentioned, actually ban any claim. Nevertheless, the result reached is that a particular statement, at least when it appears in a particular context, is not protected under the First Amendment. Principles may have a life of their own, and no one can say where this result might lead many constitutional cases hence. For these reasons, special care is warranted in determining what the reasons are which support Commission action.

As a general proposition, I am convinced that it is important that the Commission stake out its jurisdiction over modern corporate image advertising. Many companies are doing more and more corporate image advertising, and corporate image elements are increasingly appearing in advertisements which expressly mention products. I would have a very uneasy feeling that we were giving up a great deal more than we fully realize if we were to concede that we do not have jurisdiction over corporate image advertising.

The question then arises whether the advertisements here proposed for demand letters, involving as they do descriptions by oil companies of their actions to protect the environment, are suitable vehicles to establish the Commission's powers.

In an abstract legal sense, these advertisements probably are not ideal test cases. The argument can certainly be made that consumer decisions will not presently be affected by this advertising at least in those parts of the country where consumers are lining up at gas stations to get gasoline. (Our response is that this advertising is not only to affect current purchase decisions but is also to affect purchase decisions after the period of shortage is over. The memorandum cites studies of advertising during periods of shortage and sellers' markets (such as wars and recessions) which lend general support to this interpretation. Moreover, our demand letters ask for studies and documents which should in fact show the reasons for this advertising. And, as argued below, there appear to be reasons for finding consumer injury from deception even in areas where there is a gasoline shortage. Finally, the likely duration and actual geographic extent of the shortage are far too uncertain to support a definitive policy decision not to proceed against oil company corporate image environmental ads; even now, there appear to be areas of the country where the shortage is not acute.) 5/

There are other possible objections to using the ads chosen as test vehicles. The constitutional argument is made more difficult by the fact that the oil companies themselves are subjects of current public controversy. (Our response is that the advertisements which we have selected do not relate to energy but to environment, and environmental themes figures heavily in corporate image advertising by these companies for some years prior to the emergence of the energy controversy; indeed some of the ads we have chosen for investigation actually ran prior to the energy controversy. It would be hard for the companies to link environmental advertisements to any particular issue in the energy controversy.)

5/ Energy chief William Simon recently announced that every state will during March receive at least 85 percent of the amount used in March 1972, and the average allocation nationwide will be 89.6 percent of March 1972 consumption. Wash. Post, A 1:7 (March 8, 1974). The New York Times reported on March 15, based upon interviews "around the country," that "many motorists had already begun shopping more discriminately for gasoline," and that some "had stopped patronizing stations where they had bought their gasoline for years." p. 1:7.

No doubt a claim possessing lower visibility might present a better test case. One thinks, for example, of a false claim in a black magazine by a company that its minority hiring and promotion policies are non-discriminatory. Another better test case might be a false claim by a drug manufacturer of fungible over-the-counter drug products that it is spending millions of dollars on research for ways to combat some dread disease.

Notwithstanding these observations, I have concluded that the proposed demand letters should be sent to the four oil companies. This conclusion rests on a view of what, as a matter of policy, the Commission should consider to be significant consumer injury warranting Commission action.

It is indisputable that the last decade has witnessed an enormous expansion of consumer consciousness about business performance. Aspects of company performance which no one ever thought of ten years ago are very much in the forefront of many people's minds. A new concept of "corporate responsibility" has become the subject of an extensive literature.

Foremost among the aspects of business performance that have claimed consumer attention is the environmental impact of the corporation's activities. A vast amount of litigation and legislation responded to that consumer interest, and the companies themselves, recognizing that the issue is very much on the mind of consumers, began heavily advertising their environmentally protective activities. 6/

The Rosenthal petition should be seen against this background. It is, after all, highly unusual for the Bureau of Consumer Protection to receive a petition signed by six members of Congress, including three Senators. Unless the signatories to that petition are way out of line with their constituents, their action is not unreasonably read as

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6/ As recently stated by a leading member of the anti-trust bar, an element in current "consumerism" is the belief that a corporation should not "simply put out a product without giving some concern to the question of what that product does to the environment in which we live." Remarks of Ira Millstein, in "Federal Consumer Legislation," 28 Bus. Lawyer 289, 290 (March 1973).

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indicating a great deal of consumer interest. There are other indications of a substantial amount of public interest in the truth or falsity of claims by corporations that they are protecting the environment. A great many people appear to care very much about whether such claims are true or false. Commentators recently have emphasized that if those claims are false, corporations have done themselves an enormous amount of injury precisely because, given the great interest in these claims, the corporation's overall credibility would be severely damaged.

Wonder Bread exploit.

The extent and intensity of this concern can itself give rise to a type of injury which should be cognizable by the Commission. An advertisement which deceptively exploits such concerns is not very different from an advertisement which deceptively exploits a parent's concern for children. If a black person spends his money on the products of a company which falsely advertises that it has a non-discriminatory minority hiring and promotion policy, he has been made an unwitting accomplice in activities deeply distasteful to him. Moreover, he has thereby not given his dollars to a company which in fact is pursuing constructive minority hiring and promotion policies. If a persons cares about the environment, and gives his money to a company which falsely advertises that it, too, cares about and is protecting the environment, that person has been made a participant in environmental damage.

Are these not injuries? To say that they are not, it seems to me, is really to ignore the change and expansion of consumer concerns which have occurred in the last ten years. It is difficult to defend a definition of injury which looks solely to dollars or physical harm, and ignores the consumer's own subjective notion of injury which includes exploitation of his concerns by deceptive or unfair practices.

Quite literally, then, there is "public interest" in the claims which are the subject of the proposed demand letters. There are felt needs with respect to these claims, and the question is whether those felt needs should elicit a decision of government to respond to them by an exercise of the powers conferred for the purpose of responding to consumer interests. Upon what basis, really, can we say that it is not worth proceeding when there are a great

many people who are affronted and who care very much about the truth or falsity of these claims? Between the unfair competitive practices prohibition and the Wheeler-Lea Amendments to Section 5, there is a power to act to preserve confidence in the market system as a whole, an important component of which is a feeling that corporations are indeed accountable for what they say and do.

This view of the significance of "public interest" as itself supporting a conclusion of injury is really not new to the Commission. In Ex-Cell O Corp. for example, the Commission issued a complaint alleging deception in a claim that milk cartons would, when disposed of, quickly become "an integral and unidentifiable part of the natural environment and that because of this special ability they will not ... harm the environment." CCH Trade Reg. Rep. ¶ 20,152 (Dec. 1, 1972). The Commission recently pursued and obtained the voluntary agreement of thirty phosphate detergent manufacturers to state the percentage of phosphorous on detergent packages. See Guideline Agreement Concerning Phosphorous Content (Commission minutes of October 17, 1972; January 28, 1973). Both of these actions squarely rested upon the environmental concerns of consumers, and in neither did the deception or unfairness cause any dollar injury.

The concepts of injury and "public interest" which we are here considering have not been limited to concern for the environment. The whole line of cases dealing with products of foreign origin rested essentially on the simple fact of consumer preference, and not on any actual dollar or physical injury to consumers from deception as to the origin of products. The point is also sharply made in the skip-tracer cases, where the Commission prohibited organizations that track down debtors from concealing the nature and purpose of their activity. The persons being protected in these cases were not only the debtors but third parties who are "induce[d]" because of an erroneous belief as to "the true nature of respondents' business ... to furnish information [i.e.,about the debtor] which they would not otherwise have provided." 7/ Clearly, there is no dollar or physical injury to the persons who provide information, and the injury which moved the Commission involved the affront to the sensibilities of those deceived into giving information. (Indeed, since the justness of the debt is

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7/ National Retail Board of Trade, 57 F.T.C. 666, 674 (1960).

irrelevant in a skip-tracer case, and liability is found even if the debt is just, there does not appear to be any interest of the debtor which is protected save his interest in not being affected at all by techniques which affront sensibilities.) Finally, I have already referred (p. 4, n. 3, supra) to early Commission cases which proceeded in apparent recognition of the fact that consumers may prefer not to deal with a corporation because of characteristics of the corporation, rather than of its products.

The legal relevance of consumer preference in and of itself is not limited to our statute. Recently, for example, the D.C. Circuit recognized that regulatory consequences arise under the Securities Exchange Act of 1934 with regard to investors who "wish to have their assets used in a manner which they believe to be more socially responsible but possibly less profitable than that which is dictated by present company policy." Medical Committee for Human Rights v. SEC, 432 F.2d 659, 681 (D.C. Cir. 1970), vacated as moot, 404 U.S. 403 (1971).

Similarly, when the Food and Drug Administration proposed a little over a year ago that there be nutrition labeling on foods, it emphasized that consumers wanted the information and that they could use it. Whether or not consumers actually needed the information was not considered closely or at any length in that proposal. 8/

It should be stated expressly that the significance of public interest under Section 5 is quite different from the significance of public interest with respect to First Amendment issues. It is clear that public interest should never result in any erosion of First Amendment protections. As I have indicated, the constitutional analysis in the attached memorandum is, in my judgment, a reasonable and responsible position. It does not represent an erosion or distortion of settled principle. My emphasis of the relevance of public interest goes only to our decision whether to exercise our statutory powers, and I assume in this regard that our First Amendment position is a reasonable one. Indeed, the claims which currently are receiving the most public attention involve energy and not environment. Because in part of

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8/ See 37 Fed. Reg. 6493, et seq. (March 30, 1972).

constitutional constraints, we have concluded that the Commission cannot proceed against energy claims, notwithstanding that they currently are drawing the most public interest.

Beyond the sheer fact of consumer concern and interest in the truth or falsity of these claims, the public interest in environmental advertisements has a "real" component which gives rationality and added force to the public interest.

Traditionally, a consumer has been considered injured if there has been harm either to his person or to his pocketbook. Environmental damage partakes both of these. A consumer's overall position as a consumer is defined not only by his personal income and personal wealth, but also by his standard of living. His standard of living is greatly affected by his environment. He may be able to afford to go to Rehoboth Beach for a weekend, but his standard of living has deteriorated if he is smeared with floating oil when he goes swimming.

In other words, what used to be conveniently termed "externalities" by economists, and excluded by them when calculating the costs of producing a product, have now come to be seen as a major element in the cost of a product. My point here is that these cost are not simply abstract social costs. They directly affect the standard of living, as distinguished from personal income or personal wealth, of consumers, and consumers have now come to recognize that fact.

If a company falsely stated that those cost do not exist with respect to its product it is misleading the consumer as to the cost to the consumer of that product. It is not just injury to income or wealth which should be of concern to us; we must be concerned -- as the consumer quite rightly is -- with injury to the standard of living as well.

If a company chooses to compete for consumer dollars upon the ground that its production of its product will injure the consumer's standard of living less than production of the comparable product by other companies, or that it is doing everything it can to minimize the impact on the consumer's standard of living, it should be held accountable for that claim under Section 5. If consumers

respond to such claims, and they are false, the consumer has given dollars to the advertising company which he would have preferred to give to another company had he known of the deception. Most importantly, it is in his own rational interest to give his dollars to another company which in fact provides him with satisfactory products at less cost to his standard of living.

Similarly, the company which is attempting to protect the environment but does not advertise that fact can be injured by the false environmental protection claims of a competitor. As with any advertising the effects on competition of deceptive advertising here are difficult to ascertain but cannot, because of that difficulty, be ignored.

These various reasons warrant proceeding now. The principles involved are principles which the Commission will want to test sooner or later. The ideal test case may be a long time coming, and if we wait for it we may have to let pass many questionable corporate image claims which do not present an ideal vehicle for a legal test.

Finally, the point should be made that if we fail to act on the Rosenthal petition, we may be sued for our inaction. It is possible that a court, while recognizing that it could not command us to proceed, might conclude that it has the power to pass upon any legal conclusions which we proffer as the reason for our inaction. If, for that reason, a court were to reach the statutory or constitutional issues, we would be in the position of developing and asserting arguments as to why we cannot proceed against the ads in question. While we dispose of virtually all of the Rosenthal petition advertisements on other than constitutional grounds, as to two of them the staff conclusion is that we may proceed. It is probable that in defending inaction against those ads, which in fact present strong legal reasons in support of our power to regulate them,we would have to make arguments which, if accepted by a court, would make it enormously difficult ever to proceed in the area of corporate image advertising. As against the ads we have chosen, other corporate image ads would present an a fortiori case against regulation.

The Commission should issue the four demand letters.

* * *

We are proposing demand letters rather than compulsory process in the first instance. It was concluded that it would be useful to get some reading of the factual and legal position of the companies before entering into the relatively less flexible posture which would accompany the issuance of compulsory process. Nevertheless, it is our view that the demand letters should issue from the Commission because of their unusual nature and because the responses will to some extent be made public. Moreover, it will be clearer that these letters will be backed by compulsory process if they issue from the Commission rather than from the staff.

APPROVED:

J. Thomas Rosch 3/19/74 (See accompanying memorandum)
Director
Bureau of Consumer Protection

Exhibit 84: FTC Memorandum—Corporate Image Advertising, March 19, 1974

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : Commission DATE:

FROM : J. Thomas Rosch, Director
Bureau of Consumer Protection

SUBJECT: Corporate Image Advertising

The issues which are treated in the attached package on corporate image advertising have confronted the Commission for nearly three years. (See Staff Memo, p. 1, note 1). The current upsurge in this sort of advertising, however, makes it imperative that they be resolved now.

The staff memorandum contains a careful and complete analysis of these issues, and it concludes by recommending that the Commission proceed with respect to certain narrowly defined types of corporate image advertising. I subscribe both to its analysis and to its recommendations.



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Exhibit 85: FTC Memorandum—Corporate Image Advertising—Addendum, With Attachment, March 25, 1974

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES VERNMENT

Memorandum

TO : Commission. DATE: 3/25/74

FROM : Richard B. Herzog, Assistant Director for National Advertising. RBH 3/25/74

SUBJECT: Corporate Image Advertising - Addendum.

I believe that the Commission will be most interested in the attached letter to Congressman Rosenthal from the Columbia Broadcasting System. The letter responds to Mr. Rosenthal's contention that corporate image advertisements of the type attached to his petition to the Commission trigger the obligations of the Fairness Doctrine because they address controversial public issues. The CBS letter contends to the contrary, and in so doing squarely agrees with key conclusions in our memorandum dealing with the Rosenthal petition and corporate image advertising.

The CBS letter asserts that "a distinction can and must be drawn between ads which assert views on controversial public issues ... and ... ads which set forth the advertiser's own environmental and other policies having a direct bearing on its operations." (P. 2)

As to claims describing the corporation's own operating policies, the CBS letter draws three conclusions.

First, such claims contain "information which many consumers believe is relevant to their purchase decisions." (P. 2)1/

Second, television ads making such claims are not "political advocacy" in the sense that the "newspaper ads ... [which] address themselves to the matters of rational energy policy now being debated in Congress" are political advocacy. (Id.)

Third, along with claims as to "products and services," claims as to "operating policies" are claims "which all agree should be capable of substantiation." (P. 3)

1/ The President of CBS Broadcast Group recently stated that "buyer preferences may well turn on aspects of corporate citizenship." Advertising Age, pp. 1, 77 (March 18, 1974).

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Thus, CBS' analysis quite clearly parallels the staff analysis that claims descriptive of a corporation's own behavior can affect consumer choice; that such claims are not addressed to public issues when they appear in ads making no reference to public issues and the ads contain certain additional commercial earmarks; and that such claims should be required to be substantiated.

Interestingly, in making the distinction between ads describin the corporation's own operating policies and ads addressing public issues, the CBS letter refers specifically to two ads, cited by Rosenthal, which ran in December, 1972 and January, 1973. (P. 2). The January, 1973 ad in fact is one of the two Rosenthal ads whose investigation the staff has recommended; the December, 1972 ad was rejected by the staff but not for constitutional reasons.2/

The CBS letter suggests a further consideration tending to support the conclusion that we may properly proceed against certain corporate image ads. Ads "which assert views on controversial public issues ... are rejected under ... [CBS's] policies." (P. 2) The American Broadcasting Company joined CBS last term in arguing to the Supreme Court that broadcast licensees are not required by the Fairness Doctrine to accept spot announcements on controversial public issues.3/ It is fair to assume, therefore, that ABC also has a policy of rejecting spot announcements which assert views on controversial issues; it is highly unlikely that NBC has a different policy.4/ Five of the eight ads chosen by staff for investigation are spot announcements that appeared on one of the major networks.5/ As to each of these, if the network policy was being implemented, there was a judgment that the ads were not addressed to a controversial public issue. While an ad may address

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2/ See Staff Memo, Corporate Image Advertising, pp. 135, 206, 140, 216-17 (March 18, 1974). (Hereafter, "Staff Memo").

3/ In CBS v. Democratic National Committee, 412 U.S. 94 (1973) In upholding the policy of CBS and ABC, three members of the Court noted that such a policy is "expressly based on a journalistic judgment that 10 to 60-second spot announcements are ill-suited to intelligible and intelligent treatment of public issues; the broadcaster has chosen to provide a balanced treatment of controversial questions in a more comprehensive form." 412 U.S. at 118.

4/ Indeed, Mobil has recently been running an ad which states that "we're frustrated in trying to get information to the public.. Try to buy time on TV to say something substantive and the networks clobber you with the fairness doctrine." "Musings of an oil person." N.Y. Times, p. 37 (February 28, 1974).

5/ See Staff Memo, pp. 55, 71, 79, 87, 93.

public issues to the extent of triggering the Fairness Doctrine and nevertheless not be First Amendment speech, Capital Broadcasting v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), aff'd. mem. sub. nom., Capital Broadcasting v. Kleindienst, 405 U.S. 1000 (1972); see Staff Mem., 18, it is difficult to see how an ad which did not even trigger the Fairness Doctrine would be First Amendment speech.

CBS

Columbia Broadcasting System, Inc.
1990 M Street, N.W.
Washington, D.C. 20036
(202) 296-1234

Richard W. Jencks
Vice President, Washington

Dear Mr. Rosenthal:

Please permit me to comment on your press conference of Monday, March 11, in which you and a group of your colleagues called on the nation's broadcasters to exercise their responsibility under the FCC's Fairness Doctrine and "give those with divergent views an opportunity to respond to the multimillion dollar advertising campaign being waged by the energy industry."

No broadcaster can properly object to being reminded to be sensitive to his responsibilities under the Fairness Doctrine, since these responsibilities clearly extend to any material broadcast by him which raises a "controversial public issue" within the meaning of the Fairness Doctrine." Indeed, it is because of those responsibilities that we at CBS, in common with many other broadcasters, have long followed the policy of insisting that commercial announcements not intrude into the area of public controversy. We believe that controversial issues of public importance should be treated within the format of news and public affairs broadcasts, produced under the control of our professional news personnel, rather than argued out in 10 to 60 second spot announcements by advertisers and their opponents.

In attempting to place this issue in perspective however, we cannot help but feel that the consumer and environmental groups who joined in your press release have, whether intentionally or not, themselves been less than candid in presenting their claims that energy company advertising has raised controversial issues such as to require free public service air time for the spot announcements produced by those groups.

> Thus, in referring to an "advertising blitz" on the part of the energy industry, they neglect to mention that -- to the extent that is a correct description -- it applies to energy industry expenditures in the print media and not in broadcasting. The fact is that energy advertising expenditures in broadcasting have been, and are being, reduced from prior levels (See Media, The

2.

Washington Post, p. B 1, March 12, 1974). Broadcasting, therefore, is in effect being called upon to rectify or balance advertisements and advertising expenditures made in a competitive medium. Yet, energy advertisers have ventured into print so massively because broadcasters' policies of rejecting ads which discuss controversial issues have left advertisers, according to a spokesman for Mobil Oil quoted in the same Washington Post article, "frustrated in trying to get information to the public." The spokesman went on to say: "Try to buy time on TV to say something substantive and the networks clobber you with the Fairness Doctrine."

. While many newspaper ads for the energy companies can perhaps be characterized as "political advocacy" in the sense that they address themselves to the matters of national energy policy now being debated in the Congress, the same simply cannot be said in any comparable sense for the television ads being cited by the public interest groups. It is interesting to note that most of the ads cited were produced and first broadcast well prior to the inception of last fall's energy crisis and that two ads cited by them dated from December 1972 and January 1973, respectively. The nature of these ads, as well as the subject matter of the proposed public service spot announcements, suggest strongly that their concern with energy and other advertising goes far beyond "political advocacy"; it apparently involves an objection to any form of advertising in which a company attempts to tell how it fulfills its obligations of corporate citizenship in the production, distribution, and sale of its products. We believe a distinction can, and must, be drawn between ads which assert views on controversial public issues -- ads which are rejected under our policies -- and, on the other hand, ads which set forth the advertiser's own environmental and other policies having a direct bearing on its operations. The latter, if capable of substantiation, constitute appropriate information which many consumers believe is relevant to their purchase decisions.

. The charge made by the consumer and environmental groups that television and radio have not afforded to the average consumer "an equal opportunity to hear the other side" is without foundation. There is no dearth of objective evidence that people depend for most of their information about the energy crisis, as with other subjects, on seeing and hearing news and public affairs broadcasts on television and radio.

3.

> A January 1974 poll conducted by R. H. Bruskin Associates reported that 75 percent of the public cited television as the source of most of their information about the energy shortage, while 25 percent named radio. No subject has been covered by television and radio news with such intensity as has the energy crisis during the past several months. During the first six weeks of the energy crisis, for example, THE CBS EVENING NEWS WITH WALTER CRONKITE alone carried no less than 108 reports dealing with energy. Public opinion polls demonstrate that the public is well aware of the issues in the energy crisis and they betray no indication that public opinion has been improperly dominated by a pro-industry view.

The real issue raised by the consumer and environmental groups is whether, under their interpretation of the Fairness Doctrine, the public would be better informed than they are now. At the present time, to reiterate, broadcasters seek to keep issues of public controversy out of commercial advertising while at the same time allowing advertisers to make claims -- which all agree should be capable of substantiation -- as to their products and services and as to their operating policies. This distinction is not always easy to make, but broadcasters are largely successful in making it, and as a result, discussion of public controversial issues is almost completely relegated to news and public affairs broadcasts.

What would result from the alternate model urged by some consumer and environmental groups? Under it it is not clear how much, if any, advertising could be accomplished by an embattled industry without triggering free counter advertisements. But the following results would seem inevitable:

> 1) The existing competition between advertisers in claims for their corporate good citizenship in dealing with the environmental and other problems faced in their production and distribution efforts would be eliminated. Yet, competition for public favor along these lines is a valuable prod for improvement, and would appear to be in the public interest.
>
> 2) To the extent that advertisers would continue to make such claims, and to the extent that free counter advertising is carried in response to them, it would of course be necessary, in the interest of simple fairness, for broadcasters to remove the limitations they now apply to commercial advertising copy. In that event, what the

public interest groups see as outright "political advocacy" in current newspaper and magazine ads could become the rule in television and radio as well.

3) Yet, it would appear that ads by energy companies and other advertisers would have to meet the standards of the Federal Trade Commission, possibly even as to substantiation of claims made pursuant to political advocacy. If this is the case, it is hardly conceivable that claims made by environmental and consumer groups could escape similar governmental scrutiny.

4) In those instances where consumer and environmental groups either did not elect to make appropriate replies to advertisers' claims, or their replies were not really responsive to such claims, broadcasters would apparently have to achieve overall fairness under the Fairness Doctrine by altering news judgments in the presentation of news and public affairs on the affected issues.

In the light of these consequences, we raise most sincerely with you whether the model of public discussion on television and radio urged upon you by the consumer and environmental groups is genuinely in the public interest. It would produce, in our judgment, a tower of babel in which both advertisements and counter advertisements would present brief and simplistic views of issues which, under our current policies, would have been left to discussion in news and public affairs broadcasts.

Certainly the examples of public interest advertisements submitted by the consumer and environmental groups seem to be polemical and propagandistic in the extreme. In the current (March/April 1974) issue of the Columbia Journalism Review one of the key creative personnel of one of those groups, Public Interest Communications, is indeed quoted as saying "We are interested in propaganda in the best sense of the word." But it was to avoid the necessity of having to broadcast propagandistic spot announcements on sensitive and important controversial public issues that our present policies were designed. In support of that policy we carried to the Supreme Court and won (CBS v. Democratic National Committee, May 1973) our right to reject spot announcements on controversial public issues whether such announcements derived from partisan groups or from corporate advertisers. In its opinion, the Court made the following observations concerning the appropriateness of spot announcements dealing with controversial public issues:

5.

"The licensee policy challenged in this case is intimately related to the journalistic role of a licensee for which it has been given initial and primary responsibility by Congress. The licensee's policy against accepting editorial advertising cannot be examined as an abstract proposition, but must be viewed in the context of its journalistic role. It does not help to press on us the idea that editorial ads are 'like' commercial ads for the licensee's policy against editorial spot ads is expressly based on a journalistic judgment that 10 to 60 second spot announcements are ill suited to intelligible and intelligent treatment of public issues; the broadcaster has chosen to provide a balanced treatment of controversial questions in a more comprehensive form. Obviously the licensee's evaluation is based on its own journalistic judgment of priorities and newsworthiness." (at pages 22 and 23)

* * * * *

"The Commission is also entitled to take into account the reality that in a very real sense listeners and viewers constitute a 'captive audience'....It is no answer to say that because we tolerate pervasive commercial advertisement we can also live with its political counterparts." (at pages 32 and 33)

I hope the foregoing will provide you with some helpful background as to the policies of broadcasters on the important subject which your press conference has highlighted. Despite the differences which you may have with us or with other broadcasters, it is clear that you and we share the view that the agenda of public discussion should not be dictated by the power of the purse. We may diverge as to how best to achieve that objective. If you have any questions about our policies I would be more than pleased to call on you and have an opportunity to discuss them with you.

With best regards,

Sincerely,

W. [illegible]

The Honorable Benjamin Rosenthal
United States House of Representatives
Washington, D. C. 20515

March 15, 1974

Exhibit 86: FTC Memorandum—Corporate Image Advertising, March 28, 1974

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : Commission

DATE: March 28, 1974

FROM : Commissioner Dixon

SUBJECT: Corporate Image Advertising

Before the Commission are staff's recommendations concerning the regulation of image advertising. These recommendations arise in part from a petition and several letters from members of Congress and Government Administrators Quarles and Train. The memorandum contains (1) criteria for determining when image advertisements are protected by the First Amendment; (2) a discussion of why the regulation of image advertising would be in the "public interest," as required by §5(6)(b) of the FTC Act; (3) letters to be sent by the Commission (rather than staff) to three oil companies asking for substantiation of several image advertisements appearing in the media; (4) a response to the aforementioned letters from Congressmen and Administrators, and a reply to the petition by Congressmen for a TRR relating, inter alia, to image advertisements.

It is staff's position, as to the constitutional issue, that "claims describing corporate activity, when they appear in an advertisement, whose dominant effect is economic, may be regulated, notwithstanding that the ad may have a political effect which is greater than de minimis."

However, the reach of this definition is narrowed considerably by the criteria to be employed in determining the dominant effect. "A proper disposition requires a close analysis of each advertisement's dominant effect," utilizing the following criteria:

> "Dominant economic effect ... can be found where (a) the ad is run by a commercial corporation; (b) elements typically found in the corporation's product advertisements - for example, logos, tag lines - are also present in the ad; (c) the corporation sells consumer products under the same brand name as appears in the ad; (d) the claims in the ad consist of description of activities of the corporation (as distinguished from assertions of fact or opinion about subjects other than the

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corporation's own activities); (e) the ad is oriented toward the corporation's activities rather than a general subject; e.g., Shell's oil spill clean up device, rather than oil spills generally; and (f) the ad does not expressly link the claim concerning the corporation's own activity to some political issue."

The last listed criterion is the key limitation to the staff position. As staff would interpret (f), above, First Amendment protection would extend to any advertisements where there is "express mention of the public issue to which its claim of corporate behavior relates." With this limitation, staff contends it can meet the anticipated argument that the Commission's position may have a chilling effect on First Amendment rights. Staff will argue that there can be no chilling effect as its approach prohibits no speech. This is so because there is a "readily discernible ... way for an advertiser to describe his corporate behavior in a wholly-protected manner when in fact that behavior is relevant to some public issue." He "need only place his description of his corporate behavior in an ad which expressly links that behavior to the public issue to which it is related."

I agree with this approach, and I would like to hear from the staff as to its views on making its position on the First Amendment public. One reason for doing so, it seems to me, is that the mechanism that staff claims is "readily discernible" will be so only if the Commission policy is known.

In this connection, I assume that there are fairly compelling reasons why a corporation will not expressly link the description of its corporate behavior to a public issue. Otherwise, any Commission order could easily be avoided by the above-described mechanism, i.e., linking behavior to a public issue. I would like staff's comments on this.

I agree with staff's discussion of how the "public interest" will be served by regulating corporate image advertising. Mr. Herzog's remarks are particularly instructive in this regard.

I have no problem with seven of the eight advertisements chosen by the staff to be challenged for lack of substantiation. The exception is the "Back To The Sea"

commercial (page 73 of staff memorandum) which was filmed in December 1973, and so probably appeared in the middle of the energy crisis. Yet, staff says, at page 77, that the ad ran before that crisis. I would like staff to clarify this and to tell us, if the ad did run during the energy crisis, whether, as a consequence, the message is sufficiently political to obtain First Amendment protection or is tied into pending litigation and so should not be questioned. I should note, parenthetically, that the viability of the criteria for determining "economic effect" is amply demonstrated in staff's discussion of these advertisements.

Finally, I agree with staff's response to the congressional and other letters, and to the petition, except for one point. The Congressmen petition the Commission to establish a rule that would hold, as a violation of Section 5, "Any commercial advertisement which makes any affirmative misstatement, fails to disclose any material fact, or makes any unsubstantiated claim...." (page 177 of staff memorandum). Staff states (at page 234) that this appears to be no more than a restatement of existing law. I cannot agree. Not every failure to disclose material facts or to make claims that are substantiated is deceptive or unfair, and unless they are deceptive or unfair they do not violate §5, nor should they. I would modify the letter in question so as to make this clear.

Paul Rand Dixon,
Commissioner

Exhibit 87: FTC Memorandum—Corporate Image Advertising, March 29, 1974

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : Bickart, Cohen, Iannelli, ~~Ludlam~~, Foldes, Lange, Sanchez, Parker, Annear and Ratner DATE: March 29, 1974

FROM : Richard B. Herzog RBH 3/29/74

SUBJECT: Corporate Image Advertising

I am enormously encouraged by the attached circulation of Commissioner Dixon on corporate image advertising. This matter will be on the Agenda for the week of April 8, 1974.

I would like you to meet among yourselves to develop reasons why a corporation "will not expressly link the description of its corporate behavior to a public issue," (Dixon Mem. 2)

I can readily see one response to the Commissioner's question which, happily, is on classic First Amendment grounds. The precise issue is whether a corporation could easily avoid our order by making false claims which it links to a public issue. There is, however, a very substantial inhibition upon the making of false claims linked to public issues insofar as the linkage involves criticism of the Government. The Government is a very formidable adversary and engages in very rough and tumble rebuttal. Thus, when PPG criticized EPA's lead additive regulation, Administrator Train got front page coverage on his letter asserting that PPG's claim was utterly without foundation. And what oil company executive can readily forget the front page and television pictures of Senator Jackson holding up oil company ads and claiming that they were half truths?

I would like you to consider further inhibitions on the making of false claims which are linked with public issues, and I would also like you to consider inhibitions on the making of any claims descriptive of corporate behavior which are linked to public issues. For example, can it be said that such claims lose credibility or interest when they are so linked?



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Exhibit 88: Memorandum of Mobil Oil Corporation, April 4, 1974

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

MEMORANDUM OF MOBIL OIL CORPORATION IN OPPOSITION TO PETITION TO EXTEND THE ADVERTISING SUBSTANTIATION RESOLUTION OF THE FEDERAL TRADE COMMISSION
FILED JANUARY 9, 1974

ARNOLD & PORTER

Paul A. Porter
Stuart J. Land
Michael N. Sohn

Attorneys for Mobil Oil Corporation

Dated: April 4, 1974

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

MEMORANDUM OF MOBIL OIL CORPORATION IN OPPOSITION TO PETITION TO EXTEND THE ADVERTISING SUBSTANTIATION RESOLUTION OF THE FEDERAL TRADE COMMISSION FILED JANUARY 9, 1974

I. INTRODUCTORY STATEMENT

On January 9, 1974, a petition was submitted to the Federal Trade Commission on behalf of petitioners Senator Birch Bayh, Senator Thomas MacIntyre, Senator Frank Moss, Representative Les Aspin, Representative Benjamin Rosenthal and Representative Andrew Young. The Petitioners urge the Federal Trade Commission to extend its advertising substantiation campaign to, among others, the oil, utility and electric appliance industries in regard to environmental and energy related claims set forth in their advertising. Certain commercials of the Mobil Oil Corporation ("Mobil") are among those set forth as examples of the types of advertisements for which substantiation would be required under the proposed petition.

While Mobil can substantiate all claims made in its advertising, it is fundamentally opposed to this petition because it believes that implementation of the proposed substantiation requirements would raise grave First Amendment problems. It would be detrimental to the public interest by inhibiting a fuller discussion of ideas regarding the energy crisis. A substantiation program would permit the Federal Trade Commission to question and challenge controversial views. The Constitution and a legion of decisions by the courts have made it clear that such an intrusion cannot be permitted because of its chilling effect on the free expression of ideas.

Mobil feels that the need for a complete and open discussion regarding the environment and energy is particularly acute at this time and that the petition is thereby of an extremely injurious nature to the public interest. Unlike the major issues that have been before the public in recent times, i.e., Vietnam, Civil Rights, disarmament, this is the first instance in more recent history in which an issue of universal public

importance and concern focuses on one private sector of the economy, namely the oil industry. The energy crisis, which has had such profound effects, has led to a public debate on the legitimacy of the operations of particular companies such as Mobil.

As a corporation, Mobil is deeply concerned that the avalanche of news on the energy crisis, emanating from the television networks, is simplistic and therefore inaccurate. Moreover, Mobil believes that such news is peculiarly misleading because emphasis is placed on charges made by critics who do not have an in-depth understanding of an extremely complex industry. The news media have thus given undue circulation to what Mobil regards as the uniformed and inaccurate view that the oil companies should be blamed for the energy shortage and the ensuing discomfort of the public. At the same time, because of the complexity of the situation and the limitation of time on television and space in newspapers, Mobil believes that many viewpoints relating to this crisis are currently denied entry into the marketplace of ideas. Unless the public can obtain a better

comprehension of this highly complex problem, Mobil believes there will adverse effects on the future of the nation. An inadequately informed public opinion could lead to the adoption of counterproductive measures which would only serve to lengthen the energy crisis.

Mobil's advertising -- the type of ads which are referenced in the petition -- is but one effort on the part of our company to express another viewpoint which should be considered if the nation is to avoid these adverse consequences. Mobil asks the Commission to continue to support measures, such as counter-advertising, which would permit the fuller dissemination of ideas to the public. In any event, the petition should be dismissed as inappropriate and contrary to the fundamental policy of promoting unfettered debate on an issue of crucial public and political significance.

II. THE PETITION

Petitioners have asked the Federal Trade Commission ("FTC") to broaden the scope of its ad substantiation resolution. At present, the Resolution authorizes

the Commission to require advertisers, on demand by the Commission, to submit tests, studies or other data which they had in their possession prior to the time claims or representations are made in an advertisement "regarding the safety, performance, efficacy, quality, or comparative price of the product advertised." (Emphasis supplied.) 36 Fed. Reg. 12058 (June 24, 1971), amended 36 Fed. Reg. 14680 (August 7, 1971). In short, the present ad substantiation resolution is limited to certain specified types of claims made concerning a "product" which is the subject of an advertisement.

Petitioners would extend this resolution to require substantiation to apply to all advertisements sponsored by corporations or other businesses primarily involved in selling goods or services for profit and which have

> "as their dominant theme, (1) the promotion of the advertiser's goods or services, (2) the promotion of the advertiser's operations, activities, or policies, or (3) the giving of advice or information in connection with the use of the advertiser's products or services."

Substantiation can be required not only by the Commission, but by "any other interested person."*/ Finally, the petition purports to exempt from substantiation requirements those advertisements whose dominant theme concerns "one side of a controversial issue of public importance" if such an advertisement contains a prominently displayed, explicit statement that "this is a political advertisement intended to present this business' views on a controversial issue of public importance."**/

III. THE PROPOSED EXTENSION OF THE ADVERTISING SUBSTANTIATION RESOLUTION CONSTITUTES A SERIOUS INCURSION OF FIRST AMENDMENT RIGHTS

A. Basic Principles: The Marketplace of Ideas

It has long been an essential cornerstone of our jurisprudence that, as Mr. Justice Holmes put it:

> ". . . The ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the

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*/ Petition, p. 2.

**/ Petition, p. 3.

> thought to get itself accepted in the competition of the market . . . That at any rate is the theory of our Constitution."*/

And it has always been a cardinal principle that this marketplace of ideas will function best if it is left unencumbered with restraints on expression. Thus, in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969), the Supreme Court reiterated that:

> "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth can ultimately prevail. . . ."

A similar note was sounded in New York Times Co. v. Sullivan, 386 U.S. 254, 270 (1964), when the Court referred to the "profound national commitment that debate on public issues should be uninhibited, robust, and wide open."

The relationship between uninhibited debate and the ascertainment of truth has been articulated by one leading commentator, as follows:

> ". . . the theory starts with the premise that the soundest and most rational judgment is arrived at by considering all facts and arguments which can be put forth in behalf

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*/ Abrams v. U.S., 250 U.S. 616, 630 (1919) (Dissenting Opinion).

> of or against any proposition. Human judgment is a frail thing. It may err in being subject to emotion, prejudice or personal interest. It suffers from lack of information and insight, or inadequate thinking. It can seldom rest at the point any single person carries it, but must always remain incomplete and subject to further extension, refinement, rejection or modification. Hence an individual who seeks knowledge and truth must hear all sides of the question, especially as presented by those who feel strongly and argue militantly for a different view. He must consider all alternatives, test his judgment by exposing it to opposition, make full use of different minds to sift the true from the false. Conversely, suppression of information, discussion, or the clash of opinion prevents one from reaching the most rational judgment, blocks the generation of new ideas, and tends to perpetuate error. . . ."
> Thomas Emerson, Toward a General Theory of the First Amendment (Vintage Books, 1966 ed.), p. 7 (emphasis supplied).

B. A Substantiation Requirement Is Inconsistent With the Concept of an Uninhibited, Robust Debate Inherent in the First Amendment

As the Supreme Court has recognized, "authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth - whether administered by judges, juries, or administrative officials - and especially one that puts the burden of proving truth on the speaker." New York Times Co. v. Sullivan, supra, 376 U.S. at 271. The

constitutional protection of the First Amendment does not turn upon "the truth, popularity or social utility of the ideas and beliefs which are offered." NAACP v. Button, 371 U.S. 414, 445 (1963). This principle is based on the recognition that freedom of expression will be inhibited unless it has the "breathing space" which protects the speaker from liability even where others believe he is factually incorrect. Id. at 433. It has been consistently held that an informed public will most likely result if "a multitude of tongues" are encouraged to speak on an issue of public importance,"*/ and that diverse opinion will be forthcoming only where there is an absence of governmental sanctions which attach to the expression of opinion.

A broad rule which would permit this Commission to require "substantiation" for the claims made by advertisers which relate to issues of public controversy and importance would fly in the face of these well settled First Amendment principles.

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*/ U.S. v. Associated Press, 52 F. Supp. 362, 372 (D.S.D.N.Y. 1943) (per Learned Hand, J.).

C. Existing Limitations on Commercial Speech Are Narrow

In Breard v. City of Alexandria, 341 U.S. 622 (1951) and Valentine v. Chrestensen, 316 U.S. 52 (1942), the Supreme Court has recognized that certain forms of speech -- those limited to the direct solicitation of consumers to purchase goods or services -- may be subject to limitations which would otherwise be inconsistent with the concept of an unrestrained marketplace of ideas. */

While some commentators have argued that these decisions are of "questionable analytical force" and that strict First Amendment guarantees should apply even to purely commercial speech, **/ it is unnecessary for present purposes to reach this issue. Rather, it is

*/ Breard involved the constitutionality of a city ordinance forbidding the door-to-door solicitation of magazine subscriptions, while in Valentine the Court upheld the constitutionality of an ordinance forbidding the distribution in the streets of handbills which advertised the presence of a navy submarine being exhibited for profit by a private entrepreneur. In the latter case, the Court was careful to note that it was dealing with "purely commercial advertising." 316 U.S. at 54.

**/ Redish, The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression, 39 G.W. L. Rev. 429 (1971).

sufficient to note, as the Chairman of this Commission has perceptively pointed out, that the application of the "purely commercial speech" doctrine enunciated in Breard and Valentine is difficult indeed, and that these cases hardly stand for the proposition that First Amendment guarantees are lost simply because a message takes the form of a paid advertisement or because it has a commercial impact which is incidental to otherwise protected forms of speech. Address by Lewis A. Engman before the Antitrust Law Section, State Bar of Michigan (February 15, 1974), pp. 9-10.

Petitioners do not contend -- indeed, they could not -- that corporate advertisers lose their First Amendment rights simply because they are for-profit enterprises. See, e.g., New York Times Co. v. Sullivan, supra, 376 U.S. at 266. To the contrary, petitioners implicitly recognize that the existence of free speech rights depends not upon the identity of the speaker but upon the contents of the ideas expressed. Thus, petitioners concede that the Commission should not attempt to apply a substantiation requirement to advertising which consists of "the expression

of a corporate viewpoint on controversial issues of public importance facing our government officials."*/ They do not propose substantiation for advertising which fits this description "no matter how false or misleading [such advertising] might be."**/ Moreover, the petition itself purports to exempt advertising where the dominant theme is the expression of one side of a controversial issue of public importance.***/ As we show next, these very concessions highlight the inappropriateness of proceeding in this area by means of an across-the-board substantiation rule.

IV. IN LIGHT OF THE GRAVE FIRST AMENDMENT QUESTIONS A SWEEPING EXTENSION OF THE AD SUBSTANTIATION RESOLUTION IS UNWISE

As shown above, traditional First Amendment doctrine precludes governmental encumbrances upon the exercise

*/ Petition, p. 23.

**/ Ibid.

***/ This is not to say that petitioners' proposed exemption eliminates any First Amendment problem. There is no bright line, where the energy crisis is concerned, between advertising which expresses a corporate viewpoint on controversial
(Footnote continued on following page.)

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of free speech, except in the area of "purely commercial speech." The Commission's present ad substantiation rule is consistent with these principles in that it applies only to claims which relate to some aspect "of the product advertised." 36 Fed. Reg. 12058. Petitioners would obliterate this line on a sweeping basis by applying a substantiation requirement to a category of claims including, inter alia, those whose dominant theme relates to the "operations," activities" or "policies" of the advertiser. The inhibitions on free speech which would follow if such an extension of the ad substantiation resolution were adopted are manifest. The scope of such a ruling would be so broad, to say nothing of the vagueness of its potential application, that many forms of speech which are far removed from product solicitation might possibly be covered. For every potential untruthful claim which will be revealed or discouraged by such a rule, the expression of untold numbers of

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(Footnote continued from preceding page.)
issues of importance facing public officials, on the one hand, and advertising which centers around the discussion of an oil company's "operations" or "policies." Yet petitioners propose a rule which would cover the latter, but not the former.

honestly held beliefs will be discouraged by the prospects of a substantiation requirement to be followed by a Section 5 proceeding where substantiation is deemed inadequate.

Where, as here, serious First Amendment questions are raised, it is inappropriate in the extreme for the Commission to act on any basis other than a careful case-by-case consideration of the issues. There is a difficult and troublesome line to be drawn between "purely commercial speech" and protected comment on issues of public importance. A sweeping resolution injecting the Commission into this First Amendment area would unwisely commit the Commission in situations where First Amendment considerations should predominate. Moreover, the very publication of the substantiation rule would chill expression. A sweeping rule under which controversial claims relating to energy or environmental matters would be subject to a substantiation program administered by the Federal Trade Commission can only inhibit the free expression of ideas in these important areas. Fundamental First Amendment principles have long precluded such intrusion -- "by

judges, juries or administrative officials," New York Times Co. v. Sullivan, supra, 376 U.S. at 271 -- because of the potential chilling effect of regulatory action.

As Chairman Engman has recognized, "the Federal Trade Commission should proceed against image advertising only in clear-cut cases of commercial appeal or effect" and "the wisest course is to give the benefit of the doubt to an advertiser's rights - indeed, to every citizen's rights - under the First Amendment." Engman, supra, pp. 10-11. A careful approach of this type is pretermitted by an extension of the ad substantiation rule as proposed by petitioners.

In this connection, it should be noted that the Commission's initial ad substantiation resolution was announced without benefit of the rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. § 553. Irrespective of the legality of proceeding without adhering to these rulemaking procedures where product ad substantiation is involved, if the Commission at all entertains any doubts as to the merits of the proposed extension of that resolution, it should not take any

action without soliciting the views of all interested parties as contemplated under the Administrative Procedure Act. Given the recognized sensivity of this area, and the serious First Amendment problems raised by the petition, the APA provisions requiring the publication of a proposed rulemaking notice, with an opportunity for interested persons to participate in the rulemaking through the submission of their views and/or oral presentation, will afford the Commission access to the views of all who may be affected by the proposed extension of the substantiation resolution.

V. THE GRANTING OF THE PETITION WOULD EXACERBATE MOBIL'S INABILITY TO EXPRESS ITS OPINION ON ISSUES OF PUBLIC CONTROVERSY

The Supreme Court has stated that "freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed to enable the members of society to cope with the exigencies of their period."*/ It is

*/ Time, Inc. v. Hill, 385 U.S. 374, 388 (1967).

undeniable that the energy crisis is one of the primary "exigencies" of the present period. Mobil and the other oil companies are uniquely situated to advance public understanding of this crisis because of their direct and immediate involvement in the oil business. Thus, it would be particularly troublesome from a societal point of view if the right of Mobil and other similarly situated corporations to express their opinions and seek support for their policies were to be hedged about with restrictions such as those proposed in the petition.

As petitioners concede, many prominent and powerful government officials have been severly critical of the oil industry with a resultant adverse public opinion and perception of the responsibility of the oil companies for the current crisis.*/ Those who have publicly criticized

*/ "As for the energy crisis, which has dramatically touched the lives of all Americans, not only has public opinion put industry on the defensive, but several companies have been chided by government officials and formally charged by government agencies, including this Commission, with unwise, unethical or illegal practices which have contributed to, of course, energy shortages in order to increase their economic stranglehold on the energy industry and undermine the recent successes of the environmental effort." Petition, p. 4, (footnotes omitted).

the oil companies and others involved in the energy field have not been subjected to any requirement of substantiation. Petitioners would not have it so since their proposed substantiation rule applies only to advertisements sponsored by businesses engaged primarily in selling goods or services for profit. Yet, the petition proposes that if Mobil wishes to defend its policies against the barrage of publicity leveled against it, the company must be prepared to substantiate each and every element of its defense by way of responding to subpoenas at the instance of the Commission's staff or "any interested person." This in effect would mean any person who disagreed with Mobil's policies or ideas could trigger regulatory action.

For the reasons stated earlier, Mobil believes that this approach is inconsistent with the notion embedded in the First Amendment that truth is best obtained in the long run through uninhibited and unshackled debate. In this connection, it is important to note that Mobil's right to express itself on issues of public importance and controversy is not only threatened by the instant petition but is presently subject to severe restraints

inappropriately imposed by the television networks. Mobil's efforts to counter its critics have been frustrated by the networks' policy of refusing paid advertising dealing in any respect with Mobil's opinion on issues related to the energy crisis.

Consistent with its view that public opinion on a subject as crucial as the energy crisis should be informed by an uninhibited and robust debate, Mobil has offered to buy time on the television network for its critics, such as petitioners, provided the networks allow Mobil to buy an equal number of commercials to state its own position with respect to the energy crisis free of network censorship. To date, the networks have rejected this proposal, although Mobil believes it provides a uniquely suitable mechanism for airing an issue of prime importance to the public and the future of this country.

Petitioners are correct in asserting that industry seeks through "image advertising" to create a more favorable attitude on environmental and energy-related issues and to speak in favor of certain governmental actions which the company or industry supports. */ The role of

*/ Petition, p. 5.

government should be to facilitate the ability of all interested groups, including concerned citizens and corporations, in the achievement of these traditional exercises of speech.

As previously noted, the causes of the present energy crisis and the course which this country should follow in dealing with it involve highly complex issues of great import. Oil companies such as Mobil, by virtue of their expertise and involvement in this area, have much to contribute to this important national debate. At present, the television networks, aided by the passive acquiescence of the Federal Communications Commission, have made it difficult, if not impossible, for the oil industry or petitioners to express their views to the public.

The solution, however, is not to impose impediments to industry's exercise of free speech, as the present petition would, but to give Mobil and its critics greater access to the public for the expression of their various viewpoints as to the course the country should take in responding to the energy crisis. This

Commission has already noted that:

> "the most effective means of assuring public awareness of opposing points of view . . . and to assure that opposing views have a significant chance to persuade the public, is counter-advertising, subjecting such issues to a free and robust debate in the marketplace of ideas." Statement of the Federal Trade Commission, In the Matter of the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, FCC Docket No. 19260, p. 13.

We submit that fair access to all concerned, with the resultant uninhibited interchange of ideas, is not only consistent with First Amendment requirements but holds the greatest promise of arriving at a considered public judgment on the correct energy policies which should be pursued by our government.

Mobil strongly urges rejection of the present petition. Adoption would violate First Amendment principles by inhibiting contributions to public debate by energy companies who are uniquely qualified to participate. Thus, public debate on one of the vital issues facing our country would be limited in a manner contrary to the public interest.

Respectfully submitted,

ARNOLD & PORTER

By_____
Paul A. Porter
Stuart J. Land
Michael N. Sohn

Attorneys for Mobil Oil Corporation

April 4, 1974

Exhibit 89: FTC Memorandum—Corporate Image Advertising—Mobil Oil Corporation Memorandum, April 8, 1974

UNITED STATES GOVERNMENT

Memorandum

TO : Commission DATE:

FROM : Charles Ludlam, Attorney
Division of National Advertising
Bureau of Consumer Protection

SUBJECT: Corporate Image Advertising - Mobil Oil Corporation Memorandum

Attached is a memorandum which has been filed with the Commission by Mobil Oil Corporation. The memorandum generally opposes the Rosenthal petition. We find nothing in it that warrants any extended comment or draws into question any of our previous recommendations.

The Mobil memorandum avoids the issue which is the subject of the staff analysis, that is, advertisements whose commercial effect is not incidental to protected speech but, rather, is the dominant effect. Mobil's memorandum is focused upon ads which address public issues and whose commerical effect is incidental. With respect to such ads, Mobil makes several standard First Amendment arguments with which staff could agree without changing in any way staff's analysis or recommendations concerning ads whose dominant effects are not commercial. Mobil does not even address the question of how to go about determining whether the commercial effect is or is not dominant.

Mobil does assert in footnote three at page 12 that there is not a "bright line," at least with respect to energy ads, between claims which express a corporate viewpoint on controversial issues of importance facing public officials and claims concerning an oil company's operations. This contention is simply asserted without support or argument of any kind. It will be recalled that the staff analysis does consider this disctinction as one of several factors which aid in determining whether an advertisement has commercial ex marks. The staff considers a claim with respect to the corporation's own operations to be a necessary but not a sufficient condition to reach the conclusion that the advertisement will have a predominantly commercial effect. Thus, staff's analysis does not end when it is determined that the claim is about the corporation's own operations; it is still necessary to consider several other aspects of the advertisement. In any event, Mobil's assertion that there is no bright line appears to be limited to ads "where the energy crisis is concerned ...." Staff has avoided making any recommendations for investigation of advertisements whose theme is the energy crisis, in part because of a recognition that it is far easier to conclude that such an ad is addressed to a public issue.



Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

Mobil asserts (pages 8-9) that no test of truth or burden of substantiation can be imposed on protected speech. This portion of the Mobil memorandum assumes away the matter in issue, since the question raised by the Rosenthal petition and which the staff analysis addresses is, what is protected speech?

Mobil also argues (pages 12-16) that a rule or industrywide approach in this area is inappropriate, and that the sensitivity of the issues requires a case by case determination. The staff agrees, and its memorandum analyzes each particular ad in considerable detail.

Mobil's final argument is that Commission action in this area would inhibit Mobil's ability to express its opinion on issues of public controversy. Under the staff analysis of corporate image advertising, no speech which is in fact relevant to a public issue would be prohibited.

For the Commission's information, we note that exhibits H and G to the Rosenthal petition are Mobil ads. The staff had not recommended that either of these ads be investigated. As to one of them, exhibit H, which was also the subject of the letter from Senator McIntyre, First Amendment issues have a good deal to do with the staff's recommendation, again suggesting the consistency of staff's analysis with that of Mobil in the limited area where both Mobil and the staff cover the same ground.

APPROVED:

4/8/74

Richard B. Herzog
Assistant Director for
National Advertising

J. Thomas Rosch
Director
Bureau of Consumer Protection

Exhibit 90: FTC Minute, April 23, 1974

FOR CONFIDENTIAL STAFF USE ONLY

74-178

April 23, 1974

Memorandum For Director, Bureau of Consumer Protection,
Director of Public Information,
Legal and Public Records:

Corporate Image Advertising

The staff was directed to prepare for the Commission's consideration a draft statement of policy addressed to the First Amendment, jurisdictional, and other problems of corporate image advertising, including the circumstances under which the Commission will require advertisement substantiation and/or proceed in individual cases, and circumstances wherein Commission action might be warranted nothwithstanding the presence of public controversy if a commercial purpose such as the sale of a product is an objective of the advertisement.

Pending its consideration and approval of the policy statement, the Commission deferred action on the recommendations contained in the Bureau's memoranda in this matter.

By direction of the Commission.

The papers are transmitted to the Bureau of Consumer Protection.

Charles A. Tobin,
Secretary.

/Light original: retyped by
Subcommittee staff/

Exhibit 91: FTC Memorandum—Commission Policy Statement on Corporate Image Advertising, With Attachment, June 12, 1974

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : Commission DATE:

Charles Ludlam, Attorney clud 6/12/74
FROM : Division of National Advertising

SUBJECT: Commission Policy Statement on Corporate Image Advertising

In response to the Commission's Minute of April 23, 1974, instructing the staff to prepare a Statement of Policy addressed to the First Amendment, jurisdictional, and other questions regarding the Commission's regulation of corporate image advertising, the staff submits the attached materials.

Although the Statement parallels the staff's analysis as contained in its Memorandum of March 18, 1974, on Corporate Image Advertising, it has been redrafted both to clarify certain aspects of the First Amendment analysis in response to questions raised by the Commission at the April 23, 1974, meeting and to render it appropriate as a formal, public statement of the Commission.

Clarifications In the Staff's First Amendment Analysis

The clarifications made by the staff in the policy statement relate to whether (1) an "ambiguous" advertisement having its dominant effect with respect to a "public" issue is protected by the First Amendment notwithstanding the fact that the issue is not strictly "political"; (2) whether an "ambiguous" advertisement not containing an express reference to a relevant public issue may nonetheless receive First Amendment protection; (3) whether the addition of an express reference to a public issue can so alter the orientation of an otherwise regulable ad that by reason of that reference the ad will not be regulated. Each of these three questions will be answered in the affirmative.

(1) Public or Political Issue

With regard to the first clarification, the staff has never intended to limit the subject matters protected by the First Amendment to discussions of "political" issues. The Policy Statement now makes this point explicit in footnote 24,

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Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

page 16. Clearly, discussions of many "public issues"1/ are protected, notwithstanding the fact that such issues are not sufficiently focused or otherwise appropriate for political action. Although the staff's analysis is unaltered by this clarification, it emphasizes the importance of the staff's analysis of the "ambiguous" image advertisement discussed below.

(2) Protection for Advertisements Not Containing Express Reference

The staff's second clarification emphasizes the fact that an "ambiguous" advertisement 2/ not containing an express reference to a public issue may nonetheless have its dominant effect with respect to such issues and thereby receive First Amendment protection. Statement at page 19. Many of the features that determine the status of such an ad are analyzed in the Policy Statement, for example, whether the advertisement contains descriptions of the sponsoring corporation's own behavior rather than discussions of general subjects and whether the advertisement contains logos and tag lines establishing continuities with the same company's product advertising.

(3) Effect of Express Reference to A Public Issue

The third clarification emphasizes that although the absence of an express reference is not alone determinative of the constitutional status of an image advertisement, as a factual matter where such reference is present it

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1/ As noted in the Statement at footnote 24, in the area of privacy law, the Supreme Court has defined "public issues" to include those "about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." Time, Inc. v. Hill, 385 U.S. 374, 388 (1967).

2/ As defined in the Policy Statement at pages 16-17, an "ambiguous" image advertisement is one which (1) contains information which is at least arguably relevant to a public issue, but which (2) makes no express reference to the public issue. Such an ad is ambiguous in the sense that its dominant effect may be with respect to product sales, in which case the ad would be subject to regulation, or - in the case of a highly informed viewer - the dominant effect may have reference to the public issue, in which case the ad would receive constitutional protection.

probably has more to do with the ultimate effect of an ad than any other single factor. 3/ It is not at all unusual to the experience of the Commission that the addition of a few words to an advertisement may have significant regulatory consequences. The Commission has stated, for example, that a determination of whether an advertisement for a book will be subject to Commission regulation - a matter involving significant First Amendment considerations - will turn, in part, on whether statements made in the advertisement are disclosed to be those of the book's author. Enforcement Policy In Regard To the Advertising of Books, 36 F.R. 13414 (July 21, 1971). See Statement, footnote 25, page 19. Moreover, the legality or illegality of an ad often turns on the presence of a few words of affirmative disclosure. Since ads generally do not contain very many words to begin with, it is not unreasonable that a relatively few words can change their purport and legal status.

Moreover, the integrity of the enforcement program contemplated by the Policy Statement is not adversely affected by the ability of an advertiser to insulate its "ambiguous" advertising from regulation by frankly relating information contained in such advertising to a public issue to which it is relevant. In most cases such reference will render the dominant effect of the advertisement to be with reference to the public issue, 4/ in which case the Commis-

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3/ Of course, as the Policy Statement cautions, the reference to a public issue cannot be merely appended to the ad as a sham to avoid regulation. The information contained in the ad must, in fact, be relevant to the public issue referenced. See footnote 25, page 18.

4/ At footnote 25, page 18, in the Policy Statement the staff has set guidelines as to what constitutes an express reference. Although such reference might not always render the dominant effect of an advertisement to be with reference to the public issue, in order to provide workable guidelines to advertisers, the staff recommends against scrutinizing the actual effect of a reference that does satisfy the guidelines.

sion would be properly barred by the First Amendment from exercising its jurisdiction. Moreover, as noted above, the information contained in the ad must in fact be relevant to the public issue to which such reference is made; the requirement of relevance and the guidelines for express references indicate that the question of whether an ad has achieved protected status by reason of such reference will not be answered by a mechanistic test. Finally, the networks' policy against airing advertising raising controversial issues 5/ and the prospect of advertisers losing business expense deductions for advertising on public issues should deter advertisers from blithely seeking to protect all their image advertising from Commission regulation by including express references.

Nature of Orders to Result
From Commission Action

In response to the Commission's inquiry, the staff wishes to indicate the type of orders it contemplates may be warranted as a result of a Commission action against a corporate image advertisement. As indicated in the staff Memorandum of March 18, 1974, pages 42-47, many corporate image claims state or imply that a given instance of corporate social responsibility is typical, represents a long standing feature of corporate behavior, is currently a major commitment of the corporation, is reproducible in other situations or has a broad applicability to the problem which is the subject of the advertisement. These are usually the implied meanings of ads whose express claim is a purportedly factual description of the corporation's own behavior. Accordingly, it will be possible to get to these broader implications by prohibiting deception in such descriptions. Such a prohibition should not raise many difficult or even particularly novel problems of drafting. To the extent that difficulties arise in drafting order provisions directly regulating claims of the typicality of the corporate behavior represented in the ad, or the extent to which the corporation is committed to the type of corporate behavior represented

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5/ This policy was upheld in the case of Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973). See Addendum of March 25, 1974 to staff's Memorandum on Corporate Image Advertising.

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in the ad, such difficulties would not raise additional constitutional issues.

It is not at all clear that there would be any necessity of including in an order dealing with claims of the type just outlined any provisions directed specifically to the constitutional boundaries of the order. (Such a proviso would, for example, state in substance that the order would not reach descriptions of corporate behavior made in an advertisement having a dominant political effect, and that in ascertaining the existence of such effect the presence or absence of various enumerated factors would be taken into account.) As normally drafted, Commission orders prohibit certain claims made "in connection with the advertising" of a specified range of products. All such orders are arguably constitutionally overbroad because many constitutionally protected claims can be made "in connection with ... advertising" for a product. If faced with a First Amendment challenge, a court would read a First Amendment proviso into such orders, just as it would with any image advertising order. Drafting such a proviso therefore appears unnecessary.

Furthermore, the Commission's First Amendment analysis would be fully explained to the Court both by the Policy Statement, the Commission decision from which the appeal is taken, and the Commission's briefs and argument. It should not therefore be unreasonably difficult for a court and the respondent to ascertain the boundaries of the order whether or not it contains an express proviso.

The "Ambiguous" Image Advertisement

The staff also wishes to address one issue raised at the Commission meeting which goes to the heart of the staff's First Amendment analysis: that an "ambiguous" corporate image advertisement may be regulated notwithstanding its having a more than trivial impact with respect to a public issue. As will be seen in the Statement at footnote 31, page 26, and the accompanying text, the Supreme Court and Circuit Courts have frequently upheld government regulation of speech having a more than trivial political effect. A recent and very striking example of such a holding is to be found in Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971)(3 Judge Court),

aff'd, 405 U.S. 1000 (1972). There the Court held that the fact that an ad relates to a controversial issue of public importance is not of itself sufficient to immunize such advertising from regulation. In that case all three Judges agreed that cigarette advertising, which had previously been specifically held to present a controversial issue of public importance under the "Fairness Doctrine", (Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), could be regulated despite its having been found to have raised such an issue and a majority of two Judges found that such advertising could be banned altogether. 6/

Despite the substantial line of authority exemplified by Capital Broadcasting, the Policy Statement now indicates that the Commission will avoid raising close constitutional questions by generally refraining from action unless the economic effects are not only dominant but substantially dominant. See Statement at page 26, note 3. This decision, the Statement points out, is made not as a requirement of constitutional doctrine but as a matter of sound regulatory policy in the exercise of prosecutorial discretion.

It must be emphasized that a conclusion based on constitutional grounds that protection extends to any advertisement having a greater than de minimis relation to public issues would have enormous and adverse practical consequences for the regulatory work of the Commission. Such a conclusion would immediately give new life to arguments that product advertisements having greater than de minimis relationship to public issues should also receive constitu-

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6/ While dissenting from the majority's holding that cigarette advertising could be banned altogether, Judge Skelly Wright nevertheless sanctioned the constitutionality of regulation to the extent of "forc[ing] the removal of deceptive claims" and requir[ing] manufacturers to couple their advertisements with a clear statement of the hazardous nature of their product..." 333 F. Supp. at 593-394.

tional protection. 7/ It is relevant to note that many product claims are controversial. 8/ This pattern is not surprising since advertisers are understandably inclined to run ads which are of interest to the public.

7/ Indeed, one commentator has recently advocated First Amendment protection for product advertisements containing information. Redish, "The First Amendment In The Marketplace: Commercial Speech and the Values of Free Expression," 39 George Washington Law Review, 429 (1971). Of course this position is flatly inconsistent with the Commission's holding in Firestone that to find advertising claims Constitutionally protected merely because they contain information "of importance to consumers [would] make a mockery of the Congressional mandate to the Commission to prohibit advertising claims which are unfair or deceptive." In Re Firestone Tire and Rubber Co., Docket 8818, 81 F.T.C. 398, 472 (September 22, 1972). This Commission position is in conformity with the Supreme Court in Pittsburgh Press v. Pittsburgh Human Relations Commn., 413 U.S. 376 (1973) where the Court explicitly declined the newspaper's invitation, based on the asserted value of commercial advertising as a medium for "exchange of information," to "abrogate the distinction between commercial and other speech." 413 U.S. at 388. See Statement at pages 22-23.

8/ In addition to cigarette advertising, for example, it has been held that advertising for large automobiles may also present a controversial issue of public importance, Friends of the Earth v. F.C.C., 449 F.2d 1164 (D.C. Cir. 1971). Recent advertisements by manufacturers of micro wave ovens have been disseminated defending their products on safety grounds from criticisms by Consumers Union. There is clearly a public controversy regarding this subject and the Food and Drug Administration has just amended its regulations regarding labeling for such ovens on May 30, 1974. However, the staff has no doubt that the Commission can regulate such manufacturer's safety claims, as well as the cigarette and auto ads mentioned above.

It might, of course, be argued that precisely because of the great impact on economic regulation of extending constitutional protection to informational product claims, such protection should not, at least under a balancing test, be extended to such advertisements. The counter to that argument is contained in the Policy Statement's detailed analysis of the economic impact of image advertising. See Statement at 4-8. Corporate image advertising concerning socially responsible activities is emerging as a medium of competition whose economic impact in the market place is not insubstantial. Statement at 13.

These arguments cannot and need not be resolved here. It is sufficient for present purposes to conclude that once it were to be decided that constitutional protection extends to any corporate image advertising bearing a greater than de minimus relation to a public issue, the arguments for distinguishing informational product advertising would not be so obviously compelling as to foreclose the issue of constitutional protection for informational product claims. In ultimately resolving the issue, moreover, the courts will be faced with new questions not only as to whether the Commission can properly exercise its jurisdiction as to informational product ads, but also as to whether the Commission would be acting properly by challenging product ads but not corporate image advertising with a similar economic impact. 9/ The staff cannot predict the resolution of these questions; it may be fairly said, however, that a Commission judgment that corporate image ads having a greater than de minimus relation to a public issue are protected would usher in a period of uncertainty in which we would be faced with an increased frequency of challenges, in cases involving informational product claims, on grounds both of Constitutional protection and abuse of discretion.

9/ The courts have tended to look not only at an agency's authority to act in an area but whether it can present persuasive reasons for acting in the one area but not in a similar area. See Marco Sales Co. v. F.T.C., 453 F.2d 1 (2d Cir. 1971); Friends of the Earth, supra, 449 F.2d 1164.

These various considerations have led the staff, after considerable thought, to the view that if the Commission determines, contrary to the substantive constitutional position expressed in the Enforcement Policy Statement, that any image advertisement containing information revelant to a public issue is for this reason alone protected, no viable enforcement policy can be enunciated with respect to corporate image advertising.

Publication of Policy Statement

The staff recommends that the Policy Statement be published in the Federal Register. Although the Statement is long, it will not take many pages with the Register's small type. The Commission issued both its Book Advertising Policy Statement and Advertising Substantiation Resolution in the Register. Publishing in the Register will assure the ready availability of the Policy Statement to all those interested in it.

APPROVED:

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J. Thomas Rosch 6/19/74 (see attached memorandum)
J. Thomas Rosch, Director
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Attachment to FTC Memorandum, June 12, 1974
(See Exhibit 91)

Draft

STATEMENT OF ENFORCEMENT POLICY

BY

THE FEDERAL TRADE COMMISSION

REGARDING

CORPORATE IMAGE ADVERTISING

Submitted By:

The Division of National
Advertising

June 12, 1974

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STATEMENT OF ENFORCEMENT POLICY BY THE FEDERAL TRADE COMMISSION REGARDING CORPORATE IMAGE ADVERTISING

The Commission is aware of a growing concern on the part of consumers, commentators, and members of Congress regarding the truth and fairness of claims being made in corporate image advertisements. This concern has been expressed in numerous complaints received by the Commission with respect to corporate image advertisements, including complaints filed by several Senators and Representatives, and by various public interest groups and individual consumers, as well as a petition filed on behalf of six Senators and Representatives. The Commission shares this concern and after a review of the nature, extent and economic impact of corporate image advertising and of relevant statutory, constitutional and policy issues has determined that in certain instances its Congressional mandate under Sections 5 and 6 of the Federal Trade Commission Act, 15 U.S.C. 40, et. seq., empowers it to institute appropriate investigations or other proceedings with respect to such advertisements and that such action is fully consistant with the United States Constitution and in the public interest. Although the concerns and issues raised by corporate image advertising are familiar to the Federal Trade Commission, the Commission has not previously engaged in an extended discussion of its responsibilities and authority with respect to such advertising. The Commission believes that it is in the public interest to herein inform consumers and advertisers of its policy with respect to regulating corporate image advertising.

The Nature, Extent and Function of Corporate Image Advertising

Corporate image advertising 1/ is that which describes

1/ The terms "corporate" or "general promotion" advertising are sometimes also used to describe such advertising. Leading National Advertising (a service that tabulates expenditures) includes under the latter heading advertisements that do one or more of the following:

(footnote con't on next page)

the corporation itself, its activities or its policies, but does not explicitly describe any products or services sold by the corporation. Within the wide range of subjects covered in image ads are descriptions of corporations behavior in such diverse areas as research and development and activities and programs reflecting a sense of social responsibility towards, for example, the community or the environment.

1/ (footnote con't from preceding page)

1. Educate, inform, or impress the public regarding the company's policies, functions, facilities, objectives, ideals, and standards;

2. Build favorable opinion about the company by stressing the competence of the company's management, its scientific know how, manufacturing skills, technological progress and product improvements, and its contribution to social advancement and public welfare, and on the other hand, to offset unfavorable publicity and negative attitudes;

3. Build up the investment qualities of its securities, or improve the financial structure of the company; or

4. Sell the company as a good place to work.

Publishers Information Bureau, Inc., Magazine Service, 1972. The Commission is primarily concerned with the second of these features.

For general discussions of the uses and value of corporate image advertising see Flanagan, George A., Modern Institutional Advertising, McGraw Hill Book Company, 1967; Riley, George A., The Corporation and Its Publics, John Wiley and Sons, Inc., 1963; Bristol, Lee H., Developing The Corporate Image, Charles Scribner's Sons, 1960. For an excellent biblography of consumer and advertising research related to image advertising see Wyckham, Robert G., ed., Images and Marketing, American Marketing Association, 1971.

Portfolios of corporate image advertisements include: "Strategic Advertising/1850-1962," Time Magazine; "Strategic Advertising: A Portfolio From The Pages of Time," Time Magazine, 1970; "Communicating The Total Corporate Personality," Magazine Advertising Bureau of Magazine Publishers Association, Inc.

The benefits which companies expect from image advertisement are as diverse as the ads themselves. A recent survey indicated that corporate executives engaged in corporate image advertising hoped to benefit their company in the following areas:

Product sales - 47%

Stockholder/financial relations - 64%

Consumer relations - 55%

Trade (i.e., supplier or business customer) relations - 46%

Government relations - 32% 2/

But despite the variety of motivations behind them and the diversity of the ads themselves, two trends have become clear. First, the amount spent on corporate image advertising has increased dramatically in the past few years. By a conservative estimate, $268 million was spent in this area in 1972, up 20% from 1970. More than half ($161 million) of this was spent on television, up about 55% from 1970. 3/ Second, this rise in expenditures has been accompanied by a similar rise in corporate interest in

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2/ "Are Public Relations Executives Becoming More Involved With Corporate Advertising?" Public Relations Journal, November 1973, at 29 (some respondents gave multiple responses).

3/ "1970 Expenditures For Corporate and Association Advertising," Public Relations Journal, November 1971, at 30; "1970-71 Expenditures for Corporate and Association Advertising," Public Relations Journal, November 1972, at 26; "1971-72 Expenditures For Corporate And Association Advertising," Public Relations Journal, November 1973, at 30.

the impact of image advertising on product sales.4/

It is evident that this increasingly powerful force on the national advertising scene warrants careful examination in the discharge of the Commission's law enforcement responsibilities under Section 5 of the Federal Trade Commission Act.

The Economic Impact of Image Advertising

Any Commission action concerning corporate image advertising must of course be consistent both with the statutory mandate of Section 5 of the Federal Trade Commission and with the First Amendment's protection of freedom of speech, press, and petition. Those issues cannot be appropriately resolved by an abstract legal discussion. Rather, it is essential that those issues be addressed in light of a realistic awareness of the economic effects on consumers and businessmen of corporate image advertising. These economic effects are well documented, and are a critical element in determining the status under the First Amendment of particular corporate image advertisements. Accordingly, this policy statement will discuss the literature relating generally to the economic effects of corporate image advertising, and then turn immediately to discussion of the statutory and First Amendment issues.

Extensive research confirms the effectiveness of corporate image advertising in furthering the corporation's economic interests, whether in increasing sales, fostering investment in the corporation's stock, or encouraging recruitment. It has already been noted that these are the purposes of executives who engage in such advertising. A variety of sources confirm that these purposes are being achieved.

4/ Compare 1973 results of the Public Relations Journal survey, text at footnote 2 (47% stating prime objective to be product sales; 55% stating consumer relations) with the results of the 1972 survey (19.2% product sales; 31.5% consumer relations). "Are Public Relations Executives Becoming More Involved With Corporate Advertising?," Public Relations Journal, November 1972, at 24.

In one study corporate image advertising was found to be more effective than product advertisements in inducing favorable purchase attitudes among industrial purchasers. 5/ Eighty businessmen responsible for making industrial purchases were shown both product and image advertising by a fictional company, and asked which was more likely to induce then to solicit a bid from the sponsoring company. The image advertising was also found superior at inducing interest in the company as a future supplier and belief in supplier dependability and product quality.

Other research has also found image advertising effective in creating favorable attitudes towards the sponsoring corporation. 6/ A major, eight year, five part study conducted by Thomas E. Ryan, Inc. for Time magazine, between 1964 and 1972 7/ found that men in upper income, managerial and professional areas who have seen one or more of a company's image advertisements have more favorable opinions about that company than those who have not read any of the company's image advertising. Specifically, exposure to corporate image ads was found to enhance the believability of new product claims, interest in investing in the company's stock, respect

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5/ Lehman, Martin A. and Richard N. Cardozo, "Product or Industrial Advertisments?" 13 Journal of Advertising Research 43 (April, 1973).

6/ See Grass, Robert C., et al., "Measuring Corporate Image Ad Effects," 12 Journal of Advertising Research 15 (December, 1972) (DuPont advertising tested before and after first image advertising in several years found to be effective).

7/ "A Pilot Survey to Test Techniques of Measuring the Effects of Corporate Advertising," July 1964; "Corporate Advertising Effectiveness," Report Number 1357, 1965; "Measuring Corporate Advertising Effectiveness," Research Report Number 1422, 1966; "Measuring Strategic Advertising Effectiveness," Research Report Number 1639, 1971; "Strategic Advertising and Attitudes Toward Corporations," 1972.

for the company's research and development capacities, and resulted in favorable recruitment referrals. Indeed, in the 1972 Ryan study corporate image advertisements emphasizing corporate social responsibility--notably pollution control and minority hiring--favorably influenced even individuals opposed to the theory of corporate social responsibility.

Similarly, a Barrons Magazine study found that corporate image advertising had induced an interest which led to the actual purchase of the advertiser's stock by 60% of the sophisticated money managers surveyed. 8/

Consumer research indicates that certain consumer markets may be segmented in terms of concern for the environment 9/ - a principal emphasis in corporate image advertising.

8/ "The Impact of Corporate Advertising on the Institutional Money Manager," Erdos and Morgan, Inc. survey for Barrons Magazine, 1971. The importance of the environmental aspect of corporate activity to investors was recognized in 1971 by the Securities and Exchange Commission. In that year, it promulgated a release requiring disclosure to investors when compliance with environmental protection statutes may necessitate significant capital outlays, may materially affect the earnings power of the business, or cause material change in the business being carried out or intended to be carried out. Securities Act Release No 5170, Exchange Act Release No. 9252 (July 19 1971), CCH Securities Law Reporter Para.78,150, as amended, Securities Act Release No. 5386 (May 9, 1973).

9/ Kinnear, Thomas, et al, "Ecologically Concerned Consumers: Who Are They?," 38 Journal of Marketing 20 (April 1974); Kinnear Thomas, and James R. Taylor, "The Effect of Ecological Concern on Brand Perceptions," 10 Journal of Marketing Research 191 (May 1973); Henion, Karl E, "The Effect of Ecologically Relevant Information on Detergent Sales," 9 Journal of Marketing Research 10 (February 1972).

Extensive anecdotal evidence confirms the economic impact of corporate image advertising. 10/ There is general acknowledgement in the business community that image advertising brings long range economic benefits to a company. 11/

Corporate image advertising has long been recognized as particularly valuable during times of shortages, including wars and recessions, when it may not be appropriate directly to advertise products but nevertheless highly desirable to maintain the company's reputation for when the shortages are past. 12/ Studies of advertising before, during and after

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10/ "Corporate Advertising: Those who Try it...Like It," Public Relations Journal, November 1972, 43-58 (Tenneco, Burlington Northern, Liberty Mutual, Sperry Rand, Chrysler Motors, State Farm Insurance Companies, Metropolital Life, Trans Union, North American Rockwell); "Communicating the Total Corporate Personality," Magazine Publishers Association, Inc., at 24-28 (I.B.M., Northeast Airlines, St. Regis, Olin Corporation, Wilson Sporting Goods, Atlantic Richfield, American Can, International Paper); "Accountability," Newsweek Magazine, 1965 (Monsanto, Westinghouse); "Texaco--'Putting Aesop to Work'," Public Relations Journal, November 1973, at 44; "RCA--'the Electronic Way'", Public Relations Journal, November 1973, at 49.

11/ How Public Attitudes Influence Corporate Profits, Research Department, Batten, Barton, Durstine and Osborn, Inc., 1969; Harding, Murray, "Corporate v. Product Advertising," Industrial Marketing, September 1967, at 59; Skylar, David "A Quiet Revolution...The Rise of the Corporate Image," Industrial Marketing, September 1967, at 63.

12/ Among the "Thirty Essential Jobs for Advertising When the Product is Oversold" are to maintain customer good will and acceptance of brands, to enhance the reputation of the company for making quality products, explain the shortages, and to speed the news of innovations or efforts to ease the shortages. "Advertisers Express Belief in Values of Continued Advertising," Printers' Ink, September 8, 1950 at 4 (including "30 Essential Jobs for Advertising When the Product Is Oversold," at 67). (issue published at the height of concern over shortages engendered by the Korean War).

the 1949, 1954, 1958, and 1961 recessions found that firms which did not cut their advertising during the recession did much better in sales and profits in the year following these recessions than those who had cut their advertising budgets. 13/ Testimonials of advertising executives obtained over a seventeen-year period substantiate the value of corporate image advertising during times of shortages, including wartime. 14/ These data indicate the economic reasons which lead companies to engage in corporate image advertising, even while shortages may exist of their products.

Statutory Issues Relating To Image Advertising

Section 5 of the FTC Act is designed to protect both consumers and competitors from economic injury. As discussed above corporate image advertising can induce economic behavior favorable to the advertiser, from both consumers, investors, or potential employees. When this behavior is induced by a misleading depiction of the advertiser's image, an unfair or deceptive act or practice in commerce has occurred.15/

13/ "Advertising In Recession Periods," The Buchen Company, 1958; "Advertising In Recession Periods -- Revisited," The Buchen Company, 1970; Speech by J. Wesley Rosberg, President, Buchen Advertising, Inc., before the American Business Press, Inc., October 20, 1970.

14/ "Comments on The Value of Advertising in Time of Shortages," Elmo Roper Survey for the American Association of Advertising Agencies, 1947-1964. (World War II).

15/ That advertisements are disseminated interstate is itself sufficient to satisfy the "in commerce" requirement. Surrey Sleep Prods., 73 F.T.C. 523, 553-554 (1968); S. Klein Dept. Stores, Inc., 57 F.T.C. 1543-1544 (1960) (interlocutory order).

The Commission has long recognized that consumers may base a decision to deal or not to deal with a corporation on characteristics of the corporation itself that would not be perceived as having any bearing upon characteristics of its products. In the very first volume of its reported decisions, the Commission prohibited false representations concerning the monopoly status of a corporation. Wayne Oil Tank Co., 1 F.T.C. 259 (1918). 16/ Similarly, in 1929 it was held unfair for a company falsely to represent that its employees belonged to a labor union. Columbia Pants Mfg. Co., 13 F.T.C. 61 (1929). In finding that "a substantial proportion of the purchasing public . . . prefers to purchase . . . articles manufactured in factories . . . using . . . workers belonging to, or affiliated with, some union of organized labor," the Commission again recognized that consumers frequently will base a purchase decision on their perception of the company's activities as well as the characteristics of its products, especially on the facts of this case at a time when unions were a growing force in American life. See also The Blind Weavers, Inc., 22 F.T.C. 145 (1936) (misleading corporate name found to "divert trade from competitors of truthfully marked rugs who sell their products on their merits rather than on the basis of sympathy. . .").17/

16/ See Fleischman Co., 1 F.T.C. 119, 131 (1918) (use of "bogus independent" to acquire "trade which respondent was in danger of losing"); Armour and Co. and Farmers' Cooperative Fertilizer Co., 1 F.T.C. 430 (1919) (concealment of respondent's control of a "cooperative" fertilizer company held deceptive, apparently because consumers preferred not to deal with a monopolist). The Armour case takes on special significance when seen against its historic background. Armour & Co. had in 1919, been for some time the subject of a great deal of public criticism by the muckrakers of that era, not only because it was part of the alleged meat "packing trust," but also because of the exposure of the terrible working and sanitary conditions in Chicago packing houses by Upton Sinclair's The Jungle. The Commission in 1919 would not have had to look far to conclude that many persons preferred not to give their dollars to Armour.

17/ The scope of the prohibitions of Section 5, and the standard of public interest, is further illustrated by the Commission's past actions in protecting consumer preferences regarding product characteristics not related to the immediate

(footnote con't. on next page)

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It is indisputable that the last decade has witnessed an enormous expansion of consumer consciousness about business performance. Aspects of company performance which few people may have thought about ten years ago are very much in the forefront of many people's minds. A new concept of "corporate responsibility" has become the subject of an

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17/ (footnote con't. from preceding page)
economic or physical benefit to the consumer of consuming the product. Thus, the Commission issued a complaint and accepted a consent order in In Re Ex-Cello Corporation C-2339 (January 9, 1972) barring false claims that milk cartons were biodegradeable and presented no potential "harm to the environment . . ." CCH Trade Reg. Rep. Para.20,152, and 20,206. Also, the Commission pursued and obtained the voluntary agreement of thirty manufacturers of phosphate detergents regarding the disclosure of the percentage of phosphorous and biodegradability of such products. Press Release, Federal Trade Commission, August 6, 1973. A long line of Commission cases dealing with products of foreign origin rested essentially on the simple fact of consumer preference. See e.g., Manco Watch Strap Co., 60 F.T.C. 495, 510-515 (1962). In the so-called skip tracer cases, the Commission found that there was public interest in protecting third parties from being induced through deception to volunteer information about missing debtors, notwithstanding that the only injury was to the preferences and values of those deceived and not to their person or pocketbook. See, for example, National Retail Board of Trade, 57 FTC 666, 674 (1960).

The legal relevance of consumer preference in and of itself is not limited to the Federal Trade Commission Act. Recently, for example, the D.C. Circuit recognized that regulatory consequences arise under the Securities Exchange Act of 1934 with regard to investors who "wish to have their assets used in a manner which they believe to be more socially responsible but possibly less profitable than that which is dictated by present company policy." Medical Committee for Human Rights v. SEC, 432 F.2d 659, 681 (D.C. Cir. 1970), vacated as moot, 404 U.S. 403 (1971).

extensive literature. 18/

The manifestations of such public interest are clear. If, for example, a person from a minority group spends his money on the products of a company which falsely advertises that it has a non-discriminatory minority hiring and promotion policy, he has been made an unwitting accomplice in activities deeply distasteful to him. Moreover, he has thereby

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18/ Among the literally thousands of works on this subject are included the following: Bauer, Raymond A. and Dan H. Fenn, Jr., The Corporate Social Audit (New York: Russell Sage Foundation, 1972); Business and Society, A Biweekly Report on Business and Social Responsibility, Milton M. Moskoswitz, ed., MRM Publishing Co., Inc., San Francisco; Business and Society Review, Warren, Gorham and Larmont, Inc. (quarterly magazine); Economic Priorities Report, Council on Economic Priorities, New York (bimonthly report on "practices of U.S. corporations in employment, environmental quality, military production, political influence, and foreign activities"); Friedman, Milton, "The Social Responsibility of Business Is to Increase Its Profits," The New York Times Magazine, September 13, 1970, pp.31ff; Initiatives In Corporate Responsibility, Consumer Subcommittee of the Committee on Commerce, U.S. Senate (Washington, D.C.: U.S. Government Printing Office, October 1972); Jacoby, Neil H., Corporate Power and Social Responsibility: A Blueprint for the Future, MacMillan Publishing Co., Inc., New York, 1973; Schwartz, Donald E., "The Public-Interest Proxy Contest: "Reflections of Campaign G.M.,'" 69 Mich. L. Rev. 419 (January 1971); Simon, John G., Jon P. Gunnemann, and Charles W. Powers, The Ethical Investor: Universities and Corporate Responsibility, Yale University Press, 1972. Social Responsibilities of Business Corporations: A Statement on National Policy By the Research and Policy Committee of The Committee For Economic Development, Committee For Economic Development, New York, June 1971.

not given his dollars to a company which in fact is pursuing constructive minority hiring and promotion policies. While such affronts to a consumer's expectations may not be easily measurable in dollar terms, they are as much a subject of legitimate concern as those resulting from deception concerning other attributes of a product he has purchased.

The effect on consumers of image advertising may be particularly evident with respect to claims regarding companies manufacturing fungible products, where the claims may amount to a form of specious product differentiation. To the extent that the relevant products are non-fungible, consumers who are drawn to a specific product by a misleading depiction of the corporation may be deceived to their detriment into choosing products that are less suitable for them than competing products.

Moreover, the company which is genuinely attempting to act in a socially responsible manner but does not advertise that fact can be injured by the false social responsibility claims of a competitor. As with any advertising the effects on competition of deceptive advertising are difficult to ascertain but cannot, because of that difficulty, be ignored. To the extent that false claims by competitors make it less socially profitable for companies to act in a socially responsible manner, there is an injury to society as a whole.

As shown herein, the consumer interests affected by corporate image advertising are familiar to the Federal Trade Commission. The Commission recognizes the public interest in encouraging full accountability by maintaining legal standards for corporate image claims, especially with respect to claims regarding corporate social responsibility. In response to widespread consumer interest, corporate social responsibility is emerging as a medium of competition.19/ This trend will be enhanced if it is clear that standards of deception and unfairness apply--to the constitutionally permissible extent--to advertising claims about corporate responsibility. The Commission recognizes that the absence of accountability may in fact discourage claims of corporate social responsibility and even the practices underlying such claims. Therefore, under the Federal Trade Commission Act the Commission has a responsibility to prevent deceptive and unfair practices with respect to corporate image advertising.

Image Advertising And The First Amendment

Any evaluation of the First Amendment issues raised by corporate image advertising must recognize that such advertising has a strong commercial element. As noted in the preceding sections, there is a substantial body of evidence that corporate image advertising can affect consumer and business purchases, investment decisions, and employee recruitment, especially in times of shortage or in periods of recession. Corporate image advertising may therefore be seen as a species of "commercial" speech. But while the courts have frequently held that "purely commercial" speech is not protected by the First Amendment, Valentine v. Chrestensen, 316 U.S. 52 (1941); Pittsburgh Press Co. v. Pittsburgh Human Relations Commn., 413 U.S. 376 (1973); Banzhaf v. FCC, 405

19/ With respect to adverse effects on the environment of corporate activity, for example, such effects have come to be seen by many as an important element in the cost of a product. These costs can directly affect the quality of life, and therefore are seen by many consumers as costs to them of that product. Deception as to such costs is therefore a matter of statutory concern.

F2d 1082 (D.C. Cir. 1968), cert. denied, sub. nom. Tobacco Institute Inc. v. F.C.C., 396 U.S. 842 (1969); Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D. D.C. 1971), aff'd mem. sub nom., Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972), the cases are of limited use in locating the point at which image advertising becomes constitutionally protected.

The cases which have relegated commercial speech to inferior status have rarely given reasons, and the reasons advanced by the commentators for the lesser protection of commercial speech are of little analytic utility. One opinion suggests that the free marketplace model of the First Amendment, that "speech can rebut speech [and] propaganda will answer propaganda" (Dennis v. United States, 341 U.S. 494, 503 (1951)) is not satisfied by "commercial" advertising (Banzhaf, supra, 405 F.2d at 1102). Some commentators have also stressed that commercial advertising is "the handmaiden of economic activity already subject to extensive regulation."20/ As such, advertising is said to belong in the area of activity involving property rights, an area in which the government has a distinct and legitimate interest in protecting individuals from deception. 21/ Other commentators have maintained that the government can act with relative impartiality where commercial advertising is concerned because, in regulating commercial advertising, the government is not ordinarily attempting to vindicate any particular substantive policies of its own and because advertising claims, unlike claims concerning desirable social policy, are capable of objective evaluation. 22/ Finally,

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20/ "Developments in the Law - Deceptive Advertising," 80 Harv. L. Rev. 1005, 1027 (1967).

21/ Emerson, Thomas I., "Toward a General Theory of the First Amendment," 72 Yale L.J. 877, 948-949, n. 93 (1963).

22/ Id. at 921; see "Note, Freedom of Expression in a Commercial Context," 78 Harv. L. Rev. 1119, 1197 (1965).

commercial advertising is considered less subject to "chilling" than individual expression, and therefore is believed to need less of the "breathing space" normally accorded to individual expression. 23/

The above rationales are abstract, and the courts have rarely been presented with the close questions as to what is "commercial" that require a more detailed articulation of a theory. In the leading Supreme Court cases on the issue, the line between unprotected and protected speech has been relatively easy to draw. Thus in the recent case of Pittsburgh Press Co. v. Pittsburgh Human Relations Commission, 413 U.S. 376 (1973), there was little question that the want ads in question were "no more than a proposal of possible employment." 413 U.S. at 385. In Valentine v. Chrestensen, supra, the Court simply found that the protest was a calculated effort to evade an otherwise lawful prohibition against commercial handbills, thereby avoiding the difficult question of whether a twosided handbill, one of whose sides contained a sightseeing ad for a submarine and the other which contained a protest against a denial of mooring privileges for the sub, was sufficiently commercial to be unprotected or sufficiently political to be protected. 316 U.S. at 55. Conversely, in New York Times v. Sullivan, 376 U.S. 254 (1964), the Court needed little analysis to find that the civil rights protest against police brutality was purely political, even though it took the form of a newspaper advertisement. 376 U.S. at 265-266. Finally, in Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961), a public relations campaign launched by railroad interests against rival trucking interests was - according to the trucker's own complaint - "designed to foster the adoption and retention of laws and law enforcement practices." 365 U.S. at 129. Although the motive for the campaign, destruction of the trucking business, was economic, the Court found that speech so predominantly political on its face was beyond the reach of the Sherman Act by reason of First Amendment considerations. 365 U.S. at 143-144. It can be seen from these four principal cases that the Court has not confronted speech which was especially difficult to classify.

23/ "Developments", footnote 20, supra at 1031.

More particularly, the Court has not discussed the constitutional status of any type of corporate image advertisement.

Two factors which might be considered of particular applicability to image advertising but which have been held not to automatically classify speech as commercial are (1) the fact that the speech takes the form of a paid advertisement, New York Times, supra, 376 U.S. at 254-255, and (2) the fact that the statements made are erroneous, 376 U.S. at 271. As to the second point, it is a maxim of First Amendment law that there is no "test of truth" in determining whether or not speech receives First Amendment protection. Id. That an advertisement contains erroneous statements does not of itself remove the advertisement from the protections of the First Amendment. (See, however, footnote 29, infra).

As defined above, corporate image advertising is advertising which, while describing the corporation's own activities or policies, does not explicitly describe any products or services sold by the corporation. Certain advertising fitting this description contains information arguably relevant to a public or political issue 24/, without at the same time making any express reference to such issue; other image advertising contains no such information and no reference to a public issue. A corporate image advertisement which does contain information arguably relevant to a public issue, yet makes no reference to it, shall be termed for this Policy Statement, an "ambiguous" corporate image advertisement. The "ambiguous" corporate image advertisement, then, makes no express reference either to products or services of the company or to any public issue, and it contains information relevant to a public issue. Its constitutional status is determined, in accord with the analysis contained herein, only after a factual analysis of the effect of each individual advertisement. The legal framework within which that analysis is undertaken is described below.

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24/ Throughout this statement the terms "public" and "political" issue are used interchangeably to indicate that the Commission recognizes that some discussions of public issues receive First Amendment protection even if the issue is not strictly "political." The Supreme Court has indicated that "public issues" are those "about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) citing Thornhill v. Alabama, 310 U.S. 88, 102 (1940). See generally Brennan, Justice William J., "The Supreme Court and The Meiklejohn Interpretation of The First Amendment," 79 Harvard L. Rev. 1, (1965).

The ambiguous ad, despite its demonstrable economic impact, does not fit smoothly into either the "commercial" or the "political" categories recognized by the Supreme Court.

The claim of First Amendment protection for the ambiguous advertisement arises because, notwithstanding the absence of an express reference to any political issue, such an advertisement may contain information which arguably is relevant to some issue of public importance. For example, that a company takes steps to minimize pollution may enhance its image as an environmentally concerned corporation; it may also impress -- upon a highly informed viewer -- the governmental wisdom of less regid enforcement of anti-pollution laws. Therefore, while such an ad may not be expressly directed to the legislature or executive as, for example, in Noerr, neither is it a "classic example . . . of commercial speech," like the want ads in Pittsburgh Press, which presented "no more than a proposal of possible employment." 413 U.S. at 385.

In light of the ambiguous image advertisement's potential for both economic and political effect, it is the view of the Commission - which will be developed below - that the dominant effect of the ad is of major significance in determining its constitutional status and that a proper disposition under such a standard requires an analysis of each ambiguous advertisement's dominant effect.

In determining whether a given ambiguous corporate image advertisement can be found to have a dominant commercial effect and whether investigation and enforcement under Section 5 may otherwise be warranted, the Commission will take the following factors into account: whether (a) the ad is run by a commercial corporation; (b) elements typically found in the corporation's product advertisements - for example, logos, tag lines - are also present in the ad; (c) the corporation sells consumer products under a brand name identifiable or identical with that which appears in the ad; (d) the claims in the ad consist of a description of corporate activities, as distinguished from assertions of fact or opinion about general subjects unrelated to corporate activities; (e) the ad is oriented toward the sponsoring corporation's own activities rather than activities of other corporations of the same type or with the same interests; (f) the dominant purpose of the advertiser in disseminating the advertisement is economic; and (g) persons viewing the ad are likely to perceive its relevance to a public issue.

The consideration of these factors, including particularly the likelihood that relevance to a public issue will be perceived, will generally mean that corporate image advertisements which do expressly relate information contained in them to relevant public issues will not be the subject of Commission proceedings. 25/ That the Commission will ordinarily limit

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25/ An express link to a public issue will, of course, be determinitive only when the advertisement is otherwise ambiguous. The mere appending of a "moral or civic platitude" to an otherwise clearly commercial advertisement will not immunize that advertisement from regulation. Valentine v. Chrestensen, supra, 316 U.S. at 55. Nor can reference to a political issue be employed as a "sham" to evade otherwise proper regulation. Noerr, supra, 365 U.S. at 144. See Ginzburg, supra, 383 U.S. at 474, n. 17, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972). If the appeal to a public issue is relevant although it does not "so inextricably penetrate [the non-political appeal] so as to make fission impossible or impracticable," it may be possible for the Commission to regulate the separable non-political appeal. Chrestensen v. Valentine, 122 F.2d 511, 520 (2d Cir. 1941) (Frank J., dissenting), rev'd, on other grounds, 316 U.S. 52 (1941).

Although the Commission may in an unusual case wish to question whether a given express reference is sufficient to render the dominant effect of the advertisement to be upon a public issue, the Commission deems it desirable and important to give guidance to advertisers concerning the type of express reference which it would ordinarily consider to be sufficient in this regard. Although a mere determination of whether an ad contains an express reference - absent scrutiny of the effect of such reference - may not be sufficient as a Constitutional standard, as a matter of policy the Commission ordinarily will not scrutinize the actual effect of such reference. In order for an image advertisement to avoid such further scrutiny, the express reference contained therein must ordinarily take one of the following forms: (1) acknowledge that the subject matter of the advertisement is controversial, (2) offer the advertisement as the advertiser's opinion or position upon a public issue referred to in the ad, (3) refer to governmental policies or proposals, or (4) inform the public concerning its ability to influence the disposition of public issues referred to in the ad.

its assertions of jurisdiction to corporate image advertisements which do not expressly refer, in the manner described in footnote 25, supra, to a relevant public issue emphasizes the limited nature of the regulation contemplated by the Commission with respect to the ambiguous corporate image ad. Dominant economic effect will under this analysis ordinarily be found only in an ad descriptive of corporate behavior and making no express mention of any public issue to which the claimed corporate activity is relevant. (Even an ad lacking such reference may be protected; its status must in the last analysis depend upon its particular characteristics.) Thus, while claims of corporate behavior may be regulated when they appear in an ambiguous ad whose dominant effect is economic, no claim found in an image ad which is of relevance to a public issue is entirely prohibited. Any such claim could, notwithstanding regulation by the Commission when presented so as to have a dominant economic effect, be made without regulation in an advertisement whose dominant effect is political, as for example when the ad expressly relates such information to a public issue to which it is relevant. No claim or bit of information of relevance to a public issue is therefore ultimately banned by the regulation contemplated herein. With respect to the ambiguous corporate image ad, the Commission's determination to regulate would depend upon the context of the claim in the advertisement in which it appears.

(Scrutinizing The Context of Speech)

The conclusion that speech may be regulated in one context and not in another is not novel in First Amendment analysis. In NLRB v. Gissel Packing Co. 395 U.S. 575, 617-620 (1969), the Court recognized that antiunion statements that might otherwise be protected could be regulated when made by an employer to his employees during a labor dispute. In Ginzburg v. United States 383 U.S. 463 (1966), the Court held that sexually suggestive materials may be banned as obscene when presented in a titillating manner even assuming that "in other contexts the material would escape such condemnation." 383 U.S. at 475-476. In New York State Broadcasters Assn. V. United States, 414 F.2d 990, 998 (2d Cir.), cert. denied, 396 U.S. 1061 (1969), the Court recognized that information concerning the benefits to be realized from a lottery (for example, the construction of new school buildings) could be prohibited in advertising, even though they might

be protected when part of a newscast. 26/ See U.S. v. Bob Lawrence Realty, Inc., 474 F.2d 115, 122 (5th Cir. 1973) cert. den., 414 U.S. 826 (1974) ("informational value" of "making racial representations to obtain the business of a potential seller when the racial statement presents the truth" held "clearly outweighed by the government's overriding interest in preventing blockbusting" under the Fair Housing Act of 1968).

The result of the Commission's determination to scrutinize the effects of an ambiguous advertisement dictates that each advertisement must be individually analyzed and no single test will determine the advertisement's constitutional status. The absence of an express link to a political issue - while important - does not alone determine that an advertisement's dominant effect is commercial. While the presence of an express link will ordinarily result in protected status, a dominant political effect (and, therefore, protected status) may also arise from the orientation of the ad even in the absence of such a link.

Since Commission regulation of corporate image advertising will depend upon the context of a given claim, any argument that speech has been abridged, even to the limited extent of being chilled, falters if the corporation wishing to make claims about its behavior in an advertisement has available a simple technique for insuring that the claim will be accorded protected status. Such a technique is readily discernible here. All that the corporation must do is make express mention of the public issue to which its claim of corporate behavior relates. The chilling effect of such regulation is slight -- perhaps nonexistent.

26/ That the addition of a relatively few words to an advertisement may have significant regulatory consequences under §5 is not unusual. The Commission has stated, for example, that a determination of whether an advertisement for a book is subject to Commission regulation or is protected from such regulation under the First Amendment will turn, in part, on whether statements made in the advertisement are disclosed to be those of the book's author. See Enforcement Policy in Regard to the Advertising of Books, 36 F.R. 13414 (July 21, 1971). There are, of course, a multitude of Commission cases which turn on the adequacy or inadequacy of a short phrase to qualify otherwise deceptive claims. See, e.g., FTC v. Royal Milling Co., 288 U.S. 212 (1933). (disclosure that company is not a mill held sufficient).

The limited regulatory focus contemplated by the Commission, which bans no claim and regulates the ambiguous ad only where the dominant effect of such ad is economic, together with the slight chilling effect of cease and desist orders, is to be contrasted sharply in its impact upon speech with regulation that results in an absolute prohibition (that is, in any and all contexts) against dissemination of specified information, or with regulation resulting in criminal penalties or massive money judgments. The corporation's interests -- whatever they may be -- in making wholly unfettered claims as to corporate behavior by way of the ambiguous ad do not outweigh the governmental interest in preserving the integrity of regulation of advertising generally by way of cease and desist orders.

(Information of Intrinsic Relevance)

Merely because corporate image ads do not expressly sell a product, it is not necessarily true that they cannot, in fact, have such effect, and, indeed, such effect can be their intended effect. In fact, the indirect selling approach taken by corporate image ads may under certain circumstances be even more effective in promoting a company's product sales than an express sales effort. The Commission can clearly regulate an advertisement which accomplishes indirectly what could be regulated if accomplished directly.

In terms of the First Amendment, however, it can be argued that despite its commercial aspects corporate image advertising often contains raw information of intrinsic relevance to public issues and for that reason alone should be protected. Although this argument finds some support in language of some of the cases, it is an overly simplistic rationale for distinguishing commercial from protected advertisements of the corporate image type.

Simply stated, the "information theory" holds that even though an advertisement has a commercial aspect and even though it is not presented in the form of a protest, argument, or editorial, the mere fact that information it contains is relevant to a public issue raises the advertisement containing such information to the status of protected speech. The "information theory" would therefore protect corporate image advertisements - and even product ads - with any relevance to any matter of public interest or, in other words, to virtually any subject of sufficient topical interest for the advertiser to expect that the advertisement can rouse the interest of his audience.

The "information theory" finds some support in New York Times where the Court distinguished the civil rights advertisement from the handbill in Valentine partly on the basis that the former "communicated information." New York Times, supra, 376 U.S. at 266. Similarly, in Banzhaf Judge Bazelon asserted that one reason why commercial advertising is not "associated with any of the interests the First Amendment seeks to protect [is that a]s a rule, it does not... provide information on matters of public importance..." Banzhaf, supra, 405 F.2d at 1102.

Finally, in Capital Broadcasting, supra, the sole dissenter argued that because cigarette advertising had earlier been held to relate to a "controversial matter of public importance" within the meaning of the FCC's Fairness Doctrine, it was protected by the First Amendment, even though cigarette advertising "involves expression which is ostensibly apolitical..." Capital Broadcasting, supra, 333 F.Supp. at 590 (Wright, J., dissenting) (this view was not adopted by the court).

From these cases, at least one commentator has concluded that the First Amendment must necessarily protect all advertising, whether for products or otherwise, or at least that advertising that communicates information. 27/ This view was explicitly rejected by the Commission in the Firestone case, at least insofar as product claims are concerned. To hold that such claims are protected merely because they contain informaton "of importance to consumers" would, the Commission held, "make a mockery of the ... Congressional mandate to the Federal Trade Commission to prohibit advertising claims which are unfair or deceptive." In re Firestone Tire and Rubber Co., Docket 8818, 81 F.T.C. 398, at 472. The Courts have been similarly unreceptive. In Curtis Pub. Co. v. Butts, 388 U.S. 130, 150 (1967), a case following New York Times, the plurality opinion of Justice Harlan pointed out that:

27/ Redish, "The First Amendment in the Marketplace", 39 Geo Wash. L. Rev. 429 (1971).

> "Federal securities regulation, mail fraud statutes, and common-law actions for deceit and misrepresentation are only some examples of our understanding that the right to communicate information of public interest is not 'unconditional'". (Emphasis added.)

Furthermore, the Court in Pittsburgh Press explicitly declined the newspaper's invitation, based on the asserted value of commercial advertising as a medium for "exchange of information," to "abrogate the distinction between commercial and other speech." 413 U.S. at 388.

In Capital Broadcasting, the dissenter's view did not prevail, and many other cases have likewise held that commercial speech may be regulated even if it contains information relevant to a public issue. See, e.g., Texas Gulf Sulphur Co. v. SEC, 446 F.2d 1301 (2d Cir. 1971) (major mining discovery); New York State Broadcasters Assn. v. United States, 414 F.2d 990 (2d Cir.), cert. denied, 396 U.S. 1061 (1969) (lottery information). Compare Perma-Maid Co. v. FTC, 121 F.2d 282 (6th Cir. 1941) with Scientific Mfg. Co. v. FTC, 124 F.2d 640 (3d Cir. 1941) (ad containing identical health information unprotected when disseminated by businessmen, protected when disseminated by non-commercial publicist). Indeed, even the dissenter in Capital Broadcasting, the leading judicial proponent of the "information theory," would have applied the theory only to a statute banning speech (cigarette ads), not to regulation of the speech. 333 F.Supp. at 593-94. 28/ That even the most forceful advocate of the information theory acknowledges a power to regulate so long as the information is not totally banned is of special significance in light of the conclusion reached herein, which is that the Commission can regulate certain corporate image claims which appear in a predominantly commercial advertisement, but cannot regulate such claims when they appear in predominantly political advertisement. Thus, there is no total ban of any information under the regulatory approach which is herein adopted by the Commission.

28/ Compare Banzhaf to Robinson v. American Broadcasting Companies, Inc., 441 F.2d 1396, 1399 (6th Cir. 1971) (injunction that would have totally prohibited allegedly defamatory anti-smoking advertisements denied because-unlike Banzhaf-such injunction "would be a ban on speech").

Determining The Economic Effect Of An Image Advertisement

In the Commission's view, a determination of whether an advertisement that contains information relevant to a public issue is subject to regulation will turn largely on the dominant effect of the advertisement. If the dominant effect is to induce economic behavior, then the traditional governmental interest in preventing economic injury or unjust enrichment will justify regulation. Alternatively, where the dominant effect of the ad lies in the political area, the governmental interest in regulation is, at best, suspect.29/

29/ This is not to say that the government has no interest in maintaining honesty in the political arena. The First Amendment has been held not to invalidate statutues requiring lobbyists to register, see United States v. Harriss, 347 U.S. 612(1954), or that advertisements for political candidates identify their source. See United States v. Insco, 365 F.Supp. 1308 (M.D. Fla 1973).

The Commission is aware that an argument can be made that even clearly political advertisements could be regulated by the Commission where claims were made with a "reckless disregard" for their falsity. See New York Times v. Sullivan, supra, 376 U.S. at 279-280 (1964). Garrison v. Louisiana 379 U.S. 64, 73-75 (1964); "Calculated Misstatements of Fact Not Protected By First Amendment Guarantees of Free Speech and Press," 1969 Utah L. Rev. 118 (1969). As a matter of policy, and statutory interpretation, however, the Commission believes that its involvement in areas outside the field of "trade" would be inappropriate. Lichtenstein v. F.T.C., 194 F.2d 607, 611 (9th Cir. 1952), cert. den., 344 U.S. 819 (1953) (Commission barred from regulating transmission of lottery devices in interstate commerce except where lotteries used in merchandising). See Noerr, supra, 365 U.S. at 135 (Action under Sherman Act barred as economic impact of respondents' activity "incidental" to campaign to influence the passage or enforcement of laws); (footnote con't. on following page)

The need to focus on the effects of speech to determine whether the speech is protected is recognized in many cases. The classic exceptions to the First Amendment, obscenity and "fighting words", are rooted in a recognition that the likely effects of such speech are subject to regulation. See Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (obscenity and crime); Gooding v. Wilson, 405 U.S. 518, 524 (1972) (words are unprotected when they have "direct tendency to cause acts of violence" by individual addressee.) Similarly, the Courts in a variety of contexts have sanctioned regulation of speech because of the speech's likely effects.

In NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), the Supreme Court unanimously affirmed a finding that an empoyer's anti-union speech constituted an unfair labor practice. In so doing, the Court looked not only to the precise words spoken, but also to the likely effects of those words on the audience - employees who were "particularly sensitive to the rumors of plant closings." 395 U.S. at 619-620. In New York State Broadcasters, supra, the Circuit Court, in evaluating the constitutionality of the federal statute prohibiting the broadcast of "information concerning" lotteries, looked to whether the information (such as winner's lists) had the effect of "directly" promoting a lottery or merely "broadcasting about it." 414 F.2d at 997. In Pittsburgh Press, supra, the Supreme Court found that the grouping by a newspaper of want-ads in sex designated columns had the "practical effect" of "an overtly discriminating want-ad." 30/ 413 U.S. at 388.

29/ (footnote con't. from preceeding page)
The Commission has recognized that Noerr applies to the Federal Trade Commission Act. Rogers v. FTC, 492 F.2d 228 (9th Cir. 1974), cert. requested, May 28, 1974 (Commission determination not to regulate campaign activities of opponents of anti-litter measure upheld).

30/ Although the record contained survey evidence as to the effects of the want ads, it is unclear whether the Court relied on the survey's findings. For detailed information about the survey, see "The Supreme Court, 1972 Term," 87 Harvard L. Rev. 156, n.21 (1973).

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Similarly, in the Noerr case, the Court cited the effects of the railroad's lobbying campaign to support its conclusion that the railroad's principal effort had been a protected attempt "to influence legislation" rather than a prohibited attempt "to interfere with business relationships in a manner proscribed by the Sherman Act." 365 U.S. at 144.

While the Commission emphasizes the attention paid by the Courts to the effects of speech, it recognizes that the effects of an ambiguous corporate image advertisement may be mixed. Some viewers may respond to an ad in economic terms and buy the company's products, others may write their Congressmen.

In such a case, the Commission believes that the dominant effect of the advertisement should be controlling.31/

31/ As a matter of policy, the Commission is unlikely to commit investigatory resources to an image advertisement unless the economic effect is not only dominant, but substantially dominant. It is recognized, however, that under the dominance test the Commission may regulate corporate image advertisements having an effect upon a public issue which is not trivial or insignificant. In addition to the precedent established in Miller, see text at footnote 32, infra, New York State Broadcasters, supra, and Chrestensen v. Valentine, supra, for the "dominance test," many other cases already cited upheld government regulation despite its having a more than trivial impact on a First Amendment interest. Banzhaf, supra, 405 F.2d 1052 (position on health and safety issue); Capital Broadcasting, supra, 333 F. Supp. 582 (position on health and safety issue); Bob Lawrence Realthy, supra, 474 F.2d 115 (views on race relations); Pittsburgh Press, supra, 413 U.S. 376 (editorial policy of newspaper); Texas Gulf Sulphur, supra, 446 F.2d 1301 (news of major mining discovery); Perma-Maid Co., supra, 121 F.2d 282 (views on health and safety issue); Gissel Packing Co., supra 395 U.S. 575 (employer's views on labor relations); Ginzburg, supra, 383 U.S 463 (artistic expression of acknowledged social value); Breard, infra, 341 U.S. 622 (literary expression); and O'Brien, infra, 391 U.S. 367 (political protest).

This focus on dominance may be found in both early and recent cases, most recently in the obscenity area. In Miller v. California, 413 U.S. 15 (1973), the Court held that certain speech could be banned entirely if its "dominant theme" was prurient and the work "taken as a whole" lacked "serious literary, artistic, political or scietific value." 413 U.S. at 24. Thus, under Miller, it is likely that books may be banned, even though they have "some value," if they "do not measure up to the standard of seriousness." 32/ Similarly, in New York State Broadcasters, the Court held that news concerning the amount a lottery realized for new school construction would be protected if it had only the "incidental effect" of promoting a lottery, but could be prohibited if integrated in a lottery "announcement" which "directly promot[es]" the lottery. 414 F.2d at 998. 33/

Finally, when the Valentine case was before the Circuit Court, Judge Jerome Frank in dissent would have determined the constitutional status of an ambiguous ad 34/ from the "dominant" purpose of the advertiser. 122 F.2d 511, 520-21 (2d Cir. 1941). Rejecting the view of his brethren that such a task would be overly subtle, Judge Frank, who could scarcely be accused of insensitivity to free speech issues, stated:

> [W]e should not be disturbed because, in the future, cases may arise where there will be some difficulty in ascertaining the primary purpose in distributing a handbill, and, because, when such cases arise, the Courts may not be able to stop at locating merely the north and

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32/ "The Supreme Court - 1972 Term," 87 Harv. L. Rev. 164-165 (1973). Thus, words which "admittedly have some social importance" may nevertheless be unprotected because they come within the Miller definition of obscenity. Id.

33/ That lottery proceeds go to a worthy cause may materially induce the purchase of lottery tickets, even by those without gambling blood.

34/ Since the Supreme Court found, unlike any of the Judges below, an intent to evade the statute, it did not have to undertake the close analysis undertaken by Judge Frank.

> south poles of the subject matter, but may be required to do a more precise job of legal map-making and to fix a definite equatorial line. Where to draw such lines "is the question in pretty much everything worth arguing about in the law" Mr. Justice Holmes often noted. 122 F.2d at 520.

While Judge Frank emphasized purpose, rather than effect, his observations are equally applicable to a dominant effect standard. Moreover, as shall be noted below, an advertiser's purpose in creating an ad is relevant to determining the ad's effect.

Inference of Commercial Effect

If the dominant effect of an ambiguous advertisement is controlling on the issue of whether an ad is protected, a question remains as to the type and degree of proof required to determine such effect. Consumer survey evidence, where it exists, will be useful, and, as already noted, survey evidence as to effect was introduced in the Pittsburgh Press case. 35/

However, where survey or other evidence of effect does not resolve the issue, the Commission believes it both reasonable and constitutionally sound 36/ to infer a dominant commercial effect from the nature of the advertiser and the purpose and characteristics of the advertisement. These factors are discussed immediately below.

(1) Character of Speaker

35/ See note 30, supra.

36/ The Courts appear to have acknowledged the expertise of regulatory agencies in determining whether messages cross the line between protected speech and speech that can be regulated. See Gissel Packing Co., supra, 395 U.S. at 620 (N.L.R.B.); SEC v. Wall Street Transcript Corp., 422 F.2d 1371 (2d Cir.), cert. denied, 398 U.S. 958 (1970).

The Supreme Court has frequently looked into the nature of the speaker as an aid to determining the nature of his speech. 37/ In New York Times v. Sullivan, for example, the Court's holding that the ad was protected rested at least in part on a finding that the "communicat [ion]", "opinion" and "protest" was made "on behalf of a movement whose existence and objectives, are matters of the highest public interest and concern." 376 U.S. at 266 (emphasis added.)

Similarly, in Murdock v. Pennsylvania, 319 U.S. 105, 109 (1943) the Court emphasized the sincere religious beliefs of the distributors in holding that a license fee could not constitutionally be imposed on the sale of books by Jehovah's Witnesses. Just as the fact that the speaker is a Jehovah's Witness tends to support the conclusion that the effect of his speech is non-commercial, the fact that the speaker is a corporation 38/ tends to support the conclusion that the effect of its speech is commercial.

37/ Although the Supreme Court has apparently never directly held that corporations not engaged in the business of communication, e.g. newspapers, are accorded First Amendment Rights, the Commission assumes corporations hold such rights. See generally First National Bank of Boston v. Attorney General, 290 N.E. 2d 526 (Mass. 1972) (law barring corporate expenditures to influence vote on referrendums held unconstitutional); "Corporate Freedom of Speech," 7 Suffolk Univ. L. Rev. 1117 (1973). "Freedom of Expression," footnote 22, supra, at 1193.

38/ The Commission's statutory mandate is limited to companies "organized to carry on business for its profit or that of its members." Sec. 4, Federal Trade Commission Act, 15 U.S.C. 44. See Community Blood Bank of the Kansas City Area, Inc. v. F.T.C., 405 F.2d 1011 (8th Cir. 1969) (held that a hospital association and blood bank association were nonprofit and therefore exempt from the F.T.C. Act). Compare Perma-Maid, supra, 121 F.2d 282 (regulation of pamphlets regarding health hazards from aluminum cookware disseminated by cookware manufacturer upheld) with Scientific Manufacturing, (footnote con't on following page)

Conversely, in Gissel, supra, the Court recognized that what otherwise might be "predictions" about the economic consequences of unionization could become "threats" when the statements were made by the employer, since the future events in such circumstances were within the speaker's (the employer's) control. 395 U.S. at 619. In Valentine v. Chrestensen, Judge Jerome Frank, dissenting from the Court of Appeals decision that was ultimately reversed by the Supreme Court, inferred, from the commercial nature of the handbill's author, a dominant commercial effect from a handbill that "nowhere directly solicits patronage." 122 F.2d at 521.

(2) Purpose of the Advertiser

As with the character of the advertiser, the purpose of an advertiser is also relevant in determining dominant effect. 39/ As Judge Frank in Chrestensen noted, "Motive is a persuasive interpreter" of "equivocal conduct." 122 F.2d at 518, n. 7.

The Supreme Court has likewise recognized the relevance of motive in characterizing otherwise equivocal conduct. 40/

38/ (footnote cont. from preceding page)
supra, 124 F.2d 640 (regulation of identical pamphlets disseminated by publicist with no financial interest in cookware trade held beyond Commission jurisdiction).

39/ Although New York Times v. Sullivan, supra, is sometimes cited as holding purpose "immaterial" (365 U.S. at 266), the profit motive held immaterial was that of the medium (i.e., the New York Times), not the sponsor of the ad. As the Times Court recognized, to deny protection to an ad, merely because a newspaper profits from its placement, would severely limit the rights of individual speakers who cannot afford to buy a printing press. 365 U.S. at 266. As noted, above, the Times opinion suggests that the character of the sponsor is material.

40/ Where the speech is unequivocally political, economic motive will not of course subject it to regulation, unless the political element is a "sham". Noerr, supra, 365 U.S. at 138-139. See footnote 26, supra.

In Murdock, supra, where the Court held protected speech "having the characteristics of advertising," 41/ the Court discussed at length the purposes of the handbill distributor, which were found to be "as evangelical as the revival meeting." 319 U.S. at 109. And in Ginzburg, supra, the Court stated that "if the object of a work is material gain for the creator through 'an appeal to the sexual curiosity and appetite' the work is pornographic," even though absent such pandering motive the conclusion would be "otherwise debatable." 383 U.S. at 471. In "close cases" the Court held such evidence of pandering "may be probative with respect to the nature of the material in question." 383 U.S. at 474.

(3) Characteristics of the Advertisement

As shown above, corporate image advertising in general is considered by both advertisers and researchers to have a substantial impact on the economic behavior of those who read it. While this general learning may not suffice to demonstrate in a given case that a specific advertisement has a dominantly economic effect, various aspects of an advertisement may confirm that the ad speaks primarily to the economic rather than the political arena. 42/ For example, the ad may consist solely of descriptions of the corporation's own activities (e.g., its pollution clean-up activities), rather than views about, or discussions of, general conditions (pollution control generally). Such an ad is more likely to focus the viewer's attention on the corporation, and his relationship with it, than on some public issue of general concern. This focus on the corporation will be further enhanced if the corporation's name is prominently featured in the ad, and that name is identified with or identical to the name under which the corporation markets its products. When a company which is known by consumers to sell a particular product runs an ad describing its corporate activities, the viewer is likely to relate the

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41/ Ginzburg v. United States, 383 U.S. 463, 474 n.17 (1966).

42/ The drawing of these inferences lies, to some extent within the Commission's expertise. See n. 36 supra.

ads to that which he is most familiar - the line of products distributed by the company. A further link to the corporation and its products appears when elements typically found in the corporation's product such as logos or tag lines, are featured in the ambiguous image ad as well. These symbols and slogans have been developed with great care and at great expense because they are known to have a commercial impact. 43/ When such elements appear in an image ad, they serve not merely to identify the sponsor, but more importantly to reinforce the connection between the sponsor of the ad and its products. Indeed, the source of the message may become more important to the viewer than the content of the message itself.

When these elements are present, the effect of an otherwise ambiguous ad upon public issues will be minimized. The ad will tend not to alert the viewer to the existence of a public controversy, let alone implore him to agree with or disagree with the advertiser's view. Nor will it indicate how public or political action may be taken.

Other aspects of an ambiguous image ad may, of course, rebut the inference of commercial effect. As already noted, ads that explicitly link a description of corporate activity to some generally recognized public issue to which it is relevant should significantly increase the political response and, for that reason, the Commission will as a matter of policy not regulate the ad. Similarly, ads which speak in terms of an entire industry, rather than the advertiser itself, may at least alert the viewer that some broader interest than that of the advertiser is being advanced. It is evident that each individual advertisement must be analyzed in detail to determine its constitutional status.

Propriety of the Inference

It may be argued that the constitutional freedom of speech is too important to turn on an inference of dominant economic effect, and that if the message or its effects are ambiguous, any presumption must be in favor of protec-

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43/ Rosen, Ben, The Corporate Search for Visual Identity, Van Nostrand Reinhold Co., 1970; Martineau, Pierre, Motivation in Advertising, 1957; Schlandermudt, Peter, "The Image and Design," Developing The Corporate Image, Lee H. Bristol, ed., Charles Scribner's Sons, 1960.

tion, rather than regulation, in order to encourage an ample flow of information about public affairs, and to avoid chilling debate.

Such an argument is a more subtle variant of the "information theory" discussed above. It concedes that the intrinsic relevance of information in an ad to a public issue is not enough to achieve protected status where the ad expressly mentions a product or otherwise contains an express offer to deal (e.g., a help-wanted ad). Where, however, the ad is not expressly commercial in this sense--where, in other words, it is ambiguous--then, so the argument goes, the presumption must be in favor of protecting the speech. Ambiguities and marginal cases must be resolved in favor of protecting the speech to avoid chilling and to give maximum encouragement to robust debate and an ample flow of information into public affairs.

In assessing this position it should be borne in mind that the claim at issue is a claim which purports to describe the corporation's own activities. It will be recalled that the (essentially factual) analysis which the Commission contemplates leads to the view that it is where an advertisement contains this particular type of claim, as well as certain other factors, that an inference can be reasonably be drawn (in the absence of dispositive survey evidence) that the dominant effect is economic. Thus, it is with reference to an ad containing claims by a corporation describing its own behavior that the Commission assesses the argument that such an ad, when it does not expressly mention any public issue or offer to deal commercially, must be presumed to be protected.

The root premise of this position that ambiguities must be resolved in favor of protecting the speech would rest on the premise that the presumption against regulation is necessary in order to avoid chilling. As has been emphasized, however, the policy adopted by the Commission prohibits no speech. To the extent that an advertiser wishes to describe its own activities, it may do so without regulation by the Federal Trade Commission so long as it expressly links the information to the public issue to which such information is relevant. This policy cannot, therefore, be said to "chill" expression in any significant way. As the Supreme Court noted in NLRB v. Gissel, in rejecting the employer's argument that his anti-union speech did not lose constitutional protection by reason of its coercive effects, "[h]e can easily make his views known without engaging in 'brinkmanship'". 395 U.S. at 620.

See also Ginzburg supra, 383 U.S. at 471; Breard v. City of Alexandria, 341 U.S. 622, 644 (1951). As in Gissel, under the analysis herein adopted the advertiser has available a clearly discernible technique for insuring the protected status of the claim. As has been indicated the advertiser need only place his description of his corporate behavior in an ad which expressly links that behavior to the public issue to which it is related. (See footnote 26, supra.)

The Commission is aware that grounding the power to regulate speech on the context in which the speech appears may limit to some extent the manner in which a corporation's views or opinions are communicated. Corporations wishing to influence political opinion on matters of public importance will generally do so frankly rather than by ads whose political meaning is dimly perceived, if at all, by its audience. 44/ But while a requirement of frankness may slightly limit creativity, the First Amendment interest in covert appeals would appear to be minimal. 45/ As the Supreme Court held in New York Times, "The central meaning of the First Amendment" lies in "assur[ing] the unfettered interchange of ideas for the bringing about of political and social changes..."

44/ Justice Harlan, concurring in O'Brien emphasized that the defendant could have conveyed his anti-war message in many ways other than burning his draft card. 391 U.S. at 389.

45/ In United States v. Insco, 365 F. Supp. 1308 (M.D. Fla. 1973), an indictment under 18 U.S.C. §612, which requires that statements about a candidate for federal office must identify their sponsor, was sustained over a First Amendment objection. The indictment charged that Insco, a Republican candidate for Congress, had distributed bumper stickers linking the name of his Democratic opponent to George McGovern, without disclosing the source of the stickers. If Insco had, in a public speech frankly linked his opponent with McGovern, the statement would undoubtedly have been protected under New York Times v. Sullivan, supra, 376 U.S. 254 (1964).

376 U.S. at 273, 279. That central meaning is better served by encouraging frank presentations of information that can be comprehended, discussed and debated by an audience, than by subliminal appeals. 46/

To automatically resolve all ambiguities in favor of protection, moreover, would be to forego any real analysis of the effects of the ad, other than that necessary in the threshold determination that the ad possessed some political effect. That the dominant effect of the ad is economic would be irrelevant once it is decided that the political effect is greater than de minimis. Yet, as has been shown, a great deal of attention in constitutional analysis under the First Amendment is given to the effect of speech precisely in those instances where a determination is necessary as to whether the speech is or is not protected. Common law concepts which remove certain speech from constitutional protection, such as libel, fraud and assault, all look to effect. The constitutional concepts of obscenity and fighting words are linked to effect. 47/ Determinations are made in such instances--often without benefit of empirical evidence--that the likely effect of the speech renders it unprotected.

Finally, to accord protected status to descriptions of corporate behavior whenever they appear in an ambiguous advertisement would be to forego any effort at balancing

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46/ In Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 128 (1973), the Court expressed distaste for the "subliminal impact of th[e] pervasive propaganda [in advertising, which] . . . may be greater than the impact of the written word." Indeed, that advertising generally, "results to a lesser degree in a conscious choice among differing views", has been cited as a reason for denying First Amendment protection. "Freedom of Expression", note 22 supra at 1195 (emphasis added).

47/ In determining whether speech is obscene, Miller asks whether "the average person" would find that the work appeals to the prurient interest; whether the work describes sexual conduct in a "patently offensive way," and whether the work "lacks serious literary, artistic, political or scientific value." 413 U.S. at 24.

the advertiser's interest in describing his corporate behavior by way of ambiguous ads against the longstanding and substantial government interest in regulating commercial conduct.

That the advertiser's interest is slight seems clear from the fact that, if his description of his own behavior is in fact related to some specific public issue, he can put that description in an ad which makes specific reference to that issue and thereby achieve protected status insulated from any regulation. That the government interest in regulating commercial conduct is substantial need not be elaborated.

That a balancing of these interests is proper under the First Amendment can be seen in Gissel, where the Supreme Court recognized that an employer's speech rights must be weighed against the statutory rights of employees to associate, as protected by the National Labor Relations Act. 395 U.S. at 616. The propriety of balancing can also be seen in the draft card burning case of United States v. O'Brien, 391 U.S. 367, 377 (1968) where the Court stated that when mixed speech and nonspeech is involved:

> "[G]overnment regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

Two of the factors which appear in this passage deserve comment. The first is the requirement that the restriction on First Amendment freedom be no greater than is essential to the furtherance of the governmental interest. As has been shown, the regulation which the Commission proposes is regulation where the dominant effect of the advertisement is commercial. Where the commercial effect is significant but not dominant, this analysis would not support regulation. Moreover, no claim is totally banned under this approach if there is a public issue to which it is relevant. Thus, the Commission can satisfy this requirement that the restriction be no greater than is necessary to the "furtherance" of the government interest.

The second element which deserves comment is that the governmental interest be "unrelated to the suppression of free speech." The Commission does not consider the governmental interest embodied in the Federal Trade Commission Act to be the suppression of free speech. Of course, the statute regulates a certain type of speech. The more reasonable reading of the criterion in O'Brien, however, is that the governmental interest not be an interest of the type embodied in statutes punishing seditious libel. The proscribed situation is where the speech suppressed is speech that is critical of a policy of the government. Regulation of a corporation's description of its own behavior in an ad which makes no express mention of any public issue cannot fairly be said to be action to "vindicate" 48/ or insulate from criticism a particular policy of this or some other government agency.

In summary, the view that such an ambiguous ad should be presumed to be protected would not bar Commission action to determine if there is actual evidence of effect rendering inferences or presumptions unnecessary. The argument that in the absence of actual evidence the ambiguous ad must be accorded protected status appears to rest on the premise that protection is necessary in order to avoid chilling. The approach adopted herein, however, prohibits no speech, and the chilling argument is not strong if there is a readily discernible way, as there is, for an advertiser to describe his corporate behavior in a wholly protected manner when that behavior is relevant to some public issue. "Brinkmanship" has no more, and probably less, claim to constitutional protection in this context than in Gissel. To presume protection for the ambiguous ad would be to forego any real examination of the effects of the ad. Yet such examination is frequently undertaken in constitutional analysis under the First Amendment precisely where it is necessary to determine whether speech is or is not protected. To presume protection would also be to forego any balancing of the advertiser's interest in describing his corporate behavior by way of the ambiguous ad and the government interest in the regulation of economic behavior. Such balancing is

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48/ Curtis Publishing Co. v. Butts, 388 U.S. 130, 154 (1967) (Harlan, J.). In contrast the ban on cigarette advertising which was nevertheless upheld in Capital Broadcasting can be argued to have had precisely the effect of vindicating government policy. 333 F. Supp. at 593 (Wright, I. dissenting).

proper under the First Amendment, and results here in the conclusion that the ambiguous ad should not be protected where it can reasonably be inferred from the nature of the advertiser and the purpose and characteristics of the advertisement that its dominant effect is economic.

Propriety of Investigation

At least with respect to an ambiguous advertisement, the determination of whether it receives Constitutional protection will ultimately turn on facts concerning its effects, as well as the nature and purpose of the advertisement. Therefore, of necessity the Commission must often investigate such facts before determining whether such advertisement receives Constitutional protection. Given what is already known about the economic affects of corporate image advertising, the Commission believes that there is ample authority to justify the issuance of compulsory process to companies requesting data, part of which bears on whether the advertisements being investigated are subject to Commission jurisdiction. In SEC v. Wall Street Transcript Corp., 422 F.2d 1371 (2d Cir.), cert denied, 398 U.S. 958 (1970) the SEC was permitted to issue compulsory process to investigate whether a "newspaper" was in fact an "investment advisor" unlawfully disseminating financial advice without registering under the Investment Advisers Act. The newspaper's claim that the investigation "chilled" its expression was specifically rejected, 49/ and the Commission was held entitled to investigate on the basis of its "suspicion" that the Transcript was not in fact a "newspaper." 422 F.2d at 1378. The rationale for permitting the investigation was the need of the Commission to study the "context" in which the "newspaper" was published, an investigation "parallel" to that appropriate for making a determination of the Constitutional status of an advertisement. 422 F.2d at 1379. See "First Amendment Right Inferior to SEC Subpoena Power" 1971 Utah L. Rev. 132 (1971). In Laird v. Tatum, 408 U.S. 1 (1972) an on-going Army investigation into the activities of protest groups was held not to chill First Amendment Rights. Compare Gibson v. Florida Legislative Committee, 372 U.S. 539 (1963)

49/ Since the SEC investigation specifically requested correspondence between the Transcript and its news sources, its "chill" claim was scarcely frivolous. See 422 F.2d at 1374.

(prohibiting on First Amendment grounds an investigation into NAACP membership lists). 50/

CONCLUSION

As outlined herein the Commission finds that corporate image advertising having a dominant economic effect does not receive First Amendment protection. Within the category of corporate image advertisements are certain advertisements -- herein termed "ambiguous" -- which may contain information which is arguably relevant to some issue of public importance. (The term "ambiguous" is defined for purposes of this statement in the text accompanying footnote 24, supra.) The Commission has concluded that if the dominant effect of the "ambiguous" advertisement is economic it may be regulated. A determination of whether the dominant effect of an ambiguous ad is economic requires an examination of the particular ad in each instance.

The Commission recognizes that the same information that may be regulated when presented in a commercial context would be beyond the scope of regulation when presented so as to have a dominant political effect, as when the ad expressly relates such information to a relevant public issue. Because the Commission would under this policy ban no information of relevance to a public issue and would regulate such information only in a commercial context, and because the advertiser

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50/ The Commission will also consider in the context of an individual case whether, even if the advertisement to be investigated probably could not be the subject of a cease and desist order under Section 5, an investigation is nonetheless proper under Section 6(a) of the Federal Trade Commission Act authorizing the Commission "to gather and compile information concerning, and to investigate the . . . practices . . . of any corporation engaged in commerce . . .," and under its authority under Section 6(f) to "make public" information obtained in an investigation. See generally U.S. v. St. Regis Paper Co., 295 F.2d 607, 611-613 (2d Cir. 1960), cert. lim. to other grounds, 368 U.S. 208 (1961) (Commission powers to subpoena information derived from non-regulatory power of Bureau of Corporations, Department of Commerce).

may continue to express such information in a political context, the Commission has concluded that such carefully limited regulation is proper under the First Amendment.

Where evidence of the effects of an advertisement does not resolve the question of the advertisement's effect, the Commission has determined that it may infer that the effect of the advertisement is economic from the nature of the advertiser and the purpose and characteristics of the advertisement. This inference operates only where direct evidence does not resolve the issue of the effect of advertisement. The Commission has also determined that an investigation as to the effects of an ambiguous advertisement does not itself violate advertisers' First Amendment rights.

Exhibit 92: FTC Memorandum—Corporate Image Advertising (Commission Minute of April 23, 1974) June 12, 1974

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 C.F.R.) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : Commission

DATE: JUN 12 1974

FROM : Richard B. Herzog
Assistant Director for
National Advertising

RBH 6/12/74

SUBJECT: Corporate Image Advertising (Commission minute of April 23, 1974)

These materials are responsive to the directive in the Commission's minute of April 23, 1974, to prepare a policy statement "addressed to the First Amendment, jurisdictional, and other problems of corporate image advertising, including the circumstances under which the Commission will require advertisement substantiation and/or proceed in individual cases, and circumstances wherein Commission action might be warranted notwithstanding the presence of public controversy if a commercial purpose such as the sale of a product is an objective of the advertisement."

I have previously expressed my views quite fully to the Commission on this extremely important subject. I will note that I am in complete agreement with the changes that have been made in the analysis of this issue both to render that analysis suitable for a proposed public statement of enforcement policy and in response to various issues raised by the Commission.

APPROVED:

J. Thomas Rosch
Director
Bureau of Consumer Protection



Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

Exhibit 93: FTC Memorandum—Corporate Image Advertising (Commission Minute of April 23, 1974) June 17, 1974

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : Commission

DATE: JUN 17 1974

FROM : J. Thomas Rosch, Director
Bureau of Consumer Protection

J. Thomas Rosch 6/17/74

SUBJECT: Corporate Image Advertising
(Commission minute of April 23, 1974)

Pursuant to the Commission's directive, the staff has prepared a statement of enforcement policy regarding corporate image advertising for the Commission's consideration. That statement is attached.

The statement appears to me to be responsive to the several concerns voiced at the table when the matter was last considered by the Commission. More specifically, as discussed in the staff memorandum, the statement now makes it clear that the Commission will not proceed against advertising presenting close constitutional questions (Memo p. 6); the statement recognizes the sanctity of discussion of "public" issues, and not just "political" issues, under the First Amendment (Memo pp. 1-2); and the statement treats absence of reference to a public issue as an important, but not a dispositive, factor in determining whether an advertisement is protected by the First Amendment (Memo pp. 2-3).

I recommend that the Commission publish the attached statement of enforcement policy.

Attachments



Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

Exhibit 94: FTC Memorandum—Corporate Image Advertising (Commission Minute of April 23, 1974) July 10, 1974

UNITED STATES GOVERNMENT

Memorandum

TO : Commission

DATE: JUL 10 1974

FROM : Commissioner Dixon

SUBJECT: Corporate Image Advertising
(Commission minute of April 23, 1974)

The transmitted policy statement prepared by BCP broadly focuses on (a) the effectiveness of image advertising on commercial sales, and (b) the application of the First Amendment to such advertising.

I think it would be best to delay considering this matter at the table until after the recess. In the interim, I ask the GC to review the policy statement so that he may give us the benefit of his views concerning the matter by memorandum before the first meeting in September. I have several questions relating to the first [illegible] segment of the statement to which I would like staff and the GC to respond.

Of central importance is the definition of "ambiguous" corporate ad, for it is this type of image advertisement that will likely give rise to the inevitable First Amendment challenge, and to which the First Amendment discussion is generally devoted.

The statement defines an ambiguous ad as one that "makes no express reference either to products or services of the company or to any public issues, and it contains information relevant to a public issue." (P. 16)

The statement then goes on to say that the Commission will treat an advertisement containing an express reference to public issues, as a matter of policy (it is not conceded that it is mandated by the First Amendment), as an advertisement that will not be regulated, assuming the reference is not a sham. If this statement means that an ad containing an express reference to public issues is not ambiguous (i.e., it is protected by the First Amendment), why is it that the statement considers at length advertisements with an express reference to public issues as though they were ambiguous?

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

Further, in this connection, I ask the GC, as well as staff, to consider more specifically the definition of ambiguous. It seems to me an ad may make a specific reference to a product and still be dominantly a public message. Perhaps the Kellogg eat-a-nourishing-breakfast ad would be such if nutrition were a public issue of the same concern as pollution, even though the ad makes a specific reference to Kellogg cereal.

Put somewhat differently, I want these questions considered: Is an ad that makes express reference to a product or service necessarily a dominantly commercial advertisement? Is an ad that makes an express reference to a public issue necessarily protected by the First Amendment? As to the second question, as noted above, staff, in the policy statement, seems to say it is not, but in its definition of ambiguous it seems to be saying that it is. Finally, what do we do with an ad that makes an express reference to both a product and public issues?

Generally, I have doubts about the wisdom of including a very lengthy discourse on the law of the First Amendment. It seems to me unnecessary and best to save the legal arguments for that time when the legal issues are more narrowly and clearly defined -- that is, at such time as our implementation of the policy is challenged. I ask the staff, and the GC, to consider paring down the legal discussion.

Paul Rand Dixon
Commissioner

Exhibit 95: FTC Minute, July 16, 1974

FOR CONFIDENTIAL STAFF USE ONLY

July 16, 1974

75-007

Memorandum for General Counsel,
Director, Bureau of Consumer Protection,
Director of Public Information,
Legal and Public Records:

Commission Enforcement Policy Regarding Corporate Image Advertising

The General Counsel was requested to review the proposed policy statement transmitted by the Bureau of Consumer Protection with memorandum of June 12, 1974, so that he may give the Commission the benefit of his views concerning the matter by memorandum before the first Commission meeting in September.

Of central importance is the definition of "ambiguous" corporate advertisement, which is the type of image advertisement that will likely give rise to the inevitable First Amendment challenge, and to which the First Amendment discussion in the draft policy statement is generally devoted, as elaborated upon in Commissioner Dixon's memorandum of July 10, 1974.

The General Counsel and the staff were requested to consider and submit answers to the questions: (1) Is an ad that makes express reference to a product or service necessarily a dominantly commercial advertisement? (2) Is an ad that makes an express reference to a public issue necessarily protected by the First Amendment? (3) What is done with an ad that makes an express reference to both a product and public issues?

In view of Mr. Dixon's expressed doubts about the wisdom of including a very lengthy discourse on the law of the First Amendment and his belief that it may be best to save the legal arguments for that time when the legal issues are more narrowly and clearly defined,

Commission Enforcement Policy Regarding Corporate Image Advertising.

i.e., at such time as implementation of the policy is challenged, the staff, and the General Counsel, were asked to consider paring down the legal discussion.

By direction of the Commission.

The papers are transmitted to the General Counsel.

C.A.T.

Charles A. Tobin,
Secretary.

bw

Exhibit 96: FTC Memorandum—Commission Enforcement Policy Regarding Corporate Image Advertising, With Attachments, December 4, 1974

UNITED STATES GOVERNMENT

Memorandum

: Commission DEC 10 1974 SECRETARY DATE: DEC 4 1974

FROM : General Counsel

SUBJECT: Commission Enforcement Policy Regarding Corporate Image Advertising

In response to the Commission minute of July 16, 1974, the General Counsel's Office has reviewed the proposed policy statement on corporate image advertising transmitted to the Commission by the Bureau of Consumer Protection with memorandum of June 12, 1974.

Attached is a revised statement which is the product of close coordination between this Office and the Bureau's National Advertising Division. Considerable effort has been made to formulate a mutually acceptable statement.

The proposed statement has been revised in a number of respects. Among the changes are the following:

1. The statement has been pared down by making the First Amendment section more concise. Discussion of collateral First Amendment issues has been eliminated, and the relevant case law is cited and summarized, rather than discussed at length.

2. In this revised statement, neither the fact that an image advertisement makes an express reference to a product or service or to a public issue, nor any other single factor, is necessarily controlling as to the ad's regulability under the FTC Act.

3. The discussion of the "ambiguous advertisement" has been dropped.

4. This revision adopts a flexible approach to the problem of determining whether an advertisement constitutes protected or unprotected speech under the First Amendment. It sets forth guidelines and factors to be considered by the Commission in making the determination.

* See attachments.

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

A joint letter from Senators Birch Bayh and Frank Moss and Representatives Les Aspin, Benjamin Rosenthal, and Andrew Young, dated October 4, 1974, has been received inquiring as to whether and when a decision will be forthcoming on the petition they have filed with the Commission. This petition had requested the Commission to revise its advertising substantiation rules to include treatment of image advertising. This joint letter is attached along with a proposed response to the petitioners which could be transmitted if the revised policy statement is adopted by the Commission.

Respectfully submitted,

12/2/74

Jeffrey S. Edelstein
Attorney
Office of General Counsel

APPROVED:

12/5/74

Thomas H. Tucker
Assistant General Counsel

12/3

Calvin J. Collier
General Counsel

CONCURRENCE:

12/6/74

Richard B. Herzog
Assistant Director for
National Advertising

12/3/74

J. Thomas Rosch
Director
Bureau of Consumer Protection

Enclosure

Attachment to December 4, 1974, Memorandum
(See Exhibit 96)

STATEMENT OF ENFORCEMENT POLICY BY THE FEDERAL TRADE COMMISSION REGARDING CORPORATE IMAGE ADVERTISING Draft

The Commission is aware of a growing concern on the part of consumers, commentators, and members of Congress regarding the truth and fairness of claims being made in corporate image advertisements. This concern has been expressed in numerous complaints received by the Commission with respect to corporate image advertisements, including complaints filed by several Senators and Representatives and by various public interest groups and individual consumers, as well as a petition filed on behalf of six Senators and Representatives. The Commission shares this concern, and after a review of the nature, extent, and economic impact of corporate image advertising and of relevant statutory, constitutional, and policy issues, has determined that in certain instances its Congressional mandate under the Federal Trade Commission Act, 15 U.S.C. § 41, et. seq., empowers it to institute appropriate investigations or other proceedings with respect to such advertisements, and that such action is fully consistent with the United States Constitution and in the public interest. Although the concerns and issues raised by corporate image advertising are familiar to the Federal Trade Commission, the Commission has not previously engaged in an extended discussion of its responsibilities

and authority with respect to such advertising. The Commission believes that it is in the public interest to herein inform consumers and advertisers of its policy with respect to regulating corporate image advertising.

The Nature, Extent, and Function of Corporate Image Advertising

Corporate image advertising 1/ is advertising which describes the corporation itself, its activities, or its policies, but does not explicitly describe any products

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1/ The terms "corporate" or "general promotion" advertising are sometimes also used to describe such advertising. Leading National Advertising (a service that tabulates expenditures) includes under the latter heading advertisements that perform one or more of the following functions:

1. Educate, inform, or impress the public regarding the company's policies, functions, facilities, objectives, ideals, and standards;

2. Build favorable opinion about the company by stressing the competence of the company's management, its scientific know how, manufacturing skills, technological progress and product improvements, and its contribution to social advancement and public welfare, and on the other hand, to offset unfavorable publicity and negative attitudes;

3. Build up the investment qualities of its securities, or improve the financial structure of the company; or

4. Sell the company as a good place to work.

Publishers Information Bureau, Inc., Magazine Service, 1972.

The Commission is primarily concerned with the second of these features.

[Footnote continued]

or services sold by the corporation. Within the wide range of subjects covered in image ads are descriptions of the corporation's behavior in such diverse areas as research and development, and its activities and programs reflecting a sense of social responsibility towards, for example, the community or the environment.

The benefits which companies expect from image advertising are as diverse as the ads themselves. A recent survey indicated that corporate executives who engaged in corporate image advertising hoped to benefit their company in the following areas:

Product sales - 47%

Stockholder/financial relations - 64%

Consumer relations - 55%

1/ [Cont'd]
For general discussions of the uses and value of corporate image advertising, see Flanagan, George A., Modern Institutional Advertising, McGraw Hill Book Company, 1967; Riley, George A., The Corporation and Its Publics, John Wiley and Sons, Inc., 1963; Bristol, Lee H., Developing The Corporate Image, Charles Scribner's Sons, 1960. For an excellent bibliography of consumer and advertising research related to image advertising, see Wyckham, Robert G., ed., Images and Marketing, American Marketing Association, 1971.

Portfolios of corporate image advertisements include: "Strategic Advertising/1850-1962," Time Magazine; "Strategic Advertising: A Portfolio From The Pages of Time," Time Magazine, 1970; "Communicating The Total Corporate Personality," Magazine Advertising Bureau of Magazine Publishers Association, Inc.

Trade (i.e., supplier or business customer) relations - 46%

Government relations - 32% 2/

But despite the variety of motivations behind them and the diversity of the ads themselves, two trends have become clear. First, the amount spent on corporate image advertising has increased dramatically in the past few years. By a conservative estimate, $268 million was spent in this area in 1972, up 20% from 1970. More than half ($161 million) of this was spent on television, up about 55% from 1970. 3/ Second, this rise in expenditures has been accompanied by a similar rise in corporate interest in the impact of image advertising on product sales. 4/

2/ "Are Public Relations Executives Becoming More Involved With Corporate Advertising?" Public Relations Journal, November 1972, at 29. Some respondents gave multiple responses.

3/ "1970 Expenditures For Corporate and Association Advertising," Public Relations Journal, November 1971, at 30; "1970-71 Expenditures for Corporate and Association Advertising," Public Relations Journal, November 1973, at 30.

4/ Compare 1973 results of the Public Relations Journal survey, text at footnote 2 (47% stating prime objective to be product sales; 55% stating consumer relations) with the results of the 1972 survey (19.2% product sales; 31.5% consumer relations). "Are Public Relations Executives Becoming More Involved With Corporate Advertising?" Public Relations Journal, November 1972, at 24.

It is evident that this increasingly powerful force on the national advertising scene warrants careful examination in the discharge of the Commission's law enforcement responsibilities under Section 5 of the Federal Trade Commission Act.

The Economic Impact of Image Advertising

Any Commission action concerning corporate image advertising must of course be consistent both with the statutory mandate of Section 5 of the Federal Trade Commission and with the First Amendment's protection of freedom of speech, press, and petition. Those issues cannot be appropriately resolved by an abstract legal discussion. Rather, it is essential that those issues be addressed in light of a realistic awareness of the economic effects on consumers and businessmen of corporate image advertising. These economic effects are well documented, and are a critical element in determining the status under the First Amendment of particular corporate image advertisements. Accordingly, this policy statement will discuss the literature relating generally to the economic effects of corporate image advertising, and then turn immediately to discussion of the statutory and First Amendment issues.

Extensive research confirms the effectiveness of corporate image advertising in furthering the corporation's economic interests, whether in increasing sales, fostering

investment in the corporation's stock, or encouraging recruitment. It has already been noted that these are the purposes of executives who engage in such advertising. A variety of sources confirm that these purposes are being achieved.

In one study corporate image advertising was found to be more effective than product advertisements in inducing favorable purchase attitudes among industrial purchasers. 5/ Eighty businessmen responsible for making industrial purchases were shown both product and image advertising by a fictional company, and asked which was more likely to induce them to solicit a bid from the sponsoring company. The image advertising was also found superior at inducing interest in the company as a future supplier and belief in supplier dependability and product quality.

Other research has also found image advertising effective in creating favorable attitudes towards the sponsoring corporation. 6/ A major, eight year, five part study conducted by Thomas E. Ryan, Inc. for Time magazine, between

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5/ Lehman, Martin A. and Richard N. Cardozo, "Product or Industrial Advertisements?" 13 Journal of Advertising Research 43 (April, 1973).

6/ See Grass, Robert C., et al., "Measuring Corporate Image Ad Effects," 12 Journal of Advertising Research 15 (December, 1972) (DuPont advertising tested before and after first image advertising in several years found to be effective).

1964 and 1972 7/ found that men in upper income, managerial, and professional areas who have seen one or more of a company's image advertisements have more favorable opinions about that company than those who have not read any of the company's image advertising. Specifically, exposure to corporate image ads was found to enhance the believability of new product claims, interest in investing in the company's stock, respect for the company's research and development capacities, and resulted in favorable recruitment referrals. Indeed, in the 1972 Ryan study corporate image advertisements emphasizing corporate social responsibility--notably pollution control and minority hiring--favorably influenced even individuals opposed to the theory of corporate social responsibility.

Similarly, a Barrons magazine study found that corporate image advertising had induced an interest which led to the actual purchase of the advertiser's stock by 60% of the sophisticated money managers surveyed. 8/

7/ "A Pilot Survey to Test Techniques of Measuring the Effects of Corporate Advertising," July 1964; "Corporate Advertising Effectiveness," Report Number 1357, 1965; "Measuring Corporate Advertising Effectiveness," Research Report Number 1422, 1966; "Measuring Strategic Advertising Effectiveness," Research Report Number 1639, 1971; "Strategic Advertising and Attitudes Toward Corporations," 1972.

8/ "The Impact of Corporate Advertising on the Institutional Money Manager," Erdos and Morgan, Inc. survey for Barrons Magazine, 1971. The importance of the environmental aspect of corporate activity to investors was recognized in 1971 by the Securities and Exchange Commission. In that year, it promulgated a release requiring disclosure to investors when compliance with environmental protection statutes may necessitate significant capital outlays, may materially affect the earnings power of the business, or cause material

[Footnote continued]

Consumer research indicates that certain consumer markets may be segmented in terms of concern for the environment 9/ - a principal emphasis in corporate image advertising.

Extensive anecdotal evidence confirms the economic impact of corporate image advertising. 10/ There is

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8/ [Cont'd]
change in the business being carried out or intended to be carried out. Securities Act Release No. 5170, Exchange Act Release No. 9252 (July 19, 1971), CCH Securities Law Reporter Para. 78,150, as amended, Securities Act Release No. 5386 (May 9, 1973).

9/ Kinnear, Thomas, et al., "Ecologically Concerned Consumers: Who Are They?," 38 Journal of Marketing 20 (April 1974); Kinnear, Thomas, and James R. Taylor, "The Effect of Ecological Concern on Brand Perceptions," 10 Journal of Marketing Research 191 (May 1973); Henion, Karl E., "The Effect of Ecologically Relevant Information on Detergent Sales," 9 Journal of Marketing Research 10 (February 1972).

10/ "Corporate Advertising: Those who Try it . . . Like it," Public Relations Journal, November 1972, 43-58; "Communicating the Total Corporate Personality," Magazine Publishers Association, Inc., at 24-28; "Accountability," Newsweek Magazine, 1965; "Texaco--'Putting Aesop to Work'," Public Relations Journal, November 1973, at 44; "RCA--'the Electronic Way'", Public Relations Journal, November 1973, at 49.

general acknowledgement in the business community that image advertising brings long range economic benefits to a company. 11/

Corporate image advertising has long been recognized as particularly valuable during times of shortages, including wars and recessions, when it may not be appropriate to directly advertise products but nevertheless highly desirable to maintain the company's reputation for when the shortages are past. 12/ Studies of advertising before, during, and after the 1949, 1954, 1958, and 1961 recessions found that firms which did not cut their advertising during the recession did

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11/ How Public Attitudes Influence Corporate Profits, Research Department, Batten, Barton, Durstine and Osborn, Inc., 1969; Harding, Murray, "Corporate v. Product Advertising," Industrial Marketing, September 1967, at 59; Skylar, David "A Quiet Revolution . . . The Rise of the Corporate Image," Industrial Marketing, September 1967, at 63.

12/ Among the "Thirty Essential Jobs for Advertising When the Product is Oversold" are to maintain customer good will and acceptance of brands, to enhance the reputation of the company for making quality products, explain the shortages, and to speed the news of innovations or efforts to ease the shortages. "Advertisers Express Belief in Values of Continued Advertising," Printers' Ink, September 8, 1950 at 4 (including "30 Essential Jobs for Advertising When the Product is Oversold," at 67). (Issue published at the height of concern over shortages engendered by the Korean War.)

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much better in sales and profits in the year following these recessions than those who had cut their advertising budgets. 13/ Testimonials of advertising executives obtained over a seventeen-year period substantiate the value of corporate image advertising during times of shortages, including wartime. 14/ These data indicate the economic reasons which lead companies to engage in corporate image advertising, even while shortages of their products may exist.

Statutory Issues Relating to Image Advertising

Section 5 of the FTC Act, which prohibits "unfair methods of competition and unfair or deceptive acts or practices in commerce," is designed to protect both consumers and competitors from economic injury. As discussed above, corporate image advertising can induce economic behavior favorable to the advertiser from consumers, investors, or potential employees. Corporate image advertisements not protected by the First Amendment 15/ within the

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13/ "Advertising In Recession Periods," The Buchen Company, 1958; "Advertising In Recession Periods--Revisited," The Buchen Company, 1970; Speech by J. Wesley Rosberg, President, Buchen Advertising, Inc., before the American Business Press, Inc., October 20, 1970.

14/ "Comments on The Value of Advertising in Time of Shortages," Elmo Roper Survey for the American Association of Advertising Agencies, 1947-1964. (World War II).

15/ See infra.

Commission's jurisdiction 16/ which convey a deceptive or unfair image of the advertiser are cognizable under Section 5. 17/

The Commission has long recognized that consumers may base a decision to deal or not to deal with a corporation on characteristics of the corporation itself that would not be perceived as having any bearing upon characteristics of its products. In the very first volume of its reported decisions, the Commission prohibited false representations concerning the monopoly status of a corporation. Wayne Oil

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16/ Section 5(a)(6) of the FTC Act grants jurisdiction to the Commission over persons, partnerships, or corporations. "Corporation" is defined in Section 4 to include any company or association "which is organized to carry on business for its own profit or that of its members."

It should be noted that, as a rule, the expression of "honest opinion or belief" by a party not engaged or financially interested in the trade involved is outside the scope of the FTC Act. Scientific Manufacturing Co. v. FTC, 124 F.2d 640, 644 (3d Cir. 1941). Compare Perma-Maid, Inc. v. FTC, 121 F.2d 282 (6th Cir. 1941).

17/ Advertising falls within the FTC Act's proscriptions not only when there is proof of actual deception, but also when the representations made have a tendency or capacity to deceive the public. FTC v. Sterling Drug, Inc., 317 F.2d 669, 674 (2d Cir. 1963); American Life and Accident Insurance Co. v. FTC, 255 F.2d 289, 293 (8th Cir.), cert. denied, 358 U.S. 875 (1958); Charles of the Ritz Distributors Corp. v. FTC, 143 F.2d 676, 680 (2d Cir. 1944).

Tank Co., 1 F.T.C. 259 (1918). 18/ Similarily, in 1929 it was held unfair for a company falsely to represent that its employees belonged to a labor union. Columbia Pants Mfg. Co., 13 F.T.C. 61 (1929). In finding that "a substantial proportion of the purchasing public . . . prefers to purchase. . . articles manufactured in factories . . . using . . . workers belonging to, or affiliated with, some union of organized labor," the Commission again recognized that consumers frequently will base a purchase decision on their perception of the company's activities as well as the characteristics of its products, especially on the facts of this case at the time when unions were a growing force in American life. See also The Blind Weavers, Inc., 22 F.T.C. 145 (1936)

18/ See also Fleischman Co., 1 F.T.C. 119, 131 (1918) (use of "bogus independent" to acquire "trade which respondent was in danger of losing"); Armour and Co. and Farmers' Cooperative Fertilizer Co., 1 F.T.C. 430 (1919) (concealment of respondent's control of "cooperative" fertilizer company held deceptive, apparently because consumers preferred not to deal with a monopolist). The Armour case takes on special significance when seen against its historic background. Armour & Co. had in 1919 been for some time the subject of a great deal of public criticism by the muckrakers of that era, not only because it was part of the alleged meat "packing trust," but also because of the exposure of the terrible working and sanitary conditions in Chicago packing houses by Upton Sinclair's The Jungle.

(misleading corporate name found to "divert trade from competitors of truthfully marked rugs who sell their products on their merits rather than on the basis of sympathy. . ."). 19/

19/ The scope of the prohibitions of Section 5, and the standard of public interest, is further illustrated by the Commission's past actions in protecting consumer preferences regarding product characteristics not related to the immediate economic or physical benefit to the consumer of consuming the product. Thus, the Commission issued a complaint and accepted a consent order in In Re Ex-Cello Corporation, 82 F.T.C. 36 (1973) barring false claims that milk cartons were biodegradeable and presented no potential harm to the environment. 82 F.T.C. at 44. Also, the Commission pursued and obtained the voluntary agreement of thirty manufacturers of phosphate detergents regarding the disclosure of the percentage of phosphorous and biodegradability of such products. Press Release, Federal Trade Commission, August 6, 1973. A long line of Commission cases dealing with products of foreign origin rested essentially on the simple fact of consumer preference. See, e.g., Manco Watch Strap Co., 60 F.T.C. 495, 510-515 (1962). In the so-called skip tracer cases, the Commission found that there was public interest in protecting third parties from being induced through deception to volunteer information about missing debtors, notwithstanding that the only injury was to the preferences and values of those deceived and not to their person or pocketbook. See, e.g., National Retail Board of Trade, 57 FTC 666, 674 (1960).

The legal relevance of consumer preference in and of itself is not limited to the Federal Trade Commission Act. Recently, for example, the D.C. Circuit recognized that regulatory consequences arise under the Securities Exchange Act of 1934 with regard to investors who "wish to have their assets used in a manner which they believe to be more socially responsible but possibly less profitable then that which is dictated by present company policy." Medical Committee for Human Rights v. SEC, 432 F.2d 659, 681 (D.C. Cir. 1970), vacated as moot, 404 U.S. 403 (1971).

It is indisputable that the last decade has witnessed an enormous expansion of consumer consciousness about business performance. Aspects of company performance which few people may have thought about ten years ago are very much in the forefront of many people's minds. A new concept of "corporate responsibility" has become the subject of an extensive literature. 20/

20/ Among the literally thousands of works on this subject are included the following: Bauer, Raymond A. and Dan H. Fenn, Jr., The Corporate Social Audit (New York: Russell Sage Foundation, 1972); Business and Society, A Biweekly Report on Business and Social Responsibility, Milton M. Moskowitz, ed., MNT Publishing Co., Inc., San Francisco; Business and Society Review, Warren, Gorham and Larmont, Inc. (quarterly magazine); Economic Priorities Report, Council on Economic Priorities, New York (bimonthly report on "practices of U.S. corporations in employment, environmental quality, military production, political influence, and foreign activities"); Friedman, Milton, "The Social Responsibility of Business Is to Increase Its Profits," The New York Times Magazine, September 13, 1970, pp. 31ff; Initiatives in Corporate Responsibility, Consumer Subcommittee of the Committee on Commerce, U.S. Senate (Washington, D.C.: U.S. Government Printing Office, October 1972); Jacoby, Neil H., Corporate Power and Social Responsibility: A Blueprint for the Future, MacMillan Publishing Co., Inc., New York, 1973; Schwartz, Donald E., "The Public-Interst Proxy Contest: 'Reflections of Campaign G.M.,'" 69 Mich. L. Rev. 419 (January 1971); Simon, John G., Jon P. Gunnemann, and Charles W. Powers, The Ethical Investor: Universities and Corporate Responsibility, Yale University Press, 1972; Social Responsibilities of Business Corporations: A Statement on National Policy by the Research and Policy Committee of the Committee for Economic Development, Committee for Economic Development, New York, June 1971.

The manifestations of such public interest are clear. If, for example, members of a minority group spend their money on the products of a company which falsely advertises that it has a non-discriminatory minority hiring and promotion policy, they have been made unwitting accomplices in activities deeply distasteful to them. Moreover, they have thereby not given their dollars to a company which in fact is pursuing constructive minority hiring and promotion policies. While such affronts to these consumers' expectations may not be easily measurable in dollar terms, they are as much a subject of legitimate concern as those resulting from deception concerning other attributes of a product they have purchased.

The effect on consumers of image advertising may be particularly evident with respect to claims regarding a company's manufacturing fungible products, where the claims may amount to a form of specious product differentiation. To the extent that the relevant products are non-fungible, consumers who are drawn to a specific product by a misleading depiction of the corporation may be deceived to their detriment into choosing products that are less suitable for them than competing products.

Moreover, the company which is genuinely attempting to act in a socially responsible manner but does not advertise that fact can be injured by the false social responsibility

claims of a competitor. As with any advertising, the effects on competition of deceptive advertising are difficult to ascertain but cannot, because of that difficulty, be ignored. To the extent that false claims by competitors make it less socially profitable for companies to act in a socially responsible manner, there is an injury to society as a whole.

As shown herein, the consumer interests affected by corporate image advertising are familiar to the Federal Trade Commission. The Commission recognizes the public interest in encouraging full accountability by maintaining legal standards for corporate image claims, especially with respect to claims regarding corporate social responsibility. In response to widespread consumer interest, corporate social responsibility is emerging as a medium of competition. This trend will be enchanced if it is clear the standards of deception and unfairness apply to advertising claims about corporate responsibility. The Commission recognizes that the absence of accountability may in fact discourage claims of corporate social responsibility and even the practices underlying such claims. Therefore, under the Federal Trade Commission Act, the Commission has a responsibility to prevent deceptive and unfair practices with respect to corporate image advertising.

It is against this background, then, that the Commission addresses the issue of the status under the First Amendment of corporate image advertising. It is clear that certain speech is sufficiently related to commercial activities of the advertiser to be subject to the traditional governmental regulation of commercial activity 21/ and, therefore, does not receive the type of First Amendment protection accorded other types of speech. 22/ No simple test is available to determine when this point is reached

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21/ The Commission's statutory mandate is to prohibit deceptive or unfair acts or practices, or unfair competitive practices, when they occur in commerce, and its jurisdiction is limited to companies "organized to carry on business for its profit or that of its members." Sec. 4, Federal Trade Commission Act, 15 U.S.C. 44. See Community Blood Bank of the Kansas City Area, Inc. v. F.T.C., 405 F.2d 1011 (8th Cir. 1969). Cf. Rogers v. F.T.C., 492 F.2d 228 (9th Cir. 1974), cert. denied, 43 U.S.L.W. 3209 (October 15, 1974) (Commission determination not to regulate campaign activities of opponents of anti-litter measure upheld).

22/ Valentine v. Chrestensen, 316 U.S. 52 (1941); Pittsburgh Press v. Pittsburgh Human Relations Commn., 413 U.S. 376 (1973). See Capital Broadcasting Co. v. Kleindiest, 405 U.S. 1000 (1972), aff'g Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971); Banzhaf v. Federal Communications Commission, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969); Gibony v. Empire Storage Co., 336 U.S. 490 (1949).

Numerous cases involving the Federal Trade Commission hold that there is no constitutional right to disseminate false advertisements. See, e.g., S.S.S. Company v. F.T.C., 416 F.2d 226, 231 (6th Cir. 1969); Regina Corporation v. F.T.C., 322 F.2d 765,

[Footnote continued]

in most cases. The courts have held that an otherwise protected statement does not lose its protection solely because it takes the form of a paid advertisement 23/ or solely because it is false. 24/ The courts have also recognized that otherwise unprotected statements do not gain First Amendment protection solely because they provide information 25/ or even

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22/ [Con't]
770 (3d Cir. 1963); E.F. Drew and Company v. F.T.C., 235 F.2d 735, 739-740 (2d. Cir. 1956), cert. denied, 352 U.S. 969 (1957).

First Amendment claims for product advertising have been rejected even where the product is controversial. Banzhaf, supra, 405 F.2d at 1101-1102 (advertising for controversial product held not protected by First Amendment). Cf. In Re Alan F. Neckritz, (Chevron), 29 F.C.C. 2d. 807, 812, reconsid. denied, 37 F.C.C. 2d 528 (1972) (making a controversial claim regarding the merits of a product is not to argue a position on a controversial issue of public importance).

23/ New York Times v. Sullivan, 376 U.S. 254, 266 (1967). In extending constitutional protection to a paid advertisement protesting police abuse on behalf of a civil rights group, the Court stated that the First Amendment embodies the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ." 367 U.S. at 270.

24/ New York Times, supra, 376 U.S. at 271; Gertz v. Robert Welch, 94 S.Ct. 2297, 3007 (1974) ("Under the First Amendment there is no such thing as a false idea").

25/ Pittsburgh Press Co., supra, 413 U.S. at 388 (claim that commercial advertising serves as a medium for "exchange of information" insufficient to "abrogate the distinction between commercial and other speech"); Valentine, supra, 316 U.S. at 55 (First Amendment does not protect dissemination of commercial handbill, even though it contained "matter proper for public information"); Texas Gulf Sulphur Co. v. S.E.C., 446 F2.d 1301 (2d Cir. 1971) (regulation of corporation's release of news of major mining discovery); New York State Broadcasters Assn. v.

[Footnote continued]

bear upon "issues of general or public interest." 26/ In this area, it is essential that the Commission make factually careful and constitutionally informed judgments in the resolution of close questions.

The approach which the Commission finds has been taken by the courts in comparable situations under the First Amendment is to look to the likely effect and appeal of the speech in question. 27/ The Commission believes that both substantial breadth for First Amendment interests and adequate recognition of the congressionally-mandated interest in regulating commercial conduct can best be preserved by looking to the dominant appeal and likely

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25/ [Con't]
United States, 414 F.2d 990, 997 (2d Cir.), cert. denied, 396 U.S. 1061 (1969) (prohibition on dissemination of lottery information, including news as to the amount a lottery realized for educational purposes, upheld). Compare Perma-Maid Co. v. F.T.C., 121 F.2d 282 (6th Cir. 1941) with Scientific Manufacturing Co. v. F.T.C., 124 F.2d 640 (3rd Cir. 1941) (ad for cookware containing identical health information unprotected when disseminated by person with financial interest in cookware trade, protected when disseminated by noncommercial publicist); In Re Firestone Tire and Rubber Co., 81 F.T.C. 398, 472 (1973), Commission order upheld, 481 F.2d 246 (6th) Cir. 1973), cert. denied, 414 U.S. 1112 (1973) (to decline to regulate advertisements containing information of "importance to consumers" would make a "mockery" of Commission mandate to prohibit unfair and deceptive advertising).

26/ Gertz, supra, 94 S. Ct. at 3010 (upholding defamation action). See Curtis Pub. Co. v. Butts, 388 U.S. 130, 150 (1967) (Harlan, J.) ("right to communicate information of public interest is not 'unconditional'").

27/ See Pittsburgh Press, supra, 413 U.S. at 388 (Court found that the grouping by a newspaper of want-ads in sex designated columns had the "practical effect" of "an overtly discriminatory want-ad"); NLRB v. Gissel Packing Co., 395 U.S. 575, 619-620 (1969) (consideration of likely "impact"

[Footnote continued]

effect of such speech 28/ to determine whether or not it is constitutionally protected.

27/ [Con't]
of employer's anti-union statements upon employees who were "particularly sensitive to the rumors of plant closing"); Eastern Railroad President's Conference v. Noerr Motor Freight, 365 U.S. 127, 144 (1961) (effectiveness of railroad's lobbying campaign cited to support conclusion that railroad's principal effort had been a protected attempt "to influence legislation" rather than a prohibited attempt "to interfere with business relationships in a manner proscribed by the Sherman Act"); New York State Broadcasters Assn., supra, 414 F.2d at 997 (court scrutinized whether information concerning lotteries had the effect of "directly" promoting a lottery or merely "broadcasting about it").

28/ See Miller v. California, 413 U.S. 15, 24 (1973) (certain speech can be banned if its "dominant theme" is prurient and the work "taken as a whole" lacks "serious literacy, artistic, political or scientific value"); New York State Broadcasters Assn., supra, 414 F.2d at 998 (news concerning the amount a lottery realized for new school construction would be protected if it had only the "incidental effect" of promoting a lottery, but could be prohibited if integrated in a lottery "announcement" which "directly promot[es]" the lottery). Many other cases have upheld government regulation where the appeal or effect of the speech place it within the ambit of a regulatory statute, notwithstanding that the speech also had a more than a trivial impact on a First Amendment interest. Banzhaf, supra, 405 F.2d 1052 (position on health and safety issue); U.S. v. Bob Lawrence Realty, 474 F.2d 115, 122 (5th Cir. 1973), cert. denied, 414 U.S. 826 (1974) (views on race relations); Pittsburgh Press, supra, 413 U.S. 376 (editorial policy of newspaper); Texas Gulf Sulphur, supra, 446 F2.d 1301 (news of major mining discovery); Perma-Maid Co., supra, 121 F.2d 282 (views on health and safety issue); Gissel Packing Co., supra, 395 U.S. 575 (employer's views on labor relations); Ginzburg v. United States, 383 U.S. 463 (1966) (artistic expression of acknowledged social value); Breard v. Alexandria, 341 U.S. 622 (1951) (literary expression); and United States v. O'Brien 391 U.S. 367 (1968) (political protest). See also footnote 33, infra.

Consequently, the Commission will proceed against unfair or deceptive corporate image advertising in situations where the dominant appeal and likely effect of the advertisement is commercial. Under Section 5 of the Federal Trade Commission Act, the question in each instance will be whether the dominant appeal and likely effect of an advertisement relates to consumer and business purchases, investment decisions, and employee recruitment or morale, rather than to the formation of public opinion about or action on a public issue.

Based upon its examination of corporate image advertising, the Commission anticipates that the application of this standard will often require a careful analysis of the particular advertisement in question. 29/ Claims in certain corporate image advertisements may arguably be capable of eliciting both commercial responses and political ones--for example, claims which describe corporate behavior that is itself the subject of public controversy.

In determining whether such a corporate image advertisement has a dominant commercial appeal and likely effect, the Commission will take the following factors, among others into account: whether

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29/ This is an appropriate role for this regulatory agency to take in attempting to discharge its statutory responsibilities in situations raising constitutional issues. Indeed, the courts give particular weight to agency factual determinations in such situations. See, e.g., Gissel Packing Co., supra, 395 U.S. at 620 (N.L.R.B.); SEC v. Wall Street Transcript Corp., 422 F.2d 1371 (2d Cir.), cert. denied, 398 U.S. 958 (1970).

(a) the claims in the ad consist of claims relating to the sponsoring corporation's own activities as distinguished from assertions of fact, opinion, or views about general subjects or conditions;

(b) elements typically found in the corporation's product advertisements - for example, logos, tag lines - are also present in the ad;

(c) the corporation sells consumer products under a brand name identifiable or identical with that which appears in the ad;

(d) the dominant purpose of the advertiser in disseminating the advertisement is economic 30/;

30/ See, e.g., Noerr, supra, 365 U.S. at 140-141; Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jamison v. Texas, 318 U.S. 413 (1943).

Judge Frank, dissenting in the lower court in Chrestensen, observed: "Motive is a persuasive interpreter" of "equivocal conduct." Chrestensen v. Valentine, 122 F.2d 511, 518 n.7 (2d Cir. 1941). Judge Frank would take judicial notice that the "dominant purpose of most men, when engaged in business, is to seek customers and make profits." Id. at 519 (Frank J., dissenting) (emphasis in original). Although New York Times v. Sullivan, supra, is sometimes cited as holding purpose "immaterial," 365 U.S. at 266, the profit motive held immaterial was that of the medium (i.e., the New York Times), not the civil rights group which sponsored the ad. As the Times Court recognized, to deny protection to an ad merely because a newspaper profits from its placement would severely limit the rights of individual speakers who cannot afford to buy a printing press. 365 U.S. at 266. See Perma-Maid Co., supra, 121 F.2d 282, and Scientific Manufacturing, supra, 124 F.2d 640; Ginzburg, supra, 383 U.S. at 474 (evidence of purpose to pander "may be probative with respect to the nature of the material in question").

(e) persons viewing the ad are likely to perceive it as the expression of fact, views, or opinions with respect to a public issue 31/; and

(f) the advertisement contains a reference to or depiction of any product or service in which the sponsor has a financial interest. 32/

While none of these factors is often alone determinative of the constitutional status of an image advertisement, each one relates to the capacity of such advertisement to affect commercial behavior.

31/ Obviously, the mere appending of a "moral or civic platitude" to an otherwise clearly commercial advertisement will not alter the orientation of an advertisement such that its dominant appeal or effect is with respect to a public issue, thus serving to immunize that advertisement from regulation. Valentine v. Chrestensen, supra, 316 U.S. at 55. Nor will references to a public issue employed as a "sham" to evade otherwise proper regulation immunize an ad from regulation. Noerr, supra, 365 U.S. at 144. See Ginzburg, supra, 383 U.S. at 474 n.17; California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972); Kois v. Wisconsin, 408 U.S. 229, 231 (1972) ("a quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication").

32/ Strictly speaking, a corporate image advertisement, as defined in this Statement, does not make a direct reference to the sponsor's products or services. However, the overall character of some advertisements is that of image advertising, despite a reference to a product or service.

It can be seen that the application of these factors may mean that a statement which is in fact of relevance to a public issue may be regulated when it appears in the context of one advertisement, and constitutionally protected when it appears in another. This result is not novel under the First Amendment. 33/ The possibility that a statement subject to the Federal Trade Commission Act when made in a predominantly commercial context may nevertheless be constitutionally protected when made in a predominantly political context supports the appropriateness of the dominant appeal and likely effect standard: no item of information need be denied to the public debate, and the chilling effect

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33/ See N.L.R.B. v. Gissel Packing Co., supra, 395 U.S. at 617-618 (1969) (anti-union statements that the employer might otherwise be "freer" to make could be regulated when made by an employer to his employees in the context of his "limited relationship" with them during a labor dispute); Ginzburg, supra, 383 U.S. at 475-476 (sexually suggestive materials may be banned as obscene when presented in a titillating manner even assuming that "in other contexts the material would escape such condemnation"); New York State Broadcasters Assn., supra, 414 F.2d at 998 (information concerning the benefits to be realized from a lottery for education could "nonetheless be banned" in advertising, even though they would be protected when presented as a "news" item); Bob Lawrence Realty, Inc., supra, 474 F.2d at 122 ("informational value" of "making racial representations to obtain the business of a potential seller when the racial statement presents the truth" held "clearly outweighed by the government's overriding interest in preventing blockbusting" under the Fair Housing Act of 1968).

The Commission has previously recognized that the addition of a relatively few words to a statement may significantly alter the context and, thereby, the status of the statement under the First Amendment. See Enforcement Policy in Regard to the Advertising of Books, 36 Fed. Reg. 13414 (July 21, 1971).

of Commission action is minimal. 34/ At the same time, however, the standard will enable the Commission to bar deception or unfairness in such statements when their dominant appeal and likely effect will be to elicit economic behavior from consumers, commercial customers, investors, or present or prospective employees, in direct furtherance of the commercial interests of the advertiser in his or her dealings with those groups.

34/ Compare Banzhaf, supra, 405 F.2d at 1101 (constitutionality of "Fairness Doctrine" requirement of airing of anti-smoking advertisements supported by fact that this doctrine did not ban any speech) with Robinson v. American Broadcasting Companies, Inc., 441 F.2d 1396, 1399 (6th Cir. 1971) (denial of request for injunction against allegedly defamatory anti-smoking commercials because - unlike Banzhaf such injunction "would be a ban on speech"). See also Capital Broadcasting, supra, 333 F. Supp. at 593-94 (Wright, J., dissenting) (although dissenter found statute banning all cigarette commercials to violate First Amendment, he would uphold statute which would "force the removal of deceptive claims" and "require [disclosure] of ... hazardous nature of ... product").

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Exhibit 97: FTC Memorandum—Commission Enforcement Policy Regarding Corporate Image Advertising, December 19, 1974

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : Commission

DATE: DEC 19 1974

FROM : Commissioner Dixon

SUBJECT: Commission Enforcement Policy
Regarding Corporate Image Advertising

I agree that the revised Statement of Enforcement Policy relating to corporate image advertising is much improved over the previous effort, and endorse the test which would have the Commission look to the "dominant commercial appeal and likely effect" of corporate image advertising to determine whether Commission regulation of image advertisements is consistent with the protection afforded by the First Amendment.

There are a number of questions and recommendations I have concerning the statement, as follows:

(1) The first footnote, page 2, notes that "The Commission is primarily concerned with the second" of the four described functions of corporate image advertising. I would delete this sentence, as it does not seem to me that we should or can state that our concern relates principally or exclusively to any one of the four categories.

(2) Page 4 - The first sentence, in the first full paragraph, starts off "But despite the variety of motivations behind them," etc. I fail to see how the variety of reasons given for corporate image advertising relates to the two trends described on page 4. Therefore, the use of the word "despite" does not parse. I would simply state, "Two trends have become clear in the use of corporate image advertising."

(3) Page 8 - I think the first sentence might be made clearer if it was changed to read "Consumer research indicates that certain consumer markets (e.g., college graduates or whatever group staff has in mind) are marked by a concern for the environment," etc.

(4) Page 16 - The second full sentence reads: "To the extent that false claims by competitors make it less socially profitable for companies to act in a socially responsible manner, there is an injury to society as a whole." Because, as I understand it, staff does not mean

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

"socially" profitable, but "commercially" profitable, I would delete the word "socially."

On the same page, I would make clear that the reference in the second sentence in the first full paragraph to legal standards is a reference to Commission legal standards, by deleting the phrase after "accountability" ("by maintaining legal standards") for the phrase "the Commission's establishment of legal standards...." by

In the same paragraph I would change, in the sentence beginning "This trend," the verb "will" to "should." In the same paragraph, I would substitute, for the last two sentences, the following: "The Commission recognizes that the absence of accountability may tend to discourage advertising of corporate social responsibility, and, as a consequence, dissuade firms from undertaking the socially responsible acts that underly such advertising. Therefore, there is substantial public interest in the Commission's regulation of corporate image advertising."

Page 22 - Subparagraph (d) is not entirely meaningful, as the purpose of all corporate advertising is economic. I, therefore, would change subparagraph (d) to read: "the dominant purpose of the advertiser in disseminating the advertisement is to advance the sales of its products or services."

With these changes, I move that the enforcement policy statement issue, and that the transmitted letter to the Senators and Congressmen be sent.

Paul Rand Dixon
Commissioner

Exhibit 98: FTC Minute, January 7, 1975

FOR CONFIDENTIAL STAFF USE ONLY

January 7, 1975

75-061

Memorandum for Director, Bureau of Consumer Protection,,
General Counsel,
Director of Public Information,
Legal and Public Records:

Commission Enforcement Policy Regarding Corporate Image Advertising
In re: Congressional Petition to Revise Ad Substantiation Program to Include Treatment of Image Advertising

Pursuant to Commission directive of July 16, 1974, the General Counsel revised and transmitted with memorandum of December 4, 1974, the draft policy statement originally transmitted to the Commission by the Bureau of Consumer Protection with memorandum of June 12, 1974. The statement was the product of close coordination between his Office and the Bureau's National Advertising Division.

The above draft policy statement was returned to the Bureau of Consumer Protection with instructions to draft, in conjunction with the General Counsel, for the Commission's consideration a succinct response to the joint petition from Senators Birch Bayh and Frank Moss, and Representatives Les Aspin, Benjamin Rosenthal, and Andrew Young, of October 4, 1974, containing the legal and Constitutional discussion set forth in the draft statement.

By direction of the Commission.

The papers are transmitted to the Bureau of Consumer Protection.

C.A.T.

Charles A. Tobin,
Secretary.

bw

Exhibit 99: FTC Memorandum—Commission Response to Petition on Corporate Image Advertising, With Attachment, March 11, 1975

UNITED STATES GOVERNMENT

Memorandum

TO : Commission DATE: [illegible] 197[illegible]

FROM : Bureau of Consumer Protection

SUBJECT: Commission Response to Petition on Corporate Image Advertising

In response to the Commission Minute of January 7, 1975, resubmitting the draft policy statement on corporate image advertising to the Bureau of Consumer Protection, the staff has drafted the attached letter as a succinct response to the joint petition of Senators Birch Bayh and Frank Moss and Representatives Les Aspin, Benjamin Rosenthal, and Andrew Young of January 9, 1974, and joint letter of October 4, 1974.

Two drafts of the letter are attached for the Commission's consideration, the first containing and the second omitting the list of six factors which the Commission would take into account, among others, in determining whether the dominant appeal and likely effect of a given corporate image advertisement is commercial. (page 3 of first draft). These factors are taken from pages 21 to 23 of the staff's December 4 draft of the proposed statement of enforcement policy. The letters are identical but for this difference. These two versions are offered as the staff was not clear whether or not the Commission wished to include a list of these factors in the letter.

As indicated in these drafts, the staff recommends that the Commission forward with the letter to the Petitioners a copy of the staff's December 4 draft policy statement in order to indicate the extent of the Commission's effort in responding to the petition, which has been pending now for over a year. In order to dispel any confusion as to the status of this draft, the letter would explain that the statement was not issued because of the determination that a lengthy, complex statement was not an appropriate vehicle for developing an enforcement policy in this area.

The letter informs the Petitioners that due to the general public interest in this subject the letter will be made public. The staff believes that to assure ready and uniform availability of the letter, especially in the future, it should be published in the Federal Register as the



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Commission's response to a petition for rulemaking. Statements in a similar form have been published in the Register by other agencies.

Respectfully submitted,

Charles E. Ludlam 3/5/75

Charles E. Ludlam
Attorney
Division of National
Advertising

APPROVED:

Richard B. Herzog 3/5/75

Richard B. Herzog
Assistant Director for
National Advertising

J. Thomas Rosch 3/6/75

J. Thomas Rosch
Director
Bureau of Consumer Protection

CONCURRENCE:

3-6-75

Calvin J. Collier
General Counsel

Attachment to March 11, 1975, Memorandum (See Exhibit 99)

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

The Honorable Frank E. Moss
The Honorable Birch Bayh
United States Senate
Washington, D.C. 20510

Draft

The Honorable Les Aspin
The Honorable Benjamin S. Rosenthal
The Honorable Andrew Young
House of Representatives
Washington, D.C. 20515

Gentlemen:

This is in reference to the petition filed with the Commission on your behalf concerning the regulation of environmental and energy-related claims in corporate image advertising. Reference is also made to your joint letter of October 4, 1974, inquiring as to whether and when a decision will be forthcoming from the Commission on this petition.

Some months ago the Commission directed its staff to explore the legal and policy issues connected with your proposal that the Commission undertake a significant enforcement effort directed at these advertisements. In response to this directive, the staff made a comprehensive study of the issues raised by corporate image advertising. The Commission then directed the staff to draft a proposed statement of enforcement policy. Although cognizant of the considerable time and effort devoted to this proposed policy statement, the Commission decided not to issue it because of the determination that a lengthy, complex statement was not an appropriate vehicle for developing an enforcement policy in this area.

The proposed policy statement drafted by the staff is enclosed for your information.

As described in the proposed policy statement, corporate image advertising can be defined as advertising which describes the corporation itself, its activities, or its policies, but does not explicitly describe any products or services sold by the corporation. The staff's analysis makes clear that regulation of corporate image advertising may involve substantial questions under the First Amendment.

The Supreme Court has certainly upheld government regulation of "commercial" speech. At the same time it is clear that public debate regarding governmental policy or the official conduct of public officials is protected by the First Amendment. Moreover, such expression does not lose its protected character merely because it takes the form of a paid advertisement, or contains erroneous statements. Truth or falsity is not the sole test under the First Amendment.

The Commission shares the Supreme Court's view that the First Amendment embodies the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." The Commission believes that the free speech guarantee requires that government regulation allow breathing room to the expression of views on public issues.

In the Commission's opinion, the Constitutional test to be applied to any particular corporate image advertisement is whether the dominant appeal and likely effect of the advertisement is commercial. Stated in terms of the Federal Trade Commission Act, the question is whether an unfair or deceptive advertisement has as its dominant appeal or likely effect the sale of goods or services or the elicitation of other commercial dealings.

In determining whether the dominant appeal and likely effect of a corporate image advertisement is commercial, the Commission will take the following factors, among others, into account: whether

(a) the claims in the ad relate to the sponsoring corporation's own activities as distinguished from assertions of fact, opinion, or views about general subjects or conditions;

(b) elements typically found in the corporation's product advertisements - for example, logos, tag lines - are also present in the ad;

(c) the corporation sells consumer products under a brand name identifiable or identical with that which appears in the ad;

(d) the dominant purpose of the advertiser in disseminating the advertisement is to induce commercial dealings;

(e) persons viewing the ad are likely to perceive it as the expression of fact, views, or opinions with respect to a public issue; and

(f) the advertisement contains a reference to or depiction of any product or service in which the sponsor has a financial interest.

With respect to matters specifically addressed in your petition, the Commission believes it unnecessary to amend the Commission's resolution regarding substantiation of product advertising, as it already has ample authority under Sections 6, 9, and 10 of the Federal Trade Commission Act to investigate any violations of such Act. Similarly, the Commission believes it unnecessary to adopt a rule prohibiting advertisements which make affirmative misstatements, fail to disclose material facts, or make unsubstantiated claims. Such advertisements, if otherwise subject to the Commission's jurisdiction, and if unfair or deceptive,

clearly violate Section 5. Finally, with reference to the advertisements appended to the petition, the Commission has determined that enforcement proceedings are not warranted at this time.

Please be advised, however, that the Commission is prepared to take such enforcement actions in the future as it deems appropriate and consistent with its understanding of its constitutional and statutory obligations.

Commissioner Hanford dissents from the Commission's action in this matter and would have preferred the adoption of the staff's proposed enforcement policy statement.

Because of general public interest in this subject, the Commission is making public this letter and the enclosures thereto.

By direction of the Commission.

Charles A. Tobin
Secretary

Enclosures

Exhibit 100: FTC Memorandum—Commission Response to Petition on Corporate Image Advertising, March 14, 1975

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : Commission DATE: MAR 14 1975

FROM : Commissioner Dixon

SUBJECT: Commission Response to Petition on Corporate Image Advertising

The staff has drafted two letters and asked the Commission to choose one to send to several congressmen as a succinct statement of the Commission's position in regard to corporate image advertising. I prefer the letter that spells out the various factors that will be considered in determining whether the dominant appeal and likely effect of corporate image advertising is commercial. This information may not be essential to their understanding of the Commission's position, but will give the congressmen and the public (the letter should be published in the Federal Register, as staff recommends) a clearer understanding of what can be expected from the Commission, and even the problems involved.

The staff would enclose "for information" the draft proposed statement of enforcement policy. Either the Commission should adopt this draft, or abandon it. To send it to the congressmen, it would seem to me, is an indirect way of getting it out to the public, possibly to be interpreted as a statement by the Commission. If the Commission is concerned that the substance of that statement will come back to haunt it, then it should not be made public directly or indirectly. Personally, I think the statement is a good one, and, with the changes I suggested in my circulation of December 19, 1974, it is something that we could live with. But, if the Commission continues to disagree with this view, I would not send it to the congressmen in any form, and would, therefore, omit the last paragraph on the first page of the letter to the congressmen; delete the last two sentences in the second paragraph; change the first sentence on page 2 of the letter to read, "Corporate image advertising can be defined as advertising," etc.; change the second sentence in that paragraph to read, "The regulation of corporate image advertising may involve," etc.; and, in the last paragraph, on page 4, delete the reference to enclosures.

I move the more detailed of the two transmitted letters with the changes described above. But, if a majority of the Commissioners indicate at the table that they would adopt the policy statement, then the letter should be redrafted to reflect that the statement is enclosed to serve as a fuller description of the Commission's policy, and the statement should be redrafted to reflect the changes I moved in my December 19 circulation.

Paul Rand Dixon
Commissioner.

Exhibit 101: FTC Minute, March 25, 1975

FOR CONFIDENTIAL STAFF USE ONLY

March 25, 1975

Memorandum for General Counsel,
Director, Bureau of Consumer Protection,
Director of Public Information,
Legal and Public Records:

Commission Enforcement Policy Regarding Corporate Image Advertising
In re: Congressional Petition to Revise Ad Substantiation Program to Include Treatment of Image Advertising

In response to the directive of January 7, 1975, the Bureau of Consumer Protection transmitted for the Commission's consideration with memorandum of March 11 two draft letters in answer to the Congressional joint petition concerning the regulation of environmental and energy-related claims in corporate image advertising.

The Commission directed the Bureau of Consumer Protection to modify the less detailed draft letter transmitted with memorandum of March 11, 1975, in response to the Congressional petition, filed on behalf of Senators Frank E. Moss and Birch Bayh, and Congressmen Les Aspin, Benjamin S. Rosenthal, and Andrew Young, by identifying the enclosed statement as a "Staff Statement to the Commission," and deleting from the last sentence of the first paragraph on page 3 the words "at this time."

The letter responding to the petition concerning the regulation of environmental and energy-related claims in corporate image advertising and referring also to the joint letter of October 4, 1974, inquiring as to whether and when a decision will be forthcoming from the Commission on this petition, enclosing the Staff Statement to the Commission, was approved for forwarding to the above members of the Congress after signature by the Secretary.

The letter advised that the Commission decided not to issue the staff statement because of the determination that a lengthy, complex statement was not an appropriate vehicle for developing an enforcement policy in this area; discussed the Supreme Court's view that the First Amendment embodies the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," with which it agrees; and, with respect to matters specifically addressed in the petition, expressed the Commission's belief that it is unnecessary to amend the Commission's resolution regarding substan-

tisting of product advertising, as it already has ample authority under Sections 6, 9, and 10 of the FTC Act to investigate any violations of such Act, similarly, it is unnecessary to adopt a rule prohibiting advertisements which make affirmative misstatements, fail to disclose material facts, or make unsubstantiated claims since such advertisements, if otherwise subject to the Commission's jurisdiction, and if unfair or deceptive, clearly violate Section 5.

Finally, with reference to the advertisements appended to the petition, the Commission has determined that enforcement proceedings are not warranted; however, the Commission is prepared to take such enforcement actions in the future as it deems appropriate and consistent with its understanding of its constitutional and statutory obligations.

The letter further advised that Commissioner Hanford dissented from the Commission's action in this matter and would have preferred the adoption of the staff's proposed enforcement policy statement; and that, because of general public interest in this subject, the Commission is making public this letter and the enclosures thereto.

It was directed that the forwarding of the letter to the individual petitioners be held pending Commissioner Hanford's determination to append a dissenting statement.

Upon such determination, it was further directed that the letter and enclosures thereto be placed on the public record, and be published in the Federal Register.

For the public record, Commissioners Engman, Dixon, Thompson and Nye voted in the affirmative as to the foregoing action; and Commissioner Hanford dissented.

The Bureau of Consumer Protection was instructed to make a determination as to whether a separate response is required to Senator Thomas McIntyre (D.-N.H.), who is referred to on page 175 of the staff statement to the Commission as a petitioner in this matter.

By direction of the Commission.

The papers are transmitted to the Bureau of Consumer Protection.

C. A. T.

Charles A. Tobin,
Secretary.

bw

Exhibit 102: FTC Statement of Proposed Enforcement Policy

STATEMENT OF PROPOSED ENFORCEMENT POLICY BY THE STAFF OF THE FEDERAL TRADE COMMISSION REGARDING CORPORATE IMAGE ADVERTISING
DECEMBER 4, 1974

The Commission is aware of a growing concern on the part of consumers, commentators, and members of Congress regarding the truth and fairness of claims being made in corporate image advertisements. This concern has been expressed in numerous complaints received by the Commission with respect to corporate image advertisements, including complaints filed by several Senators and Representatives, and by various public interest groups and individual consumers, as well as a petition filed on behalf of six Senators and Representatives. The staff shares this concern and after a review of the nature, extent and economic impact of corporate image advertising and of relevant statutory, constitutional and policy issues has determined that in certain instances the Congressional mandate under the Federal Trade Commission Act, 15 U.S.C. §41, et. seq., empowers the Commission to institute appropriate investigations or other proceedings with respect to such advertisements, and that such action is fully consistent with the United States Constitution and in the public interest. Although the concerns and issues raised by corporate image advertising are familiar to the Federal Trade Commission, the Commission has not previously engaged in an extended discussion of its

responsibilities and authority with respect to such advertising. The staff believes that it is in the public interest for the Commission to inform consumers and advertisers of its policy with respect to regulating corporate image advertising.

The Nature, Extent and Function of Corporate Image Advertising

Corporate image advertising 1/ is advertising which describes the corporation itself, its activities, or its policies, but does not explicitly describe any products or services

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1/ The terms "corporate" or "general promotion" advertising are sometimes also used to describe such advertising. Leading National Advertising (a service that tabulates expenditures) includes under the latter heading advertisements that perform one or more of the following functions:

1. Educate, inform, or impress the public regarding the company's policies, functions, facilities, objectives, ideals, and standards;

2. Build favorable opinion about the company by stressing the competence of the company's management, its scientific know how, manufacturing skills, technological progress and product improvements, and its contribution to social advancement and public welfare, and on the other hand, to offset unfavorable publicity and negative attitudes;

3. Build up the investment qualities of its securities, or improve the financial structure of the company; or

4. Sell the company as a good place to work.

Publishers Information Bureau, Inc., Magazine Service, 1972.

The Commission is primarily concerned with the second of these features.

sold by the corporation. Within the wide range of subjects covered in image ads are descriptions of the corporation's behavior in such diverse areas as research and development and activities and programs reflecting a sense of social responsibility towards, for example, the community or the environment.

The benefits which companies expect from image advertising are as diverse as the ads themselves. A recent survey indicated that corporate executives who engaged in corporate image advertising hoped to benefit their company in the following areas:

Product sales - 47%

Stockholder/financial relations - 64%

Consumer relations - 55%

1/ [Cont'd]
For general discussions of the uses and value of corporate image advertising see Flanagan, George A., Modern Institutional Advertising, McGraw Hill Book Company, 1967; Riley, George A., The Corporation and Its Publics, John Wiley and Sons, Inc., 1963; Bristol, Lee H., Developing The Corporate Image, Charles Scribner's Sons, 1960. For an excellent bibliography of consumer and advertising research related to image advertising see Wyckham, Robert G., ed., Images and Marketing, American Marketing Association, 1971.

Portfolios of corporate image advertisements include: "Strategic Advertising/1850-1962," Time Magazine; "Strategic Advertising: A Portfolio From The Pages of Time," Time Magazine, 1970; "Communicating The Total Corporate Personality," Magazine Advertising Bureau of Magazine Publishers Association, Inc.

33-291 O - 78 - 95

Trade (i.e., supplier or business customer) relations - 46%

Government relations - 32% 2/

But despite the variety of motivations behind them and the diversity of the ads themselves, two trends have become clear. First, the amount spent on corporate image advertising has increased dramatically in the past few years. By a conservative estimate, $268 million was spent in this area in 1972, up 20% from 1970. More than half ($161 million) of this was spent on television, up about 55% from 1970. 3/ Second, this rise in expenditures has been accompanied by a similar rise in corporate interest in the impact of image advertising on product sales.4/

2/ "Are Public Relations Executives Becoming More Involved With Corporate Advertising?" Public Relations Journal, November 1972, at 29 (some respondents gave multiple responses).

3/ "1970 Expenditures For Corporate and Association Advertising," Public Relations Journal, November 1971, at 30; "1970-71 Expenditures for Corporate and Association Advertising," Public Relations Journal, November 1973, at 30.

4/ Compare 1973 results of the Public Relations Journal survey, text at footnote 2 (47% stating prime objective to be product sales; 55% stating consumer relations) with the results of the 1972 survey (19.2% product sales; 31.5% consumer relations). "Are Public Relations Executives Becoming More Involved With Corporate Advertising?," Public Relations Journal, November 1972, at 24.

It is evident that this increasingly powerful force on the national advertising scene warrants careful examination in the discharge of the Commission's law enforcement responsibilities under Section 5 of the Federal Trade Commission Act.

The Economic Impact of Image Advertising

Any Commission action concerning corporate image advertising must of course be consistent both with the statutory mandate of Section 5 of the Federal Trade Commission and with the First Amendment's protection of freedom of speech, press, and petition. Those issues cannot be appropriately resolved by an abstract legal discussion. Rather, it is essential that those issues be addressed in light of a realistic awareness of the economic effects on consumers and businessmen of corporate image advertising. These economic effects are well documented, and are a critical element in determining the status under the First Amendment of particular corporate image advertisements. Accordingly, we will discuss the literature relating generally to the economic effects of corporate image advertising, and then turn immediately to discussion of the statutory and First Amendment issues.

Extensive research confirms the effectiveness of corporate image advertising in furthering the corporation's economic interests, whether in increasing sales, fostering

investment in the corporation's stock, or encouraging recruitment. It has already been noted that these are the purposes of executives who engage in such advertising. A variety of sources confirm that these purposes are being achieved.

In one study corporate image advertising was found to be more effective than product advertisements in inducing favorable purchase attitudes among industrial purchasers. 5/ Eighty businessmen responsible for making industrial purchases were shown both product and image advertising by a fictional company, and asked which was more likely to induce then to solicit a bid from the sponsoring company. The image advertising was also found superior at inducing interest in the company as a future supplier and belief in supplier dependability and product quality.

Other research has also found image advertising effective in creating favorable attitudes towards the sponsoring corporation. 6/ A major, eight year, five part study conducted by Thomas E. Ryan, Inc. for Time magazine, between

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5/ Lehman, Martin A. and Richard N. Cardozo, "Product or Industrial Advertisments?" 13 Journal of Advertising Research 43 (April, 1973).

6/ See Grass, Robert C., et al., "Measuring Corporate Image Ad Effects," 12 Journal of Advertising Research 15 (December, 1972) (DuPont advertising tested before and after first image advertising in several years found to be effective).

1964 and 1972 7/ found that men in upper income, managerial and professional areas who have seen one or more of a company's image advertisements have more favorable opinions about that company than those who have not read any of the company's image advertising. Specifically, exposure to corporate image ads was found to enhance the believability of new product claims, interest in investing in the company's stock, respect for the company's research and development capacities, and resulted in favorable recruitment referrals. Indeed, in the 1972 Ryan study corporate image advertisements emphasizing corporate social responsibility--notably pollution control and minority hiring--favorably influenced even individuals opposed to the theory of corporate social responsibility.

Similarly, a Barrons Magazine study found that corporate image advertising had induced an interest which led to the actual purchase of the advertiser's stock by 60% of the sophisticated money managers surveyed. 8/

7/ "A Pilot Survey to Test Techniques of Measuring the Effects of Corporate Advertising," July 1964; "Corporate Advertising Effectiveness," Report Number 1357, 1965; "Measuring Corporate Advertising Effectiveness," Research Report Number 1422, 1966; "Measuring Strategic Advertising Effectiveness," Research Report Number 1639, 1971; "Strategic Advertising and Attitudes Toward Corporations," 1972.

8/ "The Impact of Corporate Advertising on the Institutional Money Manager," Erdos and Morgan, Inc. survey for Barrons Magazine, 1971. The importance of the environmental aspect of corporate activity to investors was recognized in 1971 by the Securities and Exchange Commission. In that year, it promulgated a release requiring disclosure to investors when compliance with environmental protection statutes may necessitate significant capital outlays, may materially affect the earnings power of the business, or cause material

[Footnote continued]

Consumer research indicates that certain consumer markets may be segmented in terms of concern for the environment 9/ - a principal emphasis in corporate image advertising.

Extensive anecdotal evidence confirms the economic impact of corporate image advertising. 10/ There is

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8/ [Cont'd]
change in the business being carried out or intended to be carried out. Securities Act Release No 5170, Exchange Act Release No. 9252 (July 19 1971), CCH Securities Law Reporter Para.78,150, as amended, Securities Act Release No. 5386 (May 9, 1973).

9/ Kinnear, Thomas, et al, "Ecologically Concerned Consumers: Who Are They?." 38 Journal of Marketing 20 (April 1974); Kinnear Thomas, and James R. Taylor, "The Effect of Ecological Concern on Brand Perceptions," 10 Journal of Marketing Research 191 (May 1973); Henion, Karl E, "The Effect of Ecologically Relevant Information on Detergent Sales," 9 Journal of Marketing Research 10 (February 1972).

10/ "Corporate Advertising: Those who Try it...Like It," Public Relations Journal, November 1972, 43-58 "Communicating the Total Corporate Personality," Magazine Publishers Association, Inc., at 24-28 "Accountability," Newsweek Magazine, 1965 "Texaco--'Putting Aesop to Work'," Public Relations Journal, November 1973, at 44; "RCA--'the Electronic Way'", Public Relations Journal, November 1973, at 49.

general acknowledgement in the business community that image advertising brings long range economic benefits to a company. 11/

Corporate image advertising has long been recognized as particularly valuable during times of shortages, including wars and recessions, when it may not be appropriate to directly advertise products but nevertheless highly desirable to maintain the company's reputation for when the shortages are past. 12/ Studies of advertising before, during and after the 1949, 1954, 1958, and 1961 recessions found that firms which did not cut their advertising during the recession did

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11/ How Public Attitudes Influence Corporate Profits, Research Department, Batten, Barton, Durstine and Osborn, Inc., 1969; Harding, Murray, "Corporate v. Product Advertising," Industrial Marketing, September 1967, at 59; Skylar, David "A Quiet Revolution...The Rise of the Corporate Image," Industrial Marketing, September 1967, at 63.

12/ Among the "Thirty Essential Jobs for Advertising When the Product is Oversold" are to maintain customer good will and acceptance of brands, to enhance the reputation of the company for making quality products, explain the shortages, and to speed the news of innovations or efforts to ease the shortages. "Advertisers Express Belief in Values of Continued Advertising," Printers' Ink, September 8, 1950 at 4 (including "30 Essential Jobs for Advertising When the Product Is Oversold," at 67). (Issue published at the height of concern over shortages engendered by the Korean War.)

much better in sales and profits in the year following these recessions than those who had cut their advertising budgets. 13/ Testimonials of advertising executives obtained over a seventeen-year period substantiate the value of corporate image advertising during times of shortages, including wartime. 14/ These data indicate the economic reasons which lead companies to engage in corporate image advertising, even while shortages of their products may exist.

Statutory Issues Relating To Image Advertising

Section 5 of the FTC Act, which prohibits "unfair methods of competition and unfair or deceptive acts or practices in commerce," is designed to protect both consumers and competitors from economic injury. As discussed above, corporate image advertising can induce economic behavior favorable to the advertiser from consumers, investors, or potential employees. Corporate image advertisements not protected by the First Amendment 15/ within the Commission's

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13/ "Advertising In Recession Periods," The Buchen Company, 1958; "Advertising In Recession Periods -- Revisited," The Buchen Company, 1970; Speech by J. Wesley Rosberg, President, Buchen Advertising, Inc., before the American Business Press, Inc., October 20, 1970.

14/ "Comments on The Value of Advertising in Time of Shortages," Elmo Roper Survey for the American Association of Advertising Agencies, 1947-1964. (World War II).

15/ See infra.

jurisdiction 16/ which convey a deceptive or unfair image of the advertiser are cognizable under Section 5. 17/

The Commission has long recognized that consumers may base a decision to deal or not to deal with a corporation on characteristics of the corporation itself that would not be perceived as having any bearing upon characteristics of its products. In the very first volume of its reported decisions, the Commission prohibited false representations concerning the monopoly status of a corporation. Wayne Oil

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16/ Section 5(a)(6) of the FTC Act grants jurisdiction to the Commission over persons, partnerships, or corporations. "Corporation" is defined in Section 4 to include any company or association "which is organized to carry on business for its own profit or that of its members."

It should be noted that, as a rule, the expression of "honest opinion or belief" by a party not engaged or financially interested in the trade involved is outside the scope of the FTC Act. Scientific Manufacturing Co. v. FTC, 124 F.2d 640, 644 (3d Cir. 1941). Compare Perma-Maid, Inc. v. FTC, 121 F.2d 282 (6th Cir. 1941).

17/ Advertising falls within the FTC Act's proscriptions not only when there is proof of actual deception, but also when the representations made have a tendency or capacity to deceive the public. FTC v. Sterling Drug, Inc., 317 F.2d 669, 674 (2d Cir. 1963); American Life and Accident Insurance Co. v. FTC, 255 F.2d 289, 293 (8th Cir.), cert. denied. , 358 U.S. 875 (1958); Charles of the Ritz Distributors Corp. v. FTC, 143 F.2d 676, 680 (2d Cir. 1944).

Tank Co., 1 F.T.C. 259 (1918). 18/ Similarly, in 1929 it was held unfair for a company falsely to represent that its employees belonged to a labor union. Columbia Pants Mfg. Co., 13 F.T.C. 61 (1929). In finding that "a substantial proportion of the purchasing public . . . prefers to purchase . . . articles manufactured in factories . . . using . . . workers belonging to, or affiliated with, some union of organized labor," the Commission again recognized that consumers frequently will base a purchase decision on their perception of the company's activities as well as the characteristics of its products, especially on the facts of this case at the time when unions were a growing force in American life. See also The Blind Weavers, Inc., 22 F.T.C. 145 (1936)

18/ See Fleischman Co., 1 F.T.C. 119, 131 (1918) (use of "bogus independent" to acquire "trade which respondent was in danger of losing"); Armour and Co. and Farmers' Cooperative Fertilizer Co., 1 F.T.C. 430 (1919) (concealment of respondent's control of a "cooperative" fertilizer company held deceptive, apparently because consumers preferred not to deal with a monopolist). The Armour case takes on special significance when seen against its historic background. Armour & Co. had in 1919, been for some time the subject of a great deal of public criticism by the muckrakers of that era, not only because it was part of the alleged meat "packing trust," but also because of the exposure of the terrible working and sanitary conditions in Chicago packing houses by Upton Sinclair's The Jungle.

(misleading corporate name found to "divert trade from competitors of truthfully marked rugs who sell their products on their merits rather than on the basis of sympathy. . .").19/

19/ The scope of the prohibitions of Section 5, and the standard of public interest, is further illustrated by the Commission's past actions in protecting consumer preferences regarding product characteristics not related to the immediate economic or physical benefit to the consumer of consuming the product. Thus, the Commission issued a complaint and accepted a consent order in In Re Ex-Cello Corporation, 82 F.T.C. 36 (1973) barring false claims that milk cartons were biodegradeable and presented no potential "harm to the environment. 82 F.T.C. at 44. Also, the Commission pursued and obtained the voluntary agreement of thirty manufacturers of phosphate detergents regarding the disclosure of the percentage of phosphorous and biodegradability of such products. Press Release, Federal Trade Commission, August 6, 1973. A long line of Commission cases dealing with products of foreign origin rested essentially on the simple fact of consumer preference. See e.g., Manco Watch Strap Co., 60 F.T.C. 495, 510-515 (1962). In the so-called skip tracer cases, the Commission found that there was public interest in protecting third parties from being induced through deception to volunteer information about missing debtors, notwithstanding that the only injury was to the preferences and values of those deceived and not to their person or pocketbook. See, e.g., National Retail Board of Trade, 57 FTC 666, 674 (1960).

The legal relevance of consumer preference in and of itself is not limited to the Federal Trade Commission Act. Recently, for example, the D.C. Circuit recognized that regulatory consequences arise under the Securities Exchange Act of 1934 with regard to investors who "wish to have their assets used in a manner which they believe to be more socially responsible but possibly less profitable than that which is dictated by present company policy." Medical Committee for Human Rights v. SEC, 432 F.2d 659, 681 (D.C. Cir. 1970), vacated as moot, 404 U.S. 403 (1971).

It is indisputable that the last decade has witnessed an enormous expansion of consumer consciousness about business performance. Aspects of company performance which few people may have thought about ten years ago are very much in the forefront of many people's minds. A new concept of "corporate responsibility" has become the subject of an extensive literature. 20/

20/ Among the literally thousands of works on this subject are included the following: Bauer, Raymond A. and Dan H. Fenn, Jr., The Corporate Social Audit (New York: Russell Sage Foundation, 1972); Business and Society, A Biweekly Report on Business and Social Responsibility, Milton M. Moskoswitz, ed., MRM Publishing Co., Inc., San Francisco; Business and Society Review, Warren, Gorham and Larmont, Inc. (quarterly magazine); Economic Priorities Report, Council on Economic Priorities, New York (bimonthly report on "practices of U.S. corporations in employment, environmental quality, military production, political influence, and foreign activities"); Friedman, Milton, "The Social Responsibility of Business Is to Increase Its Profits," The New York Times Magazine, September 13, 1970, pp.31ff; Initiatives In Corporate Responsibility, Consumer Subcommittee of the Committee on Commerce, U.S. Senate (Washington, D.C.: U.S. Government Printing Office, October 1972); Jacoby, Neil H., Corporate Power and Social Responsibility: A Blueprint for the Future, MacMillan Publishing Co., Inc., New York, 1973; Schwartz, Donald E., "The Public-Interest Proxy Contest: "Reflections of Campaign G.M.,'" 69 Mich. L. Rev. 419 (January 1971); Simon, John G., Jon P. Gunnemann, and Charles W. Powers, The Ethical Investor: Universities and Corporate Responsibility, Yale University Press, 1972. Social Responsibilities of Business Corporations: A Statement on National Policy By the Research and Policy Committee of The Committee For Economic Development, Committee For Economic Development, New York, June 1971.

The manifestations of such public interest are clear. If, for example, a person from a minority group spends his money on the products of a company which falsely advertises that it has a non-discriminatory minority hiring and promotion policy, they have been made unwitting accomplices in activities deeply distasteful to him. Moreover, he has thereby not given his dollars to a company which in fact is pursuing constructive minority hiring and promotion policies. While such affronts to a consumer's expectations may not be easily measurable in dollar terms, they are as much a subject of legitimate concern as those resulting from deception concerning other attributes of a product he has purchased.

The effect on consumers of image advertising may be particularly evident with respect to claims regarding a company's manufacturing fungible products, where the claims may amount to a form of specious product differentiation. To the extent that the relevant products are non-fungible, consumers who are drawn to a specific product by a misleading depiction of the corporation may be deceived to their detriment into choosing products that are less suitable for them than competing products.

Moreover, the company which is genuinely attempting to act in a socially responsible manner but does not advertise that fact can be injured by the false social responsibility

claims of a competitor. As with any advertising the effects on competition of deceptive advertising are difficult to ascertain but cannot, because of that difficulty, be ignored. To the extent that false claims by competitors make it less socially profitable for companies to act in a socially responsible manner, there is an injury to society as a whole.

As shown herein, the consumer interests affected by corporate image advertising are familiar to the Federal Trade Commission. We believe there is a public interest in encouraging full accountability by maintaining legal standards for corporate image claims, especially with respect to claims regarding corporate social responsibility. In response to widespread consumer interest, corporate social responsibility is emerging as a medium of competition. This trend will be enhanced if it is clear that standards of deception and unfairness apply to claims about corporate responsibility. We believe that the absence of accountability may in fact discourage claims of corporate social responsibility and even the practices underlying such claims. Under the Federal Trade Commission Act, the Commission has a responsibility to prevent deceptive and unfair practices with respect to corporate image advertising.

Corporate Image Advertising
And The First Amendment

It is against this background, then, that the Commission should address the issue of the status under the First Amendment of corporate image advertising. It is clear that certain speech is sufficiently related to commercial activities of the advertiser to be subject to the traditional governmental regulation of commercial activity 21/ and, therefore, does not receive the type of First Amendment protection accorded other types of speech. 22/ No simple test is available to determine when this point is reached in most cases. The

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21/ The Commission's statutory mandate is to prohibit deceptive or unfair acts or practices, or unfair competitive practices, when they occur in commerce, and its jurisdiction is limited to companies "organized to carry on business for its profit or that of its members." Sec. 4, Federal Trade Commission Act, 15 U.S.C. 44. See Community Blood Bank of the Kansas City Area, Inc. v. F.T.C., 405 F.2d 1011 (8th Cir. 1969). Cf. Rogers v. F.T.C., 492 F.2d 228 (9th Cir. 1974), cert. denied, 43 U.S.L.W. 3209 (October 15, 1974) (Commission determination not to regulate campaign activities of opponents of anti-litter measure upheld).

22/ Valentine v. Chrestensen, 316 U.S. 52 (1941); Pittsburgh Press v. Pittsburgh Human Relations Commn., 413 U.S. 376 (1973). See Capital Broadcasting Co. v. Kleindiest, 405 U.S. 1000 (1972), aff'g Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971); Banzhaf v. Federal Communications Commission, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969); Gibony v. Empire Storage Co., 336 U.S. 490 (1949).

Numerous cases involving the Federal Trade Commission hold that there is no constitutional right to disseminate false advertisements. See, e.g., S.S.S. Company v. F.T.C., 416 F.2d 226, 231 (6th Cir. 1969); Regina Corporation v. F.T.C., 322 F.2d 765,

[Footnote continued]

courts have held that an otherwise protected statement does not lose its protection solely because it takes the form of a paid advertisement 23/ or solely because it is false. 24/ The courts have also recognized that otherwise unprotected statements do not gain First Amendment protection solely because they provide information 25/ or even bear upon

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22/ [Cont'd]
770 (3d Cir. 1963); E.F. Drew and Company v. F.T.C. 235 F.2d 735, 739-740 (2d. Cir. 1956), cert. denied, 352 U.S. 969 (1957).

First Amendment claims for product advertising have been rejected even where the product is controversial. Banzhaf, supra, 405 F.2d at 1101-1102 (advertising for controversial product held not protected by First Amendment). Cf. In Re Alan F. Neckritz, (Chevron), 29 F.C.C. 2d. 807, 812, reconsid. denied, 37 F.C.C. 2d 528 (1972) (making a controversial claim regarding the merits of a product is not to argue a position on a controversial issue of public importance).

23/ New York Times v. Sullivan, 376 U.S. 254, 266 (1967). In extending constitutional protection to a paid advertisement protesting police abuse on behalf of a civil rghts group, the Court stated that the First Amendment embodies the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ." 367 U.S. at 270.

24/ New York Times, supra, 376 U.S. at 271; Gertz v. Robert Welch, 94 S.Ct. 2297, 3007 (1974) ("Under the First Amendment there is no such thing as a false idea").

25/ Pittsburgh Press Co., supra, 413 U.S. at 388 (claim that commercial advertising serves as a medium for "exchange of information" insufficient to "abrogate the distinction between commercial and other speech"); Valentine, supra, 316 U.S. at 55 (First Amendment does not protect dissemination of commercial handbill, even though it contained "matter proper for public information"); Texas Gulf Sulphur Co. v. S.E.C., 446 F.2d 1301 (2d Cir. 1971) (regulation of corporation's release of news of major mining discovery); New York State Broadcasters Assn. v.
[Footnote continued]

"issues of general or public interest." 26/ In this area, it is essential that the Commission make factually careful and constitutionally informed judgments in the resolution of close questions.

The approach which we find has been taken by the courts in comparable situations under the First Amendment is to look to the likely effect and appeal of the speech in question. 27/ We believe that both substantial breadth for First Amendment interests and adequate recognition of the congressionally-mandated interest in regulating commercial conduct can best be preserved by

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25/ [Cont'd]
United States, 414 F.2d 990, 997 (2d Cir.), cert. denied, 396 U.S. 1061 (1969) (prohibition on dissemination of lottery information, including news as to the amount a lottery realized for educational purposes, upheld). Compare Perma-Maid Co. v. F.T.C., 121 F.2d 282 (6th Cir. 1941) with Scientific Manufacturing Co. v. F.T.C., 124 F.2d 640 (3rd Cir. 1941) (ad for cookware containing identical health information uprotected when disseminated by person with financial interest in cookware trade, protected when disseminated by noncommercial publicist); In Re Firestone Tire and Rubber Co., 81 F.T.C. 398, 472 (1973), Commission order upheld, 481 F.2d 246 (6th Cir. 1973), cert. denied, 414 U.S. 1112 (1973) (to decline to regulate advertisements containing information of "importance to consumers" would make a "mockery" of Commission mandate to prohibit unfair and deceptive advertising).

26/ Gertz, supra, 94 S.Ct. at 3010 (upholding defamation action). See Curtis Pub. Co. v. Butts, 388 U.S. 130, 150 (1967) (Harlan, J.) ("right to communicate information of public interest is not 'unconditional'").

27/ See Pittsburgh Press, supra, 413 U.S. at 388 (Court found that the grouping by a newspaper of want-ads in sex designated columns had the "practical effect" of "an overtly
[Footnote continued]

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looking to the dominant appeal and likely effect of such speech 28/ to determine whether or not it is constitutionally protected.

27/ [Cont'd]
discriminatory want-ad"); NLRB v. Gissel Packing Co., 395 U.S. 575, 619-620 (1969) (consideration of likely "impact" of employer's anti-union statements upon employees who were "particularly sensitive to the rumors of plant closing"); Eastern Railroad President's Conference v. Noerr Motor Freight, 365 U.S. 127, 144 (1961) (effectiveness of railroad's lobbying campaign cited to support conclusion that railroad's principal effort had been a protected attempt "to influence legislation" rather than a prohibited attempt "to interfere with business relationships in a manner proscribed by the Sherman Act"); New York State Broadcasters Assn., supra, 414 F.2d at 997 (court scrutinized whether information concerning lotteries had the effect of "directly" promoting a lottery or merely "broadcasting about it").

28/ See Miller v. California, 413 U.S. 15, 24 (1973) (certain speech can be banned if its "dominant theme" is prurient and the work "taken as a whole" lacks "serious literacy, artistic, political or scientific value"); New York State Broadcasters Assn., supra, 414 F.2d at 998 (news concerning the amount a lottery realized for new school construction would be protected if it had only the "incidental effect" of promoting a lottery, but could be prohibited if integrated in a lottery "announcement" which "directly promot[es]" the lottery). Many other cases have upheld government regulation where the appeal or effect of the speech place it within the ambit of a regulatory statute, notwithstanding that the speech also had a more than a trivial impact on a First Amendment interest. Banzhaf, supra, 405 F.2d 1052 (position on health and safety issue); U.S. v. Bob Lawrence Realty, 474 F.2d 115, 122 (5th Cir. 1973), cert. denied, 414 U.S. 826 (1974) (views on race relations); Pittsburgh Press, supra, 413 U.S. 376 (editorial policy of newspaper); Texas Gulf Sulphur, supra, 446 F.2d 1301 (news of major mining discovery); Perma-Maid Co., supra, 121 F.2d 282 (views on health and safety issue); Gissel Packing Co., supra, 395 U.S. 575 (employer's views on labor relations); Ginzburg v. United States, 383 U.S. 463 (1966) (artistic expression of acknowledged social value); Breard v. Alexandria, 341 U.S. 622 (1951) (literary expression); and United States v. O'Brien 391 U.S. 367 (1968) (political protest). See also footnote 33, infra.

Consequently, we propose that the Commission proceed against unfair or deceptive corporate image advertising in situations where the dominant appeal and likely effect of the advertisement is commercial. Under Section 5 of the Federal Trade Commission Act, the question in each instance will be whether the dominant appeal and likely effect of an advertisement relates to consumer and business purchases, investment decisions, and employee recruitment or morale, rather than to the formation of public opinion about or action on a public issue.

Based upon our examination of corporate image advertising, we anticipate that the application of this standard will often require a careful analysis of the particular advertisement in question. 29/ Claims in certain corporate image advertisements may arguably be capable of eliciting both commercial responses and political ones--for example, claims which describe corporate behavior that is itself the subject of public controversy.

29/ This is an appropriate role for this regulatory agency to take in attempting to discharge its statutory responsibilities in situations raising constitutional issues. Indeed, the courts give particular weight to agency factual determinations in such situations. See, e.g., Gissel Packing Co., supra, 395 U.S. at 620 (N.L.R.B.); SEC v. Wall Street Transcript Corp., 422 F.2d 1371 (2d Cir.), cert. denied, 398 U.S. 958 (1970).

In determining whether such a corporate image advertisement has a dominant commercial appeal and likely effect, we believe the Commission should take the following factors, among others into account: whether

(a) the claims in the ad consist of claims relating to the sponsoring corporation's own activities as distinguished from assertions of fact, opinion, or views about general subjects or conditions;

(b) elements typically found in the corporation's product advertisements - for example, logos, tag lines - are also present in the ad;

(c) the corporation sells consumer products under a brand name identifiable or identical with that which appears in the ad;

(d) the dominant purpose of the advertiser in disseminating the advertisement is economic 30/;

30/ See, e.g., Noerr, supra, 365 U.S. at 140-141; Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jamison v. Texas, 318 U.S. 413 (1943).

Judge Frank, dissenting in the lower court in Chrestensen, observed: "Motive is a persuasive interpreter" of "equivocal conduct." Chrestensen v. Valentine, 122 F.2d 511, 518 n.7 (2d Cir. 1941). Judge Frank would take judicial notice that the "dominant purpose of most men, when engaged in business, is to seek customers and make profits." Id. at 519 (Frank J., dissenting) (emphasis in original). Although New York Times v. Sullivan, supra, is sometimes cited as holding purpose "immaterial," 365 U.S. at 266, the profit motive held immaterial was that of the medium (i.e., the New York Times), not the civil rights group which sponsored the ad. As the Times Court

[Footnote continued]

(e) persons viewing the ad are likely to perceive it as the express of fact, views, or opinions with respect to a public issue 31; and

(f) the advertisement contains a reference to or depiction of any product or service in which the sponsor has a financial interest. 32/

30/ [Cont'd]
recognized, to deny protection to an ad merely because a newspaper profits from its placement would severely limit the rights of individual speakers who cannot afford to buy a printing press. 365 U.S. at 266. See Perma-Maid Co., supra, 121 F.2d 282, and Scientific Manufacturing, supra, 124 F.2d 640, Ginzburg, supra, 383 U.S. at 474 (evidence of purpose to pander "may be probative with respect to the nature of the material in question").

31/ Obviously, the mere appending of a "moral or civic platitude" to an otherwise clearly commercial advertisement will not alter the orientation of an advertisement such that its dominant appeal or effect is with respect to a public issue, thus serving to immunize that advertisement from regulation. Valentine v. Chrestensen, supra, 316 U.S. at 55. Nor will references to a public issue employed as a "sham" to evade otherwise proper regulation immunize an ad from regulation. Noerr, supra, 365 U.S. at 144. See Ginzburg, supra, 383 U.S. at 474 n.17; California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972); Kois v. Wisconsin, 408 U.S. 229, 231 (1972) ("a quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication").

32/ Strictly speaking, a corporate image advertisement, as defined in this Statement, does not make a direct reference to the sponsor's products or services. However, the overall character of some advertisements is that of image advertising, despite a reference to a product or service.

While none of these factors is often alone determinative of the constitutional status of an image advertisement, each one relates to the capacity of such advertisement to affect commercial behavior.

It can be seen that the application of these factors may mean that a statement which is in fact of relevance to a public issue may be regulated when it appears in the context of one advertisement, and constitutionally protected when it appears in another. This result is not novel under the First Amendment. 33/ The possibility that a statement

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33/ See N.L.R.B. v. Gissel Packing Co., supra, 395 U.S. at 617-618 (1969) (anti-union statements that the employer might otherwise be "freer" to make could be regulated when made by an employer to his employees in the context of his "limited relationship" with them during a labor dispute); Ginzburg, supra, 383 U.S. at 475-476 (sexually suggestive materials may be banned as obscene when presented in a titillating manner even assuming that "in other contexts the material would escape such condemnation"); New York State Broadcasters Assn., supra, 414 F.2d at 998 (information concerning the benefits to be realized from a lottery for education could "nonetheless be banned" in advertising, even though they would be protected when presented as a "news" item); Bob Lawrence Realty, Inc., supra, 474 F.2d at 122 ("Informational value" of "making racial representations to obtain the business of a potential seller when the racial statement presents the truth" held "clearly outweighted by the government's overriding interest in preventing blockbusting" under the Fair Housing Act of 1968).

The Commission has previously recognized that the addition of a relatively few words to a statement may significantly alter the context and, thereby, the status of the statement under the First Amendment. See Enforcement Policy in Regard to the Advertising of Books, 36 Fed. Reg. 13414 (July 21, 1971).

subject to the Federal Trade Commission Act when made in a predominantly commercial context may nevertheless be constitutionally protected when made in a predominantly political context supports the appropriateness of the dominant appeal and likely effect standard: no item of information need be denied to the public debate, and the chilling effect of Commission action would be minimal. 34/ At the same time, however, the standard will enable the Commission to bar deception or unfairness in such statements when their dominant appeal and likely effect will be to elicit economic behavior from consumers, commercial customers, investors, or present or prospective employees, in direct furtherance of the commercial interests of the advertiser in his or her dealings with those groups.

34/ Compare Banzhaf, supra, 405 F.2d at 1101 (constitutionality of "Fairness Doctrine" requirement of airing of anti-smoking advertisements supported by fact that this doctrine did not ban any speech) with Robinson v. American Broadcasting Companies, Inc., 441 F.2d 1396, 1399 (6th Cir. 1971) (denial of request for injunction against allegedly defamatory anti-smoking commercials because - unlike Banzhaf such injunction "would be a ban on speech"). See also Capital Broadcasting, supra, 333 F. Supp. at 593-94 (Wright, J., disseminting) (although dissenter found statute banning all cigarette commercials to violate First Amendment, he would uphold statute which would "force the removal of deceptive claims" and "require [disclosure] of ... hazardous nature of ... product").

Exhibit 103: FTC Press Release, April 30, 1975

WASHINGTON, D. C. 20580

For further information call: Office of Public Information, (202) 962-7144.
Arthur L. Amolsch, Director

FOR RELEASE AFTER 7:00 A.M., EDT, Wednesday, April 30, 1975

FTC ANSWERS PETITION CONCERNING
CORPORATE IMAGE ADVERTISING

The Federal Trade Commission has sent a letter to Senator Thomas McIntyre, Senator Frank Moss, Senator Birch Bayh, Representative Les Aspin, Representative Benjamin Rosenthal, and Representative Andrew Young responding to a Petition they filed on January 9, 1974, concerning the regulation of claims in so-called corporate image advertising.

The letter states:

The Honorable Thomas McIntyre
The Honorable Frank E. Moss
The Honorable Birch Bayh
United State States Senate
Washington, D.C. 20510

The Honorable Les Aspin
The Honorable Benjamin S. Rosenthal
The Honorable Andrew Young
House of Representatives
Washington, D.C. 20515

Gentlemen:

This is in reference to the petition filed with the Commission on your behalf concerning the regulation of environmental and energy-related claims in corporate image advertising. Reference is also made to your joint letter of October 4, 1974, inquiring as to whether and when a decision will be forthcoming from the Commission on this petition.

Some months ago the Commission directed its staff to explore the legal and policy issues connected with your proposal that the Commission undertake a significant enforcement effort directed at these advertisements. In response to this directive, the staff made a comprehensive study of the issues raised by corporate image advertising. The Commission then directed the staff to draft a proposed statement of enforcement policy. Although cognizant of the considerable time and effort devoted to this proposed policy statement, the Commission decided not to adopt it because of the determination that a lengthy, complex statement was not an appropriate vehicle for developing an enforcement policy in this area.

The proposed policy statement drafted by the staff is enclosed for your information.

DO25-IMAGE

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE $300

POSTAGE AND FEES PAID
U. S. FEDERAL TRADE COMMISSION

As described in the proposed policy statement, corporate image advertising can be defined as advertising which describes the corporation itself, its activities, or its policies, but does not explicitly describe any products or services sold by the corporation. The staff's analysis makes clear that regulation of corporate image advertising may involve substantial questions under the First Amendment.

The Supreme Court has certainly upheld government regulation of "commercial" speech. At the same time it is clear that public debate regarding governmental policy or the official conduct of public officials is protected by the First Amendment. Moreover, such expression does not lose its protected character merely because it takes the form of a paid advertisement, or contains erroneous statements. Truth or falsity is not the sole test under the First Amendment.

The Commission shares the Supreme Court's view that the First Amendment embodies the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." The Commission believes that the free speech guarantee requires that government regulation allow breathing room to the expression of views on public issues.

In the Commission's opinion, the Constitutional test to be applied to any particular corporate image advertisement is whether the dominant appeal and likely effect of the advertisement is commercial. Stated in terms of the Federal Trade Commission Act, the question is whether an unfair or deceptive advertisement has as its dominant appeal or likely effect the sale of goods or services or the elicitation of other commercial dealings.

With respect to matters specifically addressed in your petition, the Commission believes it unnecessary to amend the Commission's resolution regarding substantiation of product advertising, as it already has ample authority under Sections 6, 9, and 10 of the Federal Trade Commission Act to investigate any violations of such Act. Similarly, the Commission believes it unnecessary to adopt a rule prohibiting advertisements which make affirmative misstatements, fail to disclose material facts, or make unsubstantiated claims. Such advertisements, if otherwise subject to the Commission's jurisdiction, and if unfair or deceptive, clearly violate Section 5. Finally, with reference to the advertisements appended to the petition, the Commission has determined that enforcement proceedings are not warranted.

Please be advised, however, that the Commission is prepared to take such enforcement actions in the future as it deems appropriate and consistent with its understanding of its constitutional and statutory obligations.

Because of general public interest in this subject, the Commission is making public this letter and the enclosure thereto.

By direction of the Commission.

Charles A. Tobin
Secretary

Enclosure

Although the Commission chose not to adopt the staff draft of a Statement of Policy referred to in the letter, the Statement was enclosed with this response to the Petitioners. Both the letter and staff draft of a Statement of Policy are available to the public and copies of the staff draft of a Statement of Policy as well as the January 9, 1974, Petition to which the Commission is here responding are available upon request from Legal and Public Records, Federal Trade Commission, Washington, D.C. 20580 (Telephone No. (202) 962-5214).

FEDERAL COMMUNICATIONS COMMISSION JURISDICTION

Exhibit 104: *Banzhaf* v. *FCC*, 405 F.2d 1082 (D.C. Cir. 1968)

John F. BANZHAF, III, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

United States of America, Respondents,

WTRF-TV, Inc. and National Association of Broadcasters, American Broadcasting Companies, Inc., the Tobacco Institute, Inc., the American Tobacco Company, Brown & Williamson Tobacco Corp., Larus & Brother Co., Inc., Liggett & Myers Tobacco Co., Philip Morris, Inc., R. J. Reynolds Tobacco Co., United States Tobacco Co., P. Lorillard Co., Intervenors.

WTRF-TV, INC. and National Association of Broadcasters, Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

United States of America, Respondents,

Heart Disease Research Foundation et al., Intervenors.

The TOBACCO INSTITUTE, INCORPORATED, et al., Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

United States of America, Respondents.

Nos. 21285, 21525, 21526, 21577.

United States Court of Appeals
District of Columbia Circuit.

Argued June 25, 1968.

Decided Nov. 21, 1968.

Petitions for review of orders of the Federal Communications Commission. The Court of Appeals, Bazelon, Chief Judge, held, inter alia, that Cigarette Labeling Act of 1965 does not constitute congressional preemption of field of regulation addressed to health problem posed by cigarette smoking and does not deny FCC authority to require radio and television stations which carry cigarette advertising to devote significant amount of broadcast time to presenting case against cigarette smoking. The Court also held that the cigarette ruling did not violate the First Amendment.

Affirmed.

Wilbur K. Miller, Senior Circuit Judge, dissented in part.

1. Telecommunications ⇐435

FCC ruling requiring radio and television stations which carry cigarette advertising to devote significant amount of broadcast time to presenting case against cigarette smoking, which does not require inclusion of any statement in advertising of cigarettes, does not violate letter of Cigarette Labeling Act of 1965. Federal Cigarette Labeling and Advertising Act, §§ 5, 5(b, c), 10, 15 U.S. C.A. §§ 1334, 1334(b, c), 1339.

2. Telecommunications ⇐435

Cigarette Labeling Act of 1965 does not constitute congressional preemption of field of regulation addressed to health problem posed by cigarette smoking and does not deny FCC authority to require radio and television stations which carry cigarette advertising to devote significant amount of broadcast time to presenting case against cigarette smoking. Federal Cigarette Labeling and Advertising Act, §§ 2–10, 5(b, c), 15 U.S.C.A. §§ 1331–1339, 1334(b, c).

3. Health ⇐20

Fact that Congress considered and declined to adopt broader legislation at hearings from which Cigarette Labeling Act of 1965 emerged did not establish that it intended to bar otherwise authorized agency action under established powers and duties by preempting field of regulation addressed to health problem posed by cigarette smoking. Federal Cigarette Labeling and Advertising Act, §§ 2–10, 5(b, c), 15 U.S.C.A. §§ 1331–1339, 1334(b, c).

4. Statutes ⇐181(1)

Court must decide questions of legislative intent by the lights they have, not by those they might have had.

5. Telecommunications ⇐435

FCC's 1964 disclaimer of intent to deal with cigarette problem did not deprive it of authority, subsequent to enactment of Cigarette Labeling Act of 1965, to require radio and television stations which carry cigarette advertising to devote significant amount of broadcast time to presenting case against cigarette smoking. Federal Cigarette Labeling and Advertising Act, §§ 2–10, 5(b, c), 15 U.S.C.A. §§ 1331–1339, 1334 (b, c).

6. Telecommunications ⇐429

Power of FCC to designate programming not in the public interest authorizes FCC to regulate broadcast content. Communications Act of 1934, §§ 315, 315(a), 326, 47 U.S.C.A. §§ 315, 315(a), 326.

7. Telecommunications ⇐435

Broadcast licensee has broad discretion in giving specific content to duties to strike balance between various interests of the community or to provide reasonable amount of time for presentation of programs devoted to discussion of public issues, and on application for renewal of license FCC will focus on licensee's overall performance and good faith rather than on specific errors it may find him to have made. Communications Act of 1934, §§ 315, 315(a), 326, 47 U.S.C.A. §§ 315, 315(a), 326.

8. Telecommunications ⇐432

Public interest rulings of FCC relating to specific program content do not invariably amount to "censorship" within meaning of Communications Act. Communications Act, §§ 315, 315(a), 326, 47 U.S.C.A. §§ 315, 315(a), 326.

See publication Words and Phrases for other judicial constructions and definitions.

9. Telecommunications ⇐432

In view of settled practice of FCC of issuing rulings as to licensee's program content, doubtful issue whether Congress originally considered such rulings to constitute "censorship" would be resolved in the negative. Communications Act of 1934, §§ 315, 315(a), 326, 47 U.S.C.A. §§ 315, 315(a), 326.

10. Constitutional Law ⇐62

The "public interest" is too vague a criterion for administrative action unless it is narrowed by definable standards, especially when First Amendment issues are involved. U.S.C.A.Const. Amend. 1.

11. Telecommunications ⇐435

Ruling of FCC requiring radio and television stations which carry cigarette advertising to devote significant amount of broadcast time to presenting case against cigarette smoking could not be upheld merely on the grounds that it might reasonably be thought to serve the public interest, but as public health measure addressed to unique danger authenticated by official and congressional action, ruling was not invalid on account of its unusual particularity. Communications Act of 1934, § 307, 47 U.S.C.A. § 307.

12. Statutes ⇐219

In absence of evidence to the contrary, Congress would be deemed to have acquiesced in determinations of Radio Commission and the FCC that authority to license in the public interest includes authority to consider the public health. Communications Act of 1934, § 307, 47 U.S.C.A. § 307.

13. Telecommunications ⇐435

Authority of FCC to require radio and television stations which carry cigarette advertising to devote significant amount of broadcast time to presenting case against cigarette smoking does not license the commission to scan the airways for offensive material with no more discriminating a lens than the "public interest" or even the "public health". Communications Act of 1934, § 307, 47 U.S.C.A. § 307.

14. Constitutional Law ⇐90

First Amendment does not forbid FCC regulation of content of radio and

television programs. Communications Act of 1934, § 307, 47 U.S.C.A. § 307; U.S.C.A.Const. Amend. 1.

15. Constitutional Law ⇐90

FCC ruling requiring radio and television stations which carry cigarette advertising to devote significant amount of broadcast time to presenting case against cigarette smoking, supported by public health power of the Communications Act, does not abridge First Amendment freedoms of speech or press. Communications Act of 1934, § 307, 47 U.S.C.A. § 307; U.S.C.A.Const. Amend. 1.

16. Telecommunications ⇐435

Requiring radio and television stations which carry cigarette advertising to grant antismokers equal time could reasonably be found to be unnecessary intrusion upon licensees' discretion. Communications Act of 1934, § 307, 47 U.S.C.A. § 307.

17. Telecommunications ⇐435

Public health rationale supporting FCC ruling requiring radio and television stations which carry cigarette advertising to devote significant amount of broadcast time to presenting case against cigarette smoking would not justify compelling broadcasters to inform public that smoking might not be dangerous, and FCC did not abuse its discretion in refusing to require rebuttal time for cigarette manufacturers. Communications Act of 1934, § 307, 47 U.S.C.A. § 307.

18. Telecommunications ⇐437

Remedy of cigarette manufacturers raising issue of "fairness" with respect to FCC ruling requiring radio and television stations which carry cigarette advertising to devote significant amount of broadcast time to presenting case against cigarette smoking, because of FTC warning deterring manufacturer from making health claims in their advertisements, did not lie in particularization of FCC's fairness doctrine. Communications Act of 1934, § 307, 47 U.S.C.A. § 307.

19. Telecommunications ⇐437

Where FCC ruling requiring radio and television stations which carry cigarette advertising to devote significant amount of broadcast time to presenting case against cigarette smoking was made without providing interested parties either notice or opportunity to be heard, but numerous petitions for review were subsequently entertained and ruling was made prospective from date of affirming order, there was no prejudice to substantial rights. Communications Act of 1934, § 307, 47 U.S.C.A. § 307.

20. Telecommunications ⇐435

Premises of FCC ruling requiring radio and television stations which carry cigarette advertising to devote significant amount of broadcast time to presenting case against cigarette smoking, that cigarette advertising promotes smoking as desirable habit, that substantial authority regards habit as dangerous to health and that existing sources were inadequate to inform public of danger, were supported by record. Communications Act of 1934, § 307, 47 U.S.C.A. § 307.

Mr. John F. Banzhaf, III, petitioner pro se, and Mr. Earle K. Moore, New York City, of the bar of the Court of Appeals of New York, pro hac vice, by special leave of court, for petitioner in No. 21,285 and intervenor in Nos. 21525–6.

Mr. Howard C. Westwood, Washington, D. C., with whom Messrs. Ernest W. Jennes, Herbert Dym, Jonathan D. Blake and Richard S. Morey, Washington, D. C., were on the brief for petitioners in Nos. 21525–6. Mr. Jerome Ackerman, Washington, D. C., also entered an appearance for petitioners in Nos. 21525–6.

Mr. Abe Krash, Washington, D. C., with whom Messrs. Paul A. Porter, Daniel A. Rezneck and Jerome I. Chapman, Washington, D. C., were on the brief for The Tobacco Institute, Inc. and Philip Morris, Inc., argued for all petitioners in No. 21,577. Mr. Porter R. Chandler, New York City, was on the brief for R. J. Reynolds Tobacco Co., petitioner in No. 21,577.

Mr. Eugene R. Anderson, New York City, was on the brief for The American Tobacco Company, petitioner in No. 21,577.

Mr. Carleton A. Harkrader, Washington, D. C., was on the brief for P. Lorillard Co., petitioner in No. 21,577.

Mr. John H. Conlin, Associate General Counsel, Federal Communications Commission, with whom Asst. Atty. Gen. Donald F. Turner, Messrs. Henry Geller, General Counsel, Stuart F. Feldstein, William L. Fishman and Mrs. Lenore G. Ehrig, Counsel, Federal Communications Commission, were on the brief for respondents. Messrs. Robert D. Hadl, Attorney, Federal Communications Commission, and Howard E. Shapiro, Attorney, Department of Justice, also entered appearances for respondents.

Messrs. Lloyd N. Cutler, J. Roger Wollenberg, Timothy B. Dyk, Daniel Marcus and Robert A. Warden, Washington, D. C., were on the brief for Columbia Broadcasting System, Inc., intervenor in Nos. 21,525 and 21,526.

Messrs. Donald J. Mulvihill and Howard Monderer, Washington, D. C., were on the brief for National Broadcasting Company, Inc., intervenor in Nos. 21,525 and 21,526.

Mr. Lloyd Symington, Washington, D. C., filed a brief on behalf of The National Tuberculosis Association as amicus curiae urging affirmance.

Messrs. Abe Krash, Paul A. Porter, Daniel A. Rezneck and Jerome I. Chapman, Washington, D. C., also entered appearances for The Tobacco Institute, Inc., American Tobacco Co., Brown & Williamson Tobacco Corp., Larus & Brother Co., Inc., Liggett & Myers Tobacco Co., Philip Morris, Inc., R. J. Reynolds Tobacco Co., United States Tobacco Co. and P. Lorillard Co., intervenors in Nos. 21,285, 21,525 and 21,526.

Messrs. James A. McKenna, Jr. and Vernon L. Wilkinson, Washington, D. C., entered appearances for American Broadcasting Companies, Inc., intervenor in Nos. 21,525 and 21,526.

Mr. Edgar F. Czarra, Jr., Washington, D. C., entered an appearance for WTRF-TV, Inc. and National Association of Broadcasters, intervenors in No. 21,285, and Spartan Radiocasting, Palmetto Radio, W. A. V. E., Inc., WFIE, Inc. and WFRV, Inc. and Indiana Broadcasting, Gulf Television Corporation, Corinthian Television Corporation and Great Western Broadcasting Corp., intervenors in Nos. 21,525 and 21,526.

Messrs. Vincent A. Pepper and Arthur V. Weinberg, Washington, D. C., entered appearances for WLLE, Inc., intervenor in Nos. 21,525 and 21,526.

Before BAZELON, Chief Judge, WILBUR K. MILLER, Senior Circuit Judge, and WRIGHT, Circuit Judge.

BAZELON, Chief Judge:

In these appeals we affirm a ruling of the Federal Communications Commission requiring radio and television stations which carry cigarette advertising to devote a significant amount of broadcast time to presenting the case against cigarette smoking. This holding rests on negative answers to the following principal questions:

(I) whether in the Cigarette Labeling Act of 1965 Congress preempted the field of regulation addressed to the health problem posed by cigarette smoking so as to deny the FCC any authority it otherwise had to issue its cigarette ruling (infra, pp. 1087–1091);

(II) if not so forbidden, whether the ruling is nonetheless unauthorized (infra, pp. 1091–1099), either

(A) because the Commission has no authority to regulate broadcast content (infra, pp. 1093–1096), or

(B) because any authority over program content which the Commission may have cannot support a ruling of this kind (infra. pp. 1096–1099); and

(III) if neither forbidden nor unauthorized, whether the ruling is unconstitutional (infra, pp. 1099–1103), either

(A) because the First Amendment permits no regulation of program content (infra, pp. 1099–1101), or

(B) because the cigarette ruling in particular violates the First Amendment (infra, pp. 1101–1103).

The history of the cigarette ruling dates to December 1966, when citizen John F. Banzhaf, III asked WCBS–TV to provide free time in which anti-smokers might respond to the pro-smoking views he said were implicit in the cigarette commercials it broadcast.[1] Although he cited several specific commercial messages, Banzhaf's target included

> all cigarette advertisements which by their portrayals of youthful or virile-looking or sophisticated persons enjoying cigarettes in interesting and exciting situations deliberately seek to create the impression and present the point of view that smoking is socially acceptable and desirable, manly, and a necessary part of a rich full life.

He said this point of view raised one side of a "controversial issue of public importance" and concluded that under the FCC's fairness doctrine, WCBS was under obligation to "affirmatively endeavor to make [its] * * * facilities available for the expression of contrasting viewpoints held by responsible elements. * * *"

WCBS replied that it had broadcast several news and information programs presenting the facts about the smoking-health controversy, as well as five public service announcements of the American Cancer Society aired free of charge during recent months.[2] On the basis of these broadcasts it was confident that "its coverage of the health ramifications of smoking has been fully consistent with the fairness doctrine." But it doubted in any event that "the fairness doctrine can properly be applied to commercial announcements solely and clearly aimed at selling products and services. * *"

Thereupon, Banzhaf forwarded the correspondence to the Federal Communications Commission under cover of a complaint that the station was violating the fairness doctrine.[3] And thereby hangs the following legal tale.

The Commission sustained the Banzhaf complaint. In a letter dated June 2, 1967,[4] it agreed that the cited cigarette commercials "present the point of view that smoking is 'socially acceptable and desirable, manly, and a necessary part of a rich full life,' "[5] and, as such, invoke the fairness doctrine. It said in part:

> We stress that our holding is limited to this product—cigarettes. Governmental and private reports (e. g., the 1964 Report of the Surgeon General's Committee) and congressional action (e. g., the Federal Cigarette Labeling and Advertising Act of 1965) assert that normal use of this product can be a hazard to the health of millions of persons. The advertisements in question clearly promote the use of a particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that, however enjoyable, such smoking may be a hazard to the smoker's health.[6]

The Commission refused, however, to require "equal time" for the anti-smoking position and emphasized that "the type of programming and the amount and nature of time to be afforded is a matter for the good faith, reasonable

1. Letter from John F. Banzhaf, III to Television Station WCBS-TV, December 1, 1966.

2. Letter from Clark S. George, Vice-President and General Manager, WCBS-TV to John F. Banzhaf, III, December 30, 1966.

3. Letter from John F. Banzhaf, III, to Federal Communications Commission, January 5, 1967.

4. Television Station WCBS-TV, 8 F.C.C. 2d 381 (1967).

5. *Id.*

6. *Id.* at 381–382.

judgment of the licensee. * * *" But it directed stations which carry cigarette commercials to provide "a significant amount of time for the other viewpoint. * * *" And by way of illustration it suggested they might discharge their responsibilities by presenting "each week * * * a number of the public-service announcements of the American Cancer Society or HEW in this field." [7]

In response to numerous petitions and requests for reconsideration, the Commission affirmed its ruling in a lengthy Memorandum Opinion.[8] It rejected contentions that the fairness doctrine is unconstitutional and that the cigarette ruling is precluded by the Cigarette Labeling and Advertising Act of 1965. The opinion did make clear that cigarette advertising *in general*, not any particular commercials, necessarily conveys the controversial view that smoking is a good thing.[9] But the Commission stressed again that its ruling was "limited to this product—cigarettes" and disclaimed any intention "to imply that any appeal to the Commission by a vocal minority will suffice to classify advertising of a product as controversial and of public importance." [10]

While defending its failure to provide interested persons an opportunity to be heard before issuing its ruling, the Commission emphasized that any procedural lapse was cured by its exhaustive consideration of the many petitions for review. Finally, it concluded that, "the specifics of the Fairness Doctrine" aside, its ruling was required by the public interest.[11]

Subsequently, in response to a request for clarification, the Commission ruled that stations which carry cigarette advertising are under no obligation to provide the cigarette companies free time in which to respond to broadcast claims that smoking endangers health.[12]

In this review proceeding, the Commission is challenged at virtually every point. Mr. Banzhaf complains that the anti-smoking forces should have been granted equal time. Petitioners Station WTRF–TV, the National Association of Broadcasters, The Tobacco Institute, and eight cigarette manufacturers (hereinafter "petitioners"), all of whose appeals have been consolidated, complain of almost everything else. They are supported by Intervenors CBS and NBC–ABC–WLLE Inc. The Commission is supported by the interventions of the American Tuberculosis Association and the ubiquitous Mr. Banzhaf.

We turn now to the issues these legal armies present for our consideration.

I. The Cigarette Labeling Act

[1] We are confronted at the outset by the contention that the Commission's action is precluded by the Federal Cigarette Labeling and Advertising Act of 1965.[13] That Act requires cigarette manufacturers and importers to print on

7. *Id.* at 382. The Commission noted WCBS's public service programming in this area, see text at note 2 *supra*, but said "the question remains whether in the circumstances a sufficient amount of time is being allocated each week to cover the viewpoint of the health hazard posed by smoking." *Id.* at 383.

8. Television Station WCBS-TV ("Applicability of the Fairness Doctrine to Cigarette Advertising"), 9 F.C.C.2d 921 (1967), hereinafter cited as "Cigarette Advertising."

9. The Commission explained that it could make its ruling without having before it the text of the particular commercials cited in Banzhaf's complaint, because the controversial issue was not whether smoking is dangerous to health but whether it is desirable. *Id.* at 946 n. 30. *And see id.* at 939. The Commission said it had been cited to "no example of a cigarette commercial that does not portray the use of the particular cigarette as attractive and enjoyable as well as encourage people to smoke," and found it "difficult to conceive of one [which would not do so]." *Id.* at 938.

10. *Id.* at 943.

11. *Id.* at 949.

12. Applicability of the Fairness Doctrine to Cigarette Advertising, 10 F.C.C.2d 16 (1967).

13. 79 Stat. 282 (1965), 15 U.S.C. §§ 1331–39 (Supp.1966).

each pack the warning "Caution: Cigarette Smoking May Be Hazardous to Your Health" and provides that

> no statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.[14]

Since the Commission's ruling does not require the inclusion of any "statement * * * in the advertising of any cigarettes," but rather directs stations which advertise cigarettes to present "the other side" each week, it does not violate the letter of the Act.

But petitioners contend that, though Congress said only "no statement shall be required * * * in * * * advertising," it meant to forbid any regulation addressed to the smoking-health problem except the Federal Trade Commission's specifically exempted power to police false and misleading advertising.[15] In support of this proposition, they refer us primarily to the Act's Declaration of Policy, in which Congress asserts a purpose to

> establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.[16]

From this declaration and from assorted snippets of legislative history, they conclude that Congress has definitively balanced the conflicting interests of the health of the public and the health of the economy and determined—in effect as a matter of law—that the public will be "adequately informed" on the smoking-and-health issue until July, 1969,[17] without any further governmental requirements.

The Commission, on the other hand, thought its ruling implemented a congressional policy of promoting intensive smoker-education during the life of the Act as an alternative to the "drastic step" of requiring warnings in every cigarette advertisement. Its opinion cites the express reliance in both House and Senate Reports on the anti-smoking campaigns of public and private groups as a reason for deferring stronger Congressional action.[18] And it notes that Congress itself appropriated $2 million to fund the extensive informational activities in this

14. Federal Cigarette Labeling and Advertising Act of 1965 (hereinafter "Act") § 5(b), 15 U.S.C. § 1334(b) (Supp.1966).

15. Section 5(c) of the Act states:
> Except as is otherwise provided * * *, nothing in this Act shall be construed to limit, restrict, expand, or otherwise affect, the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes * * *.

15 U.S.C. § 1334(c) (Supp.1966).

16. Act, § 2, 15 U.S.C. § 1331 (Supp.1966).

17. Section 10 of the Act provides that the provisions "which affect the regulation of advertising" shall terminate on July 1, 1969. 15 U.S.C. § 1339 (Supp.1966).

18. The Senate Commerce Committee concluded:
> Considering the combined impact of voluntary limitations on advertising under the Cigarette Advertising Code, the extensive smoking education campaigns now underway, and the compulsory warning on the package which will be required under the provisions of this bill, it was the Committee's unanimous judgment that no warning in cigarette advertising should be required pending the showing that these vigorous, but less drastic, steps have not adequately alerted the public to the potential hazard from smoking.

S.Rep.No. 195, 89th Cong., 1st Sess., p. 5 (1965). *See also* H.R.Rep.No. 449, 89th Cong., 1st Sess. pp. 4–5 (1965), U.S.Code Congressional and Administrative News, p. 2350.

area of the Department of Health, Education and Welfare.[19]

This evidence does not establish unequivocally that Congress did not intend to rely exclusively on such non-coercive educational efforts to inform the public. Congress expressed no purpose in the Act of informing the public of anything except the bare fact that "cigarette smoking may be hazardous to health." Its prescribed warnings do that much and no more. They merely flash danger signals without either particularizing the danger or providing facts on which it may be appraised.

But the anti-smoking campaigns are scarcely so pervasive or so well-funded that additional information could be regarded as mere surfeit. Accordingly, if we are to adopt petitioners' analysis, we must conclude that Congress legislated to curtail the potential flow of information lest the public learn too much about the hazards of smoking for the good of the tobacco industry and the economy. We are loathe to impute such a purpose to Congress absent a clear expression. Where a controversial issue with potentially grave consequences is left to each individual to decide for himself, the need for an abundant and ready supply of relevant information is too obvious to need belaboring.

[2] In the present case we find no such clear expression of restrictive intent. On the contrary, there are positive indications that Congress's "comprehensive program" was directed at the relatively narrow specific issue of regulation of "cigarette labeling and advertising." The Act was in fact passed in response to a pending Federal Trade Commission rule which would have required warnings both on packages and in all advertising.[20] Subjected to competing pressures and uncertain of the full extent of the health hazard, Congress apparently settled on half of the FTC's proposed loaf, shelved the other half for four years,[21] and expressly disclaimed any intent to affect other FTC policies or powers.[22] Nothing in the Act indicates that Congress had any intent at all with respect to other types of regulation by other agencies—much less that it specifically meant to foreclose all such regulation.[23] If it meant to do anything so dramatic, it might reasonably be expected to have said so directly—especially where it was careful to include a section entitled "Preemption" specifically forbidding designated types of regulatory action.[24]

19. Cigarette Advertising, *supra* note 8, at 933.

20. On June 22, 1964, the Federal Trade Commission promulgated a proposed regulation requiring warnings on cigarette packs from January 1, 1965, and warnings in advertising as well from July 1, 1965, unless the package warnings and voluntary advertising reforms had changed the circumstances by then. 29 Fed.Reg. 8325 (1964). The next day the House Commerce Committee began hearings on various cigarette legislation which had been introduced in the House during the 88th Congress. Those hearings and that Congress adjourned without action, but the FTC acceded to the request of Chairman Harris to postpone the effective date of the package-warning rule to July 1, 1965, so that the new Congress might legislate. 29 Fed.Reg. 15570 (1964). The 89th Congress rushed into the breach with the Cigarette Labeling Act, and as a result the FTC rule was stillborn.

21. See Act, § 5(b), text at note 14, *supra*; § 10, *supra* note 17.

22. Act, § 5(c), *supra* note 15.

23. The only reference to other agencies besides the FTC in the entire Act is the declaration in Section 10 that the termination in 1969 of the provisions affecting the regulation of advertising "shall not be construed as limiting, expanding, or otherwise affecting the jurisdiction or authority which the Federal Trade Commission or any other Federal agency had prior to the date of the enactment of this Act." 15 U.S.C. § 1339 (Supp.1966). Since all other agencies are necessarily included in the blanket ban on required warnings in advertising, this negative provision is not evidence that the Act sweeps more broadly than its words import.

24. Act, § 5, 15 U.S.C. § 1334 (Supp.1966).

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[3–5] In short, we think the Cigarette Labeling Act represents the balance drawn between the narrow purpose of warning the public "that cigarette smoking may be hazardous to health" and the interests of the economy. In that reckoning, the question of the public's need for information about the nature, extent, and certainty of the danger was left out of the scales, and so is left unaffected, except incidentally, by the result. Congress may reasonably have concluded that a warning on each pack was adequate *warning*.[25] It surely did not think the warnings were themselves adequate *information*. And we find no sufficiently persuasive evidence that Congress hoped to impede the flow of adequate information for fear that, if the public knew all the facts, too many of them would stop smoking.[26]

This relatively narrow reading of the Act is not in conflict with its declared objective of protecting commerce and the national economy against "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." [27] Congress patently did not want cigarette manufacturers harassed by conflicting affirmative requirements with respect to the content of their advertising. In addition, it evidently decided that the case against smoking was not yet so overwhelming as to warrant compelling the cigarette companies to dig their own graves by neutralizing their

25. Too many bare warnings might result in an uninformed and possibly unnecessary stampede away from cigarettes. While we will not assume that Congress wished to protect the economy at the expense of life and health, it clearly did wish to protect it to the maximum extent compatible with intelligent individual decisions on the health issue. Congress gave the benefit of every doubt to the possibility that the benefits of smoking might outweigh the potential danger to health; but that is not to say that it wished to conceal from the public the true extent of the danger. It is true that the anti-cigarette broadcasts required by the Commission's ruling may include uninformative propaganda as well as hard information. That possibility is a necessary consequence of the Commission's proper reluctance to dictate the content of broadcast material. See Part II, *infra*. But the ruling is reasonably designed to promote the diffusion of information; it is plainly not the substantial equivalent of the required "warnings" in advertisement which Congress has prohibited.

26. Apart from the declaration of policy to establish a "comprehensive" program—which is meaningful only after we discover what subject matter is comprehended—petitioners rely primarily on the broad scope of the congressional hearings from which the Act emerged. The Senate Commerce Committee heard wide-ranging testimony on all aspects of the smoking-health controversy, including the views of the FCC. Congress also considered proposals for more drastic congressional action than that taken by the Act. But the fact that Congress considered and declined to adopt broader legislation does not establish that it intended to bar otherwise-authorized agency action under established powers and duties.

Petitioners also make much of the fact that the FCC, through its Chairman, specifically told Congress that it had no present plans for regulatory action addressed to the smoking-health problem and that it preferred the across-the-board approach taken by the FTC. While it is possible that had the FCC then anticipated its cigarette ruling, Congress would have expressly prohibited it, that possibility must remain in the realm of speculation. We must decide questions of legislative intent by the lights we have, not by those we might have had.

Nor do we think the FCC's 1964 disclaimer of intent to deal with the cigarette problem deprives it of authority it would otherwise have had to do so now. It is not suggested that the FCC acted in bad faith. The 1964 statement came at a time when the FTC was conspicuously taking the lead car in attacking the problem on a media-wide front. The FCC may well have been reluctant in those circumstances to place a special burden on the communications industry. Primarily because of the Cigarette Labeling Act, the FTC's broad attack is now stalled. *Supra*, note 20. If the Act itself does not preempt FCC regulation, we see no reason why the FCC may not take the effects of the Act into account in assessing the need for its own action.

27. Act, § 2, text at note 16, *supra*.

own advertising messages.[28] Even if these policies implicitly preempt regulations *of advertising* substantially equivalent to the FTC's proposed required warnings,[29] they do not exclude a single, uniform regulation *of broadcasters* designed to inform the public.

II. The Commission's Authority under the Public Interest Standard of the Communications Act.

A fundamental question, of course, is whether the Commission's ruling, though not expressly forbidden by statute, is within the scope of its delegated authority. The ruling originated in response to a "fairness doctrine" complaint and held that the fairness doctrine applied to cigarette advertising. But in its opinion affirming the ruling, the Commission also asserted that it "clearly has the authority to make this public interest ruling" under the public interest standard of the Communications Act and relied upon "the licensee's statutory obligation to operate in the public interest." [30]

Last year in Red Lion Broadcasting Co. v. FCC,[31] we upheld the fairness doctrine in the face of arguments that it was unauthorized and unconstitutional. Since then, in Radio Television News Directors v. FCC,[32] the Seventh Circuit has held that the Commission's personal attack rules violate the First Amendment and, in so doing, has cast some doubt on the constitutionality of the underlying fairness doctrine.[33] These issues are now to be resolved by the Supreme Court.

In part for this reason, we do not think protracted discussion of the fairness doctrine will materially advance our inquiry. It is clear to us that, even if incorporated into the fairness doctrine, the ruling before us is to all intents a novel applica-

28. In the Congressional hearings on proposed cigarette legislation, tobacco industry spokesmen appeared to view the FTC's rule requiring them to include warnings in their advertising as uniquely obnoxious. One of them, for example, told the House Commerce Committee that

> the insistence upon a warning in advertising, in addition to the demand for a warning on labels, is punitive in nature. The right to advertise—an essential commercial right—is virtually destroyed if a manufacturer is required in every advertisement to disparage the product.

Hearings before the House Committee on Interstate and Foreign Commerce, 89th Cong., 1st Sess., p. 284 (1964).

29. The Commission thought the Act implicitly forbade a requirement that stations present warning statements immediately "adjacent" to each cigarette commercial. We need not decide whether such a requirement, though not a regulation of *advertising*, is so nearly identical to such a regulation in purpose and effect as to fall within the statute's prohibition.

30. Cigarette Advertising, *supra* note 8, 9 F.C.C.2d at 927.

31. 127 U.S.App.D.C. 129, 381 F.2d 908, cert. granted, 389 U.S. 968, 88 S.Ct. 470, 19 L.Ed.2d 458 (1967), argument postponed pending decision of the Seventh Circuit in Radio Television News Directors Ass'n v. United States (*infra* note 32), 390 U.S. 916, 88 S.Ct. 857, 19 L.Ed. 2d 982 (1968).

32. 400 F.2d 1002 (7 Cir., decided September 10, 1968).

33. The Court of Appeals distinguished the personal attack rules from the underlying fairness doctrine on two grounds. First, the rules represent an unusual particularization of the doctrine, since they impose detailed tests for determining which individual broadcasts trigger the stations' duty to provide reply time and since, unlike the cigarette ruling, they also leave the stations little discretion as to how that duty may be fulfilled. Second, the personal attack rules are enforceable by penalties for individual infractions rather than solely by consideration of a station's overall performance in the proceedings for renewal of a license. Radio Television News Directors Ass'n v. United States (FCC), *supra* note 32 (400 F.2d pp. 1013–1014). Nonetheless, the court expressly refused to decide the constitutionality of the fairness doctrine itself. *Id.*, 400 F. 2d 1017. It did decide that the objective of a fair and balanced presentation of issues of public importance does not justify rules which are likely to inhibit public debate on political issues and might, by their vagueness, set up the Commission as a de facto censor of individual editorial and political broadcasts. This holding cuts very near the heart of the fairness doctrine. See Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

tion. In only one instance has the Commission previously held the advertising of a consumer product subject to the rule that broadcasters' presentations of controversial public issues must be fair and balanced.[34] The narrow issue presented by the facts of that case was whether a station in the temperance belt which advertised alcoholic beverages could, consistently with the principles now known as the fairness doctrine, refuse to accept anti-liquor advertising from temperance groups.[35] The case has not been followed in the twenty years since it was decided. It is not in any event a clear precedent for a ruling which instructs stations to broadcast opposition to their paid commercials regardless of whether opponents buy—or even request—such broadcast time. In addition, except for the personal attack rules struck down by the Seventh Circuit,[36] we know of no case in which the Commission has so specifically defined the stations' duties under the fairness doctrine.[37]

We also note that elsewhere the Commission has been hesitant to invoke the fairness doctrine where a controversial issue is raised only by implication.[38] Finally, the Commission itself concluded that its main point would be lost if the legal debate concentrated too intensely on the "specifics of the fairness doctrine." [39]

None of the novel aspects of the ruling, of course, precludes an extension of the fairness doctrine at this time. But the extension must, like the doctrine itself, find its authority in the public interest standard. Thus, whether the ruling is viewed as a new application of the fairness doctrine or as an independent public interest ruling, the ultimate question is the same. Moreover, in view of the constitutional attack on the doctrine, the specific question of greatest long-term importance may be whether the cigarette ruling can stand on its own feet.

In fact, we think the best statement of the Commission's holding and rationale is contained in the summary paragraph introducing the "Conclusions" section of its opinion:

> There is, we believe, some tendency to miss the main point at issue by concentration on labels such as the specifics of the Fairness Doctrine or by conjuring up a parade of "horrible" extensions of the ruling. The ruling is really a simple and practical one, required by the public interest. The licensee, who has a duty "to operate in the public interest" * * * is presenting commercials urging the consumption of a product whose normal use has been found by the Congress and the Government to represent a

34. Petition of Sam Morris, 11 F.C.C. 197 (1946). This opinion in fact predates the first formal articulation of the policies now known as the "fairness doctrine" in the 1949 Report of the Commission in the Matter of Editorializing by Broadcast Licensees, *supra* note 33. But the basic requirement of fair and balanced presentation of controversial issues of public importance dates from decisions of the old Radio Commission and from the early rulings of the FCC. See Red Lion Broadcasting v. FCC, *supra* note 31, 127 U.S. App.D.C. at 138–139, 381 F.2d at 917–918, and cases cited therein.

35. The Commission observed, "[I]t can at least be said that the advertising of alcoholic beverages can raise substantial issues of public importance," and concluded that the issue of whether or not to drink "may assume the proportions of a controverted issue of public importance." 11 F.C.C. at 199. It did not, however, deny renewal of the respondent station's license for failure to provide time to the temperance advocates.

36. Radio Television News Directors Ass'n v. United States (FCC), *supra* note 32.

37. The Commission has, upon rare occasion, identified specific issues it regards as controversial. *E.g.*, Petition of Sam Morris, *supra* note 34; Robert Harold Scott, 3 P & F Radio Reg. 259 (1946). But it has not previously gone so far as to prescribe the frequency with which opposing views must be broadcast.

38. The Commission has refused to require reply time for atheists who wish to respond to the implicit theism of broadcast church services. Mrs. Madalyn Murray, 5 P & F Radio Reg.2d 263 (1965). *But see*, Robert Harold Scott, *supra* note 37.

39. Cigarette Advertising, *supra* note 8, 9 F.C.C.2d at 949.

serious potential hazard to public health. Ordinarily the question presented would be how the carriage of such commercials is consistent with the obligation to operate in the public interest. In view of the Legislative history of the Cigarette Labeling Act, that question is one reserved for judgment of the Congress upon the basis of the studies and reports submitted to it. * * * But there is, we think, no question of the continuing obligation of a licensee who presents such commercials to devote a significant amount of time to informing his listeners of the other side of the matter—that however enjoyable smoking may be, it represents a habit which may cause or contribute to the earlier death of the user. This obligation stems not from any esoteric requirements of a particular doctrine but from the simple fact that the public interest means nothing if it does not include such a responsibility.[40]

The fairness doctrine, we think, serves chiefly to put flesh on these policy bones by providing a familiar mold to define the general contours of the obligation imposed.

The attack on the alleged statutory authority for this "public interest" ruling takes two forms: (1) a general denial that the Commission has any authority to supervise the content of broadcasting under the public interest standard; and (2) an argument that any delegation of the power to make ad hoc public interest determinations of this kind is invalid for want of adequate limiting standards.

A. *The Commission's authority over broadcast content in general*

Nothing in the Communications Act of 1934[41] expressly grants the Commission any general authority over programming. The most relevant provisions go no further than to authorize it to grant and renew broadcast licenses according to the dictates of the "public interest, convenience, and necessity."[42] A case could be made, as an abstract proposition, that this licensing power is limited to policing the traffic over the airwaves to prevent interference between stations and perhaps to assure a minimum level of technical competence. If the question were *res nova*, that case would receive substantial support from the Supreme Court decisions requiring a clear mandate for regulatory activity which brushes closely against sensitive constitutional areas.[43]

[6] But the argument was in fact made and rejected long ago in National Broadcasting Company v. United States.[44] Justice Frankfurter, speaking for the Court, said in part:

> "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts." Federal Communications Comm. v. Sanders Bros. Radio Station, 309 U.S. 470, 475, 60 S.Ct. 693, 697, 84 L.Ed. 869, 1037. The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of "public interest" were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by radio [*sic*], comparative considerations as to the services to be rendered have governed the application of the standard of "public interest, convenience, or necessity." * * *

40. *Id.*

41. 47 U.S.C. § 301 *et seq.* (1964).

42. 47 U.S.C. § 307(a), (d) (1964).

43. Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959); Kent v. Dulles, 357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958); Hannegan v. Esquire, Inc., 327 U.S. 146, 66 S.Ct. 456, 90 L.Ed. 586 (1946).

44. 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943).

> The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio. * * *
>
> These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the "larger and more effective use of radio in the public interest." [45]

In fact, neither courts nor Commission have thought it had to make its decisions among competing applicants blindfolded to the content of their programs.[46] Both the old Radio Commission and the FCC have likewise refused to renew licenses on the basis of past programming not in the public interest,[47] and this Court affirmed such a refusal as long ago as 1931.[48] If agency power to designate programming "not in the public interest" is a slippery slope, the Commission and the courts started down it too long ago to go back to the top now unless Congress or the Constitution sends them. But Congress has apparently specifically endorsed this understanding of the public interest.[49] And whatever the limits im-

45. *Id.* at 217, 63 S.Ct. at 1010.

46. In Simmons v. FCC, 83 U.S.App.D.C. 262, 264, 169 F.2d 670, 672, *cert. denied*, 335 U.S. 846, 69 S.Ct. 67, 93 L.Ed. 396 (1948), this court said:

> [W]e are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic.

See also, e.g., Henry v. FCC, 112 U.S. App.D.C. 247, 302 F.2d 191, cert. denied, 371 U.S. 821, 83 S.Ct. 37, 9 L.Ed.2d 60 (1962); Allen B. Dumont Laboratories v. Carroll, 184 F.2d 153, 156 (3 Cir. 1950); Bay State Beacon v. FCC, 84 U.S.App. D.C. 216, 171 F.2d 826 (1948). *See generally* Note, "Regulation of Program Content by the FCC," 77 HARV.L.REV. 701 (1964) and numerous cases cited therein. Also noteworthy in this regard is the concurring opinion of Justice Brennan in Head v. New Mexico Board of Examiners, 374 U.S. 424, 433, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963), which grapples at length with the possibility that the FCC's authority to regulate advertising content is so complete as to exclude any state regulation in that area. Justice Brennan concludes that not all state regulation is excluded, but observes that Congress's "failure expressly to regulate *nondeceptive* advertising surely does not deprive the FCC of all such jurisdiction * * *" *Id.* at 444, 83 S.Ct. at 1771.

47. Community Broadcasting Service, 13 P & F Radio Reg. 179 (1955); Port Frere Broadcasting Co., 5 P & F Radio Reg. 1137 (1950); Trinity Methodist Church, South v. Federal Radio Commission, 61 U.S.App.D.C. 311, 62 F.2d 850 (1932); cert. denied, 288 U.S. 599, 53 S.Ct. 317, 77 L.Ed. 975 (1933); KFKB Broadcasting Ass'n v. Federal Radio Commission, 60 App.D.C. 79, 47 F.2d 670 (1931).

48. In *KFKB Broadcasting Ass'n, supra* note 47, this court upheld the denial of a license to a station which regularly broadcast a program in which a doctor diagnosed illnesses and prescribed medicines on the basis of symptoms described in listeners' letters. The grounds for denial were both that the doctor, who controlled the station, was using it for his own private interests and also that the "medical question box" program was "inimical to the public health and safety, and for that reason [was] not in the public interest." 60 App.D.C. at 80, 47 F.2d at 672. The court said:

> It is apparent, we think, that the [broadcasting] business is impressed with a public interest and that, because the number of available broadcasting frequencies is limited, the Commission is necessarily called upon to consider the character and quality of the service to be rendered. In considering an application for a renewal of the license, an important consideration is the past conduct of the applicant, for "by their fruits shall ye know them." Matt. VII:20.

Id. at 81, 47 F.2d at 672. *Accord*, Trinity Methodist Church, South, *supra* note 47.

49. In 1959, Congress amended the provision requiring broadcasters to provide equal

posed by the First Amendment, we do not think it requires eradicating every trace of a programming component from the public interest standard.[50]

The power to refuse a license on grounds of past or proposed programming necessarily entails some power to define the stations' public interest obligations with respect to programming. It is this power to specify material which the public interest requires or forbids to be broadcast that carries the seeds of the general authority to censor denied by the Communications Act[51] and the First Amendment alike. But elementary canons of administrative and constitutional law prevent the Commission from terminating a license without giving reasons or from condemning a station's overall programming as inimical to the public interest without identifying the offending material and particularizing the public interest. And if the Commission must explain its view of the public interest when it denies or revokes a license, it may surely give advance notice of its views by way of an official ruling which is subject to judicial review. Indeed, in some cases fairness to the stations may require some advance warning of their responsibilities.

[7] Thus, in applying the public interest standard to programming, the Commission walks a tightrope between saying too much and saying too little. In most areas it has resolved this dilemma by imposing only general affirmative duties—*e. g.*, to strike a balance between the various interests of the community,[52] or to provide a reasonable amount of time for the presentation of programs devoted to the discussion of public issues.[53] The licensee has broad discretion in giving specific content to these duties, and on application for renewal of a license it is understood the Commission will focus on his overall performance and good faith rather than on specific errors it may find him to have made.[54] In practice, the Commission rarely denies licenses for breaches of these duties.[55] Given its long-established authority to consider program content, this general approach probably minimizes the dangers of censorship or pervasive supervision.

In other areas, however, the Commission has on occasion imposed more specific duties or found specific programs or

time to opponents of candidates for public office who use their stations, 47 U.S.C. § 315 (1964), in order to exempt bona fide newscasts, news interviews, news documentaries, etc., from that requirement. In so doing it included the proviso that nothing in the exemption

> shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from *the obligation imposed upon them under this chapter to operate in the public interest* and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

73 Stat. 557 (1959), 47 U.S.C. § 315(a) (1964) (emphasis added). At the very least, this language appears to be an acknowledgment of and acquiescence in the settled Commission and judicial construction that the public interest standard applies to program content.

50. *Infra*, Part III.

51. Section 326 of the Communications Act of 1934 provides:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship * * *, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

47 U.S.C. § 326 (1964).

52. Editorializing by Broadcast Licensees, *supra* note 33, 13 FCC at 1247–48.

53. *Id.* at 1249.

54. *Id.* at 1251–1252.

55. "Generally, where objectionable matter has been broadcast in particular instances, renewal of licenses has been granted, usually upon a showing that program services were otherwise meritorious and in the public interest and the objectionable matter discontinued. * * *" Note, "Governmental Regulation of the Program Content of Television Broadcasting," 19 G.W.L.Rev. 312, 317 (1950). *See also* Note, "Regulation of Program Content by the FCC," *supra* note 46, at 703–704.

advertisements to be contrary to the public interest.[56] Such rulings must be closely scrutinized lest they carry the Commission too far in the direction of the forbidden censorship. But particularity is not in itself a vice; indeed, in some circumstances it may serve to limit an otherwise impermissibly broad intrusion upon a licensee's individual responsibility for programming.

B. *The authority for the cigarette ruling in particular*

[8–10] Thus, in the context of the Communications Act as it has long been understood, we do not think that public interest rulings relating to specific program content invariably amount to "censorship" within the meaning of the Act.[57] However, there is high risk that such rulings will reflect the Commission's selection among tastes, opinions, and value judgments, rather than a recognizable public interest. Especially with First Amendment issues lurking in the near background, the "public interest" is too vague a criterion for administrative action unless it is narrowed by definable standards.[58]

[11] The ruling before us neither forbids nor requires the publication of any specific material. But as an extension of the fairness doctrine it is an unusual limitation of the licensee's discretion. And as an independent public interest ruling it requires independent support. We cannot uphold it merely on the ground that it may reasonably be thought to serve the public interest.

Whatever else it may mean, however, we think the public interest indisputably includes the public health.[59] There is

56. *E. g.*, Petition of Sam Morris, *supra* note 34; Robert Harold Scott, *supra* note 37; KFKB Broadcasting Ass'n v. Federal Radio Commission, Trinity Methodist Church, South v. FCC, and Port Frere Broadcasting Co., all *supra* note 47; Mile High Station, Inc., 20 P & F Radio Reg. 345 (1960); WSBC, Inc., 2 F.C.C. 293 (1936); Oak Leaves Broadcasting, 2 F. C.C. 298 (1936); Farmers & Bankers Life Insurance Co., 2 F.C.C. 455 (1936); and cases cited in Note, "Governmental Regulation of the Program Content of Television Broadcasting," *supra* note 55, at 317 n. 27, 317–318 n. 28.

57. See note 51, *supra*. It is not clear whether Congress originally thought that such rulings as to program content would constitute "censorship." See Note, 46 HARV.L.REV. 987, 990 (1933). But in view of the settled administrative practice of issuing such rulings and opinions, the doubtful issue of construction must be resolved in the negative. See Note, "Regulation of Program Content by the FCC," *supra* note 46, at 715.

58. The Supreme Court has suggested that the "public interest" standard may be narrowed by interpreting it in the light of "its context, * * * the nature of radio transmission and reception, [and] * * * the scope, character, and quality of services * * *." Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266, 285, 53 S. Ct. 627, 636, 77 L.Ed. 1166, 89 A.L.R. 406 (1933). While these criteria may be sufficiently precise administrative standards to govern regulation of technical performance and selection among competing applicants, however, we think they are too amorphous, without more, to support supervision over programming.

59. Petitioners WTRF-TV and the National Association of Broadcasters argue that, if the FCC has any authority with respect to advertising, it can apply only the more specific standard Congress has established to guide the Federal Trade Commission, which they say is vested with "primary" authority to regulate advertising. Thus, they would limit the FCC's role to policing "unfair methods of competition * * * and unfair or deceptive acts or practices," Federal Trade Commission Act § 5 (1914), 15 U.S.C. § 45(a) (1964), at least absent any considerations peculiar to broadcasting. Their sole authority for that proposition is FCC v. American Broadcasting Co., 347 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699 (1954). That case, however, is not in point. There, the FCC had adopted regulations disapproving of give-away programs on the ground that they were "lotteries" within the meaning of federal prohibitory statutes. The Supreme Court reversed on the ground that the FCC had misread the criminal statutes, but that reversal did not in itself preclude FCC authority to prohibit such programs as inconsistent with the public interest. SEC v. Chenery Corp., 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943). In any case, the standard of the Federal

perhaps a broader public consensus on that value, and also on its core meaning, than on any other likely component of the public interest. The power to protect the public health lies at the heart of the states' police power. It has sustained many of the most drastic exercises of that power, including quarantines, condemnations, civil commitments, and compulsory vaccinations. Likewise, public health concerns now support a sizable portion of the civilian federal bureaucracy. The public health has in effect become a kind of basic law, both justifying new extensions of old powers and evoking the legitimate concern of government wherever its regulatory power otherwise extends.

[12] The Radio Commission, predecessor to the FCC, assumed with judicial approval and without question that broadcasting of specious medical information was not in the public interest.[60] In the Communications Act of 1934, Congress transferred the Radio Commission's authority to license in the "public interest, convenience and necessity" to the FCC,[61] which has also ruled specific controversial health claims to be not in the public interest.[62] Given the premise that the "public interest" may include some of the content as well as the technical quality of broadcasting, we are satisfied that it includes the public health. But were there any initial doubt, in the absence of evidence to the contrary we think Congress must be deemed to have acquiesced in the determinations to that effect of both Commissions on a matter of such basic and universally recognized importance.

The public health standard removes much of the vagueness and over-breadth attending the standard of the public interest. But we are not prepared to say that the Commission is authorized to condemn every broadcast which might, without arbitrariness or caprice, be thought to pose some danger to the public health. Even the relatively precise concept of the public health is murky at the fringes, and in some cases what is concededly optimal health may be a less important public value than other conflicting interests. Finally, the Commission itself has no special expertise to make it the appropriate arbiter of controversies over whether particular broadcasting is dangerous to health.

But the ruling on cigarette advertising is vulnerable to none of these objections against a broad mandate to the Commission to consider the public health.[63] The danger cigarettes may pose to health is, among others, a danger to life itself. As the Commission emphasized, it is a danger inherent in the normal use of the product, not one merely associated with its abuse or dependent on intervening fortuitous events. It threatens a substantial body of the population, not merely a peculiarly susceptible fringe group. Moreover, the danger, though not established beyond all doubt, is documented by a compelling cumulation of statistical evidence. The only member of the Commission to express doubts about the validity of its ruling had no doubts about the validity of its premise that, in all probability, cigarettes are dangerous to health:[64]

Trade Act is applicable only to regulation of advertising. While the obligations imposed under the cigarette ruling arise from and are conditioned upon the broadcasting of cigarette advertising, the ruling does not regulate advertising. Rather, it has the effect of regulating stations which carry advertising by requiring them to inform the public.

60. KFKB Broadcasting Ass'n v. Federal Radio Commission, *supra* note 47.

61. 47 U.S.C. § 307 (1964).

62. WSBC, Inc., Oak Leaves Broadcasting, Inc., Farmers & Bankers Life Insurance Co., all *supra* note 56.

63. We agree with the Commission that "cigarette advertising presents a unique situation," and we note that the Commission "do[es] not now know" of any other advertised product which would warrant a comparable ruling. Cigarette Advertising, *supra* note 8, 9 F.C.C.2d at 943.

64. The Commission correctly noted that it "is not the proper arbiter of the scientific

> Cigarette smoking is a substantial hazard to the health of those who smoke which increases both with the number of cigarettes smoked and with the youthfulness when smoking is started. Cigarette smoking increases both the likelihood of the occurrence and the seriousness of the consequences of various types of cancer, of cardiovascular failures and of numerous other pathologies of smokers. These conclusions are established by overwhelming scientific evidence, by the findings of Government agencies, and by Congressional reports and statute. * * * The evidence on this subject is not conclusive, but scientific evidence is never conclusive. All scientific conclusions are probablistic (sic) * * * Furthermore, law does not and cannot demand conclusive proof. Even in a capital case, the law requires only proof beyond a reasonable doubt. * * * The evidence as to the dangers of cigarette smoking to the smoker is clearly beyond a mere preponderance and approaches proof beyond a reasonable doubt.[65]

Finally, the Commission expressly refused to rely on any scientific expertise of its own.[66] Instead, it took the word of the Surgeon General's Advisory Committee,[67] whose findings had already been adopted in substance by the Department of Health, Education and Welfare,[68] the Federal Trade Commission,[69] and the Senate Commerce Committee,[70] and had in addition been recognized and acted upon by Congress itself in the Cigarette Labeling Act.

In these circumstances, the Commission could reasonably determine that

and medical issue * * * and of course has not sought to resolve it." *Id.* at 949. But the "controversial issue" to which its ruling is addressed is not whether cigarette smoking is dangerous, but whether, in view of its authoritatively documented dangers, it is desirable:

> It comes down, we think, to a simple controversial issue: the cigarette commercials are conveying any number of reasons why it appears desirable to smoke, but understandably do not set forth the reasons why it is not desirable to commence or continue smoking. It is the affirmative presentation of smoking as a desirable habit which constitutes the viewpoint others desire to oppose.

Id. at 939.

65. *Id.*, concurring opinion of Commissioner Loevinger at 952–953.

66. See note 64, *supra*.

67. On January 11, 1964, the report of the Surgeon General's Advisory Committee concluded that cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate. The Committee recommended that "cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action."
Cigarette Advertising, *supra* note 8, Appendix A at 950.

68. The Department promptly established the National Interagency Council on Smoking and Health in order, *inter alia*, to

> use its professional talents to bring to the Nation—particularly the young—an increasing awareness of the health hazards of cigarette smoking. * * *

Id., Appendix A at 951. In 1967, HEW also released the Surgeon General's "Report on Current Information on the Health Consequences of Smoking," which reaffirmed the conclusions of the 1964 Report, *supra* note 67, on the basis of more than 2,000 subsequent research studies. This report asserted that cigarette smokers have substantially higher death and disability rates than comparable non-smokers and that a substantial number of earlier deaths and disabilities would not have occurred if the victims had never smoked. *Id.* at 936–937.

69. Note 20, *supra*.

70. While there remain [sic] a substantial number of individual physicians and scientists—the Commerce Committee received testimony from 39 of them—who do not believe that it has been demonstrated scientifically that smoking causes lung cancer or other diseases, no prominent medical or scientific body undertaking a systematic review of the evidence has reached conclusions opposed to those of the Surgeon General's Advisory Committee.
S.Rep.No. 195, 89th Cong., 1st Sess., p. 3 (1965).

news broadcasts, private and governmental educational programs, the information provided by other media, and the prescribed warnings on each cigarette pack, inadequately inform the public of the extent to which its life and health are most probably in jeopardy. The mere fact that information is available, or even that it is actually heard or read, does not mean that it is effectively understood. A man who hears a hundred "yeses" for each "no," when the actual odds lie heavily the other way, cannot be realistically deemed adequately informed. Moreover, since cigarette smoking is psychologically addicting, the confirmed smoker is likely to be relatively unreceptive to information about its dangers; his hearing is dulled by his appetite. And since it is so much harder to stop than not to start, it is crucial that an accurate picture be communicated to those who have not yet begun.

Thus, as a public health measure addressed to a unique danger authenticated by official and congressional action, the cigarette ruling is not invalid on account of its unusual particularity. It is in fact the product singled out for special treatment which justifies the action taken. In view of the potentially grave consequences of a decision to continue—or above all to start—smoking, we think it was not an abuse of discretion for the Commission to attempt to insure not only that the negative view be heard, but that it be heard repeatedly. The Commission has made no effort to dictate the content of the required anti-cigarette broadcasts. It has emphasized that the responsibility for content, source, specific volume, and precise timing rests with the good faith discretion of the licensee.[71]

[13] The cigarette ruling does not convert the Commission into either a censor or a big brother. But we emphasize that our cautious approval of this particular decision does not license the Commission to scan the airwaves for offensive material with no more discriminating a lens than the "public interest" or even the "public health."

III. THE FIRST AMENDMENT

It is difficult to separate the First Amendment question from the question of the Commission's authority. Section 326 of the Communications Act expressly provides that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." [72] It might reasonably be thought that "the right of free speech," is shorthand for the First Amendment. But since constructions of the First Amendment have broadened since 1934, and inasmuch as the First Amendment argument advanced in this case challenges a long-settled construction of the Act, we treat the constitutional question separately for purposes of analysis.

A. *Regulation of broadcast content under the First Amendment in general*

[14] Intervenors NBC, *et al.* argue cogently that the public interest standard cannot constitutionally now include any component of program content. They say the First Amendment obviously would not tolerate administrative supervision of the material published by the newspaper press. The radio press was initially treated differently only because (1) peculiar technical factors require a policeman to prevent interference between different stations, and (2) the then available broadcasting channels were so limited in number that the Commission could hardly ignore all considerations of the nature and quality of programming in choosing among applicants. The first reason does not justify supervision of content, they say, and the second, if ever sufficient, is an anachronism now that the available channels often outnumber the applicants and the broadcasting stations serving most areas far outnumber

71. Cigarette Advertising, *supra* note 8, at 941-942.

72. *Supra* note 51.

the newspapers.[73] Accordingly, in their view the First Amendment now limits the Commission's licensing discretion to technological considerations; the content of broadcasting, like that of the publishing press, must be left entirely to the licensees and ultimately to the market.

This argument has considerable force. First Amendment complaints against FCC regulation of content are not adequately answered by mere recitation of the technically imposed necessity for *some* regulation of broadcasting and the conclusory propositions that "the public owns the airwaves" and that a broadcast license is a "revocable privilege."[74] It may well be that some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets.

On the other hand, we cannot solve such complex questions by replacing one set of shibboleths with another. The First Amendment is unmistakably hostile to governmental controls over the content of the press,[75] but that is not to say that it necessarily bars every regulation which in any way affects what the newspapers publish. Even if it does, there may still be a meaningful distinction between the two media justifying different treatment under the First Amendment. Unlike broadcasting, the written press includes a rich variety of outlets for expression and persuasion, including journals, pamphlets, leaflets, and circular letters, which are available to those without technical skills or deep pockets.[76] Moreover, the broadcasting medium may be different in kind from publishing in a way which has particular relevance to the case at hand. Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are "in the air." In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary habitual television watcher can *avoid* these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be

73. See Radio Television News Directors Ass'n v. United States (FCC) *supra*, note 32, 400 F.2d pp. 1018–1020, where the Seventh Circuit declared that the historical distinction between press and broadcasting is untenable for First Amendment purposes.

74. See G. Robinson, The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulations, 52 MINN.L.REV. 67, 152 (1967).

75. *E.g.*, Near v. State of Minnesota, ex rel. Olson, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931).

76. It has also been suggested that a difference in the working of the market mechanism in the two media may justify a difference in the scope of permissible regulation under the First Amendment. It is in a newspaper's economic interest, it is said, to include features which may appeal only to a limited or specialized audience. The cost of adding a page to include special features is relatively small compared to the advertising and subscription revenue which may be expected from the resulting increase in circulation. But a broadcaster can appeal to only one audience at a time. If he devotes an hour to programs appealing to a minority taste, he foregoes the chance to compete for the greater advertising revenues consequent upon reaching a larger audience. Accordingly, it may be that even newspaper monopolies are more likely than broadcasters to serve the entire public without regulatory prodding. See Note, "Regulation of Program Content by the FCC," *supra* note 46, at 714. For support from economists for the proposition that broadcasters will compete for the majority audience at the expense even of a sizable minority taste, see J. Dirlam and A. Kahn, The Merits of Reserving the Cost-Savings from Domestic Communications Satellites for Support of Educational Television, 77 YALE L.J. 494, 515–517 (1968).

thought greater than the impact of the written word.[77]

B. *Constitutionality of the cigarette ruling in particular*

[15] These considerations are at least sufficient to convince us that we are not obliged simply to "invalidate the entire course of broadcasting development" [78] with no inquiry into the particulars of the ruling before us. Rather, we think the proper approach to the difficult First Amendment issues petitioners raise is to consider them in the context of individual regulatory policies and practices on a case-by-case basis. On this approach, since the narrow public health power which supports the cigarette ruling does not "sweep * * * widely and * * * indiscriminately" across protected freedoms,[79] the constitutional question before us is only whether the Communications Act, construed to authorize a public health ruling in the circumstances of this case, offends the First Amendment. And whatever the constitutional infirmities of other regulations of programming, we are satisfied that the cigarette ruling does not abridge the First Amendment freedoms of speech or press. We reach this conclusion in the light of the following considerations:

(1) The cigarette ruling does not ban any speech. In traditional doctrinal terms, the constitutional argument against it is only that it may have a "chilling effect" on the exercise of First Amendment freedoms by making broadcasters more reluctant to carry cigarette advertising.

(2) The speech which might conceivably be "chilled" by this ruling barely qualifies as constitutionally protected "speech." It is established that some utterances fall outside the pale of First Amendment concern.[80] Many cases indicate that product advertising is at least less rigorously protected than other forms of speech.[81] Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect. As a rule, it does not affect the political process,

77. The effectiveness of the television commercial is hardly disputed, for it alone appeals to both of man's most receptive senses—hearing and seeing. * * * Psychological memory experiments indicate strongly that people tend to remember advertising messages presented by a combination of visual and auditory methods significantly more than those presented by either method alone. See *e.g.*, Elliott, Memory for Visual Auditory, and Visual-Auditory Material, 29 ARCHIVES OF PSYCHOLOGY No. 199, at 52–54 (1936). Note, "Illusion or Deception: The Use of 'Props' and 'Mock-ups' in Television Advertising," 72 YALE L.J. 145, 156 n. 46 (1962). See generally, V. Packard, THE HIDDEN PERSUADERS (1957).

78. Note, "Regulation of Program Content by the FCC," *supra* note 46, at 715.

79. Aptheker v. Secretary of State, 378 U. S. 500, 514, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964).

80. Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942); Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957).

81. Valentine v. Chrestensen, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942); Breard v. City of Alexandria, 341 U.S. 622, 642, 71 S.Ct. 920, 95 L.Ed. 1233, 35 A.L.R.2d 335 (1951); Murdock v. Pennsylvania, 319 U.S. 105, 110–111, 63 S.Ct. 870, 87 L.Ed. 1292 (1943); Martin v. City of Struthers, 319 U.S. 141, 142 n. 1, 63 S.Ct. 862, 87 L.Ed. 1313 (1943); Jamison v. Texas, 318 U.S. 413, 417, 63 S.Ct. 669, 87 L.Ed. 869 (1943). In Head v. New Mexico Board of Examiners, the Supreme Court upheld as a health measure a state law prohibiting price-advertising by optometrists. 374 U.S. 424, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963). It did not reach the First Amendment question because that question had not been properly raised in the state court. *Id.* at 433 n. 12, 183 S.Ct. 1759. However, in a lengthy concurring opinion, supra note 46, Justice Brennan considered the principal issue to be whether in the Communications Act Congress had occupied the field of regulation of broadcast advertising. *Id.* at 433 *et seq.*, 83 S.Ct. 1759. There was no dissent. The Court's collective treatment of this case strongly discounts the possibility that it thought such regulation poses serious constitutional problems.

does not contribute to the exchange of ideas, does not provide information on matters of public importance, and is not, except perhaps for the ad-men, a form of individual self-expression. It is rather a form of merchandising subject to limitation for public purposes like other business practices. In the instant case, this argument is not dispositive because the cigarette ruling was premised on the fact that cigarette advertising implicitly states a position on a matter of public controversy. But though this advertising strongly implies that cigarette smoking is a desirable habit, petitioners have correctly insisted that the advertisements in question present no information or arguments in favor of smoking which might contribute to the public debate. Accordingly, even if cigarette commercials are protected speech, we think they are at best a negligible "part of any exposition of ideas, and are of * * * slight social value as a step to truth * * *." [82]

(3) In any event, the danger that even this marginal "speech" will be significantly chilled as a result of the ruling is probably itself marginal. We cannot, of course, undertake an economic analysis to determine the probability that the volume of cigarette advertising over radio and television will decline. We can say with fair certainty, however, that the cigarette manufacturers' interest in selling their product guarantees a continued resourceful effort to reach the public. We note also that cigarette advertising accounts for a sizable portion of broadcasting revenues,[83] and we think it at best doubtful that many stations will refuse to carry cigarette commercials in order to avoid the obligations imposed by the ruling.[84]

(4) Even if some valued speech is inhibited by the ruling, the First Amendment gain is greater than the loss. A primary First Amendment policy has been to foster the widest possible debate and dissemination of information on matters of public importance.[85] That policy has been pursued by a general hostility toward any deterrents to free expression. The difficulty with this negative approach is that not all free speakers have equally loud voices, and success in the marketplace of ideas may go to the advocate who can shout loudest or most often. Debate is not primarily an end in itself, and a debate in which only one party has the financial resources and interest to purchase sustained access to the mass communications media is not a fair test of either an argument's truth or its innate popular appeal.

Countervailing power on the opposite sides of many issues of public concern often neutralizes this defect. In many other cases, the courts must act as if such an inherent balancing mechanism were at work in order to avoid either weighing the worth of conflicting views or emasculating the robust debate they seek to promote. If the fairness doctrine cannot withstand First Amendment scrutiny, the reason is that to insure a balanced presentation of controversial issues may

82. Chaplinsky v. New Hampshire, *supra* note 80, 315 U.S. at 572, 62 S.Ct. at 769.

83. The briefs indicate that radio and television revenues from cigarette advertising total nearly $300,000,000 annually and account for more than 7% of all television advertising revenue.

84. The Commission has in fact promised to "tailor the requirement that a station which carries cigarette commercials provide a significant amount of time for the other viewpoint, so as not to preclude or curtail presentation by stations of cigarette advertising that they choose to carry." Cigarette Advertising, *supra* note 8, at 944.

85. *See, e.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130, 148–150, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) (opinion of Justice Harlan); New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686, 95 A.L.R.2d 1412 (1964); NAACP v. Button, 371 U.S. 415, 429, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); Roth v. United States, 354 U.S. 476, 484, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957).

be to insure no presentation, or no vigorous presentation, at all.[86] But where, as here, one party to a debate has a financial clout and a compelling economic interest in the presentation of one side unmatched by its opponent, and where the public stake in the argument is no less than life itself—we think the purpose of rugged debate is served, not hindered, by an attempt to redress the balance.[87]

(5) Finally, not only does the cigarette ruling not repress any information, it serves affirmatively to provide information. We do not doubt that official prescription in detail or in quantity of what the press must say can be as offensive to the principle of a free press as official prohibition. But the cigarette ruling does not dictate specific content and, in view of its special context, it is not a precedent for converting broadcasting into a mouthpiece for government propaganda. And the provision of information is no small part of what the First Amendment is about. A political system which assigns vital decisions to individual free choice assumes a well-informed citizenry. We do not think the principle of free speech stands as a barrier to required broadcasting of facts and information vital to an informed decision to smoke or not to smoke.

IV. Other Contentions

[16–18] The resolution of these basic questions leaves a residue of unanswered contentions. Mr. Banzhaf's complaint that the anti-smokers should have been granted equal time need not detain us. Even if it had authority to specify equal time, the Commission could reasonably find such a specific requirement an unnecessary intrusion upon the licensees' discretion. Likewise, the Commission did not abuse its discretion in refusing to require rebuttal time for the cigarette manufacturers. The public health rationale which supports the principal ruling would hardly justify compelling broadcasters to inform the public that smoking might *not* be dangerous. And an issue of "fairness" arises principally because the cigarette manufacturers are deterred from making health claims in their advertisements by the FTC's warning that such claims would be "unfair and deceptive."[88] If the FTC's determination is in error, the remedy does not lie in a further particularization of the FCC's fairness doctrine.

86. The main thrust of the Seventh Circuit opinion invalidating the FCC's personal attack rules under the First Amendment is that "strict compliance with the rules might result in a blandness and neutrality pervading all broadcasts arguably within the scope of the rules." Radio Television News Directors Ass'n v. United States (FCC), *supra* note 32, 400 F.2d p. 1014. The rules themselves, the Court said, "reflect an apparent desire on the Commission's part to neutralize (or perhaps to eliminate altogether) the expression of points of view on controversial issues and political candidates. Such a result would be patently inconsistent with protecting the invaluable function served by the broadcast press in influencing public opinion and exposing public ills." *Id.*, p. 1014. Thus, the Court was concerned that both the amount and the vigor of debate might be reduced.

87. *Cf.* Radio Television News Directors Ass'n v. United States (FCC), *supra* notes 32 and 86: "[T]he rules could be sustained only if the Commission demonstrated a significant public interest in the attainment of fairness in broadcasting * * * and that it is unable to attain such fairness by less restrictive and oppressive means." (p. 1020). In the instant case, we think that on balance First Amendment interests are advanced by the Commission's ruling. Moreover, the additional public interest at stake is compelling. And the technique of requiring the presentation of opposing views is markedly less "restrictive and oppressive" than many attacks on the cigarette-health problem which might well be within the power of federal agencies, but for the Cigarette Labeling Act.

88. *E.g.*, FTC, Order Vacating Trade Regulation Rule, 30 Fed.Reg. 9484, 9485 (1965). Industry codes also disapprove of affirmative health claims in cigarette advertising, but in the circumstances we hardly think this self-regulation makes out a sufficient case to require compensatory relief from the FCC.

[19, 20] Finally, The Tobacco Institute contends that the Commission's ruling is void on account of procedural irregularities. The initial ruling was made without providing interested parties either notice or an opportunity to be heard. But since the Commission subsequently entertained numerous petitions for review, wrote a thorough opinion affirming its ruling, and made the ruling prospective from the date of the affirming order, we find no prejudice to substantial rights. The Tobacco Institute also intimates that the Commission should have held an oral hearing, should have made factual investigations of its own, or should have instituted a full-fledged rulemaking proceeding, before issuing its ruling. As a general rule, we agree that more careful procedures are required to support innovation by an administrative agency. But the essential premises of the instant ruling are only (1) that cigarette advertising inherently promotes cigarette smoking as a desirable habit, (2) that very substantial medical and scientific authority regards this habit as highly dangerous to health and therefore undesirable, and (3) that in view of the volume of cigarette advertising, existing sources were inadequate to inform the public of the nature and extent of the danger. These premises are supported by the record. We do not see, and The Tobacco Institute has never suggested, what evidence a more extensive proceeding might have produced to refute them.

Affirmed.

WILBUR K. MILLER, Senior Circuit Judge:

I concur in the affirmance of No. 21,285, Banzhaf v. Federal Communications Commission and United States, but I dissent from the affirmance of Nos. 21,525–6, WTRF-TV v. Federal Communications Commission and United States, and from the affirmance of No. 21,577, Tobacco Institute, Inc. v. Federal Communications Commission and United States.

Exhibit 105: *In Re Friends of the Earth,* (Large Automobiles), 24 FCC 2d 743 (August 5, 1970)

F.C.C. 70-862

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
FRIENDS OF THE EARTH
Concerning Fairness Doctrine Re Station
WBNB-TV, New York, N.Y.

AUGUST 5, 1970.

MR. GARY SOUCIE,
Friends of the Earth,
30 E. 42d Street,
New York, N.Y.

DEAR MR. SOUCIE: This is in reference to the complaint filed on behalf of Friends of the Earth (FOE) on March 14, 1970, and supplements relating thereto filed March 22, 1970, and April 8, 1970, regarding the alleged failure of station WNBC-TV, New York City, to comply with the fairness doctrine or to meet its public interest obligations concerning coverage of the issue of air pollution caused by automobiles and gasoline. You urge that the Commission's opinion on the *Applicability of the Fairness Doctrine to Cigarette Advertising* (9 FCC 2d 921 (1967)) and the related court decision, *Banzhaf* v. *F.C.C.*, 405 F. 2d 1082 (D.C. Cir. 1968), are equally applicable to automobile and gasoline commercials and that they also represent one side of a controversial issue of public importance.

Your complaint includes copies of a February 6, 1970 letter to WNBC-TV setting forth your request that the station describe the methods it proposes to utilize to meet its obligations in presenting the other side of the automobile-gasoline/air pollution issue and the February 18, 1970 reply from WNBC-TV stating that the station has fulfilled its fairness obligations on the issue of air pollution in its overall programming and declining your offer of anti-automobile/gasoline commercials.

In your March 14, 1970 complaint, you state that WNBC-TV's refusal of your request was improper and that the reasons given by WNBC-TV are based on erroneous interpretations of the applicable law and policy. WNBC-TV in its February 18, 1970 response stated its belief that the Commission's cigarette ruling [1] did not extend to automobile and gasoline commercials or the advertising of any other commercial product; that the automobile and gasoline commercials do not represent the presentation of one side of a controversial issue of public importance; and that WNBC-TV has fulfilled its fairness obligations with respect to the issue of air pollution in its overall programming and will continue to do so. WNBC noted that between

[1] *Applicability of Fairness Doctrine to Cigarette Commercials,* 9 FCC 2d 921 (1967), aff'd *sub nom, Banzhaf* v. *F.C.C.*, 405 F. 2d 1082 (1968).

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November 1969 and February 1970 it had presented one documentary, two panel discussions and two news features dealing with air pollution and including the effects of automobile related pollution.

In support of your position you argue that the "public interest" standard referred to in the Commission's cigarette ruling was not limited to that product but rather that the Commission developed the standard of whether the product's "normal use has been found by Congressional and other Governmental actions to pose such a serious threat to general public health that advertising promoting such use would raise a substantial controversial issue of public importance . . . ." [2] It is argued that governmental action on air pollution is evidenced by both presidential messages [3] and Congressional action.[4]

The second argument advanced is that auto and gas advertisements (particularly those for large-displacement engines and lead additive gasolines) generally convey a message that such products (and necessarily the pollution they cause) are a requirement for the full rich life. The automobile commercials extol the virtues of large car size, "be a big rider," "4-barrel V-8" engines and "up to 429 cubic inches" and imply that automobiles are consonant with an unpolluted environment (e.g., by showing an automobile on a clean beach), thus, it is argued, representing one side of controversial issue of public importance—i.e., whether in the short run the public should prefer unleaded gasoline and small-engined cars which utilize less lead additive gasoline until the auto and gas companies convert to non-polluting products.

Finally, you assert that the programs cited by WNBC–TV relating to air pollution do not fulfill the fairness obligation the station has incurred through the broadcast of innumerable automobile and gasoline commercials. This fairness obligation, you suggest, cannot be fulfilled by regular programming because of the nature and frequency of the commercial announcements. *Banzhaf* v. *F.C.C.*, *supra.*

By letter dated June 22, 1970, the Environmental Protection Administration (EPA) of New York City strongly supported the position taken by the Friends of the Earth in its complaint. The Administration's submission set forth the pollution problems caused in New York City by autos and use of leaded gas, cites extensive supporting authority and pertinent Congressional enactments. In addition, on June 24, 1970, the Citizens for Clean Air, Inc. (CCA),

[2] Applicability of Fairness Doctrine to Cigarette Advertising at p. 943.

[3] President Nixon's February 10, 1970 Address to Congress—". . . pollution is our most serious environmental problem." President Nixon's State of the Union message—"The automobile is our worst polluter of air."

[4] The Clean Air Act of 1965, supplemented by the Air Quality Act of 1967 and more recently by the National Environmental Policy Act of 1969 (NEPA), Public Law 91–190, 83 Stat. 852 (1970), which requires federal agencies "to use all practical means, consistent with other essential considerations of national policy . . ." to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans." (Public Law 91–190, § 101(a)(b)) *Texas Committee on Natural Resources* v. *U.S.*, (Case No. A 69 CA 119, February 5, 1970, W.D. Texas. You also cite the report to be issued by the National Air Pollution Control Administration (NAPCA) (as summarized in the Wall Street Journal of March 5, 1970) regarding the danger and prevalence of carbon monoxide (CO) pollution in urban areas and the fact that 75% of such pollution comes from motor vehicles. According to complainant, the NAPCA report will propose standards for CO emissions and possibly require stricter motor vehicle exhaust emission controls than presently exist.

submitted a telegram expressing their support for FOE's complaint and expressing that organization's willingness to provide stations with anti-pollution messages.

By letter dated July 13, 1970, NBC responded to the above letter of EPA. It reiterated its position and further stated that "WNBC–TV has presented many programs and announcements which do express the anti-pollution point of view." It attached a partial list of such programs during the first five months of 1970 and stated that in addition, "news reports in which an anti-pollution viewpoint was expressed were carried on a number of occasions, and over 200 public service announcements for anti-pollution, conservation, and other related organizations in the field of ecology or environment were carried by WNBC–TV during the first 6 months of 1970." NBC therefore urges that the public is being informed on the anti-pollution viewpoint.

Finally, by letter dated July 30, 1970, Mr. Geoffrey Cowan submitted a letter setting forth a series of recent developments bearing on the complaint (e.g., the health hazard crisis created by New York City's automobile-produced air pollution (p. 2 Letter). Mr. Cowan does not contend that WNBC–TV "has totally failed to discuss ecology", noting that it made "a particular effort to discuss the environment this spring" and in particular with the Today programming and the program, "In Which We Live". Mr. Cowan's letter does assert that WNBC–TV coverage of the air pollution issue is inadequate; that "at most, one-third of the 50 programs cited by the stations had anything to do with air pollution, and only five or six of these appear to have presented even the most cursory discussion of automobile pollution." (p. 4, Letter). He further believes that "One reason for WNBC–TV's failure to discuss automobile pollution in depth is the natural reluctance to criticize the products made by some of the station's principal sources of revenue." The letter urges, *inter alia*, the Commission to enunciate a clear policy position which will require licensees to act in the public interest in this field.

We have reviewed the arguments presented and conclude that although no action is warranted against WNBC, a full statement of our position would be helpful to broadcasters and the public alike.

DISCUSSION

We shall first discuss the pertinent background factors and then the particular complaint here.

In the *Cigarette Advertising* ruling, *supra*, the Commission applied the fairness doctrine—really the public interest standard (see id. at p. 927, para. 14)—to the broadcast of cigarette commercials. We pointed out that the normal use of cigarettes had been found by the Government to be a hazard to health (e.g., Surgeon General's Reports; Congressional enactments); that broadcasters were presenting commercials urging people to smoke; and that therefore the public interest required that the public also be informed, to a significant extent, that however enjoyable smoking may be, it does represent a hazard to health. As a practical matter, this ruling resulted in the

presentation of anti-smoking messages, in a reasonable ratio to the smoking commercials, including periods of maximum audience listening. See *NBC, Inc.*, 16 FCC 2d 956.

At the time we adopted the above ruling, it was urged that it could not be limited to just one product, cigarettes; that it would logically have to be extended to many others, with the result that the present commercially based system of broadcasting would be undermined. We rejected that argument (9 FCC 2d 921, 943–945). We set forth our view that cigarettes were a unique product in this respect. We recognized of course that many advertised products have negative aspects in use. Automobiles result in many deaths each year and because their gasoline engines constitute the main source of air pollution (S. Rept. No. 91–745 91st Cong. 2d Sess., p. 3), they raise most serious environmental problems. Such problems are raised by a host of other products or services—detergents (particularly with phosphates), gasoline (especially of a leaded nature), electric power, airplanes, disposable containers, etc. The list could be extended greatly. We believed, however, that cigarettes are distinguishable from these products on a number of grounds that really coalesce:[5]

(i) Cigarette smoking does not involve a balancing of competing interests. It is a habit—like snuff or chewing tobacco—which can fade away and, indeed, which the Government for health reasons is urging people either not to begin or to stop at once. That is not true of the other products. As stated, they all involve ecological problems. These problems call for remedial action of varying nature, and some are certainly urgent. However, the Government is not urging people to stop *now*—without any delay—buying or using gasoline-engine automobiles, the detergents, or electricity. The benefits and detriments here are of a more complex nature, and do not permit the simplistic approach taken as to cigarettes.[6]

(ii) Indeed, because of the above consideration, we stated in our *Cigarette Advertising* ruling that the real question was how such a product could be promoted at all on a medium impressed with the public interest. In view of the Cigarette Labeling Act of 1965, we could not act on that question, but with the expiration of that Act, we proposed to ban cigarette advertising. See Notice of Proposed Rule Making, 32 F.R. 13162. And Congress has of course acted to do so. Public Law 91–222. No one proposes to stop promoting or using the fruits of the technological revolution (e.g., to stop all use of autos or trucks); rather, we are recognizing that we must take prompt action to come to terms with the environmental effects of that technology.

(iii) Finally, action can be taken effectively in these areas, and therefore the focus should properly be on action dealing with products which contribute to pollution, not the peripheral advertising aspect. It was urged that cigarettes are a legal product, and thus there can be no question of promoting their use. To this we answered that in

[5] We also noted that it is the normal use of cigarettes in any amount that is hazardous—not an abuse as in the case of automobile accidents or aspirin.

[6] We do not by the above mean to denigrate the seriousness and urgency of the problem of gasoline-engine automobile pollution problem. Thus, we recognize that, because of weather conditions or other factors, there may be Governmental strictures on the use of automobiles in major cities. But nevertheless the problems are complex.

light of the national experience with liquor, prohibition of use of cigarettes might be adjudged poor policy by the Congress, but that would be all the more reason to act effectively in the areas that remained open—namely, educational campaigns and forbidding promotion (which would undercut such campaigns). See *Letter to Senator Moss*, September 17, 1969, 23 FCC 2d ——. This consideration is not applicable to these other products or services. There could be no thriving bootlegging industry of airplanes, electric power plants, autos, detergents, etc. This means that more direct and effective Governmental action, if appropriate, is perfectly feasible. See discussion, *infra*, pp. 8–9.

This brings us to the gravamen of the complaint here—that the public should be informed of the issue, as a predicate for action by elected officials. We agree fully that these environmental issues constitute issues of great importance. See, e.g., Message of President Nixon, February 10, 1970. Licensees must devote a reasonable amount of time to such issues, as a most important part of their obligation to operate in the public interest. *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246, 1248–9 (1949). In *Red Lion Broadcasting Co., Inc* v. *F.C.C.*, 395 U.S. 367, 394 (1969), the Supreme Court stated:

> It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions. The statute, long administrative practice, and cases are to this effect.

It is up to the licensee to determine, reasonably and in good faith, the nature of its coverage of these most vital environmental issues (e.g., the format of the program; the appropriate spokesmen, etc.) *Report on Editorializing by Broadcast Licensees*, *supra*, at p. 1250. As stated, the issues are not simple ones but rather involve difficult questions concerning the steps to be taken, both short and long term, the transitional periods to be allowed, the allocation of cost among the manufacturer, consumer and government, etc. Thus, the question of pollution by the internal combustion engine has been framed in terms of emission standards (see, e.g., 1967 Clean Air Act; 1968 rule by the National Air Pollution Control Administration of HEW, 33 Fed. Reg. 8304; or, in view of the increasing number of cars, of the eventual development of "a new [propulsion] system which . . . produces few pollutants and performs as well or better than the present power plant" (S. Rept. No. 91–745, 91st Cong., 2d Sess., p. 4; e.g., the gas turbine engine; steam (Rankine cycle) engine). The short-term solution also poses complex issues. Since we are not expert in this field, we simply note that there are several approaches besides the one urged here by complainants (e.g., emissions standards, with periodic inspections; restriction on use of automobile, etc.). Further, the pollution issues of several products are often interrelated. Thus, it has been stated that elimination of phosphates from detergents will not be effective if steps

are not taken concurrently with respect to sewage, etc., (e.g., Joshua Lederberg, *Washington Post*, June 6, 1970, p. A15). Coverage by programs tailored to illuminate these aspects is clearly called for. In this connection, the matter again differs from the cigarette area, where it was appropriate, and indeed fair, simply to track the cigarette advertisements with announcements calling attention to the fact that cigarettes are the main cause of such diseases as lung cancer, emphysema, and chronic bronchitis. See Federal Trade Commission Notice, 29 F.R. 8325.

This last citation points up again the distinctions between the cigarette and these products. Were they the same, as urged by complainant, then we would be requiring each advertisement to contain the warning to the public of the health hazard. There is clearly no more effective way to proceed, and indeed, with a matter such as cigarettes, it is the only appropriate way—that since the public is being urged to consume a hazardous product (e.g., main cause of lung cancer, etc.), that it be informed, both in the advertising and labelling, of the hazard.[7] Complainants do not urge this, presumably because it would spell the end of all these product commercials. Indeed, we stress again that were the two matters really the same, we would be proposing to ban promotion of these high-powered automobiles or leaded gasoline, since that is our stated view as to cigarettes. See Notice of Proposed Rule Making in Docket No. 18434, 32 F.R. 13162. Significantly, complainants do not request such a ban, thus tacitly recognizing that there is a significant difference.

From the foregoing, our conclusion on the complaint now before us is clear. There is the threshold issue whether these commercials, which are essentially advertising slogans, such as "Dodge Rebellion" or "Ford has a better idea," "Quick start in cold weather," or "put a tiger in your tank," present one side of a controversial issue in this complex field. Further, complainant in effect calls for ascertainment of the number of commercials promoting high-powered cars, the number promoting the smaller cars, the number and nature of the programs dealing with the issue of air pollution stemming from the gasoline engine automobile,[8] and then a judgment whether the difference in time, as between the large and small cars, is sufficiently great to call for the presentation of further time to the side which the complainant espouses. We have no such information before us, but we decline in any event to extend the cigarette advertising ruling to these other products. We believe, for the reasons set forth previously, that we should adhere to our previous judgment that cigarettes are a unique product, permitting the simplistic approach adopted in that field.

However, even assuming that we are wrong in that belief, we would not extend the ruling generally to the field of product advertising. That is what, in effect, complainant urges since, as stated, a great many products have some adverse ecological effects. Were we to adopt a

[7] Only passage of the Cigarette Labelling Act of 1965 prevented effectuation of such an administrative requirement. Indeed, what complainant does not recognize is that the cigarette fairness ruling was a stop-gap requirement until termination of the 1965 Act. See para. 31, *Cigarette Fairness* ruling 9 FCC 2d 921.

[8] We also take note that, unlike cigarettes, some gasoline commercials increasingly do urge the use of gas which is less polluting.

scheme of announcements tracking in a significant ratio the ordinary product commercials, the result would be the undermining of the present system, based as it is on such commercials. Such a result is not consistent with the public interest. It is not required, since there is the alternative of providing advertiser-supported programming, valued by the public, by means of the product commercial, and at the same time affording appropriate time for discussion of these vitally important issues. In short, our action must be guided by one standard, the public interest (Sec. 303(g) of the Communications Act; *NBC* v. *U.S.*, 319 U.S. 119 (1934)), and on that standard, extension of the cigarette ruling is not in order.

In so stating, we fully recognize that the public interest standard must take into account public health (*Banzhaf* v. *F.C.C.*, 405 F. 2d 1082, 1096 (CADC 1969)), and specifically the environmental pollution aspects of public health. See National Environmental Policy Act of 1969, 83 Stat. 852, setting forth the ". . . continuing policy of the Federal Government to use all practicable means and measures in a manner calculated . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans" (Section 101(a)). The Act further states that "to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act" (Section 102). We believe that our action today does so, and that for the reasons set forth in this opinion, it is *Red Lion*—not the cigarette advertising ruling—which should be followed here as the best means of fulfilling our obligations under the 1969 Act.

We wish to emphasize that our ruling is restricted to the general product advertisement (e.g., "Join the Dodge Rebellion," "Put a Tiger in your tank," etc.). Obviously, a commercial could deal directly with an issue of public importance; if so, the fairness doctrine is fully applicable.

We also recognize that regulation of commercials may be a device used in a government campaign against pollution. As stated in point (iii), p. 4 *supra*), it would appear that if, for example, recycling makes sense, the Government would simply move to require such recycling in place of disposable containers; if detergents with enzymes or phosphates should not be sold, such products should be banned after a specified date (e.g., the Canadian law on detergents with a specific amount of phosphates—the *New York Times*, August 2, 1970, p. 26.); if only automobiles with engines of a certain size should be shipped or sold, that can readily be specified. However, we are not the experts here. It may be that a program of limiting advertising on the basis of pollution considerations would also be a helpful, transitional tool, just as taxation is apparently being proposed. See, e.g., President's Message on new taxes on non-leaded gasoline, February 10, 1970. If so, here again the matter is one for consideration by the Congress—not this agency which is not, and cannot be, the arbiter of such matters. And any decision made could then be applied across-the-board. This is not only a fairer way to handle the matter (see Letter to Senator

Moss, September 17, 1969, *supra*) but also avoids the danger that restricted to one medium, there is the substantial possibility of a corresponding increase in promotion in the other media, in order to offset the restriction. We would of course assist fully in the implementation in the broadcast field of any decision made by an agency appropriately authorized by the Congress to act in this respect.

Finally, we shall comment briefly on the contention that this preserves the commercial broadcast system, when the issue in question is whether life will be preserved—whether there will be anyone to tune in the commercial broadcasts. First, our action is logically and clearly called for, since the commercial broadcast network facilitates public focus on these great issues. If that system is undermined, it does not promote solution of our environmental problems—rather, it would work against such solution by eliminating or crippling a most important information device. But all this means that the device must be used to inform—that it must fully and effectively meet its *Red Lion* obligations. To give but one example, the Washington Evening Star of May 29, 1970, p. A–14, quotes the following Congressional testimony of Mr. Russell E. Train, the chairman of the President's Council on Environment Quality,

> The supersonic transport will fly at an altitude between 60,000 and 70,000 feet. It will place into this part of the earth's atmosphere quantities of water, carbon dioxide, nitrogen oxide and particular matter . . . . A fleet of 500 American SSTs and Concordes flying in this region of the atmosphere could, over a period of years, increase the water content by as much as 50 to 100 percent . . . . "Water in this part of the atmosphere can have two effects of practical significance. First it would affect the balance of heat in the entire atmosphere leading to a warmer surface temperature . . . . Secondly, water vapor would react so as to destroy some fraction of the ozone that is resident in this part of the atmosphere. The practical consequences of such a disruption could be that the shielding capacity of the atmosphere to penetrating and potentially dangerous ultraviolet radiation is decreased.

We cite the above only as a recent example of an environmental issue (see also The New York Times, August 2, 1970, p. 1); we could have referred to the mercury crises or the metallic pollution problem. We do not know if Mr. Train is correct or not, or whether the SST should not be authorized. Clearly, however, this is an issue of public importance which must be resolved. Broadcasters must discharge their public trust by contributing fairly and effectively to an informed electorate on these vital issues.

In sum, we decline to extend the cigarette rulings to these products commercials, and specifically hold that it would be inconsistent with the public interest to ban these commercials, have them contain health hazard announcements, or require announcements geared in some ratio to these ordinary product commercials. On the other hand, the broadcaster does have an obligation to inform the public to a substantial extent on these important issues, including prime time periods. While we have stressed that the broadcaster has large discretion in choosing and covering controversial issues of public importance, it would be no more reasonable for broadcasting to ignore these burning issues of the seventies—which may determine the quality of life for decades or

centuries to come—than it would be to ignore the issue of Vietnam or the issue of racial unrest in communities racked by this problem.[9]

It is not necessary to peg the above obligation on the fact that the broadcaster is carrying these product commercials and therefore should reasonably inform his public concerning associated environmental issues. For, under *Red Lion* he must do so, whether or not he carries the commercials. DDT or mercury compounds are rarely, if ever, advertised, but that does not mean that the public should be uninformed if there is a crucial controversial issue raised by their use. If, after cigarette advertising ends on broadcast media, cigarette smoking continues to cause a rising epidemic of death, the broadcaster cannot ignore discussion of the public health matter raised by that epidemic. In the words of the Court in *Red Lion*, "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount" (395 U.S. at 389).

The foregoing is, we believe, responsive to the request that we enunciate clearly the public interest considerations applicable to this field (see Cowan Letter, p. 4). We shall also deal briefly with two other matters raised in that letter. The first deals with the charge that WNBC–TV is not properly covering the air pollution issue because of its support from automobile and gasoline advertisers. There is no support for this charge. The one recent episode cited (the NBC Migrant Workers programs) is under study by the Commission, and further comment is inappropriate. We note, however, that the networks are to be commended for this type of broadcast (e.g., the CBS "Harvest of Shame"; the recent NBC Migrant Workers program). For, these programs typify the commitment to "robust, wide-open debate" upon which this nation depends. They do not constitute simply a measured, careful assessment of where other entities or public opinion are, but rather demonstrate a devotion to leadership—to breaking open forcefully, effectively, and fairly issues of great importance. It goes without saying that this kind of effort is called for, whatever the effect on the broadcast media advertiser.

Second, the Cowan letter challenges the adequacy of the WNBC–TV efforts in this area of air pollution. But NBC submitted only an example showing in this area, and that showing does indicate significant coverage of the issue. In any event, this is an area which would be explored, upon appropriate complaint and showing, at renewal time, where the licensee could demonstrate its overall record in this respect—the discharge of his obligation to devote a reasonable amount of time to controversial issues. In short, this matter is not appropriately before us at this time, and we therefore restrict our ruling to the fairness doctrine issue presented.

On that issue, we hold that the licensee could reasonably reject the announcement approach sought by you, and that on the basis of the information presented, no further Commission action is warranted.

[9] Of course, the broadcast licensee retains discretion as to issues, format, appropriate spokesmen, etc. Thus, a broadcaster located in an area with no air pollution issue but a severe water pollution one would clearly focus on the latter. Another, such as in New York City, would be confronted with public issues in both respects. In short, there remain wide areas for judgment by the licensee, based upon the facts of his particular area.

Commissioner Bartley concurring in the result; Commissioner Johnson dissenting and issuing a statement.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

Dissenting Opinion of Commissioner Nicholas Johnson

"The automobile is our worst polluter of the air."

—President Nixon,
State of the Union (1970).

"Poetic License"

This license certifies
That Ron Padgett may tell whatever lies
His heart desires
Until it expires

—Ron Padgett,
Columbia University Forum
(Spring 1970).

This question today is a crucial one for American commercial television. Will we allow the little glass screen in our living rooms to go merrily on its way merchandising the machines and mechanisms that pour thousands of pounds of pure poison in our sky every day? Or will American television for once put fantasies aside, pull its head out of the smog, and put the most potent merchandising tool yet developed by man—the spot advertisement—to work in curing instead of creating, in addressing rather than avoiding, one of America's greatest social ills: Pollution.

I find it ironic, if not sad, that America can invest so much stock faith and rhetoric in the "magic" of the competitive marketplace of commerce, and yet ignore the "marketplace of ideas" (to use a phrase by Mr. Justice Holmes) by tolerating a monopoly used to merchandise Detroit's peculiar dreams of the appropriate automotive life-style—with all that life-style's attendant social ills. In perhaps one of the great advertising overkills of all time, Americans are being grossly oversold an automotive product and life-style they neither need nor may really want, and which may eventually kill them with its exhaust by-products. In effect, the Commission again rules that Americans have no right to talk back to their television sets—at least on this issue. I dissent.

I

We begin with our cigarette decision, *Applicability of the Fairness Doctrine to Cigarette Advertising*, 9 F.C.C. 2d 921 (1969), and related court decisions, *e.g.*, *Banzhaf* v. *F.C.C.*, 405 F. 2d 1082 (D.C. Cir. 1968). Using law and logic stemming from these rulings, the Friends of the Earth compellingly argue that the refusal of WNBC–TV, New York City, to provide Friends with an opportunity to present anti-pollution spot advertisements violates the Fairness Doctrine. The majority up-

holds WNBC's refusal. The flaw in the Commission's thinking is readily revealed in the simple way the majority occasionally refers to these complaints—as "anti-automobile/gasoline commercials." That is only a small part of the truth, a distorted part at that. Friends of the Earth are anti-pollution, not just anti-car or anti-gas, and that simple yet fundamental distinction should be born in mind in attempting to deal with all the arguments here.

The majority labors long and hard to distinguish cigarettes from other products, including detergents, tin cans, and gasoline engines. The argument rests on elaborate contentions that cigarettes are so unique the Fairness Doctrine cannot apply to other "product commercials." Before turning to a more detailed analysis of the majority's points, it is well to bear in mind former Commissioner Loevinger's view. In his concurring opinion in the cigarette case, Commissioner Loevinger pointed out that cigarette smoking and automobile pollution pose closely analogous issues. He said:

> The Commission will be hard pressed to find a rational basis for holding that cigarettes differ from all other hazards to life and health. Contrary to the argument in the Commission opinion (para. 46), the normal use of automobiles does pose a health hazard, polluting the atmosphere to a degree that is dangerous not only to those using the automobiles but, even worse, in some localities to everyone, including infants and invalids. *Applicability of the Fairness Doctrine to Cigarette Advertising*, 9 F.C.C. 2d 921, 954 (1967).

If the analogy was strong in 1967, it is far stronger today.

II

So far as I can make out, the majority first argues that because cigarettes are a "unique" product, there are logical reasons for not extending the fairness doctrine to other products. Yet the logic of this position is clearly faulty. The question is not whether pollution of the lung differs from pollution of the air, or whether the products are manufactured or used differently, but whether advocacy of their use raises an issue of controversy and public importance sufficient to invoke the fairness doctrine. The majority's attempt to distinguish cigarettes from automobiles, therefore, is in fact a rather enormous *non sequitur*. There are no doubt many interesting differences between the two products, but so what? This fault in reasoning appears more clearly in the three points used by the majority to support its product distinction:

(1) "Cigarette smoking does not involve a balancing of competing interests. It is a habit—like snuff or chewing tobacco—which can fade away . . . ." Yet this is not true of other products, the majority maintains. First, it seems this argument is untrue. The nicotine in tobacco smoke creates in smokers a habitual and physical dependence on tobacco. Heavy smokers can "kick the habit," but it usually takes great effort of will. The anti-smoking announcements are designed to warn smokers and non-smokers of the dangers of addiction. Yet the contemporary American is wedded to automobile pollution by even stronger bonds of necessity and lack of choice. How could an individual "kick the pollution habit" if he wanted to? Most people depend

on automobiles for transportation essential to their livelihood. Many might prefer to purchase pollution-free automobiles, but Detroit has simply not given them this choice. Individuals wanting to eliminate both air and lung pollution, therefore, could give up both cigarettes and automobiles. There are, after all, alternatives to automobiles—new rapid transit systems, subways, electric automobile engines, bicycle riding, and plain old walking.[1] But that task is a difficult one. The issue here is whether the highway and oil lobbies we hear so much from on our television set will permit us to hear of the alternatives. Second, I fail to see the force of this argument. What difference does it make if cigarettes involve "habits" and automobiles do not? The question before the Commission is whether advocacy of their use invokes the Fairness Doctrine. Pay-TV, for example, may be a controversial issue of public importance in certain areas, see, *e.g.*, *The Spartan Radiocasting Co.*, 33 F.C.C. 765 (1962), yet it does not become so because it is "habit forming"!

(2) The majority appears to argue further that the Commission could consider (and has considered) a ban on all cigarette advertising, but no one would think of rolling back the technological revolution to "stop all use of autos and trucks." This argument is illogical, wrong, and a *non sequitur*. It is illogical because it improperly analogizes cigarette *advertising* with automobile *use*. The analogy, if there is one, is a possible ban on automobile *advertising*. Further, the argument in any event is wrong—for Friends of the Earth do not propose the elimination of either automobiles or automobile advertising. They merely claim their right to present a contrary view. Finally, the argument involves a *non sequitur*—for even if it were true that we could not ban the automobile (which it most certainly is not—particularly if the only alternative was death for the human race), we could certainly tolerate the *view* that our society is endangered by the automobile, and that we should work toward alternative forms of transportation.[2] The issue, therefore, is the freedom to express differing

[1] For a timely, thorough analysis of just how distorted our national transportation priorities are, see Leavitt, *Superhighway—Superhoax* (1970). The book details the quiet scandal in the nation's Interstate Highway system, a scandal that has cost the nation dearly in the lagging development of alternative modes of transportation.

Consider this portion of a *Washington Post* editorial, titled "20 Billion a Year for Highways?":

"On the Senate floor one day last month, Senator Randolph tossed off a piece of information that each member of Congress and each taxpayer ought to ponder for a while. 'State highway officials, through their nationwide organization,' he said, 'estimate that the national highway needs for the next 15 years will cost $320 billion.'

"We've gotten so used to talking about billions—a federal debt that approaches $400 billion, a defense budget of around $80 billion—that the size of this figure is hard to grasp. But $320 billion is enough money for the government to buy all the railroads in the country, repair their roadbeds, fill all of their needs for new equipment, operate their passenger and commuter trains without charge to the riders for the next 15 years, and still have a big kitty left over. Looked at another way, $320 billion is enough to buy every man, woman and child in the United States a new television set on each January 1 for the next 15 years. *Washington Post*, July 20, 1970, at A22, col. 1."

Consider also this portion of a *New York Times* editorial, titled "How Livable the City?":

"Perhaps the only thing absolutely clear in the recent smog was the idiocy of present priorities. Too much Federal revenue goes for war-related purposes, too little to meet domestic needs. Even in the nonmilitary sphere, there is distortion. The typical urban taxpayer—the father of two, making $10,000 a year—paid $19 for space exploration last year and only $1 for mass transportation. This taxpayer paid $26 for more Federal highways to accommodate more automobiles and only $4 to fight pollution of both the air and water. *N.Y. Times*, Aug. 4, 1970, at 28, col. 1."

[2] Banning automobiles, at least partially, is an idea not without merit. Environmental Action, the conservationist group that sponsored Earth Day last April, has suggested as much. Environmental Action has urged mayors of five major American cities (including New York City and Washington, D.C.) to ban cars from special "pollution-free" downtown

views on air pollution, not abolition of automobiles or their promotion. Friends of the Earth seek only to use the public airwaves to help the people get their sky back.

(3) The majority says the "focus should properly be on action, not the peripheral advertising aspect." Here again the majority attempts to deny the special, rather incredible impact of automobile spot advertising and its impetus to consumer "action" as a marketing tool. The majority contends that the anti-pollution drive has been sufficiently aired in regular news and public affairs programming. Yet the special effects of advertising cannot fairly be ignored. Advertising is hardly "peripheral." It is crucial. It has contributed enormously to our "automobile age," and is central to the problem at issue here.

There are a number of factors that should be weighed in determining whether a licensee has given "significant" coverage to various views. First, an important factor is the frequency and regularity of presentation. The Commission has explicitly recognized this factor in its decision, *Cigarette Advertising*, 9 F.C.C. 2d 921, 941 (1967):

> We think that the frequency of the presentation of one side of the controversy is a factor appropriately to be considered in our administration of the Fairness Doctrine. . . . For, while the Fairness Doctrine does not contemplate "equal time" if the presentation of one side of the issue is on a regular and continual basis, fairness and the right of the public adequately to be informed compels the conclusion that there must be some regularity in the presentation of the other side of the issues.

In affirming this ruling, the U.S. Court of Appeals in *Banzhaf* v. *FCC*, 405 F. 2d 1099 (D.C. Cir. 1968), was even more explicit:

> In these circumstances, the Commission could reasonably determine that news broadcasts, private and governmental educational programs, the information provided by other media . . . inadequately inform the public of the extent to which its life and health are most probably in jeopardy. *The mere fact that information is available, or even that it is actually heard or read, does not mean that it is effectively understood.* A man who hears a hundred "yeses" for each "no," when the actual odds lie heavily the other way, cannot be realistically deemed adequately informed. [Emphasis supplied.]

Second, even if the licensee has satisfied the fairness doctrine under traditional analyses, I think we must recognize the unusually powerful impact of spot advertising as compared to normal news coverage. Prepared spot announcements should be placed in a class by themselves—a proposition acknowledged by FCC Chairman Dean Burch with respect to political advertising. *Voters' Time*, Twentieth Century Fund Commission on Campaign Costs in the Electronic Era, p. 15 (New York 1969); *Statement of Chairman Dean Burch*, Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, June 2, 1970. The spots in question invoke the familiar Madison Avenue techniques: the enticements of glamour and excitement ("Be a Big Rider!"); the allure of travel

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areas. *Washington Post*, Aug. 4, 1970, at A3, col. 1. Such a suggestion hardly seems radical when one considers the dangerous cesspool of air that hung over the entire Eastern Seaboard for several days in late July and early August 1970. "The bread we threw out on the water now returns to us," one newspaper editorialized. "It is true that abnormal weather in the form of a mess of warm air that won't move on is a major weave in the blanket of pollution now covering us. But we cannot blame the fickleness of nature for this mess: It is man-made, largely by the exhaust fumes from automobiles and buses, according to local officials." *Washington Post*, July 30, 1970, at A20, col. 1.

and faraway places; the invocation of an ethic of masculinity; pleasant surroundings often out of more usual contexts (by showing an automobile on a clean beach); and the reassuring appearances of well-known, pleasant-looking personalities to intone the blandishments prepared by the manipulation specialists. Petitioners seek only to present an alternative to the siren call of the oil and auto establishments. This the majority has refused them.

III

The ultimate rationale for denying the complaints here is that, to use the majority's language, "the result would be the undermining of the present system [of American television], based as it is on the product commercials. Such a result is not consistent with the public interest." I cannot believe that the majority finds it more important to preserve the commercial broadcast system than *life itself* on our planet. Yet this may be the result of their action. Philip Slater has written in his recent book, *The Pursuit of Loneliness—American Culture at the Breaking Point*, that the "old culture" in America "tends to give preference to property rights over personal rights, technological requirements over human needs, . . . the producer over the consumer, [and] means over ends. . . ." Nothing better places the Commission majority in the "old culture" than today's decision.

Once again, the majority has successfully seized and wrestled to the ground a phantom issue of its own creation. Its rationale, therefore, can hardly be taken seriously. Can anyone seriously believe that the presentation of a few anti-pollution spot advertisements will destroy the "American System of Broadcasting"? One would expect this argument from *Broadcasting* magazine and other trade publications, but not the Federal Communications Commission. After all, did anti-smoking commercials bring about the end of American commercial broadcasting? Of course not. (I sometimes suspect the broadcasting industry itself could ban all cigarette and automobile commercials, as well as a dozen other types, and still fund its entire operations on soap, deodorant and detergent commercials alone.) In any event, the majority has not shown that the gravamen of its decision—preservation of "the present [television] system"—is even an issue here. We have no economic information whatsoever on the cost impact of anti-automobile advertisements. Without this, I must dismiss the majority's artificial fears as illusory.

We must not lose sight of what is fundamentally at issue here: whether our citizens should be told the *whole* truth about the products they use and consume. Is this not the bedrock of American competitive enterprise and consumer choice in the marketplace? How can such an un-American position be urged by an agency of our government? For an intelligent contemporary consumer to be free and independent (so the magic of the free enterprise marketplace can play its supposed role), the consumer must be fully informed on all aspects of his purchases.

American television's "copout" is apparent. Working hand in glove with the industrial machine it supports and by which it is supported, it

shows us only half the commercial picture, and always the glamorous half. Where are the warts, the wrinkles? They, too, are an important part of reality. What the majority really says today is that our present system of commercial television depends for its livelihood on duping the American consumer into buying faulty products [3] he may not need, for reasons unrelated to their merits, that may indeed be literally killing him.

The majority argues that it is necessary for this Commission to keep its heavy hand out of programming decisions, and, in general, I agree. The majority would subject the broadcaster to review against the public interest standard only every three years at renewal time. But our system of commercial television must tell its consumers the *whole* truth, not just a part of it. Otherwise, that FCC license to use the public's airwaves becomes like Ron Padgett's "Poetic License":

> This license certifies
> That Ron Padgett may tell whatever lies
> His heart desires
> Until it expires

Is this what Congress intended the "public interest" to mean: is an FCC license to be a license to lie as much as desired until the license expires?

The truth is far more subtle than that. This Commission needs to relearn the First Amendment lessons Professor Thomas I. Emerson of Yale has been trying to teach:

> Human judgment is a frail thing. It may err in being subject to emotion, prejudice or personal interest. It suffers from lack of information and insight, or inadequate thinking. It can seldom rest at the point any single person carries it, but must always remain in complete and subject to further extension, refinement, rejection or modification. Hence an individual who seeks knowledge and truth must hear all sides of the question, especially as presented by those who feel strongly and argue militantly for a different view. Emerson, *Toward a General Theory of the First Amendment* 7 (Vintage Ed. 1963).

This fundamental truth the Commission today, once again, denies.

IV

Finally, the unstated—or only partially articulated—premise from which the majority proceeds might be called the "Hit Parade" argument. It goes like this. If the Commission decrees that all licensees must carry programs dealing with pollution, persons holding strong views on many other issues inevitably will seek access to the Commission's "Hit Parade," and the Commission will find itself in the unfortunate position of deciding which issues are important and which are not, thus assuming the very role of arbiter of programming which the Commission has always disclaimed.

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[3] The National Air Pollution Control Administration (NAPCA) has just learned from new testing procedures that new cars emit twice as much carbon monoxide and hydrocarbons as permitted by federal law. And according to Representative Paul Rogers, American consumers have paid roughly $1.5 billion for pollution control systems on 30 million new cars (certified in compliance by the NAPCA) since 1967. Automobile commercials during those years, therefore, have been inherently deceptive, failing to warn consumers that the products advertised do not comply with federal law and do not effectively combat air pollution. *See generally, Washington Post,* July 15, 1970, p. A–2, cols. 1–2.

It is important to recognize that what issues gain access to this list and why is basically beyond the Commission's powers. Who decides? The people do. The people decide through their proxies, the President, the Congress, and numerous public commissions and bodies that, as here, have defined what are today's "controversial issues of public importance." The majority itself cites much of this qualifying evidence. President Nixon, in his February 10, 1970 address to Congress, said pollution "is our most serious environmental problem." Witness also the Clean Air Act of 1965, supplemented by the Air Quality Act of 1967 and more recently by the National Environmental Policy Act of 1969 (NEPA), P.L. 91–190, 83 Stat. 852 (1970), which requires Federal agencies "to use all practicable means, consistent with other essential considerations of national policy . . ." to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans." How can the FCC, austensibly a "federal agency," square today's decision with that Act?

The Commission turns aside the pleas of Friends of the Earth, the Environmental Protection Administration of New York City, and Citizens for Clean Air, Inc., three public interest groups who have filed some of the more thoughtful and impressively documented petitions ever received by this Commission. These groups see at stake here nothing less than the quality of life in contemporary America. The Commission's vision, through the smog it has helped create, is not as good. It is sad and somewhat disheartening that this Commission holds dearer the quantity of commercial profits than the quality of human life itself.

Exhibit 106: *Friends of the Earth* v. *FCC* (Large Automobiles), 449 F.2d 1164 (D.C. Cir. 1971)

FRIENDS OF the EARTH and Gary A. Soucie, Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

Citizens For Clean Air, Inc., National Broadcasting Company, Inc., Intervenors.

No. 24556.

United States Court of Appeals, District of Columbia Circuit.

Argued June 10, 1971.

Decided Aug. 16, 1971.

Petition for review of order of the Federal Communications Commission. The Court of Appeals, McGowan, Circuit Judge, held that in determining whether action was warranted against television broadcast station which broadcast advertisements stressing value of large automobile engines and high-test gasolines, allegedly without carrying reasonable amount of information on the relationship of air pollution to automobiles, FCC was bound to extend to gasoline and automobile commercials the fairness doctrine as applied with respect to cigarette commercials.

Order accordingly.

Wilbur K. Miller, Senior Circuit Judge, dissented.

Telecommunications ⇐435

In determining whether action was warranted against television broadcast station which broadcast advertisements stressing value of large automobile engines and high-test gasolines, allegedly without carrying reasonable amount of information on the relationship of air pollution to automobiles, FCC was bound to extend to gasoline and automobile commercials the fairness doctrine as applied with respect to cigarette commercials. National Environmental Policy Act of 1969, § 1 et seq., 42 U.S.C.A. § 4321 et seq.

Mr. Geoffrey Cowan, with whom Messrs. Victor H. Kramer and James W. Moorman, Washington, D. C., were on the brief, for petitioners.

Mr. Richard E. Wiley, General Counsel, Federal Communications Commission, with whom Messrs. Daniel R. Ohlbaum, Deputy General Counsel, and Edward J. Kuhlmann, Counsel, Federal Communications Commission, were on the brief, for respondents. Mr. John H. Conlin, Associate General Counsel, Federal Communications Commission, and Mr. Howard E. Shapiro, Atty., Department of Justice, also entered appearances for respondents.

Mr. Lawrence J. McKay, New York City, for intervenor National Broadcasting Co., Messrs. Donald J. Mulvihill, Washington, D. C., Mathias E. Mone, New York City, Howard Monderer, Washington, D. C., and Roy L. Regozin, were on the brief for intervenor, National Broadcasting Co.

Mr. Roger C. Wolf, Washington, D. C., was on the brief for intervenor Citizens For Clean Air, Inc.

Mr. Jerome Congress, New York, N. Y., filed a brief on behalf of the New York City Environmental Protection Administration, amicus curiae.

Before WILBUR K. MILLER, Senior Circuit Judge, McGOWAN and ROBB, Circuit Judges.

McGOWAN, Circuit Judge:

Petitioners in this statutory review proceeding attack the dismissal by the Federal Communications Commission, without hearing or oral argument, of their fairness doctrine complaint in respect of Station WNBC-TV in New York City. The issue raised is that of the reach of the fairness doctrine in relation to product advertising, in this instance automobile and gasoline commercials. For the reasons hereinafter appearing, we think that the Commission erred in concluding that the advertising in question did not present a point of view favorable to one side of a controversial issue of public importance; and

we remand for reconsideration and further inquiry by the Commission to determine whether the licensee has been adequately discharging its public service obligations by carrying a reasonable amount of information on the other side of the question, or whether it must take further positive actions, differing in either kind or degree from what it has been doing, in order to achieve the balance contemplated by the fairness doctrine.

I

On February 6, 1970, petitioners[1] wrote a letter to WNBC-TV, complaining of the "spot advertisements for automobile and gasoline companies [which] constantly bombard the New York area viewers with pitches for large-engine and high-test gasolines which are generally described as efficient, clean, socially responsible, and automotively necessary." Petitioners referred to the following commercials as having been selected at random in the weeks immediately preceding their letter:

(1) January 26, 1970, 8:15 p. m., 30 sec., an advertisement for Ford Mustang, picturing the car on a lonely beach, and stressing its "performance" (large engine displacement);

(2) Same date, 8:45 p. m., 30 sec., an advertisement for Ford Torino stressing size;

(3) January 22, 1970, 6:51 p. m., 30 sec., an advertisement for Chevrolet Impala stressing the great value of its size ("you don't have to be a big spender to be a big rider"), including the standard 250-horsepower V-8 engine;

(4) January 5, 1970, 8:05 p. m., 30 sec., an advertisement for Ford Mustang and Torino GT, again stressing size ("4-barrel, V-8" and "up to 429 cubic inches") and advocating "moving up to" a larger car;

(5) December 10, 1969, 11:15 p. m., encouraging the use of high-test leaded gasoline for cold-weather starting ("the cold-weather gasoline").

Petitioners asserted, contrarily, that these products were especially heavy contributors to air pollution, which had become peculiarly oppressive and dangerous in New York City; and that they fell within the reach of the decisions of the Commission and of this court on cigarette advertising. Banzhaf v. FCC, 132 U.S.App.D.C. 14, 405 F.2d 1082 (1968), cert. denied *sub nom.*, Tobacco Institute v. FCC, 396 U.S. 842, 90 S.Ct. 50, 24 L.Ed.2d 93 (1969). Petitioners noted that, just as the Commission in the case of cigarette advertising relied heavily upon the report of the Surgeon General's Advisory Committee, so had the Surgeon General, in his 1962 report on "Motor Vehicles, Air Pollution and Health," concluded that automobile emissions offer significant dangers to human health and survival—a conclusion reiterated by a more recent report issued by the National Academy of Science and the National Academy of Engineering. Reference was also made to the 1969 report of Mayor Lindsay's Task Force on Air Pollution, which said that "[T]he best way to cut down on dangerous hydrocarbons in the air is to cut down on horsepower."

Thus, so it was said, the treatment by the communications media of the relationship of air pollution to automobiles occurs in the context of a public controversy in which government officials and professional and lay people concerned about health are pitted against the automobile manufacturers and the oil companies, and presents a situation to which

1. The individual petitioner is a resident of New York City who serves as executive director of Friends of the Earth, the other petitioner herein. The latter is a national organization dedicated to the protection and preservation of the environment. Its headquarters are in New York City.

the fairness doctrine applies.[2] Petitioners asked that the licensee "promptly make known the ways in which it intends to discharge its responsibility to inform the public of the other side of this critical controversy;" and, although asserting financial inability to purchase time, offered to produce and make available to the licensee spot advertisements presenting the anti-auto-pollution case. Petitioners indicated that, if a satisfactory response was not forthcoming, complaint would be made to the Commission.

On February 18, the licensee replied. It took the position that the Commission's tobacco decision was limited by its terms to cigarette advertising, and that it did not, in the Commission's words in that decision, impose any fairness doctrine obligation "with respect to other product advertising." Further, said the licensee, there is no real controversy about whether transportation by automobile should continue and that, therefore, the advertising of automobiles and of the fuels which propel them is not related to any controversial issue of public importance. Finally, the licensee referred to a number of programs presented by it in which the problem of air pollution by automobiles had been discussed; and it suggested that this represented an adequate discharge of any public interest obligation it had to inform its viewers on this subject.

On March 14 petitioners wrote a letter to the Commission, attaching the foregoing exchange of correspondence with the licensee and lodging a formal complaint against WNBC-TV "for failure to fulfill its 'fairness doctrine' and 'public interest' obligations with respect to automobile and gasoline advertisements." Petitioners urged upon the Commission the applicability of its cigarette advertising decision to other health hazards, and to the increasing recognition by governmental and other experts that carbon monoxide pollution caused by automobiles had become a serious and substantial danger to health, particularly in New York City. They reasserted their contentions that the large-car and high-powered gasoline advertisements carried by the licensee were designed to promote the idea that these products presented no health hazards in fact. They also contended that the discussion programs cited by the licensee were no adequate offset to the many spot commercials which were aired repeatedly throughout the broadcast hours, including the times of maximum viewing. It was the petitioners' request of the Commission that "this complaint be investigated and that necessary and appropriate action be taken to bring WNBC-TV into compliance with the requirements of the Federal Communications Act."

This letter of complaint was supplemented on April 7 by a letter to the Commission from counsel for the petitioners in which the Commission's attention was drawn to the recently enacted National Environmental Policy Act of 1969, Public Law 91-190, 83 Stat. 852. Counsel pointed out that in this new statute Congress had emphasized the "critical importance of restoring and maintaining environmental quality," and had authorized and directed government agencies to advance these ends and to interpret and administer "the policies, regulations, and public laws of the United States * * * in accordance with the policies set forth in this Act." Counsel referred to the underlying report of the Senate Committee which indicated that this mandate was intended to extend to "the licensing functions of independent agencies as well as the ongoing activities of regular Federal agencies." S.Rep. No. 91-296, 91st Cong., 1st Sess. 14 (1969).

On June 20 the Environmental Protection Administration of the City of New York addressed a letter to the Commission in support of the petitioners' complaint. It described air pollution condi-

2. The origins and nature of the fairness doctrine are comprehensively described in Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969), especially at pp. 375-386, 89 S.Ct. 1794, 23 L.Ed.2d 371.

tions in New York City, and asserted that they were presenting an increasingly serious danger to health. A similar supporting letter was sent to the Commission by Citizens for Clean Air, Inc., a New York membership corporation organized for the purpose of educating the citizens of the New York metropolitan area in the hazards of air pollution and the effective means of alleviating it. It pointed out that, although serious suggestions were currently being made for the prohibition of automobiles in Manhattan, the commercials in question were urging the use of cars of ever larger horsepower, thereby compounding the problem. This letter urged that the Commission conduct hearings "for the purpose of developing facts adequate to resolve the serious questions which have been raised"; and it indicated a wish to present testimony in any such hearings.

On June 13 the licensee wrote a letter to the Commission in which it reiterated its contention that the content of the commercials complained of did not constitute a discussion of the pollution issue. It also listed by title a number of programs carried by it which it characterized as a more than adequate discharge by it of any duty it may have had to inform the public of the anti-pollution viewpoint.

Counsel for the petitioners responded to this letter on June 30 in a letter which, among other things, described the ever-growing health hazard in New York City by reason of automobile-produced air pollution and challenged the claim by the licensee that its public service programs adequately countered the effect of the automobile and gasoline spot advertisements complained of. It asked the Commission to examine actual transcripts of the programs cited by the licensee as fulfilling its public interest obligations, and asserted that such an examination would demonstrate that a substantial gap remained in the licensee's presentation of the conflicting positions with respect to automotive pollution of the air.[3]

In a letter to petitioners dated August 5, 1970, the Commission reviewed the contentions made in the foregoing correspondence and reported its conclusion that "no action is warranted against WNBC." It recognized that automobiles "result in many deaths each year and because their gasoline engines constitute the main source of air pollution (S.Rep. No. 91–745, 91st Cong. 2d Sess. 3 (1970)), they raise most serious environmental problems." This was, however, said to be true of "a host of other products or services—detergents (particularly with phosphates), gasoline (especially of a leaded nature), electric power, airplanes, disposable containers, etc." Cigarettes, said the Commission, are distinguishable from products of this nature, since smoking them is a habit "which can fade away" without impact upon other aspects of life, and which official voices have urged the public to avoid or to abandon. Contrarily, the Government is not urging discontinuance of the use of automobiles, although it is beginning to recognize that far-reaching action must be taken to accommodate the impact of automobiles upon the environment. The Commission asserted that the focus should probably be on such action and "not [on] the peripheral advertising aspect."

The Commission represented itself as being without power to take the kind of action which could solve or alleviate the air pollution problems caused by the use of automobiles. That was a matter about which it was not expert, and which falls within the competence of other agencies of the Government. The Commission also stated that there was a threshold issue as to whether the commercials complained of did in fact present one side of a controversial issue. It purported not to have the information

3. Petitioners professed difficulty in seeing how "The World of the Beaver" and "The Great Barrier Reef" programs, cited by the licensee, had much relevance to the problem of the pollution of the air in New York City by automobiles.

available to exercise judgment on the question of whether the differences in the amount of time respectively involved in the advertising of large and small cars is sufficiently great to call for further time to be afforded to the side taken by petitioners. "We have," said the Commission, "no such information before us, but we decline in any event to extend the cigarette advertising ruling to these other products." It stated its belief to be that "we should adhere to our previous judgment that cigarettes are a unique product permitting the simplistic approach adopted in that field."

The Commission went on to say that, even if it be assumed to be wrong in that belief, it would not extend the cigarette ruling "generally to the field of product advertising." To do so would, said the Commission, "undermine the present system which is based on product commercials, many of which have some adverse ecological effects." It justified this conclusion by pointing to the fact that a licensee had a public interest obligation to provide discussions of the environmental issues affected by some of the advertised products, although it did not address itself to the content and volume of the programs relied upon by the licensee as discharging its obligations or make any findings in this regard. It thought that the approach of regulating product advertising is one which Congress could take, but, in the absence of action by Congress, the Commission should stay its hand.

II

In this court the Commission asserted that "[T]he crucial issue in this case is whether the Commission reasonably refused to extend to gasoline and automobile commercials its ruling with respect to cigarette commercials." We have no difficulty in accepting this formulation of the issue, involving as it does a comparison of the record before us with that before the Commission and this court in *Banzhaf*.

The complainant in *Banzhaf* brought to the Commission's attention certain specific commercials which allegedly sought "to create the impression and present the point of view that smoking is socially acceptable and desirable, manly, and a necessary part of a rich full life." It was urged upon the Commission that such commercials took one side of a controversial issue of public importance, and that, under the fairness doctrine, the licensee was required affirmatively to make its facilities available for contrasting viewpoints. The licensee in *Banzhaf* represented that it had in fact broadcast a number of news and information programs about the impact of smoking upon health, and had carried some public service announcements of the American Cancer Society free of charge. Thus, said the licensee, its coverage of the health aspects of smoking had actually been in full compliance with the fairness doctrine, although it went on to insist that the fairness doctrine had no application to product advertising.

The Commission accepted the complainant's characterization of the cigarette commercials in question as presenting a distinct point of view on a controversial matter of public importance; and it regarded this as bringing the fairness doctrine into operation. The Commission did not require the licensee to provide a precisely equal amount of time for the anti-smoking position, and it left this matter of time and the type of programming to the good faith judgment of the licensee. It did, however, expressly direct licensees carrying cigarette commercials to provide "a significant amount of time for the other viewpoint." The vigorous challenge made in this court to the Commission's ruling did not prevail, and we upheld the Commission's action as against the many-faceted attack mounted against it in the tobacco case.

Petitioners' letter of complaint to the Commission in the case presently before us called attention to certain commer-

cials of the licensee which allegedly suggested that there were special virtues in cars of greater rather than lesser horsepower, and in gasolines of the high-test, leaded character. As the petitioners said in concluding their letter to the licensee, all of these advertisements, in a manner reminiscent of the themes sounded in the cigarette advertisements, "imply that the good life is somehow inexorably connected with the use of powerful cars and high-test gasoline." For this reason, it was said, these particular commercials reflected a point of view on the merits of the use of larger cars and more powerful fuels which, in the context of the current concern about the danger of air pollution to health, invoked the fairness doctrine.

No more than in *Banzhaf* did the Commission here deny the existence or the persuasiveness of expert evidence, from both official and private quarters, of the very real dangers to health presented by air pollution, and the significant degree to which automobile emissions both create and aggravate the air pollution problem. To this point, therefore, the pattern of the problem unfolding before the Commission and its response to it are very like that in *Banzhaf*. Where the Commission departs from *Banzhaf* is in insisting that, because cigarettes are unique in the threat they present to human health, the public interest considerations which caused it to reach the result it did in *Banzhaf* have no force here.

The distinction is not apparent to us, any more than we suppose it is to the asthmatic in New York City for whom increasing air pollution is a mortal danger. Neither are we impressed by the Commission's assertion that, because no governmental agency has as yet urged the complete abandonment of the use of automobiles, the commercials in question do not touch upon a controversial issue of public importance. Matters of degree arise in environmental control, as in other areas of legal regulation. To say that all automobiles pollute the atmosphere is not to say that some do not pollute more than others. Voices have already been lifted against the fetish of unnecessary horsepower; and some gasoline refiners have begun to make a virtue of necessity by extolling their nonleaded, less dynamic, brands of gasoline. Commercials which continue to insinuate that the human personality finds greater fulfillment in the large car with the quick getaway do, it seems to us, ventilate a point of view which not only has become controversial but involves an issue of public importance. When there is undisputed evidence, as there is here, that the hazards to health implicit in air pollution are enlarged and aggravated by such products, then the parallel with cigarette advertising is exact and the relevance of *Banzhaf* inescapable.

In its *Banzhaf* ruling the Commission was at great pains to warn that it did not contemplate its extension to product advertising generally; and the Commission's action now under review reflects, more than anything else, a purpose to make good on that representation. But the Commission has since been obliged to moderate its view that commercial advertising, apart from cigarettes, is immune from the fairness doctrine. On May 12 last it issued its ruling (FCC 71–526) in the so-called *Chevron* case where complaint had been made of gasoline commercials which allegedly made deceptive and misleading claims with respect to the product's capacity to minimize air pollution.

The Commission decided to take no action in *Chevron* because (1) the commercials there in question, far from suggesting that automobile emissions do not contribute significantly to the dangers of air pollution, urged that the gasoline being advertised was designed to reduce those dangers, and (2) the commercials were the subject of a pending Federal Trade Commission proceeding on a charge of false and deceptive advertising. In this context the Commission did not think that the purposes of the fairness doctrine were served by making it the occasion for a debate with respect to the efficacy of a commercial product.

Of the applicability of the doctrine generally, however, the Commission said:

> This is not to say that a product commercial cannot argue a controversial issue raising fairness responsibilities. For example, if an announcement sponsored by a coal-mining company asserted that strip mining had no harmful ecological results, the sponsor would be engaging directly in debate on a controversial issue, and fairness obligations would ensue. Or, if a community were in dispute over closing a factory emitting noxious fumes and an advertisement for a product made in the factory argued that question, fairness would also come into play.

On June 30 last, the Commission in the so-called *Esso* case (FCC 71–704) sustained a fairness doctrine complaint which it thought to come within the range of these examples. Complaint had been made about commercials sponsored by Standard Oil Company of New Jersey which related to the development of oil reserves in Alaska, and which were said "to discuss one side of controversial issues of public importance, namely (1) the need of developing Alaskan oil reserves quickly and (2) the capability of the oil companies to develop and transport that oil without environmental damage." The licensee took the position that the commercials in question were institutional advertising which did not involve any controversial issue of public importance. The Commission held that this approach was unreasonable, and that the fairness doctrine was triggered by the commercials in issue.

Having decided that the fairness doctrine applied, the Commission then turned in *Esso* to the claim by the licensee that other programs carried by it were fully adequate to present the contrary side of the question. The Commission concluded that, on the basis of the information before it, it could not find that the programs cited by the licensee "afforded reasonable opportunity for the presentation of contrasting views to those presented in the commercials. * * *" The licensee was, accordingly, directed to submit within 10 days a statement indicating what additional material it had, or intended to, broadcast in order to satisfy its obligations under the fairness doctrine.

It is obvious that the Commission is faced with great difficulties in tracing a coherent pattern for the accommodation of product advertising to the fairness doctrine. It has said as much in the closing paragraphs of the *Chevron* decision, where it announced its purpose to initiate in the near future a wide ranging inquiry which "will permit a thorough re-examination and re-thinking of the broader issues suggested by this and other recent cases before us. * * *" We do not, of course, anticipate what the result of that proceeding will prove to be, nor do we minimize either the seriousness or the thorny nature of the problems to be explored therein. Pending, however, a reformulation of its position, we are unable to see how the Commission can plausibly differentiate the case presently before us from *Banzhaf* insofar as the applicability of the fairness doctrine is concerned.

It is true that fairness doctrine obligations can be met by public service programs which do give reasonable vent to points of view contrary to those reflected in the offending commercials. The Commission recognized this principle in the decision now under review, and noted that the licensee had listed programs carried by it as allegedly discharging this responsibility. The Commission, however, explicitly restricted the basis of its ruling to the inapplicability of the fairness doctrine; and it did not regard as being before it for decision the question of whether the licensee had otherwise met its fairness obligations. It indicated that this was a matter which was properly to be explored at license renewal time.

The fairness doctrine does not, of course, operate on that kind of a time schedule, as the Commission's most recent decision in the *Esso* case demonstrates. There, once the Commission

found the fairness doctrine to be applicable, it directed its attention to the question of whether compliance had in effect been forthcoming by virtue of other programs aired by the licensee. Since the information before it on this point was scanty, the Commission was compelled to find the programs cited as falling short of an adequate presentation of contrasting views. It did, however, give the licensee an opportunity within 10 days to submit further information on this score.

The disposition we make here follows the *Esso* approach. Having found this case indistinguishable from *Banzhaf* in the reach of the fairness doctrine, and being without the benefit of an express finding by the Commission on the question of the possible satisfaction of that doctrine by the licensee through the medium of other programs, we remand the case to the Commission for determination by it of this second issue.[4]

It is so ordered.

WILBUR K. MILLER, Senior Circuit Judge, would affirm.

4. In Green v. FCC and G. I. Association v. FCC, —— U.S.App.D.C. ——, 447 F.2d 323 (decided June 18, 1971), this court left undisturbed the Commission's disallowance of a fairness doctrine complaint about military recruitment advertisements. There, however, the petitioners persisted in linking their complaints about the advertisements to the controversial issues of the Vietnam War and the draft; and the Commission found expressly that the licensees had not "failed to treat the issues of Vietnam and the draft (both concededly controversial issues of public importance) in conformance with the fairness doctrine."

Exhibit 107: *In Re Alan F. Neckritz* (Chevron F–310) 29 FCC 2d 807

F.C.C. 71–526

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
ALAN F. NECKRITZ AND LAWRENCE B. ORDOWER, BERKLEY, CALIF.
Concerning Fairness Doctrine Re Stations KGO–TV, KRON–TV, KPIX, KNBC, and KNXT

MAY 12, 1971.

GENTLEMEN: As you know, a complaint was filed by Alan F. Neckritz and Lawrence B. Ordower against the licensees of Television Station KGO-TV, KRON-TV, and KPIX (San Francisco) and KNBC and KNXT (Los Angeles) alleging failure to fulfill their fairness doctrine and public interest obligations regarding advertisements for Standard Oil of California's Chevron with F–310 gasoline.

Complainants allege that the advertisements are produced in several versions, which include depiction of (1) a large balloon attached to a late model Chevrolet which turns black with exhaust; (2) a car engulfed in a bag of black smoke; and (3) exhaust ignited with a blow torch to indicate unburned gasoline going out the exhaust; and that the advertisements claim these conditions are cured by "just six tankfuls of Chevron with F–310." Complainants state that the advertisements say the gasoline is a "significant contribution toward cleaner air" and that "F–310 turns dirty exhaust into good clean mileage." A Federal Trade Commission complaint [1] cites the following as a typical advertisement:

"TELEVISION

SCOTT CARPENTER: I'm Scott Carpenter. We're attaching a clear balloon to this car to show you one of the most meaningful gasoline achievements in history. The balloon is filling with dirty exhaust emissions that go into the air and waste mileage.

Now Standard Oil of California has accomplished the development of a remarkable gasoline additive, Formula F–310, that reduce exhaust emissions from dirty engines. The same car, after just six tankfuls of Chevron with F–310; no dirty smoke, cleaner air. A major breakthrough to help solve one of today's critical problems. And since dirty exhaust is wasted gasoline, F–310 keeps good mileage from going up in smoke. Cleaner air, better mileage—Chevron with F–310 turns dirty smoke into good, clean mileage. There isn't a car on the road that shouldn't be using it."

Complainants contend:

1. California-Standard's F–310 advertisements have created a public controversy which is subject to the fairness doctrine, and the li-

[1] On December 29, 1970, the Federal Trade Commission issued a complaint regarding Chevron F–310 and the matter has been set for hearing.

censees have not fulfilled their fairness responsibilities. There are, complainants suggest, two controversial issues: (a) whether F–310 additive will help solve the air pollution problem; and (b) whether the advertisements themselves are controversial in light of Chevron's attempt to refute the FTC complaint. Complainants allege that "Cal-Standard's advertisements have created a controversy . . . because they attempt to exploit the legitimate and appropriate public concern about air pollution."

2. The licensees and networks failed to fulfill the public interest obligations of the Communications Act. Complainants assert that when a licensee allows an advertiser to "exploit public concern over a community problem" he should be required to satisfy the community interest in the issues raised by the commercials. Complaints further state that "Congress has recognized that environmental pollution creates a 'clear and present danger' to the public health and it has enacted the National Environmental Policy Act which makes it *compelling* upon the Commission to recognize this aspect of the public interest standard."

3. Licensees abridged the complainants' First Amendment rights by denying access to contrasting views on the issue raised in the advertisements. Complainants state that the First Amendment sanctions "effective speech" (*Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963)) and that its effectiveness depends on the existence and nature of an appropriate forum and format. Complainants ask that their views be presented through spot announcements to achieve fairness with the "prepackaged nature of Standard's $9.5 million saturation television advertising campaign." In support of their contention that the opposing point of view should be presented through spot announcements, the complainants cite *In Re Complaint of Bella S. Abzug*, 25 FCC 2d 117 (1970), where the licensee stated that, ". . . programs and spots are different in their economic and impact values, and . . . [spots are] considerably more valuable. . . ."

4. The Commission should require licensees to refrain from broadcasting this particular series of advertisements because Cal-Standard's advertisements involve material deception as to the characteristics and performance of F–310. Complainants contend the licensees have violated the Commission's policies regarding advertising because,

> "(1) Of all the licensees only KPIX appears to have exercised any degree of care with respect to insuring that the ads did not mislead the public. (2) Two official state authorities found these ads to be misleading, and the continued broadcasting of the F–310 commercials raises serious questions as to whether the licensees are operating in the public interest. (3) . . . [t]he official reports of the California Air Resources Board and the Hawaiian State Consumer Protection Committee, the outcry of the Friends of the Earth and the Sierra Club, have put the licensees on notice and they cannot claim ignorance of controversy that has been raised in print but silenced by the mass media."

In reply to the Broadcast Bureau's inquiry, the licensees[2] state that they do not believe the broadcasts of the Chevron with F–310 advertisements constitute a discussion of a controversial issue of public im-

[2] It appears from the replies filed by ABC, CBS and NBC that the commercials were carried by the California stations licensed to them (KGO–TV, KNST and KNBC, respectively) and not by the networks.

portance, and that in their overall programming they have devoted ample time to the treatment of the larger issues of air pollution and ecology.[3] KRON, KNXT, KGO-TV, and KPIX state they covered the F-310 controversy in their news broadcasts or other programs. KNBC, KGO-TV and KRON-TV state that the advertisements were nothing more than product claims of a factual nature. KNBC, KGO-TV, KNXT, and KPIX also state that they received documentation of the claims made in the commercials.[4] KNBC and KNXT declare that they believe it is in the public interest to encourage manufacturers to compete in the improvement of their product and to advertise these improvements. KNXT and KRON-TV assert that the question of deceptive advertising is solely within the jurisdiction of the Federal Trade Commission. KNXT denies that economic pressure from the advertisers affected the news coverage of the issue of air pollution. All licensees state that they believe the cigarette advertising case, *Banzhaf* v. *FCC*, 132 U.S. App. D.C. 14, 405 F.2d 1082 (1968), *cert. denied sub nom Tobacco Institute* v. *FCC*, 396 U.S. 842 (1969), to be inapplicable and *Friends of the Earth*, 24 FCC 2d 743 (1970), on appeal *sub nom Friends of the Earth* v. *FCC*, No. 24,556, U.S. Ct. App., D.C. to be applicable.[5]

In reply to the licensees' responses, the complainants state that (1) "the general impression test" should be applied to interpret the message conveyed by the advertisements; (2) the advertisements take a position on a public issue which is slanted and distorted, and therefore the fairness doctrine applies; (3) the licensees' judgments regarding the commercials were unreasonable; (4) the licensees failed to discuss how their decisions implement the National Environmental Policy Act of 1969. The complainants cite *Retail Store Employees Union* v. *FCC*, D.C. Cir., Case No. 22605, decided October 27, 1970, Slip Op., at p. 22:

> "It is at the very least a fair question whether a radio station properly serves the public interest by making available to an employer broadcast time for the purpose of urging the public to patronize his store, while denying the employees any remotely comparable opportunity to urge the public to join their side of the strife [sic] and boycott the employer."

We do not believe that complainants' First Amendment rights have been abridged by the denial of access to the air waves. It is well established that a broadcast licensee is not a common carrier and thus is not required to provide all persons with access to the air. 47 U.S.C. § 153(h). The Supreme Court has stated that "[u]nlike other modes of expression, radio inherently is not available to all. . . . Because it cannot be used by all, some who wish to use it must be denied." *NBC* v. *United States*, 319 U.S. 190, 226 (1943). See also *Democratic National*

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[3] KPIX states that it considers the "disagreement concerning the ecological effects of the F-310 additive as one facet of the larger controversy over air and environment pollution."

[4] KPIX states it became concerned that the announcements were possibly misleading; that it used slides from the advertising agency to modify the original announcements in order to prevent misunderstanding; and that later it received and used new commercial announcements which incorporate the explanatory statements. KGO-TV states that it is no longer telecasting the balloon demonstration. KRON-TV states that the F-310 commercials contain superimposed messages stating the limitations of the test.

[5] KPIX further states that, "Even if a specific commercial did raise a controversial issue of public importance, the fairness doctrine would only require reasonable efforts to present contrasting viewpoints—not a series of spot announcements in opposition."

Committee, 25 FCC 2d 216 (1970), on appeal *sub nom. Democratic National Committee* v. *FCC*, No. 24,537, U.S. Ct. App., D.C. However, it is also well established that the absence of right to demand that any particular matter be carried by a broadcast station does not mean that a licensee can use the air waves solely for his own purposes or without regard to the public interest. A licensee must operate his station so as to serve the needs and interest of the public. *Sioux Empire Broadcasting Co.*, 16 FCC 2d 995 (1969); *City of Camden, et al.*, 18 FCC 2d 412 (1969); and has an obligation both to inform the public on major issues of public concern and to afford a reasonable opportunity for the presentation of contrasting points of view on controversial issues. *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367 (1969). See also *Editorializing by Broadcast Licensees*, 13 FCC 1246 (1949), *Fairness Primer*, 29 Fed. Reg. 10415 (1964), and 47 U.S.C. § 315(a). The remaining issues before us must be determined in that context.

Complainants' request that we require the licensees to stop broadcasting the series of commercial announcements at issue on the ground that they are materially deceptive cannot be granted. These announcements are now the subject of a Federal Trade Commission proceeding. That agency of course has primary jurisdiction and qualifications in this area. With its proceeding still pending and the issues still unresolved, it would be clearly inappropriate for us to order cessation of the disputed announcements.

The complainants' primary contentions resolve themselves into the basic position that the fairness doctrine applies to the Chevron announcements. In this regard, they make two principal arguments, one based on the issuance by the FTC of its complaint and the second based on the factual nature of this particular advertisement. We shall deal first with the effect of issuance of the FTC complaint.

The essence of this argument is that the filing of the FTC complaint against the advertisements and the sponsor's rebuttal thereto have in themselves created a controversial issue of public importance. Were that the case, however, the filing of every FTC complaint alleging falsity or deception in advertising followed by the continued broadcast of the advertisements in question would invoke the fairness doctrine, requiring the broadcast of free replies in some set ratio to the advertisements. See *Cigarette Advertising* ruling, *supra; Cullman Broadcasting Co., supra.* Indeed, there would appear to be no way to draw a reasonable distinction, for fairness doctrine purposes, between the case where an FTC complaint is filed and the case where a substantial question can be raised concerning the validity of the product claim even though the FTC has taken no action. And, in all instances, the licensee would be under an affirmative obligation to encourage and implement the presentation of the contrasting viewpoints to the advertisements.

We do not believe that this approach would serve the public interest. The FTC issues many contested complaints. We make no blanket assumption that, in each case involving allegations of false or misleading advertising, there is necessarily a controversial issue of public importance warranting the drastic and unusual remedy applied in the area

of cigarette advertising. Just as in the case of this Commission, a substantial number of FTC complaints may turn out not to call for corrective or other action or, if so, the validity of such action may not be affirmed. But under the approach urged by complainants, the practical effect so far as broadcasting is concerned would be "sentence first, verdict later." For the application of the fairness doctrine to product commercials in these circumstances would almost certainly rule the the commercials off the air (with advertising outlays continuing or increasing in other media).

The second aspect of the complainants' fairness argument, as noted above, is based on the factual nature of the particular advertisement involved, i.e., the claim that the product provides a partial remedy to some problem of widespread concern. In our only ruling to date applying the obligations of the fairness doctrine to advertising of commercial products, *Applicability of the Fairness Doctrine to Cigarette Advertising*, 9 FCC 2d 921 (1967), affirmed *Banzhaf* v. *FCC*, 132 U.S. App. D.C. 14, 405 F.2d 1082 (1968), *cert. den.* 396 U.S. 842, we made clear that the unique situation there involved would not be extended to other product advertising. It had been argued (9 FCC 2d at 942) that "if governmental and private reports on the possible hazard of a product are a sufficient basis for the cigarette ruling, the ruling would apply to a host of other products such as: automobiles, food with high cholesterol count, alcoholic beverages . . . [and] detergents. . . ." In response to this contention, we stressed that our ruling was "limited to this product—cigarettes." The reason was that cigarette smoking was unique in regard to the hazard which results from normal use and also in regard to the simple issue presented—whether or not to smoke. We therefore stated (9 FCC 2d at 943) that:

> "47. *We adhere to our view that cigarette advertising presents a unique situation.* As to whether there are other comparable products whose normal use has been found by Congressional and other Government action to pose such a serious threat to general public health that advertising promoting such use would raise a substantial controversial issue of public importance, bringing into play the Fairness Doctrine, we can only state that we do not now know of such an advertised product, and that we do not find such circumstances present in petitioners' contentions about the advertised products upon which they rely."

In *Friends of the Earth*, *supra*, we dealt squarely with the issue treated by way of *dictum* in the cigarette case, and held that advertisements of automobiles and gasoline did not invoke the fairness doctrine. We stated (24 FCC 2d at 748–749):

> ". . . we decline in any event to extend the cigarette advertising ruling to these other products. We believe, for the reasons set forth previously, that we should adhere to our previous judgment that cigarettes are a unique product. . . . However, even assuming that we are wrong in that belief, we would not extend the ruling generally to the field of product advertising . . . [a] great many products have some adverse ecological effects. Were we to adopt a scheme of announcements tracking in a significant ratio the ordinary product commercials, the result would be the undermining of the present system, based as it is on such commercials. Such a result is not consistent with the public interest. It is not required, since there is the alternative of providing advertiser-supported programming, valued by the public, by means of the product commercial, and at the same time affording appropriate time for discussion of these vitally important issues. In short, our action must be guided by one standard, the public interest . . . and on that standard, extension of the cigarette ruling is not in order."

We added (24 FCC 2d at 749) that "a commercial could deal directly with an issue of public importance" and that, if it did, "the fairness doctrine is fully applicable." The question here is whether the Chevron ads come within that description. We do not believe that they do. The Chevron F–310 announcements do not argue a position on a controversial issue of public importance, but rather advance a claim for product efficacy. It is true that this claim relates to a matter of public concern, but making such a claim for a product is not the same thing as arguing a position on a controversial issue of public importance. That the claim is alleged to be untrue or partially deceptive does not change its nature. The Chevron advertisements do not claim there is no danger in air pollution or that automobiles do not contribute to pollution but assert, instead, that use of the sponsor's product helps to solve the problem. It would ill suit the purposes of the fairness doctrine, designed to illumine significant controversial issues, to apply it to claims of a product's efficacy or social utility.[6] The merits of any one gasoline, weight reducer, breakfast cereal or headache remedy—to name but a few examples that come readily to mind—do not rise to the level of a significant public issue. We therefore decline to extend the doctrine to this area. We think this conclusion is required not only as a matter of reason, but also of practical necessity if fairness is to work for the public and not to its detriment.

A contrary view would extend the application of the fairness doctrine to an endless variety of advertisements for commercial products. It would create a doctrine which, from a practical standpoint, would be unworkable. This would be true for advertisements which make product claims, such as those presently in issue, just as we found it to be the case with product advertising generally in our cigarette and *Friends of the Earth* rulings. As we pointed out in *Friends of the Earth*, requiring the broadcast of "answers" to advertisements of commercial products or services on the grounds that they raise controversial issues of public importance might eventually drive most commercials from the air, resulting in chaos and the destruction of economic support for the public service rendered by broadcast licensees. For the above reasons, we must deny the complaint to the extent that it seeks to apply the requirements of the fairness doctrine to the advertisements in question.[7]

There is the further question as to a licensee's public interest obligations with respect to advertisements that have been the subject of a formal FTC complaint. In our Public Notice of November 7, 1961, "Licensee Responsibility with Respect to Broadcasting of False, Misleading or Deceptive Advertising," we stated that if a licensee continues to broadcast advertisements after a final Order has been issued by the

[6] This is not to say that a product commercial cannot argue a controversial issue raising fairness responsibilities. For example, if an announcement sponsored by a coal-mining company asserted that strip mining had no harmful ecological results, the sponsor would be engaging directly in debate on a controversial issue, and fairness obligations would ensue. Or, if a community were in dispute over closing a factory emitting noxious fumes and an advertisement for a product made in the factory argued that question, fairness would also come into play.

[7] With reference to Congressional recognition of the dangers of environmental pollution in enacting the National Environmental Policy Act, we note that all the licensees here state that they have devoted considerable time to treatment of the issue of air pollution and ecology and that complainants have not denied their assertions. The relationship of gasoline to air pollution would appropriately be addressed in such coverage.

FTC against the advertiser, serious questions would be raised regarding the licensee's fulfillment of his obligation to operate in the public interest, and that "if there is submitted to a licensee advertising matter which has been the subject of an FTC complaint, he should realize that although no final determination has been made that the advertising in question is false or deceptive, a question has been raised as to its propriety, and he should, therefore, exercise particular care in deciding whether to accept it for broadcast." We also stated that a licensee has a responsibility to take reasonable steps to satisfy himself as to the reliability and reputation of prospective advertisers and their ability to fulfill their promises regarding advertisments that have not been the subject of FTC action.

Although we have imposed these obligations upon licensees, we recognize that most licensees lack the facilities (i.e., laboratories, experts in the particular field) necessary to determine for themselves whether certain advertisements are false or misleading or to resolve contrary claims. This case may well be an example of that difficult area. However, we believe, as stated in our 1961 Public Notice, that issuance of a complaint by the federal agency charged with responsibility in this field and possessing the expertise to make judgments on such matters imposes a further obligation on broadcasters, and that the continued broadcast of the advertising matter without any further inquiry simply because a final adjudication has not been made does not represent adequate exercise of the licensee's responsibility. The licensee should acquaint itself with the charges recited in the FTC complaint and the advertiser's response. This should assist the licensee in making a responsible determination as to whether continuing to carry the advertisement would be in the public interest. We do not believe that the pendency of an unresolved FTC complaint of itself should be held to require cessation of the advertisements, for this would effectively resolve the issue against the respondent before he has been fully heard in the forum provided by Congress. We do expect a reasoned licensee judgment based on the facts available and his own capacity to ascertain the public interest.

In this connection, we note in the present case that KPIX states that it became concerned that the Chevron announcements were possibly misleading, that it requested and received supporting data from the advertising agency, that the agency sent to KPIX slides containing qualifying or explanatory statements to be used with the announcements, and that new announcements incorporating these explanatory statements were later received and used by KPIX. KRON–TV also states that messages were superimposed on the commercials stating the limitations of the tests on which the advertiser's claims were based. We also note that all five stations either requested documentation of the advertiser's claims or made changes in the content of the advertisements, and that four of the stations state that they covered the F–310 controversy in their news or other programs.

There is a further point to be made. We have decided the present complaint in accordance with established policies—a result that we feel, on the basis of the facts before us, is both appropriate and required. We recognize, however, that this case and others that have

arisen recently in the fairness and related "public interest" areas have been made on the basis of single complaints and with the participation of the few parties directly involved, even though the findings may have far broader implications. *Ad hoc* proceedings have the advantages of action taken and policy evolved on the basis of concrete bodies of fact. But they have the countervailing disadvantages of limited participation by interested parties and often lack of adequate overview. We strongly believe that something more is now called for.

An overall proceeding with wide-ranging participation might help us to develop more finely drawn classifications, approaches, and policies within the rubric of the fairness doctrine that will better serve the public interest. Such an overview was last undertaken by this Commission more than two decades ago, yet the evolution of broadcasting and communications generally has been profound during this timespan.

Accordingly, we expect in the near future to initiate a proceeding of broad scope to consider every facet of our fairness doctrine and related public interest policies, including the vexing problem of access that has been on the periphery of many of our decisions in these areas.[8]

We cannot now predict the direction in which this inquiry may lead us. The policies involved are of such complexity and significance that, before any decisions are reached, all interested parties should have a full opportunity to be heard. Such a proceeding will permit a thorough re-examination and re-thinking of the broader issues suggested by this and other recent cases before us to determine whether some modification of the fairness doctrine and related policies would better serve the public interest.

Commissioners Bartley, Robert E. Lee and H. Rex Lee absent; Commissioner Johnson dissenting and issuing a statement.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

[8] See Order In *Radio Enterprises of Ohio, Inc.*, Docket No. 19207, FCC 71-401, released April 26, 1971.

Dissenting Opinion of Commissioner Nicholas Johnson

In our recent cable hearings there was unanimity on one issue: virtually everyone conceded that one of the primary advantages of cable is its potential for meeting unsatisfied demands for access to television.

Clearly, there is a pent-up frustration felt by many that the present structure of the television industry excludes their views. Especially does this concern relate to values other than those presented by commercials on television. And these concerns are in no sense limited to radical intellectuals. Without going into an endless list of quotes, I will simply set forth the views of some current Administration spokesmen.

> We have seen too many patterns of deception: in political life, impossible dreams; in advertising, extravagant claims; in business, shoddy deals. . . .
> —*President Nixon.*[1]

[1] Address in Madison, South Dakota, reported in *Advertising Age*, June 9, 1969.

> [A]s often as not, it seems that many of the programs and most of the commercials from Madison Avenue appeal to a set of values entirely different from, if not in clear opposition to, the set of values taught in home, in school, and in the church. —*Vice President Agnew.*[2]
>
> Virginia H. Knauer, President Nixon's consumer adviser, told the advertising industry yesterday it will either have to reform itself or be reformed by the government. —*reported in The Washington Post.*[3]
>
> Why these corporations are so shortsighted in this important public relations field I cannot understand, but instead of volunteering to join in smoke abatement they are resisting it. I have about reached the conclusion that, while large industry is important, fresh air and clean water are more important, and the day may well come when we have to lay that kind of hand on the table and see who is bluffing. —*Senator Goldwater.*[4]

Needless to say, these views are shared by thousands—perhaps millions—of all shades of the political spectrum, all economic and educational levels.

One expression of that frustration is the complaint now before the Commission which advances First Amendment arguments for access to the air and alleges that certain licensees and networks failed to fulfill their fairness doctrine and public interest obligations regarding the broadcast of commercal announcements for Chevron F–310 gasoline.

Of course, the very nature of over-the-air broadcasting makes it inevitable that many people will never be able to express their views via broadcasting, and that some viewpoints will never be expressed at all. When a particular frequency is assigned to a broadcasting company, that company has very broad discretion in programming.

Nevertheless, "very broad" does not mean unlimited; lines have to be drawn, lines which provide realistic discretion for broadcasters while at the same time protecting "the public interest" and the public's First Amendment rights. One method which this Commission has adopted to facilitate this line-drawing is, obviously, the fairness doctrine, which requires a licensee to provide a reasonable opportunity for the presentation of conflicting views regarding controversial issues of public importance.

The Commission majority concedes, as it must, that petitioners' "claim relates to a matter of public concern," and that in *Friends of the Earth*, 24 F.C.C. 2d 743, 749 (1970), on appeal *sub nom*, *Friends of the Earth* v. *FCC*, No. 24,556, U.S. Ct. Appeals, D.C., we said: "Obviously, a commercial could deal directly with an issue of public importance; if so, the fairness doctrine is fully applicable." Nevertheless, the majority says:

> The Chevron F–310 announcements do not argue a position on a controversial issue of public importance, but rather advance a claim for product efficiency . . . . The Chevron advertisements do not claim there is no danger in air pollution or that automobiles do not contribute to pollution but assert, instead, that use of a sponsor's product helps to solve the problem . . . . The merits of any one gasoline, weight reducer, breakfast cereal or headache remedy—to name but a few examples that come readily to mind—do not rise to the level of a significant public issue.

[2] "Another Challenge to the Television Industry," *T.V. Guide*, May 16, 1970 at 6, 8.
[3] Feb. 2, 1971, p. F2.
[4] *Saturday Review*, March 7, 1970, at 52.

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The problem with this argument is that it begs the question by answering an issue which is *not* raised. No one has said that the "merits of any one gasoline, weight reducer, breakfast cereal or headache remedy," or any "claim for product efficiency," should trigger fairness obligations. No one has said the Chevron advertisements claim there is no danger in air pollution.

It is my opinion that such arguments are entirely unwarranted—and ultimately self-defeating.

First, I think that there is such public pressure for control of the abuses of commercialism on television that unless the FCC begins to fashion reasonable remedies, the courts will step in with rules anyway—and rules likely to make much broader inroads on broadcaster discretion than any rules the majority would be likely to adopt.

Second, the facts of this case present a very unusual, narrow issue. Any precedent we might set in holding for petitioners would be equally narrow. Let me elaborate.

(1) The advertisements appear to make extravagant claims on their face. A broadcaster would have to be blind to common experience to believe the claims which the complaint alleges are made on behalf of Chevron F–310 gasoline. According to the majority opinion, complaintants allege that the ads

> include depiction of (1) a large balloon attached to a late model Chevrolet which turns black with exhaust; (2) a car engulfed in a bag of black smoke; and (3) exhaust ignited with a blow torch to indicate unburned gasoline going out of the exhaust; . . . .

The petitioners allege that "the advertisements claim these conditions are cured by 'just six tankfuls of Chevron with F–310.' . . . that . . . the gasoline is a 'significant contribution toward cleaner air' and that 'F–310 turns dirty exhaust into good clean mileage.'" At the very least, these claims seem extravagant enough to remind a licensee of "their obligation to sift out fraudulent and deceptive advertising matter . . . ." *Public Notice, Licensee Responsibility With Respect To The Broadcast Of False, Misleading or Deceptive Advertising*, FCC 61–1316, November 7, 1961 [hereinafter *Public Notice—Deceptive Advertising*]. The rule, as we stated in that Notice is clear: "[T]he Commission has always held that a licensee's duty to protect the public from false, misleading or deceptive advertising is an important ingredient of his operation in the public interest."

(2) The Federal Trade Commission *has* issued a complaint against the advertisements in question. In the 1961 *Public Notice—Deceptive Advertising* we said that in such a case "a question has been raised as to [the advertisement's] propriety, and [the licensee] should therefore exercise particular care in deciding whether to accept it for broadcast."

(3) At least two official state agencies, the California Air Resources Board, and the Hawaiian State Consumer Protection Committee have found these ads to be misleading. This is particularly significant, since the Commission has indicated that even active *consideration* by local government officials was a factor which licensees should weigh in determining whether a controversial issue requiring application of the fairness doctrine has been raised. See, *e.g.*, *Pennsylvania Community*

Antenna Association, 6 P & F Radio Reg. 2d 112 (1965). Since we have said that a "formal determination" by the F.T.C. would be so significant that ignoring it would raise "serious questions . . . as to [a licensee's] operation in the public interest," it would seem that formal determinations by state agencies would also be entitled to substantial weight. See *Public Notice—Deceptive Advertising* (1961).

(4) The Friends of the Earth and the Sierra Club, two of the nation's leading conservationist groups, have spoken out strongly against these advertisements as misleading and exploitive of public concern over air pollution.

(5) The advertisements are not, as the majority claims, merely run-of-the-mill "claims for product efficiency." Instead, they clearly do play upon public concern about air pollution.

The majority's attempt to draw an analogy between the case and *Friends of the Earth*, *supra*, simply won't wash, because in *Friends of the Earth* the FCC specifically distinguished "general product advertisement[s]" from other commercials which *do* raise fairness doctrine issues. The majority in *Friends of the Earth* said:

> We wish to emphasize that our ruling is restricted to the general product advertisement, *e.g.*, "Join the Dodge Rebellion," "Put a Tiger in your tank," etc.). Obviously, a commercial could deal with an issue of public importance; if so, the fairness doctrine is fully applicable. 24 F.C.C. 2d, at 749.

There is a world of difference between "Put a Tiger in your tank" and the Chevron F–310 ad broadcast in smog-conscious California:

> Now Standard Oil of California has accomplished the development of a remarkable gasoline additive, Formula F–310, that reduces exhaust emissions from dirty engines. The same car, after just six tankfuls of Chevron with F–310; *no dirty smoke, cleaner air. A major breakthrough to help solve one of today's critical problems* . . . . cleaner air, better mileage . . . . (Emphasis added.)

Another F–310 ad, furnished to the FCC by Cal-Standard, is ignored by the majority. The ad states:

> *"I'm sure you're as concerned as I am about the problems of controlling our environment. And one of the most critical is the need for cleaner air* . . . . These are some of the important steps Standard Oil has taken toward solving *a growing national problem.* Use Chevron gasolines with F–310. You'll be doing your part toward cleaner air. Scott Carpenter for Standard Oil. (Emphasis added.)

These ads practically shout that they are dealing with a controversial issue of public importance. The president of the prestigious Sierra Club has accused these ads of having "played cynically on public concern about air pollution." [5] I believe that these ads, which unquestionably attempt to exploit public concern over air pollution, present a classic case of a commercial dealing with a controversial issue of public importance.

Moreover, there is clearly an additional controversial issue, which touches on public interest obligations as well, involving the widespread charges that these ads are false and misleading. In view of the charges by the FTC, and two state agencies concerned with environmental protection, the two leading private environmental groups in the country, and the extravagance of the claims on their face, one licensee,

[5] Complaint, p. 3.

KPIX-TV, became so concerned about the misleading nature of the Chevron F-310 ads that it chose to superimpose slides on the video portion of these commercials. The slides modified the original commercial message, to point out, *inter alia*, that a very dirty engine was purposely used in the test. In a letter to petitioners, the licensee states that it had "concluded that the dramatized demonstrations might mislead viewers . . . ." [7] In these circumstances, there is clearly a public interest obligation to protect the public by making certain that these facts become known to the viewing public which might otherwise be misled. The rule, as stated in our 1961 *Public Notice—Deceptive Advertising*, *supra*, is that "In fulfilling [the public interest] obligation a broadcast station is expected to exercise reasonable care and prudence with respect to advertising copy *in order to insure that no material is broadcast which will deceive or mislead the public.*" (Emphasis added.)

There is widespread concern throughout all sections of our society about the impact of commercialism. This is one of the rare issues on which many college students and the Vice President are in agreement.

Many Americans—intelligent businessmen and working men, as well as writers and reformers—are giving serious attention to the merits of a national (and personal) goal of zero population growth. They are questioning and ever-rising gross national product as the sole measure of America's greatness. They are talking of the "ecology" of our natural environment and the "quality of life" for our souls. The Pope's newest apostolic letter, according to a *New York Times* report yesterday, describes "the alienation caused by the consumer society." [8]

One might very well take the position, under these circumstances, that the broadcaster has a special "public interest" obligation—going beyond even the requirements of the fairness doctrine—to give full and pointed presentation to the views of those who seek to argue that the alternatives to ever-escalating conspicuous consumption of consumer goods are far preferable for us as individuals and as a society.

But I need not reach that question.

The Commission is not confronted with a request for time to present anti-commercialism messages generally.

It is not confronted with a request to answer a commercial which simply urges the purchase of a product (as cheaper, or what not) which petitioners believe has adverse side effects.

It is confronted with a request to answer a commercial which clearly and purposefully *does* address a controversial issue of public importance: air pollution. It is an attempt to sell a product by using claims that the product in fact makes a positive contribution to the problem which so concerns petitioners.

What is more, in this instance, it is not only alleged that the commercial message itself deals with such issues, it is alleged that those portions of the message are false and misleading. And these allegations

[6] See majority opinion, fn. 4.
[7] Complaint, p. 15.
[8] Paul Hofmann, "Papal Letter Sets as Goal a New Democratic Society," May 12, 1971, p. 1.

are made, not only by petitioners, but by the Federal Trade Commission and two state agencies. A broadcaster believed it to be misleading in some particulars, and took action accordingly. On the face of the ad it appears to be of doubtful validity. It would appear that current FCC regulations would raise substantial question as to the propriety of a licensee running such a commercial.

If the FCC is unprepared to act under the facts of *this* case, it is highly unlikely it will act in any of the others. Once again the American people must look to the already overburdened courts to get relief from the decision of this agency.

I have more faith in the American free private enterprise system than my colleagues. I do not believe that its continued viability is dependent upon deceitful advertising and the censoring by broadcasters—with full FCC imprimateur—of any wee small voice inquiring after the Emperor's clothes. I believe we can have a thriving economy—with meaningful employment, and an abundance of the products necessary to sustain a life of human fulfillment—and still restrain what President Nixon has described as "extravagant claims," and still permit a full and open debate in the marketplace of ideas about the wares in the marketplace of products.

Speaking of the matter of race relations to the National Association of Broadcasters on April 2, 1968, then-Chairman Rosel H. Hyde said,

> This is not just another story—another "issue of public importance." It is a major crisis which calls for the best in an industry which has never failed a call from the nation.

Surely the issues before us are no less of a "major crisis." Surely the industry would be as willing to respond. It is a shame the Commission majority cannot find the will to support a comparable response to this crisis.

Mason Williams has written a short little poem called "L.A. Day." It reads:

> I look out the window
> As the day goes by
> Watching the progress
> Screw up the sky

That's kind of the way I feel. Only in this case it's going on inside the FCC building. And, in the name of a Nineteenth Century view of progress, we are screwing up the law as well as the sky.

I dissent.

106-539—71——3

Exhibit 108: *In Re Alan F. Neckritz* (Chevron F–310) (Reconsideration) 37 FCC 2d 528

F.C.C. 72–891

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
ALAN F. NECKRITZ AND LAWRENCE B. ORDOWER, BERKELEY, CALIF., CONCERNING FAIRNESS DOCTRINE RE STATIONS KGO–TV, KRON–TV, KPIX, KNBC, and KNXT

MEMORANDUM OPINION AND ORDER

(Adopted October 5, 1972; Released October 17, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT; COMMISSIONER H. REX LEE NOT PARTICIPATING; COMMISSIONER REID ABSENT; COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. The above-captioned proceeding has been remanded to the Commission for reconsideration by the Court of Appeals. Subsequent to the Commission's initial decision, *In Re Complaint of Alan F. Neckritz*, 29 F.C.C. 2d 807 (1971) (hereinafter cited as *Chevron*),[1] the Court of Appeals reversed another Commission decision (*In Re Complaint of Friends of the Earth*, 24 F.C.C. 2d 743 (1970), reversed *sub nom. Friends of the Earth* v. *F.C.C.*, 449 F. 2d 1164 (1971)) [2] dealing with the applicability of the fairness doctrine to product advertisements for high performance cars and high octane gasoline. The Commission had cited this case with approval in *Chevron*. In view of the Court's reversal, and the fact that both cases involved the applicability of the Fairness Doctrine to product commercials for gasoline, the Commission moved the Court to remand the present case for further

[1] In *Chevron*, the complaint filed against five California television stations, alleged licensee failure to fulfill their Fairness Doctrine and public interest obligations with respect to the broadcast of Chevron F–310 gasoline commercials in that (1) licensees presented only one viewpoint (that of the advertiser) on a controversial issue of public importance discussed in the ads, i.e. whether Chevron with F–310 contributes to the solution of the air pollution problem, and (2) licensees failed to protect the public from advertising which was misleading and deceptive, pursuant to their obligations under the public interest standard of the Communications Act. Complainants requested that the Commission order licensees to cease broadcast of the ads and, pursuant to the Fairness Doctrine, to present spot announcements in opposition to the views presented in the ads. The Commission declined to order the requested relief and ruled that the Chevron F–310 ads did not argue a position on a controversial issue of public importance, but rather stated a claim for product efficacy. The Fairness Doctrine was intended to illumine significant public issues, and the claim of efficacy or utility of any particular product was not such an issue, the Commission stated. It also held that the pendency of an unresolved FTC complaint did not compel cessation of the advertisement complained of, and that all licensees involved in this case had fulfilled their public interest obligations.

[2] In *Friends of the Earth*, the Court held that advertisements broadcast in New York City encouraging the use of high performance cars and high test gasoline presented a viewpoint on a controversial issue of public importance, given public and governmental concern with, and evidence about, the danger of air pollution to health and the relation of automobile emissions to air pollution. Under the doctrine approved in *Banzhaf* v. *F.C.C.*, 405 F. 2d 1082 (1968), cert. denied *sub nom., Tobacco Institute* v. *F.C.C.*, 396 U.S. 842 (1969), which the Court found to be indistinguishable from *Friends of the Earth*, the Court held the Fairness Doctrine to be applicable.

deliberation. The Court, maintaining jurisdiction, remanded the matter to the Commission, granting it authority to rule on complainants' request for interim relief and to consider its ruling in respect to both the fairness and deceptive advertising issues. Shortly thereafter, the Commission requested the parties to the proceeding to submit their views on the following questions: (1) whether petitioners' request for interim relief should be granted pending Commission reconsideration of the case;[3] (2) what effect, if any, does the Court's decision in *Friends of the Earth* have on the Commission's resolution of the Fairness Doctrine issue and (3) whether the Commission should reconsider the deceptive advertising issue of the case. Licensees were also requested to advise the Commission of the dates and times of carriage of the advertisements complained of, and of any material broadcast which advised the public of the controversy concerning the Chevron F–310 advertisements.

2. In response to the Commission's inquiry, Petitioners reiterate their complaint that the Chevron F–310 commercials presented one side of a controversial issue of public importance by making the claim that F–310 was a means of solving the air pollution crises in light of the fact that (1) the truth of the claim was disputed by state agencies, and (2) the fact that gasoline emissions from automobiles are a prime source of air pollution which is a problem of public importance in California. Complainants allege that licensees have failed to present opposing viewpoints on this issue as required by the Fairness Doctrine. They further argue that the controversy concerning Chevron F–310 gasoline is identical to the controversy in *Friends of the Earth*, and that the precedent and rationale upon which the Commission relied in its original *Chevron* opinion have been rejected by the Court of Appeals in its reversal of the Commission's decision in *Friends of the Earth*. Finally, Complainants argue that the public interest standard of the Communications Act obliges the Commission to require licensees to protect the public from deceptive F–310 advertising. Licensees' broadcast of the ads is inconsistent with their public interest obligations under current FCC regulations, complainants maintain, in view of the FTC's charges, the reports of two state agencies, the criticisms of leading environmental groups, the fact that the advertiser modified the commercials and that one licensee (KPIX) concluded that they might be misleading, and in view of the fact that the F–310 claims are extravagant on their face.

3. Licensees, with the exception of KRON and KPIX,[4] and the intervenors, Standard Oil of California (Standard) argue, in response to Complainants, that the *Banzhaf* and *Friends of the Earth* cases do not apply to the instant proceeding inasmuch as they are distinguishable. Licensees argue that: (1) *Chevron*, unlike *Friends of the Earth*,

[3] The Commission denied petitioners request for interim relief on April 21, 1972 (34 F.C.C. 2d 579 (1970)). Petitioners renewed their motion for interim relief before the U.S. Court of Appeals which was denied by order dated June 20, 1972.

[4] KPIX regards the controversy about the Chevron F–310 ads as one facet of a larger controversial issue of public importance relating to air pollution which the station has considered extensively in its programming, and also believes that *Friends of the Earth* is applicable to the current controversy. KPIX is opposed, however, to Commission reconsideration of the deceptive advertising issue; believes that the initial decision was correct; and suggests that any change to the Commission's established policies would be most appropriately effected through a rule making proceeding where all interested parties could comment rather than through an *ad hoc* adjudication. KRON failed to respond to the Commission's letter of inquiry.

is not a case in which there is "undisputed evidence"—or even a claim—that the advertised gasoline contributes more significantly to air pollution than other gasolines; and (2) the *Chevron* ads, unlike the *Friends of the Earth* ads, do not emphasize the product attributes of power and performance which can be said to contribute to the pollution problem. In *Friends of the Earth*, licensees observe that the Court did not hold that all advertisements for gasoline raised controversial issues, but that both these factors, i.e. undisputed evidence of contribution to pollution and glorification of attributes aggravating pollution, were crucial to the Court's decision that the hazard to health issue of *Banzhaf* was indistinguishable from that in *Friends of the Earth*. The Chevron F–310 advertisements, on the other hand, raise no public health issues, and the question in dispute is whether or not the product will perform as claimed. Licensees further refute petitioners' fairness complaint by arguing that the Chevron commercials are only one facet of the general problem of air pollution, and that they have informed the public of the anti-pollution viewpoint as indicated by their program analysis. Standard Oil of California further argues that counter advertising against the product categories complained of in *Banzhaf* and *Friends of the Earth* (cigarettes, high performance cars and high octane gasoline) presents consumers with a choice to use or not to use such products. Counter advertising against a single brand, as in *Chevron*, presents no similar choice but attempts to persuade consumers to buy another brand within the same product category. Whether a person buys a product category, like cigarettes, may be an issue of public importance, but whether he buys brand A or brand B cigarettes is not, Standard maintains. Therefore, despite the fact that a particular product claim may raise a controversial issue, that issue is not of public importance, and the Fairness Doctrine is consequently inapplicable.

4. As to the deceptive advertising issue, licensees and Standard argue that the Commission should affirm its initial decision in *Chevron*. They observe that the claim that the ads are false and deceptive and that licensees have consequently failed to protect the public, assumes that which is yet unproven. Contrary to the allegations, licensees' conduct has been reasonable and consistent with present Commission standards, they maintain, given the fact that the ads have not yet been judged misleading and deceptive by the FTC. Licensees state that the FTC has primary authority and that the FCC has no resources or standards of jurisdiction for deciding the deception question, and should not modify its policy as to licensees' responsibility in this area without first affording interested parties an opportunity to comment in a rule making proceeding.

5. We have reconsidered our original ruling in the light of the Court's decision in *Friends of the Earth*. In our opinion, this decision does not require an extension of the Fairness Doctrine to the facts of the present case.

6. Originally, our application of the Fairness Doctrine to product advertising was intended to be limited to a single product. We believed that cigarettes were distinguishable from other products "* * * since smoking them is a habit 'which can fade away' without impact upon other aspects of life, and which official voices have urged the

public to avoid or abandon." *Friends of the Earth*, *supra* at 1167. The Court of Appeals held that we could not "plausibly differentiate" cigarette advertisements from certain commercials promoting large-engine cars and high-test gasolines. The Court found "undisputed evidence" that these products, like cigarettes, significantly enlarged and aggravated existing public health hazards. Furthermore, it was noted that both public and private voices had encouraged the people to avoid the use of these products.

7. The facts of the present case are quite different from those presented in the cigarette case and in *Friends of the Earth*. There is no evidence which would indicate that the Chevron additive F–310 in any way enlarges or aggravates hazards to the public health. Chevron with F–310 is not alleged to be more dangerous than any competing product. Petitioners do not urge the public to abandon the use of gasoline, or even to avoid using Chevron with F–310. It is clear, therefore, that the broadcast of contrasting views in the present case would not provide a health service similar to exhortations to stop smoking, or to drive cars with reduced horsepower and use gasolines with a low-octane rating.

8. Even assuming arguendo that a public health issue is involved here, the present case is still distinguishable from *Friends of the Earth*. The scientific evidence in this case is far from "undisputed." Chevron has amassed considerable evidence to support the proposition that its product will, in fact, contribute to a reduction of the air pollution problem. In these circumstances, there is no way that we can say with any certainty that the broadcast of contrasting viewpoints here would provide a valuable public health service to the American people.

9. Public health considerations aside, we remain convinced that traditional Fairness Doctrine principles do not require the broadcast of views in opposition to the F–310 advertisements. We are still of the opinion that these announcements did not argue a position on a controversial issue of public importance, but merely advanced a claim for product efficacy. In our original opinion, we stated that "[t]he merits of any one gasoline, weight reducer, breakfast cereal or headache remedy—to name but a few examples that readily come to mind—do not rise to the level of a significant public issue." *Chevron*, *supra*, at 812. The critical consideration here is that we should not substitute our judgment for the reasonable programming judgments of our licensees. As we stated in our Fairness Primer:

> * * * the licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved * * * In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee * * * but rather to determine whether the licensee can be said to have acted reasonably and in good faith. Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 2 R.R. 2d 1901, 1904 (1964).

In the circumstances, there is simply no persuasive showing that our licensees have not acted "reasonably and in good faith" in determining that the Chevron F–310 advertising claims did not constitute a discussion of a controversial issue of public importance.

10. In our original opinion we expressed a concern that a contrary ruling would, in effect, extend the application of the Fairness Doctrine to an endless variety of advertisements for commercial products. Such a ruling would likely create an administrative nightmare for this agency as well as its licensees, and could have disastrous economic consequences for our entire commercial system. At the present time, we are conducting an over-all review of the Fairness Doctrine (Docket No. 19260). This study includes a detailed analysis of the merits of various "counter advertising" proposals, including suggestions similar to those advanced by the Petitioners in this case. At the end of this study, we hope to be in a position to balance more intelligently likely gains to public enlightenment against the threats these gains may present to the economic base and sound administration of the commercial broadcasting system. In the meantime, we are convinced that our present policy is the one best designed to further "* * * the larger and more effective use of radio in the public interest." 47 U.S.C. § 303(g).

11. Finally, we believe that our original opinion in *Chevron* as to licensees' public interest obligations with respect to advertisements subject to an FTC complaint should be affirmed. Petitioners have presented no additional information on reconsideration to persuade us otherwise. Without repeating our earlier decision we emphasize again that only the FTC and the courts have the jurisdiction to decide whether the technical claims made by Standard in its ads are accurate or not. Certainly this Commission possesses no comparable authority or expertise to resolve such questions, and we have noted that, "* * * we do not believe it to be either reasonable or feasible to impose upon the [broadcasting] industry requirements for medical or other scientific testing procedures * * *" that would make "* * * licensees into a kind of mini-FTC." *In Re Complaint by Consumers Association of District of Columbia*, 32 F.C.C. 2d 400, 406 (1971). There is substantial evidence in this case that licensees judgments were reasonable and consistent with Commission requirements that particular care be exercised in accepting for broadcast an advertisement subject to FTC complaint, in that "* * * all five stations either requested documentation of the advertiser's claims or made changes in the content of the advertisments * * *" *Chevron*, *supra* at 813. We therefore are not warranted in reversing their judgments.

12. In effect, a grant of Petitioners' demands here would require that the FCC abandon its traditional policy in this area, and instead impose a duty on licensees to either (a) automatically terminate carriage of an advertisement subject to an FTC complaint, or (b) automatically present a "counter-advertisement." Such a drastic modification of existing policy can most responsibly be considered in an overall proceeding. In such a proceeding countervailing public interests can be weighed, and all interested parties can be afforded opportunity to comment. In our Fairness Inquiry in Docket No. 19260 we specifically requested the submission of views on the deceptive advertising issues raised in this case. The Commission will have the opportunity to deal with these issues at the conclusion of the inquiry.

13. On reconsideration, and for the reasons stated above, our earlier decision IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

This Commission, in its first *Chevron* opinion, came to the specific conclusion that it "did not know of a product other than cigarettes which would trigger the Fairness Doctrine." Fairness Doctrine Ruling, 29 F.C.C. 2d 807, 814 (1971). It based that decision in no small measure upon its similar ruling in *Friends of the Earth*, 24 F.C.C. 2d 743 (1970), handed down some months previously. Now the Court of Appeals has reversed *Friends of the Earth*, 449 F. 2d 1164 (D.C. Cir. 1971), and in doing so has said that gasoline could be such a product.

Since the Court's decision in *Friends* rendered the Commission's original *Chevron* reasoning even more tenuous and flimsy than I found it to be in my original dissent, 29 F.C.C. 2d, at 814 (1971), the Court quite naturally gave the Commission a chance to correct itself by remanding the case to us for another look. The majority of the Commission, however, appears to have been unpersuaded as to the authority of our D.C. Circuit Court of Appeals to rule as it did in *Friends*, for its decision today is little more than a cavalier reaffirmation of its first *Chevron* decision. Indeed, where the obvious parallels between this case and the Court's decision in *Friends* are considered at all, the majority merely dismisses them with no attempt at analysis.

Licensees assert (and the majority accepts) that it was the intention of the Court of Appeals that the decision in *Friends of the Earth* be limited to the specific fact situation (or the specific ad format) involved in that case. They contend that "undisputed evidence of contribution to pollution *and* glorification of attributes aggravating pollution *was* (sic) *crucial* to the Court's decision." [emphasis added]

Nowhere in the Friends opinion was there language, however, that would lend support to the second contention. Indeed, the Court stated what it considered to be *its* criteria quite succinctly:

> When there is undisputed evidence; as here, that the hazards to health implicit in air pollution are enlarged and aggravated by such products, the parallel with cigarette advertising is exact. * * *

Friends of the Earth v. *F.C.C.*, 499 F. 2d at 1169 (D.C. Cir. 1971). The specific format of the ad was never mentioned by the Court in *Friends* as "crucial" to its application of the Fairness Doctrine. Rather, the Court accepted the Commission's own assertion that

> * * * the crucial issue in this case is whether the Commission reasonably refused to extend to gasoline and automobile commercials its ruling with respect to cigarette commercials.

The Court said

> We have no difficulty in accepting this formulation of the issue, involving as it does a comparison of the record before us with that before the Commission and the Court in *Banzhaf. Id* at 1168.

Noting the Commission's recognition of the

> * * * persuasiveness of expert evidence from both official and private quarters, of the very real dangers to health presented by air pollution, and the significant degree to which automobile emissions both create and aggravate the air pollution problem,

It then went on to hold that

> * * * we are unable to see how the Commission can plausibly differentiate the case presently before us from *Banzhaf* insofar as the application of the Fairness Doctrine is concerned.

Friends of the Earth v. *F.C.C.*, 499 F. 2d at 1170 (D.C. Cir. 1971). A careful examination of the Court's language discloses its ultimate concern with the problem of automobile emissions which "both create and aggravate the air pollution problem."

Licensees argue that petitioner's complaint should fail because "Chevron with F–310 is not alleged to be more dangerous than any competing product." They thereby fail to recognize the concern either of the viewing public or of the Court. The attempted reasoning is that there is no "undisputed evidence" that Chevron contributes *more* to pollution than any other gasoline. But that quite simply is not the issue. Chevron's ads did not say "We don't pollute the air any more than Texaco or Union." Such an ad might well be unlikely to raise significant public health issues.

What the Chevron ad did say was that, "Our gasoline with F–310 is contributing to the solution of the air pollution problem." We need not even pass upon the veracity of that statement. Truth is not relevant to this particular fairness inquiry. All we need acknowledge is that the statement relates to a *controversy*. It is sufficient for fairness purposes to note that agencies like the California Air Resources Board and the Hawaiian State Consumer Protection Agency, among others, vigorously controvert Chevron's contention.

Under the law as it stands after *Friends*, one threshold of fairness doctrine liability is reached when the product itself is recognized as a hazard to health. Even so, it would be difficult as yet to find, based on *Friends* and *Banzhaf* alone, that merely advertising such a product would be enough to force the stations across that threshold. More, it seems, is still required. In *Friends*, for example, the Court indicated that fairness liability was triggered by the active promotion of higher-powered varieties of an unhealthy product.

But that does not preclude other types of gasoline promotion from triggering fairness liability. Although the ads in *Chevron* admittedly differ from those in *Friends*, in point of fact they differ by creating an even *greater* apparent broadcaster liability. If anything, the need for protection of the public interest in this case is even more compelling than it was in *Friends*, for in *Chevron* the controversy itself is openly discussed within the format of the ad. The Chevron ads cannot be considered just another type of misleading promotion.

Nevertheless the licensees and the majority of the members of this Commission persist in "crying wolf" over this case by raising the apocalyptic spectre of an "administrative nightmare" that might result from a reversal of this decision. "Disastrous economic consequences for our entire commercial system" is the way they describe it. One might better point out the "disastrous health consequences for

our entire human system" from the failure to take action. Rather than argue the merits of those contentions, in light of the responsibility of this agency to regulate industry, not be regulated by it, let us simply agree that the entire question of "administration" is spurious to a cogent decision of the issues of this case.

Contrary to licensees' suggestion, this is not merely a claim for "product efficacy"—a boast that Chevron with F–310 will give you a cleaner engine, more miles to the gallon, or put a tiger in your tank. Petitioners have singled out the Chevron commercial for this challenge for one very good reason: Chevron's particular misleading claim happens also to be an extremely *controversial* one.

In other words, the majority's analysis is fallacious when it argues that a decision for petitioners in this case would impose a duty on licensees "* * * to either a) automatically terminate carriage of an advertisement subject to FTC complaint, or b) automatically present a 'counter-advertisement.'"

To the contrary, Chevron, via its "solving air pollution" claim, is taking itself out of the realm of ordinary "misleading" advertising and placing itself in a much smaller category of advertisers who discuss their product in terms of some particular public quest for solution of a controversial problem.

Chevron has chosen, by *its* use of the ad copy in question, to attempt to capitalize on the existence of the air pollution issue. In doing so, it should recognize that if it makes statements which can be controverted by recognized, public sources (which it has), it triggers in the stations carrying its ads the absolute obligation to enlighten the public as to the alternative arguments.

The Court of Appeals in *Friends* found that gasoline products and the pollution problems they created can entitle the public to as great a measure of care from broadcasters under the Fairness Doctrine as did advertisements for cigarettes. Could this Commission have permitted some individual brand of cigarettes to advertise their new charcoal filter as "contributing to the solution of the lung cancer problem" without obligating the station carrying such an ad to provide further explication? I think not. And yet this is precisely the analogy that must be made in this case.

The Court has made absolute the correlation between the cigarette problem and the air pollution problem in the realm of controversial issues of public importance. We must assume that the Court did not lightly "remand" a case before it to this Commission "for consideration in the light of our decision in *Friends of the Earth*." If the *Friends* decision can be dismissed with as facile an effort at reevaluation as the Commission gives it in consideration of *Chevron*, there would have been no reason for the Court to remand in the first place.

I dissent.

Exhibit 109: *Alan F. Neckritz* v. *FCC* (Chevron F-310) 502 F.2d 411 (D.C. Cir. 1974)

Alan F. NECKRITZ and Lawrence B. Ordower, Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

Westinghouse Broadcasting Company, Inc., et al., Intervenors.

No. 71-1392.

United States Court of Appeals, District of Columbia Circuit.

Argued April 23, 1973.

Decided June 28, 1974.

Rehearing En Banc Denied Oct. 2, 1974.

Petition for review of FCC order rejecting complaint against broadcasting licensees. The Court of Appeals, Robb, Circuit Judge, held that efficacy of particular type of gasoline was not controversial issue of public importance subject to fairness doctrine, and television stations thus were not required to broadcast contrasting views with respect to gasoline.

Affirmed.

Bazelon, Chief Judge, filed statement as to why he voted to deny rehearing en banc.

1. Telecommunications ⇐437

Claim that television advertisements for leaded gasoline raised controversial issue of public importance under fairness doctrine, not raised before FCC, could not be considered by Court of Appeals. Communications Act of 1934, § 405, 47 U.S.C.A. § 405.

2. Telecommunications ⇐435

Under fairness doctrine, wide discretion is available to licensee, and to establish violation of doctrine complainant must demonstrate that licensee's exercise of judgment was unreasonable, arbitrary, or in bad faith.

3. Telecommunications ⇐435

Efficacy of particular type of gasoline was not controversial issue of public

importance subject to fairness doctrine, and television stations thus were not required to broadcast contrasting views with respect to gasoline.

Alan F. Neckritz, pro se, Lawrence B. Ordower and Lewis J. Paper for petitioners.

John W. Pettit, Gen. Counsel, F. C. C., with whom Joseph A. Marino, Associate Gen. Counsel, and R. Michael Senkowski, Counsel, F. C. C., were on the brief, for respondent, F. C. C.

J. Roger Wollenberg, Washington, D. C., with whom Timothy B. Dyk, David R. Anderson and Barry O. Chase, Washington, D. C., were on the brief for intervenor Columbia Broadcasting System, Inc., also argued on behalf of intervenors National Broadcasting Co., Inc., and American Broadcasting Co., Inc. Daniel Marcus, Washington, D. C., also entered an appearance for intervenor, Columbia Broadcasting System, Inc.

Lee Loevinger, Washington, D. C., with whom Raymond E. Vickery, Jr., Washington, D. C., was on the brief, for intervenor, Standard Oil Co. of Cal. Alfred F. Dougherty, Washington, D. C., also entered an appearance for intervenor, Standard Oil Co. of Cal.

Thomas E. Kauper, Asst. Atty. Gen., and Bruce B. Wilson, Deputy Asst. Atty. Gen., Dept. of Justice, were on the brief for respondent, United States. Howard E. Shapiro, Atty., Dept. of Justice, also entered an appearance for United States.

John D. Lane and J. Carter McKaig, Washington, D. C., were on the brief for intervenor Westinghouse Broadcasting Company, Inc. Ramsey L. Woodworth, Washington, D. C., also entered an appearance for intervenor Westinghouse Broadcasting Co., Inc.

Howard Monderer, Washington, D. C., was on the brief for intervenor National Broadcasting Co., Inc. Mathias E. Mone and Donald J. Mulvihill, Washington, D. C., also entered appearances for intervenor, National Broadcasting Co., Inc.

James A. McKenna, Jr., and Carl R. Ramey, Washington, D. C., were on the brief for intervenor American Broadcasting Co., Inc.

Thomas R. Asher and Tracy A. Westen, Washington, D. C., filed a brief on behalf of Council on Economic Priorities, et al., as amici curiae.

Geoffrey Cowan, Washington, D. C., and James W. Moorman, San Francisco, Cal., filed a brief on behalf of Friends of the Earth, et al., as amici curiae.

John E. Bryson filed a brief on behalf of Natural Resources Defense Council, et al., as amici curiae.

Robert Chartoff, Berkeley, Cal., filed a brief on behalf of Committee for Open Media as amicus curiae.

Before TAMM and ROBB, Circuit Judges, and DAVIES,* Senior United States District Judge for the District of North Dakota.

ROBB, Circuit Judge:

This is a petition to review an order of the Federal Communications Commission which rejected a complaint filed by the petitioners against certain broadcasting licensees. The complaint alleged that the broadcasters had failed to fulfill their Fairness Doctrine obligations, growing out of advertisements for a particular brand of gasoline. The Commission rejected the complaint on the ground that the broadcasters had acted reasonably and in good faith in concluding that the advertisements did not raise a controversial issue of public importance. For the reasons hereinafter stated we affirm the Commission.

I.

During 1970, five California television stations (KGO-TV, KPIX, KRON-TV, KNXT, and KNBC) carried advertisements for Standard Oil of California's Chevron gasoline with the new F-310 additive. These televised advertisements

* Sitting by designation pursuant to 28 U.S.C. § 292(d).

showed: (1) a large balloon attached to the exhaust pipe of a late model Chevrolet and turning black with exhaust fumes; (2) a car engulfed in a bag of black smoke; and (3) exhaust fumes ignited with a blow torch to indicate unburned gasoline going out the exhaust —conditions which the advertisements maintained would be cured by "just six tankfuls of Chevron with F–310." The following script explained the pictures:

> . . . I'm Scott Carpenter. We're attaching a clear balloon to this car to show you one of the most meaningful gasoline achievements in history. The balloon is filling with dirty exhaust emissions that go into the air and waste mileage.
>
> Now Standard Oil of California has accomplished the development of a remarkable gasoline additive, Formula F–310, that reduces exhaust emissions from dirty engines. The same car, after just six tankfuls of Chevron with F–310; no dirty smoke, cleaner air. A major breakthrough to help solve one of today's critical problems. And since dirty exhaust is wasted gasoline, F–310 keeps good mileage from going up in smoke. Cleaner air, better mileage—Chevron with F–310 turns dirty smoke into good, clean mileage. There isn't a car on the road that shouldn't be using it.

In August of 1970, the petitioners, Neckritz and Ordower, complained to each of the five stations that the Chevron advertisements were misleading and deceptive, since the F–310 additive failed to live up to the advertising claims. The complaint asserted:

> These ads seem designed to induce public complacency, and suggest that Cal-Standard is doing more to halt the pollution of our environment than the other oil companies.
>
> Chevron's "black bag" commercials have been challenged as rigged. The California Air Resources Board in a recent study found no significant change in exhaust emissions when it fuelled its cars with F–310.
>
> The California Air Resources Board has forwarded its study to the Federal Trade Commission . . . for further investigation and disciplinary action.
>
> Cal-Standard, . . . used advertising which involved material deception as to the characteristics and performance of its products. "We used a very low grade gasoline to dirty up the engine," admits Eneas W. Kane, President of Chevron Research Co., the California plant that developed F–310.
>
> Standard officials conceded in testimony before the Hawaii State Senate Consumer Protection Committee that their advertising campaign is misleading because it neglects to point out that F–310 does nothing to reduce dangerous *invisible* exhaust emissions including airborne lead, nitrogen oxide and aldehydes. [Emphasis in original.]

Neckritz and Ordower concluded that:

> Cal-Standard by its ads raises one side of a controversial issue of public importance, and leaves the public with the impression that by the development of F–310 it is doing everything that is possible and necessary to remedy the car exhaust pollution problem.
>
> Cal-Standard's ads and claims for F–310 obfiscate [sic] the true hazards of this product, and hinder efforts aimed at educating the public about the dangers of auto pollution . . . [so] your network is obliged to present the other side of this issue.
>
> Cal-Standard by its own ads raised the ecology issue, and made ecological claims. Ads replying to Standard's ecological claims would be in the "public interest" and would not undermine the present broadcast system based on product commercials.

The complaint did not otherwise specify or define the "controversial issue of public importance" or the "ecology issue" which the complainants professed to find in the advertisements. Nevertheless it was claimed that the "issues

raised by the Chevron F–310 commercials fall within the scope of" Banzhaf v. FCC, 132 U.S.App.D.C. 14, 405 F.2d 1082 (1968), cert. denied, 396 U.S. 842, 90 S.Ct. 50, 24 L.Ed.2d 93 (1969), so that the presentation of "the other side" was required.

Responding to the complaints four licensees took the position that the commercials did not argue a thesis which required the presentation of contrasting viewpoints under the Fairness Doctrine. Thus, KRON–TV said the commercials did not claim that F–310 did "everything possible and necessary to remedy the exhaust pollution problem" and did "not say that F–310 solves the problem but only that it is a significant step 'to help solve' this problem." The commercials, said KRON-TV, did not deny the existence of air pollution by exhaust emissions or claim that F–310 did more than reduce such emissions; the only issue therefore was as to the truth or falsity of the claim that the product F–310 was effective.

Station KPIX concluded "that the disagreement concerning the ecological advantages or shortcomings of the 'F–310' additives, is a facet of the issue of air and environmental pollution—a 'controversial issue of public importance' to which KPIX has frequently addressed itself." The station referred to a number of broadcasts by "leaders in the anti-pollution field" which, in the judgment of the station, "fulfilled its obligation under the Fairness Doctrine to inform the public on all significant aspects of the controversy over air pollution—including the Chevron 'F-310' advertisement." Also, the station noted that it had required the addition of these clarifying statements to the commercials:

> Very dirty engine purposely used to provide severe test.
>
> Only dirty engines emit black smoke.
>
> Degree of improvement in your car depends on conditions of engine.
>
> Not all cars emit excessive exhaust.

These qualifying statements were subsequently incorporated into the script for all stations.

Station KNXT also replied by noting that the Chevron F–310 advertisements were subject to a Federal Trade Commission investigation on charges of false and misleading advertising, and that a proposed order issued by the FTC would require corrective advertising.

Finally, all five licensees recognized that automobile pollution was a controversial issue of public importance in California, but they concluded that questions as to the efficacy of the Chevron F–310 product did not present such an issue. Each of the licensees maintained that its programming had devoted significant coverage to the many facets of the automobile pollution problem. The petitioners did not refute the licensees' contentions that the public had been and was being fully informed on the problem. In addition, Stations KRON, KGO-TV, KNXT, and KPIX stated that they had specifically covered the dispute about the efficacy of the F–310 product in their news broadcasts and other programs.

The Commission's Original Ruling

After reviewing the pleadings, the Commission was unable to find any basis for reversing the licensees' determinations that the Chevron F–310 advertisements did not discuss a controversial issue of public importance, 29 F.C.C.2d 807. The Commission observed:

> The Chevron F–310 announcements do not argue a position on a controversial issue of public importance, but rather advance a claim for product efficacy. It is true that this claim relates to a matter of public concern, but making such a claim for a product is not the same thing as arguing a position on a controversial issue of public importance. That the claim is alleged to be untrue or partially deceptive does not change its nature. The Chevron advertisements do not claim there is no

danger in air pollution or that automobiles do not contribute to pollution but assert, instead, that use of the sponsor's product helps to solve the problem. It would ill suit the purposes of the fairness doctrine, designed to illumine significant controversial issues, to apply it to claims of a product's efficacy or social utility. The merits of any one gasoline, weight reducer, breakfast cereal or headache remedy —to name but a few examples . . . do not rise to the level of a significant public issue.

Accordingly the Commission could find nothing unreasonable in the licensees' judgment that the advertisements did not raise Fairness Doctrine obligations.

The petitioners' reliance on the *Banzhaf* case in requesting counter-advertising time was rejected because "we made clear that the unique situation there involved would not be extended to other product advertising." This was because "cigarette smoking was unique in regard to the hazard which results from normal use and also in regard to the simple issue presented—whether or not to smoke." Furthermore, the Commission noted that in a subsequent ruling it had refused to extend its cigarette ruling to advertisements urging the purchase of large displacement automobiles and high-test gasoline. Friends of the Earth, 24 F.C.C.2d 743, 748–49 (1970). Finally, the Commission announced its plan "to initiate a proceeding of broad scope to consider every facet of our fairness doctrine and related public interest policies, including the vexing problem of access that has been on the periphery of many of our decisions in these areas." [1]

Pleadings Before the Commission on Remand

Petitioners sought review in this court following the Commission's ruling. While the case was pending, we reversed the Commission in Friends of the Earth v. FCC, 146 U.S.App.D.C. 88, 449 F.2d 1164 (1971). Since the licensees and the Commission had both relied in part on the ruling reversed by the court, the Commission requested that the record be remanded for reconsideration in light of our decision in *Friends of the Earth*. When the court granted the motion for remand, the Commission invited the parties [2] to comment on the effect, if any, of *Friends of the Earth*.

After the remand Standard Oil of California filed a *Motion to Dismiss or, In the Alternative, To Make More Definite and Certain* against petitioners' complaint. Standard Oil maintained that "Complainants have never stated with any specificity or precision the controversial issue which they allege raises a Fairness Doctrine question." Neckritz and Ordower responded by stating only that the issue had been clarified during the course of the proceedings. In their later pleadings, however, they insisted that the Fairness Doctrine issue was "a narrow one: do product commercials which claim that the use of a particular gasoline contributes to the solution of the air pollution problem trigger the fairness doctrine?"

Neckritz and Ordower argued:

> The facts underlying the court's decision in *Friends of the Earth* require that the Commission apply the fairness doctrine to the Chevron ads. Both that case and the instant controversy involve the same issue: does the use of a particular product pose health hazards which the ads failed to acknowledge.

They claimed also that the Chevron F–310 advertisements directly raised and discussed the controversial issue of air pollution:

> Gasoline emissions from automobiles are a prime source of air pollution, which is a problem of public importance in California. Chevron F–310

1. *See* Fairness Doctrine Inquiry in Docket 19260, 30 F.C.C.2d 26 (1971). The matter is still pending before the Commission.

2. Apparently because KRON had not intervened before this court it was not served with a copy of the Commission's letter of inquiry.

> commercials practically shout that they are dealing with this controversial issue of public importance.

However, petitioners insisted that they were not contending that the Fairness Doctrine applied to *all* gasoline commercials. Instead, they asserted only that "the fairness doctrine applies when an advertisement explicitly claims that a product helps solve a pressing community problem or when the advertisement ignores the adverse consequences which the use of that product has for a pressing community problem." [3] They repeated their demand for "counter advertising."

The Commission Ruling on Remand

In its ruling, 37 F.C.C.2d 528, the Commission first noted that "[o]riginally, our application of the Fairness Doctrine to product advertising was intended to be limited to a single product" —cigarettes. Cigarettes were thought to involve a unique problem "since smoking them is a habit 'which can fade away' without impact upon other aspects of life, and which official voices have urged the public to avoid or abandon." However, said the Commission, in the *Friends of the Earth* case the court could not "plausibly differentiate" cigarette advertisements from commercials promoting large-engine cars and high-test gasoline. "The Court found 'undisputed evidence' that these products, like cigarettes, significantly enlarged and aggravated existing public health hazards." Furthermore, public officials had encouraged the public not to use such products.

Since there was "no evidence which would indicate that the Chevron additive F–310 in any way enlarges or aggravates hazards to the public health," the Commission found the present case distinguishable from *Friends of the Earth*:

> Chevron with F–310 is not alleged to be more dangerous than any competing product. Petitioners do not urge the public to abandon the use of gasoline, or even to avoid using Chevron with F–310. It is clear, therefore, that the broadcast of contrasting views in the present case would not provide a health service similar to exhortations to stop smoking, or to drive cars with reduced horsepower and use gasolines with a low-octane rating.

In fact, the Commission pointed out, Chevron had "amassed considerable evidence to support the proposition that its product will . . . contribute to a reduction of the air pollution problem." Under such circumstances the Commission could not say with certainty that broadcast of a contrasting view would provide a valuable public health service.

Aside from the public health factors underlying the *Friends of the Earth* decision, the Commission remained convinced that traditional Fairness Doctrine principles did not require the broadcasting of contrasting views with respect to Chevron F–310. The Commission could find nothing unreasonable in the licensees' conclusions that these advertisements "did not argue a position on a controversial issue of public importance, but merely advanced a claim for product efficacy." As the Commission emphasized, the critical consideration was that:

> . . . the licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved . . . . In passing on any complaint in this area, the Commission's role is not to

3. Petitioners also urged that the importance of the controversy over Chevron F–310 was further suggested "by the fact that the licensees and Standard Oil of California have devoted considerable attention to petitioners' complaint. The licensees have taken note of the controversy on news programs, including the prestigious and widely viewed 'CBS Evening News with Walter Cronkite.'" In addition, "Standard Oil discontinued the contested ads and now airs ads which do *not* explicitly exploit community concern about the problem of air pollution." [Emphasis in original.] The disputed commercials went off the air in the fall of 1971.

> substitute its judgment for that of the licensee . . . but rather to determine whether the licensee can be said to have acted reasonably and in good faith.

Here the Commission was unable to find that the licensees had acted unreasonably or in bad faith in determining that the Chevron F–310 ads did not constitute a discussion of a controversial issue of public importance.

With respect to the demand for counter advertising the Commission pointed to its review of the Fairness Doctrine, then going on:

> This study includes a detailed analysis of the merits of various "counter advertising" proposals, including suggestions similar to those advanced by the Petitioners in this case. At the end of this study, we hope to be in a position to balance more intelligently likely gains to public enlightenment against the threats these gains may present to the economic base and sound administration of the commercial broadcasting system. In the meantime, we are convinced that our present policy is the one best designed to further ". . . the larger and more effective use of radio in the public interest." [*Quoting* 47 U.S.C. § 303(g).]

II.

As we have said, the petitioners in the administrative proceedings did not clearly articulate the controversial issue of public importance that they wished to discuss. In their brief in this court they have undertaken to remedy this deficiency. Thus they say:

> . . . the ads totally ignore the evidence that use of most gasolines, Chevron F–310 included, actually contributes to the air pollution problem. Accordingly, the Commission's decision that ads for Chevron F–310 do not raise a controversial issue of public importance will leave the California public uninformed about the other side of this critical debate. (Br. 29.)
>
> The ads ignore totally the fact that Chevron F–310 is a leaded gasoline, the very kind that was subject to the fairness doctrine complaint in *Friends of the Earth*; and the ads also ignore totally the fact that, even if the gasoline does have *some* benefit in reducing automotive pollutants, use of this gasoline will still contribute to the air pollution problem. (Br. 37.) [Emphasis in original.]
>
> To begin with, the same undisputed evidence referred to in Friends of the Earth v. F.C.C. applies to Chevron F–310 gasoline since this gasoline, like the gasoline referred to in Friends of the Earth v. F.C.C. is a leaded gasoline. (Br. 40.)
>
> First, the issue explicitly raised by the ads is whether use of Chevron F–310, or any leaded gasoline which aggravates the air pollution problem, can contribute significantly to the solution of California's air pollution problem. (Br. 46.)
>
> Failing to apply the fairness doctrine to the Chevron ads, the F.C.C. is depriving the California public of information relating to an important public question: whether use of Chevron F–310, or any leaded gasoline, can contribute significantly to the solution of California's air pollution problem. (Br. 52.)

[1] Briefly stated, the petitioners' argument in their brief is that advertisements for a *leaded* gasoline raise a controversial issue of public importance. This is a theme sounded for the first time on appeal, for in the administrative proceedings the petitioners did not base their complaint upon the presence of lead in Chevron gasoline with F–310. Consideration of this new argument is therefore precluded by section 405 of the Communications Act, 47 U.S.C. § 405. Neckritz v. FCC, 446 F.2d 501 (9th Cir. 1971).

Although the petitioners' attempts to discover or create a controversial issue

of public importance either come too late or fall short of clarity we shall discuss their contentions in the light of the principles of the Fairness Doctrine and the decisions of this court in the *Banzhaf* and *Friends of the Earth* cases.

[2] The principles of the Fairness Doctrine have been expounded by the Commission and courts in many cases and we need not review them here. *See* Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969); Democratic National Committee v. FCC, 148 U.S.App.D.C. 383, 460 F.2d 891, cert. denied, 409 U.S. 843, 93 S.Ct. 42, 34 L.Ed.2d 82 (1972); Healey v. FCC, 148 U.S.App.D.C. 409, 460 F.2d 917 (1972); Green v. FCC, 144 U.S.App.D.C. 353, 447 F.2d 323 (1971). It is enough to say that under the doctrine wide discretion is available to a licensee; to establish a violation of the doctrine a complainant must demonstrate that the licensees' exercise of judgment was unreasonable, arbitrary or in bad faith.

[3] We think the record supports the Commission's conclusion that the licensees exercised a reasonable judgment in rejecting the petitioners' complaint. As originally formulated the complaint failed to specify the ecological issue or issues which the petitioners found in the gasoline advertisements. In this situation the licensees could reasonably believe that the issue the petitioners wished to discuss was whether Chevron F–310 did what the advertisements claimed it would do. From this premise it was not unreasonable to conclude that the commercials did not raise a controversial issue of public importance, but rather made claims of a factual nature which the petitioners contended were false. In other words, the narrow question of the efficacy of F–310 was not a controversial issue of public importance.

The charge that the advertised claims for F–310 were false was not a matter properly to be tried on television by advertisement and counter-advertisement. Rather, as the licensees observed, it was a proper subject for a Federal Trade Commission investigation. That investigation did take place. In the Matter of Standard Oil Co. of Calif., et al., Federal Trade Commission, Docket No. 8827. On April 25, 1973 the Administrative Law Judge in that proceeding found that the evidence sustained the advertising claims and dismissed the charges that the advertising was false.[4] We note further that the petitioners in their brief state that they "are not asking this court to review the FCC decision to deny relief with respect to the deceptive advertising issue." (Br. 27, n.1.)

Even if the petitioners' argument based upon the presence of lead in Chevron gasoline with F–310 were properly before us it would be unpersuasive. In the first place, the record discloses without dispute that Chevron marketed *unleaded* gasoline with F–310 before the petitioners' complaint was filed. Moreover the Chevron advertisements did not proclaim the virtues of leaded gasoline.

This case is not controlled by Banzhaf v. FCC, 132 U.S.App.D.C. 14, 405 F.2d 1082 (1968), cert. denied, 396 U.S. 842, 90 S.Ct. 50, 24 L.Ed.2d 93 (1969), and Friends of the Earth v. FCC, 146 U.S. App.D.C. 88, 449 F.2d 1164 (1971). In the *Banzhaf* case advertisements represented that smoking was socially desirable, although evidence indicated that it was dangerous to health. In the *Friends of the Earth* case the burden of the advertising was that high-test gasolines and large engines were "clean, socially responsible and automotively necessary", although such engines and gasolines contributed significantly to air pollution. In each case there was an opposing point of view: that smokers should stop smoking or that consumers should purchase low-test gasolines and small engines. In the case at bar however the commercials made no attempt to glorify conduct or products which endangered public health or contributed to pollution. As we noted in the *Friends of the Earth*

4. The matter is pending on appeal before the Federal Trade Commission.

decision the F–310 commercials "far from suggesting that automobile emissions do not contribute significantly to the dangers of air pollution, urged that the gasoline being advertised was designed to reduce those dangers." 146 U.S.App.D.C. at 93, 449 F.2d at 1169.

In summary, we agree with the Commission's analysis and disposition of the petitioners' complaint.

Affirmed.

Before BAZELON, Chief Judge, and WRIGHT, McGOWAN, TAMM, LEVENTHAL, ROBINSON, MacKINNON, ROBB, and WILKEY, Circuit Judges.

ORDER

PER CURIAM.

On consideration of petitioners' suggestion for rehearing *en banc*, it is

Ordered by the Court *en banc* that petitioners' aforesaid suggestion is denied.

Statement of Chief Judge BAZELON as to why he voted to deny rehearing *en banc*:

Upon consideration of petitioners' suggestion for rehearing *en banc*, and the respondent's response thereto ordered by the Court, I am convinced that the case does not merit rehearing *en banc* for two related reasons, First, and most important, the response reveals that since the decision by the panel in this case the FCC has issued a new statement of policy concerning the Fairness Doctrine and advertising, 39 Fed. Reg. 26372 (July 12, 1974), and that review of such statement is currently being sought in this Court in No. 74–1700. I believe that review is the proper vehicle to consider in the first instance the serious issues raised in petitioners' suggestion for rehearing *en banc*. Second, the advertising messages which are the subject of this litigation have been terminated. Brief for the FCC at 12 n.4, Neckritz v. FCC, No. 71–1392 (D.C. Cir. June 28, 1974).. The extraordinary process of rehearing *en banc* is thus not appropriate in this case.

Exhibit 110: *In Re Wilderness Society* (Esso Alaska Pipeline) 30 FCC 2d 643

F.C.C. 71–704

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
WILDERNESS SOCIETY AND FRIENDS OF THE EARTH
Concerning Fairness Doctrine Re National Broadcasting Co.

JUNE 30, 1971.

GENTLEMEN: As you know, a complaint was filed by James W. Moorman and Geoffrey Cowan on behalf of the Wilderness Society and Friends of the Earth alleging you failed to fulfill fairness doctrine and public interest obligations regarding advertisements sponsored by The Standard Oil Company of New Jersey (ESSO) and broadcast by your network and your owned and operated stations.

Complainants have submitted the following transcripts of advertisements:

I. "Here on the North Slope of Alaska it takes 30 days to erect an oil rig, compared with a few days in Texas. Roads scarcely exist. In winter when sea lanes are choked with ice, all equipment must be flown in. The freight bill for the first North Slope wells was nearly a million dollars, with no guarantee of finding oil. Is it worth the risk? We at Jersey think so, both for us and for you. The Alaskan oil strikes are big, but so is America's need for energy. At the rate this country is now using oil, the Alaskan strikes probably represent little more than three years supply. If America's energy supply is to be assured in this unpredictable world the search for domestic oil must go on and fast."

II. "This is the Canadian Arctic near Alaska. In Winter temperatures plunge to sixty below and it freezes solid. But in Summer it's a gentle land. Jersey's Canadian affiliate, Imperial Oil, made its first discovery in the Arctic fifty years ago. Experience since then has shown them not only how to look for oil in the far North, but to look for ways to preserve the ecology. To protect the swans and geese and ducks that return each year to nest and raise their young. And to avoid disturbing the migration and grazing habits of reindeer, caribou and other wildlife. By balancing demands of energy with the needs of nature they're making sure that when wells are drilled or pipelines built, the life that comes back each year will have a home to come back to."

III. "The Arctic wilderness is not always frozen. In summer much of it comes alive.

Delicate vegetation called Tundra blooms. Reindeer, caribou and other animals graze on it.

Jersey's affiliate, Humble Oil, is exploring and drilling for oil in the Arctic. In constructing roads and living quarters they can't avoid disturbing some of the Tundra and if it isn't replanted it can turn into a permanent sea of mud.

So back in 1968 Humble joined a research project on the North slope of Alaska. Seeds of thirteen varieties of hearty winter grass were gathered and planted. Four types survived the bitter Arctic winter, some growing even faster than the Tundra itself.

Now we believe we know how to restore disturbed Tundra to help create a better balance between the need for oil and the needs of nature."

Complainants allege that these advertisements discuss one side of controversial issues of public importance, namely (1) the need of develop-

ing Alaskan oil reserves quickly and (2) the capability of the oil companies to develop and transport that oil without environmental damage. Complainants state the advertisements "directly address the controversial questions related to construction of the pipeline and a road which are before the courts, the Executive Branch, and the public." Complainants state that these advertisements were broadcast during the program "Meet the Press" which "is watched by an especially large number of decision-makers and people concerned with public affairs. . . ." Complainants state these commercials "are not general product advertisements, nor are their messages indirect." Complainants contend, "Any environmental issues which are raised in the advertisements are treated superficially and from only one viewpoint—i.e., that the oil is sorely needed and that there will be no environmental harm."

In your responses to the complainants and the Commission you state that (1) you do not accept commercial material discussing controversial issues of public importance; (2) the advertisements are "institutional advertising, seeking to create good will for the corporation as a whole and the general conduct of its enterprise"; (3) "the investment of oil industry resources in searching out presently unknown domestic deposits of oil is [not] a controversial issue of public importance at this time, and this, not the pros or cons of the Alaskan pipeline, is the message of the first advertisement"; (4) the second advertisement "deals with the experience of Imperial Oil, Jersey's Canadian affiliate, during the past 50 years since its first discovery of oil in the Canadian Arctic, near Alaska" and its concern for ecology; (5) the second advertisement contains a passing reference to "pipelines" which does not refer to the Alaskan pipeline and does not constitute the advocacy of one point of view; and (6) the *Friends of the Earth* ruling is applicable. You state that you have fairly covered the issue of the Alaskan pipeline in programs which included the June 28, 1970, broadcast of "In Which We Live"; the February 14, 1971, "Meet the Press" program; and reports on the "NBC Nightly News" of February 16, 24, and 28, 1971.

In rebuttal complainants contend that your statement that "[n]either advertisement refers to the Alaskan pipeline nor to any proposed legislation concerning it" indicates NBC "totally failed to understand the substance of our complaint or the two fundamental disputed issues involved in the controversy over the trans-Alaskan pipeline," i.e., legislation has never been contemplated by any of the parties involved. Additionally complainants state that while the "ESSO advertisements were running on television, the Alyeska corporation, which plans to build the pipeline and of which Standard Oil of New Jersey is one of seven oil corporation members, was itself running advertisements in newspapers and magazines throughout the country urging that the pipeline be built."

Complainants also submit a copy of an ESSO advertisement from *Harpers Magazine*, May 1971, in which the following paragraph appeared in the midst of language substantially similar to that contained in the first commercial:

"Following the discovery of oil on the Slope, we faced the problem of how to get the oil out of Alaska with a minimum disturbance of the Arctic environment. The solution is the most carefully engineered and constructed crude oil pipeline in the world. Until it is built, profits will wait."

Complainants state that this advertisement indicates that ESSO admits the interrelationship of the issues raised by complainants and the construction of the Alaskan pipeline.

Complainants state that institutional-type advertising may present one side of a controversial issue of public importance and is not immune from the fairness doctrine because it also creates good will for the advertiser. Regarding the programs which you cite as fulfilling your fairness doctrine obligations in this matter, the complainants state the coverage was inadequate and weighted in favor of those supporting the pipeline's construction. With reference to the specific broadcasts cited by you, complainants state:

"1. *In Which We Live, June 28, 1970,*—Complainants submit that the broadcast of 'In Which We Live' on *June 28, 1970,* is to be accorded little weight in determining whether NBC has an obligation under the fairness doctrine for advertisements broadcast from *November 1970* until *April 1971.*

"2. *Meet The Press, February 1971,*—The 'Meet the Press' program of February 14 cannot be said to constitute 'programming on the issue'. The text of the relevant portion of that program is attached and hereby made a formal part of this addendum to the complaint. It is inconceivable that NBC could believe, in good faith, that Mr. Train's nine equivocal sentences on the proposed trans-Alaska pipeline do anything to meaningfully present any side of the questions at issue in the dispute over whether to build the pipeline.

"3. *NBC Nightly News, February 16, 1971,*—The NBC Nightly News of February 16 featured coverage of the Washington D.C. hearings on the proposed Trans-Alaska pipeline. The purpose of the hearings was explained by Secretary of the Interior, Rogers C. B. Morton and testimony strongly in favor of the plan was given by William Egan, Governor of Alaska.

"4. *NBC Nightly News, February 24, 1971,*—The NBC Nightly News of February 24 featured a report by Don Oliver from Inuvik, Alaska. This report was balanced in its eight sentence presentation of the views of the oil companies and conservationists.

"5. *NBC Nightly News, February 28, 1971,*—The NBC Nightly News of February 28 focused on the hearings in Anchorage, Alaska, which were summarized by the statement that 'there is little opposition to the project in Alaska,' a statement which complainants contend is untrue."

Complainants, to support their contention that prompt Commission action is necessary, cite a June 1 *Wall Street Journal* article which reported that Interior Secretary Rogers C. B. Morton promised to make a decision regarding land use permits for the trans-Alaska pipeline by "about July 15."

The first question to be decided is whether the fairness doctrine applies to the advertisements cited in the complaint. In several recent cases including *Letter to Friends of the Earth*, 24 FCC 2d 743 (1970), and *NBC et al.* (Chevron Decision), FCC 71–526 (Mimeo No. 63075), dated May 12, 1971, we declined to extend the fairness doctrine to general product advertisements such as those making claims regarding a product's efficacy or social utility. However, in footnote 6 of the Chevron decision we stated:

"This is not to say that a product commercial cannot argue a controversial issue raising fairness responsibilities. For example, if an announcement sponsored by a coal-mining company asserted that strip mining had no harmful ecological results, the sponsor would be engaging directly in debate on a contro-

versial issue, and fairness obligations would ensue. Or, if a community were in dispute over closing a factory emitting noxious fumes and an advertisement for a product made in the factory argued that question, fairness would also come into play."

We have reviewed a transcript of the advertisements submitted by complainants, the contents of which are not challenged by you. We believe that these commercials are similar to the examples cited in footnote 6 and constitute the discussion of one side of a controversial issue of public importance.[1]

In the light of the present public controversy over the desirability of developing and transporting Alaskan oil, we are not persuaded by your argument that the advertisements are merely "institutional advertising," or that a discussion of an oil company's search for oil and its asserted concern for ecology are not controversial issues of public importance. The quoted advertisements appear to raise issues concerning (i) the need for developing the oil reserves in Alaska at this time and (ii) the ecological effects which may ensue from such development. In our opinion, the advertisements also inherently raise the controversial issue of the ecological effects which may result from transporting such oil, since the company's large investment in drilling for Alaskan oil quite obviously is based upon the assumption that transportation of the oil to other parts of the world will be permitted. It appears, therefore, that your determination that such advertisements did not raise fairness doctrine obligations was unreasonable.

We now must decide whether you have complied with the requirements of the fairness doctrine. We note the programs which you cited as presenting the complainants' viewpoints on the Alaskan pipeline issue, as well as the complainants' assertion that those broadcasts did not afford reasonable opportunity for the presentation of views in contrast to those advanced in the commercial announcements. We also note that you did not attempt to rebut any of the complainants' specific statements regarding the content of the cited programs. On the basis of the information before us, we cannot find the programs cited by you afforded reasonable opportunity for the presentation of contrasting views to those presented in the commercials, e.g., the possible adverse ecological and environmental effects and the possibility of obtaining oil elsewhere.

Therefore you are requested to submit within ten days a statement indicating what additional material you have broadcast or intend to broadcast in the near future which will afford opportunity for presentation of views contrasting with those raised in the commercials concerning the need to develop Alaskan oil reserves and the ability of oil companies to develop and transport oil without environmental damage.

Commissioner Robert E. Lee absent.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

[1] Although commercial II is nominally addressed to the Canadian Arctic, in the context of the present dispute it advances a viewpoint on the development and transportation of oil in the North American Arctic generally.

Exhibit 111: *In Re Wilderness Society* (Esso Alaska Pipeline) (Reconsideration) 31 FCC 2d 729

F.C.C. 71-971

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
COMPLAINT OF WILDERNESS SOCIETY AND FRIENDS OF THE EARTH AGAINST NATIONAL BROADCASTING CO. REGARDING APPLICABILITY OF FAIRNESS DOCTRINE TO COMMERCIAL ANNOUNCEMENTS SPONSORED BY STANDARD OIL OF NEW JERSEY (ESSO)

MEMORANDUM OPINION AND ORDER

(Adopted September 17, 1971; Released September 23, 1971)

BY THE COMMISSION: CHAIRMAN BURCH CONCURRING AND ISSUING A STATEMENT; COMMISSIONER JOHNSON CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT

1. Pursuant to Section 1.106 of the Commission's Rules, NBC has filed a petition for reconsideration of the Commission's June 30, 1971, ruling that the broadcast of certain commercial announcements sponsored by the Standard Oil of New Jersey (ESSO) created fairness doctrine obligations.[1] NBC has also requested oral argument of this case.

PETITION FOR RECONSIDERATION

2. NBC's arguments are as follows:

(1) "*The Commission erred in holding the three commercials presented views on controversial issues.*" NBC states that the public controversy which generated the complaint was whether the trans-Alaska pipeline should be constructed and that "not one word in any of the commercials . . . expressly refers to, much less discusses, the controversial pipeline." NBC, referring to the Commission's statement that the ESSO advertisements ". . . inherently raise controversial issues," states that "[b]y this reasoning any advertisement, institutional or otherwise, may always be held to state a position on a controversial issue." NBC refers to the advertisement run in Harper's Magazine which was submitted by complainants and states that a television station should not be required "to review other media to determine if the supposed intent of a sponsor was to affect particular public policy." NBC also cites *Green* v. *FCC*, — F 2d — (D.C. Cir. 1971) and states

[1] The following pleadings have been filed by the parties with the Commission: Petition for reconsideration filed July 23 by NBC; complainants' response filed July 27; letter from complainants filed August 3; letter from NBC filed August 10; and complainants' response to NBC's August 10 letter filed August 11.

"[t]he trans-Alaska pipeline . . . is certainly not more and probably less intertwined with north slope oil exploration and development than enlistment in the army is currently intertwined with the draft and service in Vietnam." NBC contends that the Commission should encourage institutional advertising which states the sponsor's concern for the public and that the effect of the ESSO ruling will be to discourage such presentations. NBC states that if it were required to present views opposed to the trans-Alaska pipeline, it would "deprive the broadcasters of the right to determine the manner in which the public is to be informed on public issues."

(2) "*The Commission improperly held NBC had not complied with the fairness doctrine despite the fact that NBC's judgment was made in good faith and was reasonable.*" Based on the arguments set forth in (1) above, NBC contends that its determination that the advertisements did not raise a controversial issue of public importance was reasonable and that the Commission's decision should be reversed.

(3) "*The nature of the Commission's decision, if allowed to stand, will cause great uncertainty to licensees in application of the fairness doctrine and should instead be considered in the forthcoming inquiry proceeding.*" NBC contends that cases such as ESSO should not be considered on an ad hoc basis but rather as a part of the fairness doctrine inquiry where there would be broad participation and the Commission could take an overall view of the fairness doctrine.[2]

(4) "*The Commission's findings as to the adequacy of program balance were made prematurely on an incomplete record and is factually erroneous.*" NBC states that:

> In reliance on long-standing Commission practice including its decision in *Green* v. *FCC*, NBC did not discuss the coverage given in pipeline controversy in its letter to the Commission dated [May 4,] 1971. Following normal procedure in such inquiries, NBC would first have been informed of the staff decision. If adverse, it could then have provided this information which would have been available to the Commission on its review of the matter. The telescoping of the normal multi-step procedures deprived NBC of the opportunity to furnish information about the judgment in question and about its program balance. By the same token the Commission was deprived of an adequate basis for its own determination. The informational gaps were not filled by complainant's description of the programs we cited to them.

REPLY OF THE WILDERNESS SOCIETY AND FRIENDS OF THE EARTH

3. Mr. Geoffrey Cowan, on behalf of The Wilderness Society and Friends of the Earth, requests that the Commission deny NBC's petition for reconsideration because it does not present any new considerations of law or policy, and that the Commission find that the programming presented by NBC failed to satisfy its fairness doctrine obligations.

4. Mr. Cowan states that NBC had adequate opportunity to present the Commission with all factual data regarding its programming; that the Commission never suggested that licensees must "police the print media" but that "It is not inappropriate for the Commission to

[2] NBC refers to our *Notice of Inquiry* (*Study of Fairness Doctrine*), 30 FCC 2d 26 (1971, Docket Number 19260).

expect licensees, in examining a fairness doctrine request, to take account of such information [newspaper and magazine clippings] when it is specifically called to the licensees attention by complainants"; and that the Commission's ruling regarding the applicability of the fairness doctrine to the advertisement was correct. Mr. Cowan alleges that when NBC's regular programming plus the advertisements are combined, NBC's programming is "heavily weighted in favor of the pipeline." It is also requested that the Commission order NBC to immediately fulfill its fairness obligations with programming that is broadcast on a regular basis, broadcast during time periods likely to reach the viewers of Meet the Press and the Saturday and Sunday Evening News (on which the ESSO announcements were broadcast) and with a format that provides an impact commensurate with the impact of the advertisements.

DISCUSSION

5. We deal first with two preliminary matters. NBC requests that we consider this case as part of our overall fairness inquiry (Docket No. 19260). Certainly the fairness aspects of advertising urgently require comprehensive review, possibly leading to major revision of the fairness doctrine. Thus, while we recently extended the time for filings in this docket, we granted only a 30-day extension with respect to Parts III and IV, those bearing directly on the issues in the present case. *See* FCC 71–889. We cannot simply call a halt to all *ad hoc* proceedings until the overall review is completed. We are dealing with claims that go to the public's right to be fairly informed on "matters of great public concern" (*Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367 (1969)), and both thoroughness *and* expedition are required. Rather than holding specific fairness complaints in abeyance, we must proceed to resolve them, as best we can, under established policies and law.

6. NBC also asserts that because the Commission failed to follow its "normal procedures," the network was deprived of an opportunity to furnish materials concerning its program balance. This simply was not the case. The Commission addressed a letter of inquiry to NBC on April 19, 1971, and specifically requested that, whether or not NBC believed controversial issues of public importance were involved, it submit an accurate summary of programs that in its view presented significant contrasting viewpoints to those raised in the ESSO commercials. After receiving NBC's response, a member of the Commission's staff asked NBC whether it wished to submit any additional information. NBC said it did not. (Now, on petition for reconsideration, additional information has in fact been provided by the network as to its relevant programming.) We would simply point out that, when the Commission's staff is acting pursuant to delegated authority, it is acting with full authority—and it is not for the licensee to make guesses as to whether the staff or the Commission will rule and, on this basis, hold back pertinent information. The licensee has an affirmative duty to respond, and respond fully, to all proper inquiries.

7. We turn now to the merits of the case, and first to the contention that none of the ESSO commercials specifically discussed the trans-Alaska pipeline and, thus, that the Commission should not have held that NBC acted unreasonably in determining that no controversial issue had been raised. We want to stress that our ruling does not require licensees to review other media to divine the intent of broadcast sponsors. It is based solely on the content of the broadcast commercials, in the context of the ongoing public issues concerning the proposed Alaska pipeline. Nor is our ruling designed in any way to discourage "institutional" as contrasted with "product" advertising. If any advertisement deals with one side of a controversial issue, and to the extent it does, the requirements of the fairness doctrine must be met. The matter is a factual one and, as it is in this instance, one that calls for a difficult balancing of substantial arguments on both sides.

8. We published the texts of the three advertisements in question on p. 1 of our June 30 ruling. (a) On advertisement I, NBC argues that it nowhere mentions the pipeline and that its clear thrust is America's urgent need for oil, the consequent need for such difficult oil explorations as that going forward on Alaska's North Slope, and thus that ". . . the search for domestic oil must go on, and fast." We agree that the advertisement does not specifically mention the pipeline. But we also note that germane to the controversy is the question of whether the nation urgently requires development of the North Slope deposits or whether there is room for delay to assess more carefully the alternatives to the proposed pipeline. (*See*, e.g., pp. 3–4, Moorman letter of February 25, 1971, and p. 21 of the statement attached to that letter.) By its juxtaposition of North Slope deposits and the nation's need for fast oil development, advertisement I does relate to the pipeline issue. (b) As to advertisement II, NBC points out that it mentions the *Canadian* arctic and not the Alaska pipeline. Again we agree; indeed, opponents of the Alaska pipeline are now urging consideration of a Canadian pipeline as a better alternative from the ecological perspective. (*See*, e.g., Moorman statement for EDF, p. 8, and p. 2 of the EPA statement of March 12, 1971.) On the other hand, we must also note that the advertisement opens with a reference to "* * * the Canadian Arctic near Alaska" and specifically refers to the ability of Jersey's Canadian affiliate to build a pipeline and "* * * yet preserve the ecology." The "experience" referred to is "* * * in the far North" and thus the discussion does bear on the present Alaska controversy. (c) NBC also presents cogent arguments on advertisement III. This advertisement does not mention the pipeline but simply states that Humble, in exploring and drilling for oil in the Arctic, "can't avoid disturbing some of the Tundra" and, by way of remedy, has developed four types of grass that hold promise of surviving the bitter Arctic winter. The accuracy of this statement is not in dispute. Further, it is obviously desirable that business enterprises take ecological factors into account and that they be encouraged to inform the public of their actions in this regard. Nonetheless, the clear import of this announcement is that ESSO, operating in the far North, can strike a "* * * balance between the need for oil and the needs of nature."

And thus it has a cognizable bearing on the controversial issue of the Alaska pipeline.

9. The *Green* ruling, cited by NBC, is distinguishable from the present case on its facts. In *Green*, the purpose of the recruitment announcements was to persuade men to join the Armed Services. There was no mention of the Indochina war and no argument, explicit or implicit, that the war was justified. As the Court stated, "We consider that * * * military recruitment by voluntary means is all that was implicit in virtually all the Armed Services recruitment announcements." *Green* v. *F.C.C.*, *supra* (Slip Opinion p. 13). In this case, the ESSO advertisements refer to oil development in the far North and discuss both the need for rapid development of oil deposits in Alaska and the ecological impacts of such development. The matter is indeed a difficult one—because we are reviewing the reasonableness of the licensee's judgment and because the pipeline controversy is not specifically referred to—but we adhere to our original finding, in the June 30 ruling, that these advertisements do raise fairness obligations.

10. Thus we arrive at the core issue—whether NBC has afforded "reasonable opportunity for the discussion of conflicting viewpoints * * *" on this matter. See Section 315(a); *Green* v. *F.C.C.*, *supra*. In resolving this issue, we have stressed in past cases "* * * that we look to all programming that has been presented on the issue." *Committee for the Fair Broadcasting of Controversial Issues*, 25 FCC 2d 283, 296 (1970). NBC has submitted a list of programs or news items that it states have "presented the views of those for the pipeline, those opposing it, and the various arguments for both points of view." Transcripts, excerpts, or summaries of these programs or news items have now been furnished to the Commission. Further, NBC has shown that it is continuing to inform the American people on this issue by the material that has been presented since the issuance of our June 30 decision. Thus, on July 11 it presented former Secretary of the Interior Udall, a trustee of the complainant's organization, who stated his views on the subject during the Comment program. On August 6 it presented on the Today Show two spokesmen, Senator Randolph and Congressman Dingell, to discuss the pipeline issue. On September 15, it broadcast on The Today Show an eight minute presentation by two anti-pipeline spokesmen, Representatives Aspin and Saylor. We conclude on the basis of this data that NBC has a continuing program to broadcast views on the issue a significant number of times and that, taking into account all the circumstances described above, NBC has thus afforded, and is acting to afford, reasonable opportunity for the presentation of contrasting views. In short, the American people are not being "* * * left uninformed" on this issue (*Green* v. *F.C.C.*, *supra*, Sl. Op. p. 12). We stress in this connection that the issue, in the end, is not what this Commission or some other observer might have done but, rather, the reasonableness of the licensee's journalistic judgment. That is the crucial difference between the "equal opportunities" standard of Section 315 and the much greater leeway necessarily and wisely afforded the licensee under the fairness doctrine.

11. NBC has also requested oral argument. We do not believe there is any such necessity in this case inasmuch as both parties have had full opportunity in their pleadings to make their positions clear.

12. Accordingly, IT IS ORDERED, That NBC's petition for reconsideration IS DENIED, to the extent reflected above. In view of the conclusions stated in par. 10, above, no further action is warranted in this case.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

CONCURRING STATEMENT OF CHAIRMAN BURCH

I join in the Commission's action in this case. But I do so with such a sense of frustration and disenchantment—reaching to the fundamentals of Commission *process*—that I believe it is essential to go in much greater detail into both the factual and policy bases of the action. This case ideally points up the " * * * great difficulties [the Commission faces] in tracing a coherent pattern for the accommodation of product advertising to the fairness doctrine" (*Friends of the Earth* v. *F.C.C.*, Case No. 24,556, C.A.D.C., S1. Op., p. 14) and, indeed, "difficulties" is a pretty pallid word for it. Bluntly, the situation we face is a chaotic mess. As the Court notes (*ibid.*), the Commission cannot simply slough off pending matters. It must act. But it is essential to articulate the fundamental problems so that those commenting in our wide-ranging Inquiry in Docket No. 19260 will be sure to focus on them. When I first broached the idea of such an inquiry—the first such proceeding since the *1949 Report on Editorializing* (13 F.C.C. 1246)—in a speech before the N.A.B. in April, I predicted we were heading down a perilous road in fairness matters to "no one knows where". I'll now modify that prediction. We're already there.

The problem, in my judgment, is not the root applicability of the fairness doctrine to the announcements in question. The Commission has affirmed that product commercials can raise fairness obligations and that these commercials do so. I agree. Thus, in our June 30 ruling, we directed NBC to inform us as to what it had done or planned to do to fulfill its fairness obligations—to afford reasonable opportunity for the presentation of the other side of a controversial issue, in the name of full and fair information to the public. In theory, this should be the end of the matter: pulling together of facts, followed by analysis and judgment, followed by appropriate remedy. But the whole thrust of this Concurring Statement is that, in the fairness area, the bond of theory and implementation has come unstuck and all the principal actors—licensees, public interest advocates, the Commission itself—are in limbo, left to fend for themselves.

One difficulty in this case is that NBC has in fact treated the Alaska pipeline issue repeatedly and has presented partisan spokesmen on both sides a significant number of times. Its coverage is a continuing one, as shown by presentations after the submission of the original complaint and after the issuance of our June 30 ruling. (In an Appendix, the pertinent programs are listed.)

An inevitable further question is, "how balanced was the NBC coverage overall?" Thus the problem is posed. For this involves, first, an examination of the scripts to determine whether the material was pro-pipeline, anti-pipeline, or just neutral background. It then involves either counting lines in the scripts or pulling out the stop-watch to estimate the time afforded each side. (Which assumes, of course, that there are only two sides to the issue—and in this as in most such cases, there may in fact be a multiplicity of "sides" many of which may deserve an airing.) In this instance, the Commission judged that NBC has presented fairly balanced coverage, excluding the ESSO announcements, with the best estimate being that its coverage has somewhat favored the anti-pipeline position (roughly 21 against 11 minutes). The core issue is thus whether the ESSO commercials result in an inbalance. If they are counted fully—without any consideration of the countering considerations noted in par. 8 of the majority opinion—the result is roughly a 2-to-1 ratio in time and probably a higher one in frequency, in the range of 4 or 5-to-1. All these figures must also be viewed against the fact that they are constantly changing, in view of NBC's continuing coverage of the issue.

If the matter came within the equal time provision, there is no question but that remedial action would be called for. But that provision is applicable only to broadcasts by candidates. We have also evolved a quasi-equal opportunities approach to political broadcasts generally (see *Committee for Fair Broadcasting of Controversial Issues*, 25 F.C.C. 2d 283, 300 (1970); *Letter to Mr. Nicholas Zapple*, 23 F.C.C. 2d 707 (1970) and have tended significantly in that direction as to political editorials (see *In re Complaint of George E. Cooley*, 10 F.C.C. 2d 970 (1967)).

A layman would have no difficulty with this case under the popular understanding of the fairness doctrine. He would simply say that fairness means each side gets the same treatment. But the fairness doctrine does not stand for any such simplistic proposition, and wisely so. The purpose of the doctrine is to contribute to an informed citizenry on "matters of great public concern" by promoting "uninhibited, robust, wide-open debate" on broadcast facilities. *Red Lion Bcstg. Co.* v. *F.C.C.*, 395 U.S. 367, 394; *The New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270. It would clearly frustrate that purpose if for every controversial item or presentation on a newscast or other broadcast, the licensee had to offer equal time to the other side or sides. *See* discussion at pp. 291–292, *Committee for Fair Broadcasting, supra.* The resulting quagmire would, in effect, mean the end of "robust, wide-open" debate. Therefore, the Commission has from the beginning afforded wide discretion to licensees in the manner of fulfilling their fairness obligations. See *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1250–51 (1949); *In re Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598, 599 (1964).

The Courts have also noted this distinction between the operation of fairness and "equal time". See, e.g., *Green* v. *F.C.C.*, Case No. 24,470,

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C.A.D.C. The latter case is important here because it is the only one that treats this issue head on. The Court there stated (Sl. Op., p. 10):

> * * * As to how the conflicting points of view are presented, a licensee can present conflicting views in any fashion, so long as the balance in format, time, protagonists, etc., meets a test of 'reasonableness.' (Footnote quoting Fairness Primer omitted)

To the argument that there was an imbalance in that case, the Court asserted (Sl. Op., pp. 18–19):

> * * * We will not attempt to assay here what balance or lack of balance there has existed and does exist in a presentation of the desirable and undesirable features of military life; it is sufficient to point out that under the fairness doctrine it is not necessary that there be an absolute equality in any other criteria for the points of view presented under the fairness doctrine. What the petitioners are apparently confusing with the fairness doctrine is the doctrine of equal time, which has no relevance whatsoever to the issues in this case. Unlike the 'equal opportunities' requirement, which as we have already pointed out deals with legally qualified candidates for public office, the question under the fairness doctrine is one of reasonableness of the station's action, and not whether absolute equality in allocation of time, time of day, or any other criteria, has been achieved.

In affirming the Commission, the Court stressed that, "In our view, the essential basis for any fairness doctrine, no matter with what specificity the standards are defined, is that *the American public must not be left uninformed.*" (Sl. Op., p. 12).

Against this general background, it is also necessary to ask, "what do past Commission precedents tell us about this specific matter?" And I am forced to conclude that the answer, after twenty years of administration of the doctrine, is "virtually nothing". There is one Commission ruling in the cigarette advertising area that a 5-to-1 ratio is not unreasonable. *NBC–TV*, 16 F.C.C. 2d 956 (1969). But like all others in this area, I believe that this ruling is *sui generis*. And, while I note that the Court has not acceded to this position on the general issue (see *Friends of the Earth* v. *F.C.C.*, *supra.*), this aspect was not before the Court, and I continue to regard it as inapposite precedent here. I am also told that there was a staff ruling several years back on an urgent fairness matter, and a 3-to-1 time ratio was considered not unreasonable in that case. But, clearly, a single staff ruling cannot be equated with full or proper Commission consideration in so thorny an area.

And I strongly suspect that the issue has not been resolved precisely because it is so thorny. I for one find it impossible to feel very confident or secure about a process that relies on the stop-watch approach—that is, making judgments, and then quantifying the category into which each presentation falls. And this is only the beginning. There are such additional ramifications as the time and style of the various presentations (does a prime-time spot count two times more heavily than a mid-morning interview? three times? or ten times?), the size and make up of the audience, and (as NBC urges in this case) the relative weight that should be accorded an indirect commercial announcement as against the direct rebuttal that would be afforded under a remedial fairness doctrine ruling. And how do we take into account the fact that a broadcaster, like any good journalist, stays with a hot issue until it's resolved—do we simply adopt an arbitrary cut-off? It might even be argued that we have to consider the dial switching

habits of the average viewer—which means that only rarely does he recall where he viewed which side of what controversial issue! The road here could lead to a series of decisions with enough variables and shadings to rival a medieval religious tract.

Without driving the point into the ground, this clearly is poor policy. By contrast, good administrative practice dictates that both licensees and the public should know what the pertinent criteria are and thus be able to make rational forecasts about their courses of action. *See* Friendly, *The Federal Administrative Agencies: the Need for Better Definition of Standards* (Harvard Univ. Press, 1962). Absent such clear and understandable criteria, Commission rulings tend to become simple recitations of the variables in each case, and a judgment that the action was reasonable or unreasonable—period. I fear that, under present circumstances, both licensees and the public can only fall back on prayer to divine the Commission's intent.

Additionally, the Commission has consistently and rightly striven to avoid the posture of a super-broadcast journalist. *See Hunger in America*, 20 F.C.C. 2d 143 (1969); *Democratic National Convention*, 16 F.C.C. 2d 650 (1969). I question whether a process of categorizing and quantifying presentations, times, and formats, in order to rule on the reasonableness of a licensee's judgment, does not involve the Commission too deeply in day-to-day journalistic practices. More important still, I must question whether it is appropriate for an agency of the government, even with the best of good faith, to get so involved.

On the other hand, there is obviously another side to be considered. Suppose a licensee were clearly and patently to devote 100 times more exposure to one side of an issue than to any other side? Or 50 times? Or any other clearly unreasonable disparity? Such a disparity surely could not be said to constitute "reasonable" opportunity, and this agency must be able and willing to take corrective action. But then it becomes a question of where the line should be drawn, and what process would be appropriate for agency review and remedy—and we are back full circle.

It may be that I exaggerate the difficulties. Perhaps, somewhere, there are good and workable solutions waiting to be articulated. My purpose here is to direct attention to the problems, and I urgently request that interested parties focus on them in the overall Inquiry.

In light of Commissioner Johnson's concurring/dissenting opinion, I feel I must add a few words at this point. He simply sweeps away the problems I've been discussing with two approaches, both of them invalid. First, he asserts that "fairness * * * is no more difficult to apply—or to use in guiding men's behavior—than 'negligence', 'false and misleading', 'tend to create a monopoly', or 'the reasonable man' ". He is right: these are all honorable legal concepts. But none of them involve, as the case before us clearly does, free speech or free press considerations. Commissioner Johnson wants to have it both ways. In such recent cases as "The Selling of the Pentagon", he comes down hard on the inappropriateness of governmental intrusion into the journalistic process; but here, where he urges the Commission to intrude in great detail into that same process, he has no problem. I can't grasp

his distinction. This is a most sensitive area. And there is always the need to tailor our actions with infinite care—as we all recognized in two sua sponte modifications of our personal attack rules in order to avoid a "chilling effect" on broadcast journalism.

Our objective is clear: to promote "uninhibited, robust, wide-open debate" by means of Commission policies that do not unduly intrude into the broadcast journalistic process. For to do that would precisely frustrate our objective. Unlike Commissioner Johnson, I believe it markedly serves the public interest, and specifically the purposes of the First Amendment, to face the issue head on: namely, *is* there some workable middle course?

Commissioner Johnson need not face that issue—and this leads to my second comment on his opinion—because he has already opted for one of the extremes. He would adopt an "equal opportunities" approach with a vengeance, requiring that NBC "* * * air additional programming against the Alaskan pipeline which can reach the same audience as saw the original ESSO spots * * * with the same force and with the same regularity as the original spots". In its ultimate logic, this approach would involve a counter-announcement for every announcement, back-to-back, and measuring to the same split-vibration on some "intensity" scale. I will not repeat the reasons why, in my judgment, the approach Commissioner Johnson recommends in this case would signal the end of robust, wide-open debate altogether. See discussion *supra*. It would be poor policy and worse law. See Section 315(a); *Green* v. *F.C.C.*, *supra*.

Finally, I turn to the resolution of the matter in the case before us. Because, of course, the Commission must resolve the issue as best it can on the basis of existing policies. I think it has.

The test is whether NBC has afforded *reasonable* opportunity—whether the American public has or has not been "* * * left uninformed" on one side of this pipeline issue by NBC's actions. Further, the test is not what we would do as broadcast journalists but whether we can say that NBC's actions here are of such a nature that they may be termed arbitrary. I cannot find that to be the case. If we are to prescribe criteria that would result in some other conclusion, they must emerge from the Inquiry on the basis of overall considerations, and not by yet another ad hoc determination in the confines of this narrow adjudication.

APPENDIX

Following is an analysis by the Commission's staff of material broadcast by NBC dealing with the general subject of the ESSO announcements during the period June 7, 1970 through September 15, 1971. The amount of time accorded each side of the issue, based upon the estimate of the staff, is given in minutes and seconds. That which was believed to have favored the position set forth in the ESSO announcements is listed under the heading "Pro" and that which appeared to have advocated a contrasting view is listed under "Anti."

Date of broadcast	Pro	Anti
June 7, 1970	4:40	5:35
September 10, 1970	:20	1:00
January 13, 1971	:06	:15
February 14, 1971		:10
February 16, 1971	:49	1:05
February 24, 1971	:15	1:30
February 28, 1971	1:32	
June 4, 1971	1:58	
July 11, 1971	:27	2:15
August 6, 1971	:45	1:10
August 26, 1971		:15
September 15, 1971		8:00
Totals	10:52	21:15

Opinion of Commissioner Nicholas Johnson Concurring in Part and Dissenting in Part

The question of the desirability of building a pipeline across Alaska is, to borrow from the rhetoric of the law of the fairness doctrine, "a controversial issue of public importance."

Standard Oil of New Jersey (ESSO) favors the pipeline. The Wilderness Society and Friends of the Earth oppose it. NBC has carried programming and commercial announcements regarding the issue. The Wilderness Society and Friends of the Earth, the complainants, believe NBC has violated the fairness doctrine and urge that the FCC order the network to provide more time for the presentation of complainants' position.

On June 30, 1971, the FCC ruled that the commercial spot announcements presented by ESSO were the presentation of one side of a controversial issue of public importance and therefore should be counted along with the programming of NBC in evaluating the balance in the network's presentation. NBC has asked for reconsideration of that decision. The majority denies NBC's request. I concur. However, the opinion of the majority, and the separate opinion of Chairman Burch—finding NBC to have complied with its fairness obligations—warrant some comment.

There are a number of issues before us that need to be separately addressed to be fully understood.

The fairness doctrine requires that a licensee (or network) accord a rough balance in the presentation of various points of view on a controversial issue of public importance in its news and public affairs coverage. As of September 14, 1971, the majority—and I—agreed with NBC that it acted reasonably and in good faith in trying to achieve such a balance in its presentation of the Alaska pipeline issue on its public affairs and news programs. It should be made clear that no one has even suggested a "bias" or lack of professionalism on the part of anyone associated with NBC News.

The problem arises here because of the existence of the commercial spot announcements—paid for by ESSO and carried by NBC—which we have decided supported the construction of the pipeline.

Does the fairness doctrine apply only to programming? The majority has ruled not, that the commercial must be considered. I agree.

Can the fairness doctrine be complied with by merely including commercial announcements along with the other programming in totaling up the balance? NBC has, the morning of September 15, 1971, informed the Commission it has presented an additional eight minutes of antipipeline programming (an interview on the *Today Show*). Can such programming be found to "balance" commercials? The majority has ruled it can. I disagree.

An issue for this Commission to determine is "whether the licensee can be said to have acted reasonably and in good faith" in making certain judgments—"as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming." [1]

An aspect of this task involves totaling up the number of minutes afforded on both sides of the controversial issue in question, and then making a judgment about the reasonableness of the licensee's balance. As much as I recognize the fairly subjective nature of the process involved here, I must say that I feel that NBC has not acted reasonably in presenting both sides of the issues involved in the Alaska pipeline dispute. Accordingly, I cannot agree with the majority's handling of this issue, and I dissent.

There is no doubt that NBC has covered the Alaska pipeline dispute in its news and public affairs programming. Generally, NBC's coverage of this issue in such programming has been balanced. On September 15, 1971, NBC aired the additional eight minutes of antipipeline news programming. The true question we face, a question which the majority does not want to admit must be faced, is what effect these additional eight minutes of interview time has on a situation involving an otherwise balanced news presentation and the presentation of a number of spots giving only the proponent of one side of the public controversy an unfettered opportunity to address and inform the American public on his own terms, with one of the most forceful means of communication known to man (the TV commercial).

According to NBC, one or another of these ESSO announcements were presented a total of 28 times on NBC between November 1970 and April 1971, during *Meet the Press*, *Saturday Night News*, and *Sunday Night News*. I assume that these are 60-second spots, inasmuch as complainant's statement to that effect in their letter in opposition to NBC's petition for reconsideration is uncontradicted by NBC. As such, they constitute 28 minutes of argument for the Alaska pipeline. Throwing all of the programming—news, interviews, and spots—into the hopper, there is still a ratio of unbalance of approximately 2 to 1 for the pipeline.[2]

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[1] Fairness Doctrine Primer, FCC 64–611 (1964), 2.

[2] This ratio is arrived at as follows: Pro, 10 : 52, Anti, 21 : 15 (news and public affairs); Pro, 28 (spot announcements). Totals: Pro, 38 : 52; Anti, 21 : 15 (minutes).

There are two questions. (1) What decisional significance does this ratio have? Does 2 to 1 comply with the fairness doctrine? (2) Even if it does, can commercials on one side be balanced by programming on the other?

It is important to begin by stating that our responsibility is not merely to total up the pros and cons and decide the fairness doctrine issue solely according to this arithmetic. Instead, of course, we are talking about the licensee's good faith and reasonableness. No one questions NBC's good faith. What about their reasonableness?

I think it would be useful to quote from NBC's own Directive on the fairness doctrine:

> The various contrasting points of view on controversial public issues are presented by NBC in regular and special news, discussion and interview programs, under the standard of fairness. This generally meets the public interest goal at which NBC aims. That goal seeks to provide the public with information on a balanced basis, rather than to assure particular advocates with a means of personal expression of their views. *In many cases, adding to the NBC coverage of a controversial issue a paid-time presentation advocating a position on that issue might itself lead to imbalance.* (Italics supplied.)[3]

Were it not for NBC's last-minute addition of eight minutes of "anti"-programming on September 15, I believe that this excerpt from NBC's own internal management directive alone would establish the fact that NBC was unreasonable in not putting on programming against the Alaskan pipeline to balance the force of the ESSO spots. NBC itself understood, in general, the impact of such spots; NBC has been on notice since June 30, 1971, that the ESSO spots presented one point of view on this controversial issue; thus, NBC should soon have made time available to complainants or other responsible spokesmen for complainants' viewpoint. This would have been a procedure consonant with NBC's own internal policies. What better minimal definition do we have of the word "reasonable" than the licensee's own standard operating procedure? This is not to say that NBC's or any other licensee's standard is per se reasonable on the issue of licensee conduct under the fairness doctrine. It is only to say that if the licensee fails to operate according to what it determines to be in the public interest, there may be a prima facie case of unreasonable conduct.

In *Committee for the Fair Broadcasting of Controversial Issues*, 25 F.C.C. 2d 283 (1970), we ordered the networks to give uninterrupted rebuttal time to opponents of the President's Indochina policy, after we found that the President's five national TV and radio addresses within a few months had created an imbalance in network coverage of the war issue. However, in a separate opinion, I addressed myself to a question I considered far more important and significant than the narrow question of whether on a particular issue the networks' coverage added up to "balance" under the fairness doctrine.

In that opinion, I described the impact of these Presidential broadcasts, which represent, in the purest form, the concept of unfettered individual access to the media:

> Each [of the President's speeches] was broadcast completely intact,

[3] NBC's Petition for Reconsideration, Exhibit A.

without interruptions, cuts, commercial insertions, or delays. There were no questions asked of the President, either before, during, or after his addresses.[4]

In this case, I would approach the issue of licensee reasonableness in a similar manner to the way I advocated in the *Committee for the Fair Broadcasting* case. When the proponent of one side of a "controversial issue of public importance" purchases spot advertisements he shares many of the powerful aspects of the Presidential address—his positions are "broadcast completely intact, without interruptions, cuts, commercial insertions, or delays,"; and the proponent is asked "no questions * * * either before, during, or after" his spot. In this circumstance I would ask whether the licensee satisfied his fairness doctrine obligation by balancing this spot advertising campaign with an interview program controlled and directed by a third party.

The courts have ruled—generally reversing this Commission—that individual citizens do, under some circumstances, have "access" to radio and television stations for purposes of presenting their own point of view (without having to go through the format of an interview, or the process of having a brief excerpt presented on the news).[5] The case before us goes nowhere nearly as far. All it requires us to hold is that when a broadcaster does grant access to one party to a controversial issue of public importance, he has created a fairness doctrine obligation to grant direct access for the presentation of opposing points of view as well. The purpose of the fairness doctrine is to insure "that the American public . . . not be left uninformed." (Emphasis in original.)[6] Recognizing the impact on the individual, as he becomes informed, of the unrestrained program such as the Presidential address or the commercial spot, in short, recognizing the ability of these types of programs to deliver an unimpeded, undiluted message directly from speaker to listener, I would treat such direct-access programming differently from other informative (and perfectly commendable) programming like the Today interview. It cannot be simply thrown in with the other less powerful programming formats for purposes of evaluating the balance.

Thus, I believe that NBC should be instructed to place on the air additional programming against the Alaskan pipeline which can reach the same audience as saw the original ESSO spots—on *Meet the Press*, *Saturday Night News*, and *Sunday Night News*—with the same force and with the same regularity as the original spots.

Finally, a word about the Chairman's concurring statement.

The broadcasting industry has long ridiculed and fought the fairness doctrine—even its constitutionality, see, *Red Lion Broadcasting* v. *F.C.C.*, 395 U.S. 367 (1969). They will undoubtedly read the Chairman's statement with delight.

It would be far preferable, in my view, if an unlimited-channel cable system made access to "television" available to all comers. Then

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[4] Committee for the Fair Broadcasting of Controversial Issues, 25 F.C.C. 2d 283, 307 (1970).
[5] *Red Lion Broadcasting* v. *F.C.C.*, 395 U.S. 367 (1969); *BEM* v. *F.C.C.*, — Fd 2d — (D.C. Cir. 1971).
[6] *Green* v. *F.C.C.*, — F. 2d — (D.C. Cir. 1971).

the need for regulation of "broadcasting" would be more analogous to the "regulation" of the magazine industry. But we have not yet reached that day. We are still living in a nation in which mass media, access to the minds of Americans, is disproportionately controlled by a government-sanctioned quasi-monopoly of the three commercial television networks and their affiliates in the largest markets. So long as that condition persists the rationale for FCC regulation, including the fairness doctrine, is as valid today as when Congress debated the issues in the late 1920's and early 1930's and enacted the Communications Act of 1934.

Of course, the fairness doctrine is subjective and difficult to enforce on a case by case basis. But that's what the common law has been all about for centuries. And its creation is what commissioners and judges are paid to do. "Fairness," as it has been interpreted over the years, is no more difficult to apply—or to use in guiding men's behavior—than "negligence," "false and misleading," "tend to create a monopoly," or the "reasonable man." Any of these concepts can be ridiculed and made to appear impossible of administration—especially by those who don't like their effect in the first place. But such is the stuff of which "law and order" is made. It has worked pretty well. It should be improved where it can be. But the anarchy that remains when it's disposed of is a pretty poor substitute.

Finally, it is curious that when a case is difficult or impossible to resolve this Commission usually disposes of it by concluding that the broadcaster wins. It would be as unreasonable to propose that all difficult cases will be resolved in favor of the complaining public interest representative. In fact, I propose we do neither. I think we ought to continue to dispose of these cases as they come along as best we can in light of the body of fairness doctrine law created by the courts and this Commission over the years. I dissent from the way we have done so today.

Exhibit 112: *In Re Wilderness Society* (Esso Alaska Pipeline) (Further Reconsideration) 32 FCC 2d 714

F.C.C. 71-1285

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
COMPLAINT OF WILDERNESS SOCIETY AND FRIENDS OF THE EARTH AGAINST NATIONAL BROADCASTING CO. REGARDING APPLICABILITY OF FAIRNESS DOCTRINE TO COMMERCIAL ANNOUNCEMENTS SPONSORED BY STANDARD OIL OF NEW JERSEY (ESSO).

MEMORANDUM OPINION AND ORDER

(Adopted December 23, 1971; Released December 27, 1971)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT; COMMISSIONERS H. REX LEE AND REID ABSENT.

1. By Memorandum Opinion and Order released September 23, 1971, 31 FCC 2d 729, we denied a petition filed by NBC for reconsideration of our earlier ruling of June 30, 1971 that the broadcast of certain commercial announcements sponsored by Standard Oil Company of New Jersey (ESSO) created fairness doctrine obligations relating to the dispute over the proposed construction of an Alaskan oil pipeline. We held that the commercial announcements in question did deal with the controversy surrounding the trans-Alaskan pipeline, but concluded that no further action was warranted because NBC had a continuing program of broadcasting contrasting views on the issue. We now have before us a further petition for reconsideration filed by The Wilderness Society and Friends of the Earth on October 22, 1971, in which it is requested that we determine whether NBC has broadcast an adequate amount of programming on the issue of "the need of developing Alaskan oil reserves quickly." The petition is opposed by NBC.

2. The essential argument made by the petitioners is that the Commission has found that the pipeline controversy involves two separate issues: (i) the need for developing the oil reserves in Alaska at this time, and (ii) the ecological effects which may ensue from such development, and that we must determine separately whether NBC has complied with the fairness doctrine with respect to the first of these "issues." We do not agree. The clear tenor of our prior treatment of this matter has been that the basic controversial issue involved is the proposed construction of an Alaskan oil pipeline. While we have recognized that the parties to the dispute were in disagreement over both the need for developing Alaskan oil reserves quickly and the ecological effects of transporting oil from Alaska by pipeline, we have not suggested and do not believe that these two facets of

the basic problem should be treated as independent controversial issues to be examined separately under the fairness doctrine.[1] NBC, we think, has reasonably determined that the issue the petitioners have wanted influenced is the issue of pipeline construction. As the licensee points out, the petitioners have considered the time element important in terms of a governmental decision to grant land use permits for the pipeline. What is important, therefore, is that the spokesmen for the opposing viewpoints on the merits of the pipeline be afforded a reasonable opportunity to express their views. The particular arguments to be made and issues to be raised are matters to be determined by the parties, and there is no indication here that the pipeline opponents have not been afforded a reasonable opportunity to make all arguments they regarded as significant. This is not a case of the sort mentioned in *Letter to NBC*, 25 FCC 2d 735 (1970), where a licensee has made two important points in discussion of an issue and then afforded time only for discussion of contrasting views on one of the points, rejecting fairness requests on the other point. We therefore decline to grant the requested relief.

3. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by The Wilderness Society and Friends of the Earth IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

Again we are faced with the issue of NBC's compliance with the Fairness Doctrine after its broadcast of several commercials dealing with the Alaskan oil discoveries.

Six months ago we decided that NBC had erred in not treating the issues presented in these advertisements as controversial issues of public importance. Three months ago we denied NBC's petition for reconsideration of the earlier ruling, but ruled, over my dissent, that NBC had complied with its obligations under the Fairness Doctrine to provide reasonable coverage to both sides of the controversy.

On October 22, 1971, the petitioners, Wilderness Society and Friends of the Earth, filed a request that we reconsider one aspect of our September 23, 1971 decision. Their claim is that we erred in limiting the scope of the "controversial issue of public importance" to whether the Alaskan pipeline ought to be built.

In our June 30 decision, we stated that:

> The quoted advertisements appear to raise issues concerning (i) the need for developing the oil reserves in Alaska at this time and (ii) the ecological effects which may ensue from such development. . . . On the basis of the information before us, we cannot find the programs cited by you [NBC] afforded reasonable opportunity for the presentation of contrasting views to

[1] Our finding in the September 23, 1971 opinion that an advertisement whose thrust was America's alleged urgent need for oil was germane to the controversy, was a finding of relevance to "the pipeline issue." That finding does not support petitioners' contention that the opponents of the pipeline must be afforded independent response time on the "energy crisis issue."

those presented in the commercials, e.g., the possible adverse ecological and environmental effects and the possibility of obtaining oil elsewhere.[1]

In our September 23 decision, we stated that: "In this case, the ESSO advertisements refer to oil development in the far North and discuss both the need for rapid development of oil deposits and the ecological impacts of such development." [2] However, later in that opinion, at par. 10, we limit the discussion of NBC's compliance with the Fairness Doctrine to the single issue of whether the oil pipeline ought to be built.

In a separate dissenting and concurring opinion, I argued that NBC had failed to comply with the Fairness Doctrine by failing to present sufficient programming (of the spot-advertisement nature) putting forward the arguments against building the pipeline. In that opinion, I did not address myself to the issue of the need for developing oil reserves in Alaska.

Clearly, from the opinions of June 30 and from the major portion of the majority opinion of September 23, this Commission defined two separate issues—both the desirability of building the pipeline and the need to develop Alaskan oil reserves. Abruptly, in the midst of the September 23 opinion, the Commission reversed its field and limited the discussion to the pipeline issue. It did so without explanation. Now, in the majority's opinion today, there is a lame attempt to cover its elusive tracks:

> The clear tenor of our prior treatment of this matter has been that the basic controversial issue involved is the proposed construction of an Alaskan oil pipeline. While we have recognized that the parties to the dispute were in disagreement over both the need for developing Alaskan oil reserves quickly and the ecological effects of transporting oil from Alaska by pipeline, we have not suggested and do not believe that these two facts of the basic problem should be treated as independent controversial issues to be examined separately under the fairness doctrine.

I do not believe that the majority has adequately explained why, in mid-stream, the issues were narrowed. While we are not inextricably bound by our prior decision to consider this a two-issue controversy, unquestionably we have the legal obligation to explain in rational, reasonable terms our change-of-mind. We are not allowed the luxury of deciding the same case one way on Monday and the other way on Tuesday. *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D. C. Cir. 1965); *Burinska v. NLRB*, 357 F.2d 822 (D. C. Cir. 1966). Similarly, I do not believe that—in the same proceeding—we can make a conclusion of law in Monday's opinion and reverse it in Tuesday's, without making an adequate, rational explanation. "[T]he Commission . . . must explain its reasons and do more than enumerate factual differences. . . ." [3] Nor is it legally sufficient for the Commission to say "Black is white, because we say it is," which is the way today's majority opinion seems to read.

We are not required to grant a petition for reconsideration, but the fact is that we have made an error of law in this case, and we are required to correct that error.

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[1] *Wilderness Society and Friends of the Earth*, 30 F.C.C. 2d 643, at 646 (1971).
[2] *Wilderness Society and Friends of the Earth*, 31 F.C.C. 2d 729, at 733 (1971).
[3] *Melody Music, Inc.* v. *FCC*, 345 F.2d 730, at 73 (D. C. Cir. 1965).

If my own position on September 23 must be interpreted as an acceptance of the majority's definition of the (narrowed) issue then I was also in error. I would correct that error by granting the petition for reconsideration in this case, and asking the parties for their comments on NBC's coverage of the issue of whether there is a need to develop the Alaskan oil reserves at this time.

Accordingly, I dissent.

Exhibit 113: *In Re Media Access Project* (Georgia Power) 44 FCC 2d 755

F.C.C. 73-1291

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
MEDIA ACCESS PROJECT
Concerning Fairness Doctrine Re Station WJBF, Augusta, Ga. and Station WQXI-TV, Atlanta, Ga.

DECEMBER 7, 1973.

CERTIFIED MAIL—RETURN RECEIPT REQUESTED
FUQUA TELEVISION, INC.,
Licensee of Television Station WJBF,
Box 1404,
Augusta, Ga.

PACIFIC & SOUTHERN BROADCASTING CO.,
Licensee of Station WQXI-TV,
1611 West Peachtree Street NW.,
Atlanta, Ga.

GENTLEMEN: This is with reference to the fairness doctrine complaint filed with the Commission on January 29, 1973 by Media Access Project on behalf of the Georgia Power Project, the Georgia Tenants Organization, and the Atlanta Chapter of the National Welfare Rights Organization against Television Stations WJBF, Augusta, Georgia, and WQXI-TV, Atlanta, Georgia.

Complainants state that their complaint "is based upon the broadcasters failure to air viewpoints contrasting with those raised and expressed in a series of 60 second spot advertisements by the Georgia Power Company aired by them from June 1972 until the present."[1] In particular, complainants allege that the Georgia Power Company advertisements, "unlike straight product advocacy ads, lobby to convince the people of Georgia that Georgia Power is a responsible entity seeking to deal reasonably with such closely interrelated controversial issues of public importance as: (1) the need for Georgia Power Company to expand its generating capacity; (2) the need for a rate increase and the soundness of Georgia Power's regressive rate structure; (3) the impact of rapidly expanding generation of electricity upon the nation's limited sources of energy; (4) the environmental dangers caused by Georgia Power's generation of electricity; and (5) whether promotional advertising by Georgia Power, a state regulated

[1] Copies of the advertisements in question have been submitted by complainants and their texts are attached hereto as Appendix I. The advertisements are numbered A-1 through A-9 and are referred to accordingly herein. By letter to the Commission, dated November 16, 1973, complainants have submitted the text of an additional Georgia Power Company advertisement broadcast by the stations beginning October 12, 1973. This advertisement is included in Appendix I as A-10. By letter of November 21, the Commission requested the licensees' comments with respect to this advertisement. The licensees' further responses are referred to *infra*.

monopoly, is a desirable practice." Complainants allege that the advertisements "are designed to marshall public opinion behind the utility's effort to obtain regulatory approval for higher rates which, in turn, will finance the construction of additional generating facilities." Complainants further state that the advertisements first appeared in June 1972 when the Georgia Public Service Commission (PSC) commenced hearings on Georgia Power's request for a rate increase and were broadcast by WQXI–TV six times a week and by WJBF five times a week through the months of June, July, and August of 1972. Complainants state that "The broadcasters have continued to air these or similar Georgia Power advertisements up to the present . . ." and ". . . have made no effort to redress the imbalance in their programming," and that "Georgia Power has indicated that it will continue to utilize such advertisements to 'educate' its customers about its side of these controversial issues involved in its ongoing legal battle with complainants and the PSC."

Complainants have submitted copies of letters to the management of Stations WJBF and WQXI–TV, dated October 19, 1972, which set forth their fairness doctrine claims and contentions and requested that the stations comply with their "obligation to present the other sides of the controversial issues of public importance raised by Georgia Power's commercials . . ." Complainants have also submitted copies of the reply letters from WJBF and WQXI–TV, dated November 13, 1972 and January 2, 1973 respectively. WJBF stated that "we have reviewed the announcements to which you refer and it is our best judgment that they do not raise the issues which you suggest," and that "it is also our judgment that neither the pendency of the rate proceeding nor your group's participation therein occasion a 'fairness' situation as to the announcements carried by the station." WQXI–TV stated that although "The commercials carried by our station were institutional in nature and in themselves did not present a position on a matter of public controversy," it "recognized that the rate increase sought by the Georgia Power Company engendered controversy in the Atlanta area" and "in accordance with the fairness doctrine, . . . has presented viewpoints of all segments of the community concerning such rate increase."

Complainants seek an order which would provide them "and/or other informed persons with a regular amount of spot advertising time, comparable to that sold to Georgia Power Company, in which to present contrasting viewpoints on the controversial issues of public importance raised by the Georgia Power Company ads," and which would also direct that "program time" be used "to redress the past imbalance herein complained of."

In response to a Commission inquiry, dated February 27, 1973, WJBF states that "it is our best judgment that the announcements in question did not raise or present controversial issues of public importance." With particular reference to the proposed rate increase, it states that "the rate hearings did not take place in this area [Augusta], but rather in Atlanta," and that "While it is true that the outcome would affect individuals and organizations in this area, there was no discernible concern with or debate regarding the proposal or the proceed-

ing in this area." It urges that "While it may be argued that any proposal which will increase the costs of any product or service is, per se, a 'controversial issue', such a proposition is in our view an unacceptable over-simplification." WJBF also states that "In general—and absent a determination by a competent body that the providing of electrical service today presents in and of itself a nation-wide controversial issue of public importance—we are simply not prepared and indeed can find no basis for concluding that advertising by such companies expresses one side of a controversial issue so as to present a fairness obligation as to stations carrying such announcements." WJBF further states that "we have adequately fulfilled any obligation that may exist to inform our viewers regarding pollution and ecological considerations generally," and that "we have reported the Georgia Power rate proceedings on various newscasts," such coverage being "essentially in the nature of reports as to the facts of the rate filings and the pendency of the proceedings."

In its response, dated March 1, 1973, WQXI–TV states that "It is our position that while there is controversy in our area concerning certain activities of the Georgia Power Company, the commercials carried by us for the Georgia Power Company did not concern themselves with such controversy," and that "Rather, the commercials . . . are institutional in nature and thus, do not engender fairness obligations." It further states that "Since there was, however, a controversial issue involving proposed rate increases of the Georgia Power Company, we did present significant contrasting viewpoints on such issue . . . ," including "direct comments of officials of the complainants and of the Georgia Power Company" which were presented in its "Pro News" program "from November 9, 1972 through December 27, 1972 on at least nine different dates."

In their reply to these responses, dated March 23, 1973, complainants reassert their fairness doctrine claims with respect to the Georgia Power Company advertisements and state that "neither licensee makes any effort to refute the allegations in the complaint nor to address the actual contents of the advertisements which it aired." Complainants further state that although the Public Service Commission granted part of the requested rate increase, both Georgia Power Company and complainants (as well as other parties) have appealed the ruling to the Georgia courts and "Accordingly, the public controversy surrounding the rate increase . . . is still very much a live issue in the licensees' areas of service."

Under the fairness doctrine, a broadcaster presenting one side of a controversial issue of public importance is obligated to afford reasonable opportunity for the presentation of contrasting views. The Commission has further defined this obligation as follows:

> . . . the licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming . . . *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance,* 40 FCC 598, 599 (1964).

Both the Commission and the courts have held that on a complaint under the fairness doctrine, the burden is on the complainant to specify the particular issue involved and substantiate its controversiality and public importance, and also to show that particular broadcast material has presented one side of that issue and that the licensee has not afforded reasonable opportunity in his overall programming for the presentation of contrasting views. See *Allen C. Phelps*, 21 FCC 2d 12 (1969); *Healey* v. *F.C.C.*, 460 F. 2d 917 (D.C. Cir., 1972); *Green* v. *F.C.C.*, 447 F. 2d 323 (D.C. Cir., 1971). Should the licensee reach different conclusions as to these matters, the Commission will review those judgments only to determine whether the licensee can be said to have acted reasonably and in good faith. See *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 FCC at 599 (1964).

Complainants contend that the advertisements in question present one side of several "interrelated" controversial issues of public importance and thereby obligate the licensees to afford reasonable opportunity for the presentation of contrasting views. The licensees reply that, in their judgment, the advertisements do not present or advocate a view on such issues in any way and, alternatively, that many of the issues cited by complainants are not, in fact, controversial or of public importance in their areas of service. The initial issue thus joined is the reasonableness of these judgments in light of all the facts, circumstances, and arguments presented.

At the outset, we must reject as unreasonable the summary conclusion of WQXI–TV that since the advertisements are "institutional in nature," they "do not engender fairness obligations." [1A] As the Commission has stated:

> In determining compliance with the fairness doctrine the Commission looks to substance rather than to label or form . . . Regardless of label or form, if one viewpoint of a controversial issue of public importance is presented, the licensee is obligated to make a reasonable effort to present the other opposing viewpoint or viewpoints. *Stations' Responsibilities under the Fairness Doctrine as to Controversial Issue Programming*, 40 FCC 571, 572 (1963).
>
> * * * * * * *
>
> If any advertisement deals with one side of a controversial issue, and to the extent it does, the requirements of the fairness doctrine must be met, *Wilderness Society* (ESSO case), 31 FCC 2d 729, 732 (1971).

Complainants allege that all the advertisements in question raise a controversial issue of public importance which "involves" the propriety of "promotional advertising by governmentally-regulated monopolies, and specifically by electric companies." Both the Commission and the courts have emphasized that to invoke the fairness doctrine, "It is not enough for the complainant to allege that there is a controversial issue of public importance on which the complainant wants to be heard on the licensee's station." *Healey* v. *F.C.C.*, *supra*, at 921. Rather the complainant must show that particular broadcast material, in fact, *has presented one side of that issue*. Here the complainants have provided no evidence that "promotional advertising by governmentally-regulated monopolies" has become a controversial issue of public importance in the areas served by the stations. Moreover,

[1A] However, see first paragraph, page 7, *infra*, regarding WQXI–TV's comments in connection with advertisement A–10.

the mere fact that advertisements of a public utility are being broadcast does not, in and of itself, present one side of such an issue, even if it be assumed that such an issue exists.

Complainants also allege that advertisements A–7, A–8, and A–9 "concern the company's benevolent air and water pollution policies," and "directly raise and address one side of controversial issues of public importance" since "No mention is made of the immense pollution caused by Georgia Power's generating of electricity." In response, WQXI–TV states that "We do not believe that there is any significant group in the Atlanta area which would contend that . . . the need for protection of the environment is controversial," and that "There may well be persons who believe that greater ecological efforts are needed, but this does not make an assertion of attempts at environmental protection controversial." WJBF similarly denies that these advertisements presented one side of an environmental issue of controversy and public importance.

Review of the advertisements in question and complainants' arguments with respect thereto fails to indicate that these licensee judgments are unreasonable. Although complainants allege that the issue involved is "the pollution caused by Georgia Power's generating of electricity," they have submitted no information to indicate that this particular matter is one of controversial public importance in the licensees' areas of service, other than their own conclusions based on governmental and private studies dealing with the overall subject of electricity generation. Complainants state that "Georgia Power's efforts to control its pollution were an issue at the PSC hearings," giving the bare citation, "See, e.g., *Atlanta Journal*, p. 8–D, November 10, 1972." However, they have not provided the Commission with any specific information to show how such efforts of the Company were at issue in the hearings which, as complainants acknowledge, were held to rule on the request for a rate increase rather than any question of the pollution caused by Georgia Power's operations. Similarly, while complainants cite coverage of their views by other Georgia broadcast stations as "recognition of the continuing controversy following the partial rate increase," they do not indicate what particular views were presented or whether such coverage was "in recognition" of an issue as to the rate increase or the different matter of the Company's pollution. In short, complainants have advanced no reasonable grounds for their conclusion that Georgia Power's pollution constitutes a controversial issue of public importance in the licensees' areas of service. In this regard, complainants reliance on *Wilderness Society*, (ESSO case), 30 FCC 2d 643 (1971); *reaffirmed*, 31 FCC 2d 729 (1971); *pet. for reconsid. denied*, 32 FCC 2d 714 (1971), is misplaced. There the Commission found that the oil company's "asserted concern for ecology" in its advertisements was directly related to "the dispute over the proposed construction of the Alaskan oil pipeline," a clearly identified controversial issue of public importance. Here complainants have alleged only that in asserting Georgia Power's "concern for the environment," the advertisements in question are in some indirect way

related to a broad, general topic of "the environmental impact of Georgia Power's electricity generation." [2]

Complainants further claim that in light of the Georgia Public Service Commission hearings and related court contests, Georgia Power's request for a rate increase, based on the alleged inadequacy of its present rates and need to expand its generating capacity, constitutes a controversial issue of public importance, and that certain of the Georgia Power advertisements which have been broadcast by the licensees present the Company's side of the issue. In response, WJBF contends that since the rate hearings were held in Atlanta and there was "no discernible debate" concerning the hearings in Augusta, its judgment that Georgia Power's request for a rate increase does not present a controversial issue of public importance in its service area is reasonable. It also states that it is an "unacceptable oversimplification" to argue that any proposal which will increase the costs of any product or service is "per se, a 'controversial issue.'" WQXI-TV contends that although a controversy exists in its area concerning "certain activities of the Georgia Power Company," the advertisements cited in the complaint [A-1 through A-9] "did not concern themselves with such controversy." By its later response to the Commission, dated November 26, 1973, WQXI-TV states that advertisement A-10 "did request an increase in the price to be paid for electricity," but apparently maintains its position with respect to the other advertisements referred to in the complaint.

Upon the facts and circumstances here presented, we cannot find that the judgment of WJBF is reasonable. Complainants have stated, and the licensee does not dispute that while the advertisements in question have been broadcast the Georgia Public Service Commission has been holding public hearings on Georgia Power's request for a rate increase and the Georgia courts have been engaged in review of the Commission's ruling on appeal by the complainants, other opposition parties, and the Company.[3] Complainants have also stated without contradiction that Georgia Power's request is opposed by not only complainants but also by 18 other groups "ranging from the Georgia Textile Manufacturers Association to the U.S. Army." Although WJBF urges that it would be an "unacceptable oversimplification" to characterize any proposal to increase the cost of any product or service as a controversial issue of public importance within the meaning of the fairness doctrine, it must be observed that complainants' fairness claims are not so broadly stated. Rather they more narrowly concern a request for a rate increase by a public utility which has been granted a monopoly in the production and sale of electricity by the public authority and is regulated in the public interest by that author-

[2] We note here that complainants, without precision or clarity, appear to argue that the issue involved is, alternatively, whether Georgia Power is a polluter, whether Georgia Power is doing enough to combat pollution in its operations, or whether Georgia Power can continue to produce electricity without endangering the environment. As the Court of Appeals has stated: "To invoke the fairness doctrine as a ground for obtaining access to the air waves, it is not only necessary to define a controversial issue of public importance, but implicitly it is first necessary to define the issue." *Green v. F.C.C., supra* at 329.

[3] Complainants, by letter dated August 9, 1973, also state that Georgia Power has filed "new requests for additional rate increases," and that these requests "will be debated in public hearings this September." In a letter to the Commission of November 16, 1973, complainants further state that the Georgia Public Service Commission will rule on the additional requests by December 15.

ity. Given these facts and circumstances, the Commission cannot uphold as reasonable a judgment that the question of the increase in the cost of electricity for the entire state of Georgia, except the city of Savannah, does not constitute a controversial issue of public importance in WJBF's area of service.

It is also difficult to sustain the reasonableness of a judgment that none of the advertisements in question presented one side of the rate-increase issue. Clearly, advertisements A–1 and A–10 advocated Georgia Power's position on the rate increase question which, as noted at [3] *supra*, has been and remains a controversial issue of public importance in the licensees' area of service:

> By 1978, our customers will need twice as much electric power. And we must build to supply it.
>
> Every year, you're increasing your use of electricity.
>
> We're busy keeping up with your present needs and getting ready for the future.
>
> But it costs money. We'll spend nearly $2 million every working day this year, just for construction.
>
> Most of that money must be borrowed. And interest rates are steep.
>
> Environmental protection adds millions of dollars to our costs, too. For instance, one tower to cool and recirculate water is about $4 million.
>
> All these things effect the price of your electricity. So does inflation. *In today's economy, it just isn't possible to provide electricity at pre-inflation prices.* But your needs keep growing . . . and construction can't wait. We're building . . . to serve you. [A–1] [Emphasis added]

* * * * * * *

> . . . to continue providing the power needed by Georgia homes and industries, we must be able to build. Which means borrowing money. Lots of it.
>
> An increase in price will help us borrow the money that's needed, and keep power flowing. To *your* home and *your* job.
>
> Electricity. What would you do without it? [A–10]

It also is arguable that advertisements A–2, A–3, A–4 and A–5 asserted the need for an increase in generating capacity and thereby likewise advocated one side of the rate-increase issue since one of the power company's claimed justifications for the rate increase was the need to expand its generating facilities. However, in light of our finding that advertisements A–1 and A–10, which both stations broadcast repeatedly, clearly presented the Company's position on the rate-increase issue, we find it unnecessary here to pass upon the applicability of the fairness doctrine to advertisements A–2 through A–5.

In light of these findings, it does not appear that the licensees have complied with their fairness doctrine obligation to afford reasonable opportunity for the presentation of views on the issue of the proposed rate increase which would contrast with those advanced by Georgia Power in the noted advertisements. WJBF states that it has only "reported the Georgia Power rate proceedings on various newscasts," such coverage being "essentially in the nature of reports as to the facts of the rate filings and the pendency of the proceedings." Although WQXI–TV states that it did present "significant contrasting viewpoints" on the issue of the proposed rate increase in its "Pro News" program on "at least nine different dates from November 9, 1972 through December 27, 1972," review of the submitted transcripts of such news items discloses that views opposed to the rate increase were presented by the station on only four different dates,[4] and that the

[4] These opposing views are set forth in Appendix II.

remainder of the items were either coverage of the views of Georgia Power spokesmen or merely reportage of the fact that the PSC hearings were being held, that an increase less than requested had been granted, or that the PSC decision has been appealed to the Georgia courts. In its later response of November 26, 1973, WQXI–TV has also submitted summaries of additional material related to the rate increase request which it broadcast in its "Pro-News" program on five dates during August and September of 1973.[5] While WQXI–TV thus may be correct in its contention that contrasting views—both for and against the rate increase—were presented on the nine dates indicated, it would appear from complainant's uncontradicted submissions that advertisement A–1 or announcements similar thereto have been broadcast by WQXI–TV and WJBF from June 1972 through the present, and that advertisement A–10 has been broadcast many times since October 12, 1973. The Commission has held that both the amount of time allotted to each side of the issue and the frequency of the presentation of views on each side are factors appropriately to be considered in reviewing licensee compliance with fairness. See *Big Chief Broadcasting Co.* (KTOW), 25 FCC 2d 73 (1970); *King Broadcasting*, 10 FCC 2d 970 (1967). Based on the information presently before us, we cannot find that the licensees, in their overall programming, have afforded the reasonable opportunity for the presentation of contrasting views contemplated by the fairness doctrine.

In accordance with these findings, and in light of the imminent ruling by the Georgia Public Service Commission on the power company's most recent request for a rate increase, the licensees of Stations WJBF and WQXI–TV are requested to submit within 7 days of the date of this letter a statement indicating what additional material they have broadcast or intend to broadcast in the near future which will afford opportunity for the presentation of contrasting views on the rate-increase issue. Complainants also assert that the advertisements raise additional separate but "interrelated issues," including "the soundness of the Company's regressive rate structure" and "the impact of rapidly expanding generation of electricity upon the nation's limited sources of energy." However, we believe that the licensees might reasonably determine that the advertisements in question did not raise distinct controversial issues of public importance on these additional matters. See *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, *supra*, at 599, *National Broadcasting Co.* (AOPA complaint), 25 FCC 2d 735 (1970).

Chairman Burch and Commissioners H. Rex Lee, Richard E. Wiley, and Charlotte T. Reid concurring in the result.

By Direction of the Commission,
Vincent J. Mullins, *Secretary*.

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[5] These submitted summaries are set forth in Appendix II. We note that such summaries only refer to "views opposed to the power rate increase" and make no mention of additional views *favoring* the increase which also may have been broadcast in its news programs.

APPENDIX I

A–1

(Audio)—By 1978, our customers will need twice as much electric power. And we must build to supply it.

Every year, you're increasing your use of electricity. We're busy keeping up with your present needs, and getting ready for the future.

But it costs money. We'll spend nearly $2 million every working day this year, just for construction.

Most of that money must be borrowed. And interest rates are steep.

Environmental protection adds millions of dollars to our costs, too. For instance, one tower to cool and recirculate water is about $4 million.

All these things affect the price of your electricity. So does inflation. In today's economy, it just isn't possible to provide electricity at pre-inflation prices. But your needs keep growing . . . and construction can't wait. We're Building . . . to serve *you.*

LOGO: Georgia Power Company

A–2

(Audio)—Chris is one year old. In his lifetime he'll experience love, independence, and morning gold with sunshine.

In that lifetime Chris may need a million kilowatt-hours of electricity. Along with more than 90,000 babies born in Georgia last year he'll continue using it, needing it, in ever increasing amounts. That's why Georgia Power must double its generating capacity by the year 1978 . . . and it took us over 40 years to build the system we have today. This year we'll have to spend near two million dollars every working day for construction.

A–3

(Audio)—You're feeling the pulse beat of a modern electric hospital. People struggling for life with the help of . . . Electrocardiograms . . . Electric Fluoroscopes . . . Electric Iron Lungs . . . Electric Operating Lights . . . (Sound: Baby crying) . . . Electric Incubators.

As the population grows, so does the need for hospital facilities. That's another reason Georgia Power must spend nearly $2 million *every working day,* just for construction. To serve *your* growing needs.

A–4

(Video)—Water glass with one straw. Straws are added one by one. Last straw is added as glass almost empties.

(Audio)—Funny thing about electricity. Just when you think you've got enough for everybody. Everybody wants more. For New Schools, New Hospitals, New Office Buildings, New Shopping Centers, New Air and Water Purification Equipment, Better Lighting for Our Streets And for the Thousands of New Homes and Apartments built in Georgia every year.

That's why Georgia Power must build today to provide the kinds of generating facility necessary to satisfy your growing demands. Otherwise, there just might not be enough power to go around.

And that would really be the last straw. The Georgia Power Company.

A–5

(Audio)

(Sound: Typing)

Do you know what your son saw in school today? A herd of charging elephants.

Through a motion picture projector.

He saw a living cell divide. Through an electric microscope.

He watched a computer _____ estimate world population changes.

(Sound: Typing)

He printed a newspaper.

He heard a Spaniard reciting from Don Quixote . . . with the help of a tape recorder.

He listened to Beethoven symphony.
Through Hi-fi equipment.
(Symphony Continues to End of Commercial.)
Today electricity helped your son to learn in a hundred ways.
At Georgia Power we're building power plants now to make sure our schools . . . have all the electricity they need.
We're building a brighter life for you . . . and your children.

A–6

(Audio)
Little Boy: What you doing, Grandpa?
Grandpa: Fixing a lamp.
Little Boy: Funny lamp.
Grandpa: The kind we used before we had electricity.
Little Boy: How did it work?
Grandpa: With a match.
Little Boy: But how did you turn on tv?
Grandpa: We didn't have tv or even an electric stove or things like Grandma's washer or dryer, or all my shop tools.
Little Boy: Golly—no electricity!
Announcer: Did you ever count how many ways you use electricity? Surprising isn't it. No other energy plays so important a role in your daily life as electricity. The biggest bargain you can buy . . . The Georgia Power Company providing an abundance of clean dependable energy for you.

A–7

(Audio)
(Soft Guitar Music.)
"I will be the gladdest thing
Under the sun!
I will touch a hundred flowers
And not pick one.
I will look at cliffs and clouds
With quiet eyes,
Watch the wind bow down the grass
And the grass rise.
And when lights begin to show
Up from the town,
I will mark which must be mine,
And then start down."
Announcer: The Georgia Power Company is planting trees, conserving water, spending millions on air and water protection devices. We have been for a long time. "Why?" some ask us. "People," we answer.

A–8

(Audio)
I have a need of gulls again and their fly
Over the foam-white acres of the sea
Where the sunrise drifts like a fleet of ships afire,
And the dark like eternity.
Too long the city has housed me and fed me its fare,
Too long I have run with the crowd;
I have a need to be free again like the gulls
To bathe my face in the cool white peace of a cloud.
Beauty, to lift the heart, is still left in the world. But all of us must help preserve it. At Georgia Power, we're working to protect the environment. And keep it beautiful.

A–9

(Audio)—Nature supports many kinds of life—some beautiful, some ugly. Some graceful others awkward. And each has an important place.
That's why Georgia Power is involved in environmental programs—efforts to clear the air, to keep water pure to feed wildlife.
Providing electricity is only *one* of our important jobs.

A–10

(Audio)—This is a new day for Joe. He's moving up to a new job. His family is proud. So is he.

But Joe couldn't have done it alone.

His company had to expand.

And that wouldn't have been possible without adequate electricity.

Like most factories, this one runs on electricity. With these machines, workers make products that somebody needs. As long as these machines are operating, people can earn a living. Work up to a better job. Bring home a bigger paycheck. Electricity helps all this to happen. But, to continue providing the power needed by Georgia homes and industries, we must be able to build. Which means borrowing money. Lots of it.

An increase in price will help us borrow the money that's needed, and keep power flowing. To *your* home and *your* job.

Electricity. What would you do without it?

APPENDIX II

The transcripts submitted by WQXI–TV indicate that the following views *opposing* the rate increase were broadcast:

(November 9, 1972—"Pro News" 6 and 11 p.m.) "Charges of racial discrimination against Georgia Power Company were made today by a citizen's group fighting the firm's request for a 48-million dollar rate hike. The charges came during a hearing before the Public Service Commission. . . . (Bob Hall, an official of Georgia Power Project) 'This is a problem of wasted labor. They have got other people who are doing those jobs that they will refuse to allow blacks to get into those positions. They've got those positions filled but the point is that they're keeping some people down . . . Right? and . . . so now they've got to account for that irresponsibility. You realize that paper doesn't come out of the stockholders. We're saying the mistakes that they have made in these areas, which in fact are illegal, should be borne by the stockholders not by the rate payer.' "

* * * * * * *

(November 29, 1972—"Pro News" 6 and 11 p.m.) "Over a thousand trade union members showed up at the state capitol today, carrying protest signs. They said they wanted the Public Service Commission to know they oppose a rate hike requested by Georgia Power Company . . . A spokesman for the protesting trade union members said one of their major complaints is how Georgia Power spends some of its money. (John Wright, official of the Atlanta Labor Council) 'We feel like the Georgia Power Company uses a whole lot of the public's money here in Georgia for those things the people of Georgia don't really approve of . . . like advertising . . . charitable contributions . . . we feel like it's unfair for industrial rates in Georgia to be almost 50 per cent below what residential rates are. This, in effect, causes us consumers to subsidize the industrial operations of Georgia.' "

* * * * * * *

(December 14, 1972—"Pro News" 6 and 11 p.m.) "Georgia Power Company was granted a rate hike today, but almost no one is happy about it . . . the Atlanta Labor Council is also unhappy. The long time opponent to the Georgia Power Company increase said the decision means that 17-million more dollars will have to come out of the workingman's pocketbook. (John Wright, official of the Atlanta Labor Council) 'We feel like it's just as unfair as it ever was. It's a perpetuation of a system whereby homeowners, small businessmen, tenants are being discriminated against a little bit more than they were before.' "

* * * * * * *

(December 18, 1972—"Pro News" 6 and 11 p.m.) "Today, the Georgia Power Project announced a suit in Fulton County Superior Court in an effort to stop even the reduced rate hike from going into effect. (Bob Hall, an official of Georgia Power Project) 'The Public Service Commission has not taken into consideration many points which would benefit the rate payers of this state. We feel they are concerned with the welfare of the New York bankers and not concerned with the welfare of the people in

Georgia who use electricity. There are many areas . . . particularly the waste that the company now has . . . uh . . . of the money that we give them . . . this money they are wasting. If this was considered in the rate hearing we think they wouldn't have given them a nickel.' The Georgia Power Project spokesman added that rather than threatening the consumer with blackouts and brownouts, the power company ought to be figuring out how to better serve the people."

The summaries submitted by WQXI–TV in its further response of November 26, 1973 are as follows:

(August 1, 1973) "On such date we covered the PSC hearing on the rate increase with film and presented Commissioner Bobby Pafford of the PSC who criticized the charitable contributions of the Georgia Power Company. He stated that such contributions were really contributions of the public and that this was an unnecessary expenditure of the power company. The station also assembled a list of all 1972 contributions made by the Georgia Power Company and presented the film coverage and a list of contributions on both the 6 p.m. and 11 p.m. news programs."

* * * * * * *

(August 7, 1973) "On such date the PSC granted a rate increase to the Georgia Power Company. Station WQXI–TV covered such grant and pointed out on its news programs that the rate increase was substantial for both homes and industry with industry being hit harder than homes. The station took a typical home's electric bill and showed the precise effect of the rate increase granted. The station also showed a picture of Atlantic Steel, a major Atlanta firm and pointed out that their power bill was already $3,000,000 a year. Their bill for one month was $248,000 and the station noted that with the rate increase, that monthly bill would be $32,000 higher."

* * * * * * *

(September 4, 1973) "The station carried a live story concerning the plans of the Georgia Power Company to ask for still another rate increase. The station again pointed out the specific effects on homeowners and industry of the proposed rate increase and noted that the prior rate increase had increased homeowners' electric bills by an average of $1.08 per month and that if the new rate increase were approved, it would increase the average bill by $3.00 per month."

* * * * * * *

(September 5, 1973) "The station carried a film report on the 6 p.m. and 11 p.m. Pro News of the PSC hearing on the rate increase request. We ran a sound on film statement from John Bent, a representative of the Atlanta Labor Council, an organization opposing the rate increase. The Bent statement criticized the rate increase saying that it was unnecessary and that there appeared to be no end to increases in power prices."

* * * * * * *

(September 5, 1973) "On the same date as the above presentation by the Atlanta Labor Council, the station carried a statement by State Senator Roscoe Dean in opposition to the rate increase. Senator Dean stated that the increase was unnecessary and that the Georgia Power Company was trying to make Georgia customers pay for building up the electric utility power pool system for Florida, Alabama and Mississippi."

* * * * * * *

(September 6, 1973) "The station carried a live story concerning the hearings on the power rate increase and informed its listening audience of the arguments against the increase."

Exhibit 114: *Georgia Power Project* v. *FCC* (Georgia Power) 559 F.2d 237 (5th Cir. 1977)

GEORGIA POWER PROJECT, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents.

No. 74–4164.

United States Court of Appeals,
Fifth Circuit.

Sept. 14, 1977.

Petitioner sought review of an order of the Federal Communications Commission

under the fairness doctrine. The Court of Appeals held that determination by the Federal Communications Commission that a reasonable broadcast licensee could find that electric company's advertisements with respect to need for construction of additional facilities did not advocate one side of a controversial issue of public importance despite pending requests for rate increases was not arbitrary and capricious.

Petition denied.

1. Telecommunications ⇐437

Scope of review of fairness doctrine determination by the Federal Communications Commission is limited, and where the Commission upholds the licensee's judgment, it will be a rare case when reversal is warranted.

2. Telecommunications ⇐435

Determination by the Federal Communications Commission that a reasonable broadcast licensee could find that electric company's advertisements with respect to need for construction of additional facilities did not advocate one side of a controversial issue of public importance for purposes of fairness doctrine, despite pending requests for rate increases, was not arbitrary and capricious.

3. Telecommunications ⇐437

Where purpose of decision by the Federal Communications Commission was to evaluate whether broadcast licensee had afforded a reasonable opportunity for the presentation of viewpoints contrasting with those contained in two particular advertisements, gratuitous ruling on other advertisements, without advance notice to the parties that issue as to such advertisements was still alive, was improper, but was harmless under the circumstances. 5 U.S.C.A. § 706.

Harvey J. Shulman, Thomas R. Asher, Collot Guerard, Washington, D. C., for petitioner.

Stephen A. Sharp, Atty., F. C. C., Robert B. Nicholson, Anti-Trust Div., Dept. of Justice, Washington, D. C., for respondents.

Daniel M. Armstrong, Assoc. Gen., Werner K. Hartenberger, Gen. Counsel, F. C. C., Washington, D. C., for Fuqua Television.

Daniel J. Conway, Dept. of Justice, Washington, D. C., for Pacific & Southern Co.

Petition for Review of an Order of the Federal Communications Commission. (Georgia case).

Before WISDOM, SIMPSON and TJOFLAT, Circuit Judges.

PER CURIAM:

This case arises under the Federal Communication Commission's ("FCC" or "Commission") fairness doctrine. Under this doctrine when a broadcast station presents programming on one side of a controversial issue of public importance, a reasonable opportunity for the presentation of opposing views must be provided. The controversy arose when the petitioner complained to the FCC that a series of spots sponsored by the Georgia Power Company and repeatedly broadcast by the licensees of WJBF–TV and WQXI–TV (now WXIA–TV) gave rise to fairness doctrine obligations. The petitioner, Georgia Power Project, contended that these broadcasts presented one side of a controversial issue of public importance, namely the power company's rate increase requests then pending before the Georgia Public Service Commission ("PSC").

I.

Over a period of two and one half years, the FCC issued three separate decisions concerning petitioner's fairness doctrine complaint. With respect to the advertisements at issue in this petition for review,

(ads A–2 through A–5[1]), the FCC in its initial decision *Media Access Project*, 44 F.C.C.2d 755 (1973), stated that it would not rule on the applicability of the fairness doctrine. The Commission noted, however, that the advertisements arguably asserted the need for an increase in generating capacity and thus also advocated one side of the rate increase issue. The Commission did find that two additional advertisements sponsored by the power company, A–1 and A–10, had directly and specifically advocated the rate increase and that the licensees had not afforded a reasonable opportunity for the presentation of opposing viewpoints. The Commission therefore directed the licensees to submit, within seven days of the decision, a statement indicating what additional material they had broadcast or intended to broadcast in the near future that would afford opportunity for the presentation of contrasting views on the rate increase issue. In response to the initial FCC decision, both licensees submitted descriptions of the broadcasting which they contended was sufficient to satisfy the fairness doctrine obligations found by the FCC in its initial decision.

After evaluating these responses, the FCC issued its second decision, Fuqua Television, Inc., 49 F.C.C.2d 233 (1974) (Fuqua), in which it concluded that the licensees had afforded a reasonable opportunity for the presentation of viewpoints contrasting with those contained in announcements A–1 and A–10. With regard to ads A–2 through A–5, however, the FCC concluded that WJBF and WQXI were not unreasonable in concluding that the advertisements did not present arguments on one side of the rate increase controversy. The FCC's determination—that the ads were not "devoted in an obvious and meaningful way to the discussion of" the rate increase issue—was based on an interpretation of the fairness doctrine which had been adopted by the FCC three months earlier. Fairness Rep., 48 F.C.C.2d, 1, 12, 13, 22–24 (1974).

1. Ads A–2 through A–5 read as follows:

A–2

(Audio)—Chris is one year old. In his lifetime he'll experience love, independence, and morning gold with sunshine.

In that lifetime Chris may need a million kilowatt-hours of electricity. Along with more than 90,000 babies born in Georgia last year he'll continue using it, needing it, in ever increasing amounts. That's why Georgia Power must double its generating capacity by the year 1978 . . . and it took us over 40 years to build the system we have today. This year we'll have to spend near two million dollars every working day for construction.

A–3

(Audio)—You're feeling the pulse beat of a modern electric hospital. People struggling for life with the help of . . . Electrocardiograms . . . Electric Fluoroscopes . . . Electric Iron Lungs . . . Electric Operating Lights . . . (Sound: Baby crying) . . . Electric Incubators.

As the population grows, so does the need for hospital facilities. That's another reason Georgia Power must spend nearly $2 million every working day, just for construction. To serve your growing needs.

A–4

(Video)—Water glass with one straw. Straws are added one by one. Last straw is added as glass almost empties.

(Audio)—Funny thing about electricity. Just when you think you've got enough for everybody. Everybody wants more. For New Schools, New Hospitals, New Office Buildings, New Shopping Centers, New Air and Water Purification Equipment, Better Lighting for Our Street. And for the Thousands of New Homes and Apartments built in Georgia every year.

That's why Georgia Power must build today to provide the kinds of generating facility necessary to satisfy your growing demands. Otherwise, there just might not be enough power to go around.

And that would really be the last straw. The Georgia Power Company.

A–5

(Audio)
(Sound: Typing)
Do you know what your son saw in school today? A herd of charging elephants.

Through a motion picture projector.
He saw a living cell divide. Through an electric microscope.
He watched a computer_____estimate world population changes.
(Sound: Typing)
He printed a newspaper.
He heard a Spaniard reciting from Don Quixote . . . with the help of a tape recorder.

Subsequently, on December 16, 1974, the petitioner filed the instant petition for review and simultaneously moved this Court for leave to present newly discovered evidence before the FCC.

The Court, on January 28, 1975, granted petitioner's motion solely with respect to one item of evidence described as a report of a telephone conversation between a representative of Georgia Power Company and a representative of WJBF. Thereafter, in a third decision, *Fuqua Television, Inc.*, (July 30, 1976), the Commission considered the additional evidence which the petitioner was permitted to present by virtue of an order of this Court. After reviewing the report adduced by petitioner, the Commission reaffirmed its second decision.

II.

The petitioner argues [2] that the failure on the part of the FCC to find that advertisements A–2 through A–5 presented only one side of a controversial issue of public importance was arbitrary and capricious. We disagree and affirm the Commission's finding.

As the Commission did not have a definite standard by which to gauge broadcasts that treated issues implicitly rather than explicitly, the Commission refined its policy in the context of an extensive, open policy inquiry. See Fairness Report, 48 F.C.C.2d 1 (1974). In this report, the Commission made clear that:

> . . . what we are really concerned with is an obvious participation in public debate and not a subjective judgment as to the advertiser's actual intentions. Accordingly, we expect our licensees to do nothing more than to make a reasonable, common sense judgment as to whether the "advertisement" presents a meaningful statement which obviously addresses, and advocates a point of view on, a controversial issue of public importance.

48 F.C.C.2d at 23. As the Commission pointed out, id. at 24, this judgment may be a difficult one on which individual licensees might well differ. Consequently, the Commission declared it would "not rule against the licensee unless the facts are so clear that the *only reasonable conclusion* would be to view the 'advertisement' as a presentation on one side of a specific public issue." Id. (Emphasis added).

[1, 2] Furthermore our review of the Commission's determination is limited. See *Permian Basin Area Rate Cases*, 1968, 390 U.S. 747, 767, 88 S.Ct. 1344, 20 L.Ed.2d 312; *Greater Boston TV Corp. v. F.C.C.*, 143 U.S. App.D.C. 383, 444 F.2d 841, 851, *cert. denied*, 403 U.S. 923, 91 S.Ct. 2229, 2233, 29 L.Ed.2d 201 (1971). *See also General Telephone Co. of Southwest v. United States*, 5 Cir. 1971, 449 F.2d 846, 858–59. Thus in the present context, where the Commission upholds the licensee's judgment, it will be a rare case indeed when reversal is warranted. We cannot, in the instant case, say that the Commission's determination that a reasonable licensee could find that advertisements A–2 through A–5 did not advocate one side of a controversial issue of public importance was arbitrary and capricious.

[3] We might note in conclusion, however, that the procedure by which the Commission ruled on advertisements A–2 through A–5, is improper and, we trust, will not be repeated. The purpose of the second decision, *Fuqua Television* (Fuqua I), was to evaluate whether the licensees had afforded a reasonable opportunity for the presentation of viewpoints contrasting with those contained in advertisements A–1 and A–10. The gratuitous ruling on advertisements A–2 through A–5, coming without advance notice to the parties that this issue was still alive, is improper although in these circumstances the error was harmless. Section 10 Administrative Procedure Act, 5 U.S.C. § 706.

The Petition for Review is DENIED.

2. We have also considered the FCC's claim of mootness and petitioner's additional claims that the FCC departed from prior pronouncements on the fairness doctrine's application to editorial advertising and that the FCC improperly interpreted the Court's order concerning supplementary evidence and find these claims are without merit.

Exhibit 115: *In Re Peter C. Herbst* (Snowmobiles)
48 FCC 2d 614

FCC 74-934

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
PETER C. HERBST, ET AL., AGAINST STATION
WMTW-TV, POLAND SPRING, MAINE

ORDER

(Adopted August 28, 1974; Released September 9, 1974)

BY THE COMMISSION: COMMISSIONER LEE, REID AND WASHBURN ABSENT; COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. The Commission has before it an Application for Review of the Broadcast Bureau's ruling of March 16, 1973 (40 FCC 2d 115), filed April 16, 1973 by Peter C. Herbst, *et al.;* an opposition to the Application filed by WMTW-TV on April 27, 1973; correspondence dated November 5 and 12, and December 21, 1973 from the licensee in response to the October 5, 1973 Bureau's letter of inquiry; and complainants' reply dated November 26, 1973 to the licensee's correspondence of November 5 and 12, 1973.

2. We have examined all the pleadings herein and believe that the Bureau's ruling was correct. However, we believe some comment should be made concerning one specific allegation set forth in the Application for Review. Complainants state that their complaint was denied in part because of their failure to set forth sufficient facts necessary to establish a *prima facie* fairness doctrine case. Complainants contend that they met the burden set forth in *Allen C. Phelps*, 21 FCC 12 (1969), for establishing a fairness doctrine case when they monitored the station "for many hours, over many weeks" and specified the times that the snowmobile advertisements were broadcast, the sponsors of those broadcasts, and the issues discussed by the advertisements. Complainants state that the Bureau's ruling of March 16, 1973 was in error in determining that they had failed to establish a *prima facie* fairness doctrine case because they had not provided the Commission with any information which indicated that the licensee in its overall programming failed to present contrasting views on the subject of snowmobiles.

3. In the report on the Commission's recently completed inquiry into the fairness doctrine the Commission reaffirmed the *Phelps* requirement "that a complainant state the 'basis for the claim that the station has presented only one side of the question' ", and stated:

> This does not require . . . that the complainant constantly monitor the station. Although some groups having a particular interest in a controversial issue and a licensee's presentation of it have monitored such a station for periods of time and thus been able to offer conclusive evidence that contrasting views were not presented, the Commission realizes that such a requirement for every individual complainant would be an unduly burdensome one. While the complainant must

state the basis for this claim that the station has not presented contrasting views, that claim might be based on an assertion that the complainant is a regular listener or viewer; that is, a person who consistently or as a matter of routine listens to the news, public affairs, and other non-entertainment programs carried by the station involved. This does not require that the complainant listen to or view the station 24 hours a day, seven days a week. . . . Also the assumption that a station has failed to present an opposing viewpoint would be strengthened if several regular viewers or listeners join together in a statement that they have not heard a presentation of that viewpoint. Complainants should specify the nature and extent of their listening or viewing habits, and should indicate the period of time during which they have been regular members of the station's audience. *Fairness Report*, 39 Fed. Reg. 26372, 26379 (1974).

On the basis of the complainants' statement, they appear to have listened to the station sufficiently for the purpose of determining whether the licensee presented contrasting views on the subject of snowmobiles, and therefore the Bureau's language on this particular point is erroneous.

4. However, the primary basis for the Bureau's ruling was that the complainants failed to show that the announcements discussed one side of a controversial issue of public importance, and unless this is established it is immaterial whether contrasting views on the subject of "snowmobiles," as such, were presented. Complainants claim that the message of the snowmobile announcements was "that snowmobile ownership and use is associated with the good life and should be encouraged . . . without fear" of the individual and environmental hazards, and that this constitutes the presentation of one side of the controversial issue of snowmobile use so as to engender fairness doctrine obligations. All product advertising extolls the virtues of the product in order to convince the public to buy. That is the object of advertising which forms the economic base of the broadcasting industry. The Commission has stated that it will not extend the fairness doctrine to "general product advertisements such as those making claims regarding a product's efficacy or social utility" unless the advertisements directly or by necessary inference address a controversial issue of public importance. *National Broadcasting Company (Wilderness Society-ESSO)*, 30 FCC 2d 643 (1971); *Alan F. Neckritz, et al.*, 37 FCC 2d 528 (1972), affirmed sub. nom. *Alan F. Neckritz, et al.* v. *FCC*, — F 2d —— D.C. Cir. Case No. 71-1392, June 28, 1974). This policy was affirmed in the *Fairness Report*, *supra*, where we stated that standard product commercials which merely advocate the use of one product over another cannot "realistically be said to inform the public on any side of a controversial issue of public importance," and therefore the Commission "will apply the fairness doctrine only to those 'commercials' which are devoted in an obvious and meaningful way to the discussion of public issues." *Fairness Report*, *supra*.[1] While

[1] In affirming this policy we held that the rationale of the "cigarette case," *WCBS-TV*, 9 FCC 2d 921 (1967), affirmed sub. nom. *Banzhaf* v. *FCC*, 405 F. 2d 1082 (D.C. Cir. 1969), would no longer be observed as a precedent. Thus, we stated: ". . . While such an approach may have represented good policy from the standpoint of the public health, the precedent is not at all in keeping with the basic purposes of the fairness doctrine.[22]

[22] ". . . If in the future we are confronted with a case similar to that presented by the cigarette controversy, it may be more appropriate to refer the matter to Congress for resolution. For Congress is in a far better position than this Commission to develop expert information on whether particular broadcast advertising is dangerous to health or otherwise detrimental to the public interest. Furthermore, it is questionable whether this Commission has a mandate so broad as to permit it 'to scan the airwaves for offensive material with no more discriminating a lens than the "public interest" or even the public health . . .'" *Fairness Report*, *supra*, at 26381."

hazardous operation, adverse environmental effects and interference with private property rights by snowmobilers may constitute controversial issues of public importance in the complainants' area, it cannot be said that the announcements in question "are devoted in an obvious and meaningful way to the discussion" of those issues. Therefore the March 16 ruling was correct in determining that the snowmobile advertisements in question did not raise one side of a controversial issue of public importance, and the additional material submitted by the complainants with their Application for Review does not show otherwise.

5. Accordingly, pursuant to Section 1.115(g) of the Commission's Rules and Regulations, the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

Exhibit 116: *In Re Peter Herbst* (Snowmobiles)
49 FCC 2d 411 (October 22, 1974)

FCC 74-1152

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re complaint of
PETER C. HERBST, ET AL. AGAINST STATION WMTW-TV, POLAND SPRING, MAINE

ORDER

(Adopted October 22, 1974; Released October 25, 1974)

BY THE COMMISSION:

1. The Commission has before it a Petition for Reconsideration, filed September 13, 1974, by Peter C. Herbst, et al., of the Commission's September 9, 1974 denial of the Application for Review, filed April 16, 1973, of the Broadcast Bureau's ruling of March 16, 1973 (40 FCC 2d 115).

2. We have examined the Petition for Reconsideration and believe that the denial of the Application for Review was correct.

3. The Petition cites no erroneous findings of fact or conclusions of law in the Commission's order denying the Application for Review nor does it present any new facts or arguments. It merely states that in issuing the denial of the Application for Review the Commission "made express reference to certain pleadings before it, but did not mention other pleadings filed by the complainants, including letters of October 9, 1973 and January 7, April 15, and June 28, 1974," and requests that the Commission "reconsider its ruling for the reasons stated in all the pleadings before it, and to make it clear that it has relied on all the pleadings."

4. At the time the Commission denied the Application for Review it was in receipt of the petitioners' letters of October 9, 1973, and January 7, April 15, and June 28, 1974, and these letters were taken into consideration in making the Commission's determination. However the information and arguments contained in those letters were contained in other letters or were not relevant to the issue upon which the denial was based, and therefore were not discussed or referred to in the order issued by the Commission.

5. In view of the fact that no new facts or arguments are presented, pursuant to Section 1.106 of the Commission's Rules and Regulations, the Petition for Reconsideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

33-291 O - 78 - 104

Exhibit 117: *Public Interest Research Group* v. *FCC* (Snowmobiles) 522 F.2d 1060 (1st Cir. 1975)

PUBLIC INTEREST RESEARCH GROUP and Environmental Law Institute, et al., Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION et al., Respondents.

No. 74-1434.

United States Court of Appeals, First Circuit.

Argued April 10, 1975.

Decided Aug. 18, 1975.

Opponents of snowmobiling sought review of Federal Communications Commission decision to the effect that fairness doctrine did not entitle the opponents to respond to commercial advertisements on television for particular brands and models of snowmobiles. The Court of Appeals, Levin H. Campbell, Circuit Judge, held that decision was not arbitrary or capricious; that determination that fairness doctrine would apply only to commercial advertisements which speak in an obvious and meaningful way to public issues was not arbitrary or capricious; that the decision was not contrary to statute; that the decision did not violate the First Amendment; that the new standard was not unconstitutionally vague; and that the decision did not violate National Environmental Policy Act directive that the government use all practical means to protect and promote environmental quality.

Affirmed.

1. Courts ⇐528

Court of Appeals has equitable power to transfer cases to a proper forum if it would serve the interests of judicial economy or convenience of the parties.

2. Courts ⇐528

Where agency record in related case was yet to be filed in District of Columbia and where Federal Communications Commission was reconsidering the District of Columbia case, Court of Appeals for the First Circuit would not transfer related case brought in the First Circuit to the District of Columbia Circuit. 28 U.S.C.A. § 2112(a); Communications Act of 1934, § 402(b), 47 U.S.C.A. § 402(b).

3. Administrative Law and Procedure ⇐751

When reviewing the substance of an agency decision, a court is limited to considering whether the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and to measuring it against the twin external standards of statutory law and constitutional right. 5 U.S.C.A. § 706(2)(A–C).

4. Administrative Law and Procedure ⇐502

In the absence of statutory or constitutional barriers, an agency may abandon earlier precedents and frame new policies.

5. Telecommunications ⇐416

Fact that Federal Communications Commission's ruling, that opponents of snowmobiles were not entitled, under the fairness doctrine, to right to respond to advertisements for particular snowmobile brands, did not conform with earlier agency precedent did not render the decision arbitrary and capricious.

6. Telecommunications ⇐436

Federal Communications Commission's decision that, henceforth, the fair-

ness doctrine would apply only to those commercial advertisements which are devoted in an obvious and meaningful way to the discussion of public issues and not to commercial advertisements in general was not arbitrary, capricious or an abuse of discretion. 5 U.S.C.A. § 706(2)(A).

7. Telecommunications ⇐436

Federal Communications Commission's determination that fairness doctrine will apply only to those commercial advertisements which are devoted in an obvious and meaningful way to the discussion of public issues was not contrary to statute.

8. Telecommunications ⇐435

Congress has left questions of application and accommodation of the fairness doctrine to the Federal Communications Commission under the general public interest standard.

9. Constitutional Law ⇐90.1(9)
Telecommunications ⇐436

First Amendment permitted the Federal Communications Commission not only to experiment with full-scale application of the fairness doctrine to commercial advertising but also permitted the Commission to retreat from its experiment when it determined, from experience, that the extension was unworkable. U.S.C.A.Const. Amend. 1.

10. Constitutional Law ⇐90.1(9)

First Amendment does not require the Federal Communications Commission to force the presentation of alternate views in response to product advertisements which do not explicitly expound a point of view on a public issue. U.S.C.A. Const. Amend. 1.

11. Telecommunications ⇐436

Federal Communications Commission's standards for application of fairness doctrine to commercial advertisements which are devoted in an obvious and meaningful way to the discussion of public issues and not to other commercial advertisements are not unconstitutionally vague.

12. Health and Environment ⇐25.5

Decision of the Federal Communications Commission, under newly adopted standards applying fairness doctrine to only those commercial advertisements which are devoted in an obvious and meaningful way to discussion of public issues, that the doctrine did not entitle opponents of snowmobiling to respond to advertisements for particular brands and models of snowmobiles did not violate provision of the National Environmental Policy Act which states the congressional policy that the government use "all practical means, consistent with other essential considerations of national policy," to protect and promote the environment. National Environmental Policy Act of 1969, § 101(b), 42 U.S.C.A. § 4331(b); Communications Act of 1934, § 326, 47 U.S.C.A. § 326.

Thomas R. Asher, Washington, D. C., for petitioners.

John E. Ingle, Counsel, F.C.C., with whom Ashton R. Hardy, Gen. Counsel, Joseph A. Marino, Associate Gen. Counsel, Jack David Smith, Jr., Washington, D. C., and Robert B. Nicholson, Atty., Dept. of Justice, were on brief, for respondents.

Ellen Shaw Agress, New York City, on brief for Environment Action Friends of the Earth, The Massachusetts Audubon Society, Environmental Policy Center, Council on Economic Priorities, Project on Corporate Responsibility, Center for Science in the Public Interest, Public Media Center, Action for Children's Television and National Citizens Committee for Broadcasting, amicus curiae.

Before McENTEE and CAMPBELL, Circuit Judges, TAURO, District Judge.*

LEVIN H. CAMPBELL, Circuit Judge.

The question in this case is whether a Maine television station, having broadcast paid advertisements for snowmobiles, must air the viewpoints of those

* Sitting by designation.

who hold that snowmobiles are environmentally destructive, dangerous, noisy and offensive. The Federal Communications Commission, construing its recently revised fairness doctrine, has ruled not. *Peter B. Herbst,* 48 F.C.C.2d 614, *reconsideration denied,* 49 F.C.C.2d 411 (1974), stating that the ads were "standard product commercials" which were not devoted in an "obvious and meaningful way" to the discussion of public issues. We are asked to set aside that decision.[1]

On January 10, 1973, several viewers resident in Maine wrote to WMTW–TV, a local station. They protested Ski-Doo, Rupp, Alouette and Harley-Davidson ads that were being shown at prime viewing times. As they saw it, the ads presented,

> "basically one viewpoint regarding the sale and use of snowmobiles in Maine and greater New England: that snowmobile ownership and use is associated with the good life and should be encouraged, with individuals and families, without fear of one's own safety at high speeds, often over hilly terrain, and without any conscious consideration of wildlife, vegetation, ecological balance, noise, or safety of others on public lands, or private lands where snowmobile users are illegally trespassing."[2]

The letter spoke of testimony before a Senate subcommittee that the upsurge in snowmobile use threatened the environment, safety, property and wildlife, and caused vandalism and noise. In Maine, the letter pointed out, a controversy raged over proposals before the state legislature for regulation of snowmobile use, speed, noise and the like. Complainants charged that advertisements promoting "unrestricted product uses" did not refer to "other viewpoints on the product uses or of the problems involved." The snowmobile commercials presented "but one side of the important controversy."

Citing *Friends of the Earth v. FCC,* 146 U.S.App.D.C. 88, 449 F.2d 1164 (1971) and *In re Wilderness Society,* 30 F.C.C.2d 643 (1971), *upon reconsideration,* 31 F.C.C.2d 729 (Sept. 23, 1971), the authors asserted that there was "a controversy in your service area regarding snowmobile use." This being so, the "fairness doctrine" was said to impose a duty upon WMTW to present other sides of the controversy (though not necessarily to grant equal time). Complainants suggested that the station air numerous spots at "strategic prime time" presenting all bona fide views on the snowmobile issue.

When WMTW did not respond promptly, the authors filed a formal complaint before the Federal Communications Commission. They elaborated upon the contention that snowmobiles were unsafe, and that injuries resulted from imprudence, alcohol, and driving in prohibited areas. Television ads were said to foster such excesses by encouraging "increased horse power and speeds and wide-open use over unknown and hilly terrain." Although the Maine legislature was studying limits on horsepower, speed and noise, the public, it was said, heard only one side. Meanwhile, the number of snowmobiles in Maine had increased from 54,000 in 1971 to 75,000 in 1973.

1. Our jurisdiction to review a final order of the Commission is set forth in 28 U.S.C. § 2342 and 47 U.S.C. § 402(a).

2. The text of the ads (which, as complainants remind us, does not convey the zooming noises and video images) contained language such as: "The new look of power . . . . Tested under conditions that would turn an ordinary machine into a spinning disaster." "Rugged and beautiful as the great outdoors." "Whisper jet." "We'll be riding high . . . . We're goin' to pass them by." "Could your snowmobile take punishment like this and them come back for more?" "See who runs quiet. See who packs the power." "Trail rides two people." "A power plant without equal." "The best in family fun. . . . On a Polaris winter is just one big fun-filled season." "It's a family affair." "New Ski-Doo quiet." "The only snowmobile in the country that meets the legal noise limit proposed for 1974. It's a giant step ahead of the law." "New safety" on "the machine that changed winter."

In addition to safety problems, snowmobiles were said to stir controversy over the extent of ecological harm (plantlife, some say, is biologically used to being undisturbed in winter), and over injury to property (snowmobiles are alleged to encourage wanton trespassing on the land of others). The Commission was asked to act with speed because the Maine legislature would be in session only briefly and public information was needed on all sides of the pending snowmobile legislation.

After the complaint was filed, WMTW answered that the fairness doctrine was not in issue, and that the ads did not advocate snowmobile misuse. Complainants promptly responded that the issue was not "misuse": "Whether 'misuse,' 'abuse,' 'proper use,' or any other term is used, these ads present only one side of a controversial issue of public importance. . . . " WMTW did offer to air, and aired, a single half-hour discussion program having to do with pending snowmobile regulatory legislation. However, complainants took the position that this one program could not offset five months of repeated and continuous ads.

The Commission's staff rejected the complaint. There followed review proceedings before the full Commission, during which, for the first time, the texts of the snowmobile ads were produced. The station asserted that they were conventional product ads. Complainants, on the other hand, maintained that they associated snowmobile use with "the good life" and encouraged a heady obliviousness of ecology, property rights and the public welfare.

The Commission eventually denied review of the staff report. By then the Commission had adopted and published its new fairness report, *Fairness Doctrine and Public Interest Standards*, 39 Fed.Reg. 26372, 48 F.C.C.2d 1 (1974),[3] after extensive inquiry into the fairness doctrine, ruling that standard product commercials which merely advocate the use of one product over another cannot be said to inform the public on any side of a controversial issue of public importance. The Commission stated that it would "apply the fairness doctrine only to those 'commercials' which are devoted in an obvious and meaningful way to the discussion of public issues." 39 Fed.Reg. at 26374, 48 F.C.C.2d at 26. Referring to that policy, the Commission in denying review in the instant case said that "hazardous operation, adverse environmental effects and interference with private property rights by snowmobilers may constitute controversial issues of public importance in the complainant's area. . . . "; still, the announcements in question were not devoted "in an obvious and meaningful way to the discussion" of those issues, hence snowmobile advertisements did not raise one side of a controversial issue of public importance.

I

[1, 2] We deal initially with the suggestion of the Commission that, either under 28 U.S.C. § 2112(a) or under our inherent authority, we transfer the case to the District of Columbia Circuit for consolidation with *National Citizens Committee for Broadcasting v. FCC*, No. 74-1700. The latter proceeding, we are told, involves a broad review of the fairness report, including its product commercial policies. Given the desirability of uniform results and the special familiarity of the D.C. Circuit with communications problems, transfer seemed at first to be a plausible course. We accordingly invited supplemental briefing of the issue. Upon further consideration we are disinclined to transfer. The applicability of § 2112(a), as complainants point out, is far from clear, since the agency orders appealed from are altogether different. To be sure, the D.C. Circuit has jurisdiction to hear this case

3. This is described as a "broad-ranging inquiry into the efficacy of the fairness doctrine," the first in almost 22 years. Written comments were solicited and panel discussions held. The twin considerations of Commission policy were said to be to foster uninhibited, robust, wide-open debate on public issues, and to maintain and stimulate a commercially based broadcast system. 39 Fed.Reg. 26372, 48 F.C.C.2d 1 (1974).

under 47 U.S.C. § 402(b), and this court has equitable power to transfer cases to a proper forum if it would serve the interests of judicial economy or convenience to the parties. But we cannot be confident that the ends of justice would be served by a transfer since the agency record in *NCCB* has yet to be filed in the District of Columbia, and indeed the Commission is now reconsidering the case. We thus do not know to what extent the present case would fit in with that proceeding. We are unwilling to project the complainants, against their wills, into such an uncertain future, even assuming the D.C. Circuit would be willing to accept consolidation. Thus, without deciding the question of the applicability of 28 U.S.C. § 2112(a), we decline to transfer.

II

[3] When reviewing the substance of an agency decision, a court is limited to considering whether the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, 5 U.S.C. § 706(2)(A), and to measuring it against the twin external standards of statutory law and constitutional right, *id.* § 706(2)(B) and (C). We emphasize these standards at the outset, since this case turns as much or more upon observance of the respective functions of the court and agency as upon the merits of this interesting facet of the fairness doctrine controversy. *See generally* Ellman, *And now a Word Against Our Sponsor: Extending the FCC's Fairness Doctrine to Advertising,* 60 Cal.L.Rev. 1416 (1972).

We have no license to regulate broadcasting nor to impose our private views of the public welfare. What we must do is determine whether the Commission is acting within its lawful regulatory authority. In so doing, we shall first consider whether the Commission, judged in terms of its own procedures and precedents, past and present, has acted rationally and properly. Thereafter, we shall consider its actions in terms of statutory and constitutional law.

We begin by summarizing part of the fairness report, *see* note 3 *supra,* which explains the Commission's current policy and its departure in certain respects from earlier policy. The portion of the report dealing with paid announcements begins by quoting the Commission's pronouncements made in 1929, 3 F.R.C.Ann. Rep. 32 (1929), to the effect that although broadcasters are licensed to serve the public and not the private or selfish interests of individuals or groups, advertising is an "apparent" exception because without it, broadcasting would not exist. From this, the report deduces that "any consideration of the applicability of the fairness doctrine to broadcast advertising must proceed with caution" so as not to undermine the economic base of the system. (Otherwise, the report generally endorses and continues in effect the fairness doctrine.) The report then distinguishes "Editorial Advertising" from "Advertisements for Commercial Products or Services." It holds that the fairness doctrine should apply to the former so long as the paid announcements present "a meaningful statement which obviously addresses, and advocates a point of view on, a controversial issue of public importance."[4] Turning to product advertisements, the report recognizes that many advertisements which do not look or sound like editorials are subject to fairness complaints because the business, product or service advertised is itself controversial. Reference is made to the Commission's "cigarette" ruling, *WCBS–TV,* 9 F.C.C.2d 921 (1967), *aff'd sub nom. Banzhaf v. FCC,* 132 U.S.App. D.C. 14, 405 F.2d 1082 (1968), *cert. denied sub nom. Tobacco Institute v. FCC,* 396 U.S. 842, 90 S.Ct. 50, 24 L.Ed.2d 93

4. This test is aimed at elucidating a broadcaster's duties when faced with institutional advertisements of a subliminal type which appear to discuss public issues but may not do so explicitly. 39 Fed.Reg. at 26380, 48 F.C.C.2d at 23; *cf.* National Broadcasting Co. (Wilderness Society—Esso), 30 F.C.C.2d 642, *upon reconsideration,* 31 F.C.C.2d 729 (1971). *See also* Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access,* 85 Harv.L.Rev. 768, 777–78 (1972).

(1969), where the Commission held—very much as complainants would like it to hold here with respect to snowmobiles—that cigarette commercials inherently raised a health issue, defined in terms of the desirability of smoking. The report goes on to state,

> "With the issue defined in this fashion, it was a simple mechanical procedure to 'trigger' the fairness doctrine . . . . It seemed to be clear enough that *all* cigarette advertisements suggested that the use of the product was desirable.
>
> . . . In retrospect, we believe that this mechanical approach to the fairness doctrine represented a serious departure from the doctrine's central purpose which, of course, is to facilitate 'the development of an *informed* public opinion' . . . . We believe that standard product commercials, such as the old cigarette ads, make no meaningful contribution towards informing the public on any side of any issue."

Indeed, the report says, since the ads did not urge that cigarettes were good for health, a response that they were bad for health left the public with but one viewpoint.

The report went on to chronicle difficulties that arose when the D.C. Circuit refused to allow the Commission to treat the cigarette case as *sui generis*. In *Friends of the Earth v. FCC*, 146 U.S. App.D.C. 88, 449 F.2d 1164 (1971), the court, reversing the Commission, ruled that the fairness doctrine could not logically be restricted to cigarette advertising. Advertisements extolling high-powered cars were held to trigger fairness obligations also, even though the commercials did not discuss the product in terms of the air pollution controversy. The Commission saw itself and the broadcasters as having been forced to engage "in the trivial task" of balancing commercials which contribute "nothing to public understanding."

The upshot of the 1974 report is that the FCC cigarette decision is overruled as Commission precedent—on the grounds that without meaningful substantive discussion such as that found in "editorial advertisements" the usual product commercial cannot reasonably be said to inform the public on any side of a controversial issue of public importance, and that application of fairness doctrines to product ads "tends only to divert the attention of broadcasters from their public trustee responsibilities in aiding the development of an informed public opinion." Henceforth Commission policy will be to apply the fairness doctrine only to those commercials which "are devoted in an obvious and meaningful way to the discussion of public issues."

[4, 5] The present decision affecting snowmobiles conforms faithfully to the principles just summarized. It is true that it is open to the charge of nonconformity with two earlier agency precedents: the 1967 cigarette case and *Sam Morris*, 11 F.C.C. 197 (1946) (dealing with liquor advertisements in partially dry areas). It was on the basis of inconsistency with these rulings that the D.C. Circuit required a reluctant Commission to apply the fairness doctrine to commercials advertising other controversial products—most notably, large automobiles. *Friends of the Earth v. FCC, supra*, 449 F.2d 1164. But these cases all preceded the current fairness report and rested on the court's determination that the Commission was not applying its own precedents in an evenhanded way.[5] The Commission has now repudiated these precedents, has announced a policy which would allow no such exceptions, and has done so with appropriate notice and, we believe, sufficient clarity of analysis. *See Columbia Broadcasting System, Inc. v. FCC*, 147 U.S.App.D.C. 175, 454 F.2d 1018, 1026 (1971). We do not read *Friends of the Earth, supra*, or related cases decided in the D.C. Circuit

5. In *Friends of the Earth v. FCC*, 146 U.S.App. D.C. 88, 449 F.2d 1164, 1170 (1971), the court held that the Commission could not "plausibly differentiate the case presently before us" from the cigarette case "[p]ending . . . a reformulation of its position."

(*see Neckritz v. FCC,* 163 U.S.App.D.C. 409, 502 F.2d 411, 418 (1974)) as questioning the Commission's authority to shape a new course in this manner. In the absence of statutory or constitutional barriers, an agency may abandon earlier precedents and frame new policies. *See NLRB v. Weingarten, Inc.,* 420 U.S. 251, 264–66, 95 S.Ct. 959, 43 L.Ed.2d 171 (1974); *American Trucking Ass'n v. Atchison, T. & S. F. Ry.,* 387 U.S. 397, 416, 87 S.Ct. 1608, 18 L.Ed.2d 847 (1967); *NLRB v. Wentworth Institute,* 515 F.2d 550 (1st Cir. 1975). Thus the decision's mere nonconformity with earlier agency precedent does not render it arbitrary and capricious.

[6] Nor can we say that the decision reflects a policy which is so clearly irrational on its face as to be "arbitrary, capricious, an abuse of discretion." We distinguish between irrationality and the more complex questions, discussed below, of whether the decision is within the Commission's statutory and constitutional powers. Applying fairness standards to product commercial raises obvious problems of administration and policy that are open to more than one solution, and the Commission's present solution, whether right or wrong, was arrived at carefully and is in line with the recommendations of commentators who have studied the problem. H. Geller, The Fairness Doctrine in Broadcasting (1973); Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access,* 85 Harv.L.Rev. 768, 771–80 (1972). Unless the standard of rationality is to be narrowed to a circle no wider than a court's private judgments, we cannot rule that the Commission's policies here are "arbitrary, capricious, an abuse of discretion" within the meaning of section 706(2)(A).

We turn next to whether the Commission's exclusion of product commercials which are not facially controversial from fairness obligations is within its statutory authority. The fairness doctrine is not a creature of statute but was evolved over the years by the Commission under the "public interest" standard of the Communications Act. Thus complainants are able to point to little in the way of relevant legislation. Complainants argue that Congress, largely by acquiescence, has "codified" both the fairness doctrine and the Commission's former application of it to product ads. They contend that the fairness doctrine now applies to *all* controversial issues, and that since snowmobiles are controversial—especially when advertised at a time when their regulation was being debated in the Maine legislature—the agency acted illegally in declining to apply the doctrine.

[7, 8] But this argument assumes a degree of legislative specificity which simply does not exist. While Congress has been said to have acknowledged and generally endorsed the Commission's adoption of fairness standards, it has legislated only once on any aspect of the doctrine, and then in an area totally divorced from the thorny issue of product commercials. *See* 47 U.S.C. § 315 (equal time doctrine applying to political candidates). In *Red Lion Broadcasting v. FCC,* 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969), the Supreme Court upheld the constitutionality of the fairness doctrine as applied by the Commission to broadcasts involving personal and political criticism; and, in so doing, the Court pointed to evidence that, in amending section 315 of the Communications Act of 1934, Congress had approved the general tenets of the fairness doctrine. But it is a long step from *Red Lion* and the 1959 legislative statements cited therein, to a holding that the Commission is bound to interpret product commercials not explicitly discussing public issues as generating controversy to which fairness obligations attach. As the aftermath of the cigarette case suggests, there may be no practical stopping place if this approach is accepted; the court in *Friends of the Earth, supra,* foreclosed the luxury of a halfway approach. (Thus in the present case, if the Commission were to be impressed with the public importance of the snowmobile issue, it could now rule for complainants

only at the cost of reopening what might seem like a pandora's box.) Given the necessity of product advertising in American broadcasting, and the administrative difficulties and costs of determining when a product is so controversial as to trigger fairness obligations, we cannot, merely from the generalized congressional endorsements described in *Red Lion*, say that the Commission acted contrary to statute when it struck the current balance between product advertising and the fairness doctrine. We think Congress left questions of application and accommodation to the Commission under the general public interest standard; the Commission's present ruling is not so plainly inimical to the public interest as to be illegal.

In *Columbia Broadcasting System, Inc. v. Democratic National Comm.*, 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1972), Chief Justice Burger referred to the balancing of public and private interests in broadcasting as a "tightrope." He pointed to the established principle that the construction of a statute by the agency charged with executing it is entitled to deference, and stated on the related question of media access,

> "Congress has chosen to leave such questions [as media access] with the Commission, to which it has given the flexibility to experiment with new ideas as changing conditions require. . . . ."

Id. at 122, 93 S.Ct. at 2096. Moreover, it is perfectly obvious from the extent of the disagreement in *CBS* as well as from recent decisions on the fairness doctrine that there are difficult problems with how and when it should be applied. Under such circumstances, there is particular reason to defer to the agency established to exercise supervision. As Chief Judge Bazelon has written,

> "I think there is a proper role for Commission 'expertise' or experience in the administration of the treacherous problems of determining what issues are raised by a broadcast and whether [these] issues are 'controversial.' The FCC has by now had 40 years of experience in dealing with telecommunications broadcasts . . . . ."

National Broadcasting Sys. v. FCC, 516 F.2d 1101 (D.C.Cir.1975) (dissenting). We conclude that the Commission's current policy is within its statutory authority.

There is finally the question whether the Commission's policy violates the first amendment. Complainants argue that the fairness doctrine serves the first amendment by requiring airwave licensees to be true public forums for the presentation of divergent views. The essence of this argument seems to be that the first amendment requires the fairness doctrine either to be enforced to the hilt or to be supplemented by regulations designed to ensure access to the broadcasting media by all points of view. *Cf. CBS, supra*, 412 U.S. at 185–90, 93 S.Ct. 2080 (Brennan, J., dissenting).

[9, 10] This approach does not seem to us to have commanded a majority of the Court (although, to be sure, *CBS* involved issues of access rather than fairness). Furthermore, we have doubts as to the wisdom of mandating, rather than merely allowing, government intervention in the programming and advertising decisions of private broadcasters. It is certainly possible to argue, as complainants suggest here, that "[the] uninhibited marketplace of ideas in which truth will ultimately prevail," *see Red Lion, supra*, 395 U.S. at 390, 89 S.Ct. at 1806, might be better served by a continued extension of the fairness doctrine to product advertising. But we do not view that question, in the short and long run, as so free from doubt that courts should impose an inflexible response as a matter of constitutional law.[6] We be-

6. The majority in *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1972) has been characterized as having:

> "a deeply felt belief that the broadcasting system presents a special situation to which traditional constitutional doctrines should not be mechanically applied. Underlying

lieve the first amendment permitted the Commission not only to experiment with full-scale application of the fairness doctrine to advertising but also to retreat from its experiment when it determined from experience that the extension was unworkable. In any event, at present we cannot say that the first amendment requires the Commission to force the presentation of alternate views in response to product advertisements which do not explicitly expound a point of view on a public issue.

[11] Complainants further see a constitutional violation in differentiating commercials, unreasonably it is said, from all other forms of speech. But as we have previously said, the Commission's reasons for differentiation, which are explained in the fairness report, can hardly be termed irrational, whatever one's views as to their soundness. Furthermore, we see no vagueness in the new standards. They are, in fact, remarkably clear when compared with the distinctions that would have to be made were fairness standards to apply to product commercials generally.

[12] Finally, the decision is challenged under section 101(b) of the National Environmental Policy Act, 42 U.S.C. § 4331(b), which states the congressional policy that the Government use "all practicable means, consistent with other essential considerations of national policy," to protect and promote environmental quality. We hesitate to read this section of NEPA as imposing requirements upon the Commission's regulatory and licensing functions in the areas of program content and speech. Given the prohibition in section 326 of the Communications Act against Commission censorship, we do not believe that section 101(b) of NEPA can be interpreted to compel the Commission to use its licensing power as a lever to impose special standards upon private licensees in the interest of the environment. *Cf. United States v. SCRAP*, 412 U.S. 669, 694–95, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973).

Affirmed.

this belief is a concern that the delicate interest balancing and complex administrative demands inherent in government regulation of broadcasting require that the public interest be entrusted to an expert agency equipped with broad discretion enabling it to develop flexible solutions unburdened by rigid constitutional standards." *The Supreme Court, 1972 Term*, 87 Harv.L.Rev. 178 (1973); *Cf. Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1973).

Exhibit 118: "Fairness Doctrine and Public Interest Standards—Handling of Public Issues, 39 *Federal Register* 26372 (July 18, 1974)

federal register

THURSDAY, JULY 18, 1974

WASHINGTON, D.C.

Volume 39 ■ Number 139

PART III



FEDERAL COMMUNICATIONS COMMISSION

■

FAIRNESS DOCTRINE AND PUBLIC INTEREST STANDARDS

Handling of Public Issues

No. 139—Pt. III——1

FEDERAL COMMUNICATIONS COMMISSION

[Docket No. 19260; FCC 74-702]

FAIRNESS DOCTRINE AND PUBLIC INTEREST STANDARDS

Fairness Report Regarding Handling of Public Issues

In the matter of the handling of public issues under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Docket No. 19260.

I. *Introduction.* 1. By notice issued June 11, 1971 (Docket No. 19260, 30 FCC 2d 26), we instituted a broad-ranging inquiry into the efficacy of the fairness doctrine and related public interest policies. Observing that almost 22 years had passed since we last gave comprehensive consideration to the fairness doctrine,[1] we stated that the time had come for a reassessment and clarification of basic policy. While we noted that in view of sections 315(a) and 3(h) of the Communications Act, the Commission could not "abandon the fairness doctrine or treat broadcasters as common carriers who must accept all material offered by any and all comers," we did emphasize that these statutory standards were broad in nature and that therefore "there can and must be considerable leeway in both policy formulation and application in specific cases." In this regard, we asked that interested parties formulate their specific comments in light of two general but fundamental considerations of Commission policy. First, in view of the profound, unquestioned national commitment embodied in the First Amendment, our goal in this area must be to foster "uninhibited, robust, wide-open" debate on public issues. "New York Times Co. v. Sullivan," 376 U.S. 254, 270 (1964). Our inquiry was therefore directed in primary part to the question of whether the Commission's application of the doctrine has indeed been consistent with that goal and has promoted it to the maximum extent. Secondly, we also stressed that any promotion of this objective must be compatible with the public interest in "the larger and more effective use of radio." 47 U.S.C. section 303(g). Noting that "* * * to a major extent, ours is a commercially-based broadcast system and that this system renders a vital service to the nation," we emphasized that "[a]ny policies adopted by this Commission * * * should be consistent with the maintenance and growth of that system and should, among other appropriate, standards, be so measured." These basic policy considerations have led the Commission to initiate this inquiry and have continued to guide us in the review and reformulation of the fairness doctrine set forth in this report.

2. To facilitate consideration of the many complex problems involved, we divided the inquiry into four parts, entitled: II. The Fairness Doctrine Generally; III. Application of the Fairness Doctrine to the Broadcast of Paid Announcements; IV. Access Generally to the Broadcast Media for the Discussion of Public Issues; and V. Application of the Fairness Doctrine to Political Broadcasts.[2] Interested parties were invited to comment on any issue or aspect of these subjects. We have received and reviewed the written comments of numerous parties representing the advertising and broadcasting industries, labor unions, public interest, environmental and consumer groups, law schools, and other interested individuals and organizations.[3] Finally, in March 1972, we devoted a full week to panel discussions and oral arguments on the issues raised in this inquiry. Some fifty persons participated in the panel discussions and about thirty additional persons presented oral argument to the Commission. While this Report does not specifically address every suggestion which has been raised in the proceeding, we have given them all careful consideration in reaching the conclusions and policy judgments set forth herein.

II. *The fairness doctrine generally—*
A. *Broadcasting and free speech.* 3. We believe that it is appropriate to begin our evaluation of the fairness doctrine with a consideration of the underlying purposes of the doctrine and its relationship to freedom of speech. In 1949, we set forth the basic premises of the doctrine in these terms:

> It is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day * * *. The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community. It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting. Report on Editorializing, 13 FCC 1246, 1249 (1949).

4. At first appearance, this affirmative use of government power to expand broadcast debate would seem to raise a striking paradox, for freedom of speech has traditionally implied an absence of governmental supervision or control. Throughout most of our history, the principal function of the First Amendment has been to protect the free marketplace of ideas by precluding governmental intrusion. However, the continuing evolution of the media of mass communications—both technologically and in terms of concentration of control—has led gradually to a different approach to the First Amendment. This approach—an affirmative one—recognizes the responsibility of government in maintaining and enhancing a system of freedom of expression. See generally T. Emerson, "The System of Freedom of Expression," chapter XVII (1970).

5. In the 1949 "Report on Editorializing," the Commission expressed the view that a requirement that broadcast licensees present contrasting views on public issues was "within both the spirit and letter of the first amendment." 13 FCC at 1256. This conclusion was based, in large measure, on the decision of the Supreme Court in "Associated Press v. United States," 326 U.S. 1 (1945), which concerned anti-competitive practices in the newspaper industry. In that decision, the Court emphasized the affirmative aspects of the First Amendment:

> It would be strange indeed however if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of the information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. 326 U.S. at 20.

6. In the field of broadcasting, the principal impediment to free expression arises not from any anti-competitive practices, but from the physical characteristics of the medium itself. Practical experience in the early years of radio

[1] The Commission's first general statement on fairness doctrine principles was set forth in the Report on Editorializing by Broadcast Licensees, 13 FCC 1246 (1949). Briefly stated, "the doctrine imposes two affirmative responsibilities on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints." Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 111 (1973) (hereinafter cited as BEM).

[2] The Commission's First Report—Handling of Political Broadcast, 36 FCC 2d 40 (1972), was issued on June 22, 1972, and dealt with the issues raised in Part V of the inquiry. A copy of this First Report is attached hereto as Appendix A. We expedited consideration of this portion of the inquiry in order to clarify and treat the major questions presented therein prior to the 1972 general election campaign period. We believe, however, that it is desirable in the context of this report to supplement our treatment of the political fairness issues discussed in our First Report.

[3] A list of major contributors can be found in Appendix B. Some submitting comments after filing deadlines may not be included therein. Over 20 parties filed comments and/or replies in Part II; over 40 parties filed in Part III (an additional 71 comments were received in response to the statement of the Federal Trade Commission in Part III); more than 30 comments were filed in Part IV; and approximately 15 comments in Part V.

made it obvious that a complete laissez-faire policy on the part of the government would lead to the destruction of effective radio communication and thus to a frustration of the basic goals of the First Amendment. For a brief period during the nineteen twenties, government regulation of broadcasting was virtually non-existent, and broadcasters had the same freedom of action traditionally afforded the publishers of newspapers or magazines. The underlying policy was that "anyone who will may transmit." 67 Cong Rec 5479 (1926) (remarks of Congressman White). The results of this system were disastrous both for the broadcasting industry and for the listening public:

> From July 1926 to February 23 1927 when Congress enacted the Radio Act of 1927 almost 200 new radio stations went on the air. These new stations used any frequency they desired regardless of the interference thereby caused to others. Existing stations changed to other frequencies and increased their power and hours of operation at will. The result was confusion and chaos. With everybody on the air nobody could be heard. FCC Office of Network Study, Second Interim Report on Television Network Practices 65–66 (1965).

7. In 1927, Congress acted to end the crisis by establishing an effective system of government licensing. It would have been unthinkable, of course, for the government to have been in the business of deciding who could publish newspapers and magazines and who could not. In purely practical terms, however, it was obvious that licensing was essential to the development of an effective system of broadcasting. In the case of National Broadcasting Co. v. United States," 319 U.S. 190 (1943), the Supreme Court concluded that, because of the scarcity of available frequencies, the licensing system established by Congress did not violate the First Amendment. In an opinion written by Justice Frankfurter, the Court found that the freedom of speech did not include "the right to use the facilities of radio without a license." Id. at 227. It made it clear, furthermore, that the Commission was not limited to the role of a "traffic officer, policing the wave lengths to prevent stations from interfering with each other." Id. at 215. "[T]he Act," the Court held, "does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic." Id. at 215–16. But, while the NBC case did establish an expansive view of Commission powers, it still left a great many First Amendment questions unanswered.

8. Some twenty-six years later, in the landmark decision in "Red Lion Broadcasting Co. v. FCC", 395 U.S. 367 (1969), the Court set forth a comprehensive First Amendment theory which vindicated both the licensing system and the Commission's fairness doctrine. Justice White, writing for a unanimous Court, reaffirmed Justice Frankfurter's thesis that because of the scarcity factor, licensing was permissible.[1] The First Amendment, in the Court's opinion, did not confer upon anyone the right to operate a radio station:

> [I]f there is to be any effective communication by radio only a few can be licensed and the rest must be barred from the airways. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum. Id. at 389.

It was thus concluded that the basic purposes of the First Amendment would be undermined if there were "an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." Id. at 388.

9. While the licensing system was thus designed to further First Amendment interests in the broadcast medium, it was necessary to define those interests and identify their focus and means of implementation.[2] Should the licensees chosen by the government be accorded an absolute and unrestricted right to advance their own views to the exclusion of those of their less privileged fellow citizens? Or should there be some provision made to insure the recognition of the First Amendment interests of those citizens who are of necessity denied the opportunity to operate a broadcasting station? In language strikingly close to that found in our earlier "Report on Editorializing", the Red Lion Court stated that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." Id. at 390. While private businessmen were licensed to operate radio stations, "[t]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purpose of the First Amendment." Ibid. (emphasis supplied). That Amendment, as it has long been recognized, "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public * * *." Associated Press v. United States, 326 U.S. 1, 20 (1945). In this respect, the purpose of the First Amendment is not simply to protect the speech of particular individuals, but rather to preserve and promote the informed public opinion which is necessary for the continued vitality of our democratic society and institutions. As the Supreme Court has elsewhere stated, "speech concerning public affairs is more than self-expression: it is the essence of self-government." "Garrison v. Louisiana," 379 U.S. 64, 74–5 (1964); and "[t]hese guarantees [of the First Amendment] are not for the benefit of the press so much as for the benefit of all of us." "Time, Inc., v. Hill," 385 U.S. 374, 389 (1966).

10. In terms of this fundamental purpose of the First Amendment and the paramount right of the public to have that purpose implemented in the broadcast medium, it became clear that the license granted by the government to a chosen few could not be considered as a privilege to "ignore the problems which beset the people or * * * exclude from the airways anything but their own views of fundamental questions." 395 U.S. at 394. As the Red Lion Court stated, "the First Amendment confers no right on licensees to prevent others from broadcasting on 'their' frequencies and no right to an unconditional monopoly of a scarce resource which the Government had denied others the right to use." 395 U.S. at 391. Rather, the constitutional status of the broadcast licensee was identified in the following terms:

> As far as the First Amendment is concerned [illegible] is no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to the use of a radio frequency to the exclusion of this fellow citizen. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency [illegible] as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise be barred from the airwaves. Id. at 389.

11. Thus, in the context of the scarcity of broadcast frequencies and the resulting necessity for government licensing, the First Amendment impells, rather than prohibits, governmental promotion of a system which will ensure that the public will be informed of the important issues which confront it and of the competing [illegible] may differ from the views held by a particular licensee. The purpose and foundation of the fairness doctrine is therefore that of the First Amendment itself: "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." 395 U.S. at 390. In accordance

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[1] This rest on principle is not predicated upon a comparison between the number of broadcast stations and the number of newspapers in a given market. The true measure of scarcity is in terms of the number of persons who wish to broadcast and, as Justice White's language states are substantially more individuals who want to broadcast than there are frequencies to allocate." 395 U.S. at 388.

[2] Professor Emerson has outlined this problem in the following terms: "[o]nce it is assumed that a scarcity of broadcasting facilities exists the next question becomes what follows from that? * * * In purely commonsense terms it would seem to follow that if the government must choose among applicants for the same facilities it should choose on some sensible basis. The only sensible basis is the one that best promotes the system of freedom of expression." T. Emerson, The System of Freedom of Expression 663 (1970).

with this view and theory, the Court in Red Lion held that

> It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press. 395 U.S. at 394.

12. That the government should act affirmatively to preserve and promote the greater listening and viewing public's First Amendment interests in broadcasting is a concept which some quarters still find difficult to accept. But while arguments have been and will continue to be made as to the wisdom of the fairness doctrine and its application in particular cases, its statutory support [6] and constitutionality are firmly established. BEM, 412 U.S. 94 (1973); "Red Lion Broadcasting Co. v. FCC," 395 U.S. 367 (1969).

13. Although the legality of the fairness doctrine is thus well-established, Chief Judge Bazelon of the District of Columbia Circuit has suggested that the time has come for "the Commission to draw back and consider whether time and technology have so eroded the necessity for governmental imposition of fairness obligations that the doctrine has come to defeat its purposes in a variety of circumstances * * *." "Brandywine-Main Line Radio, Inc. v. FCC," 473 F. 2d 16, 80 (D.C. Cir. 1972) (dissenting opinion). We believe, however, that the problem of scarcity is still very much with us, and that despite recent advances in technology, there are still "substantially more individuals who want to broadcast than there are frequencies to allocate." "Red Lion Broadcasting Co. v. FCC," 395 U.S. at 388. The effective development of an electronic medium with an abundance of channels (through the use of cable, or otherwise) is still very much a thing of the future. For the present, we do not believe that it would be appropriate—or even permissible—for a government agency charged with the allocation of the channels now available to ignore the legitimate First Amendment interests of the general public. We recognize, however, that there exists within the framework of fairness doctrine administration and enforcement the potential for undue governmental interference in the processes of broadcast journalism, and the concomitant diminution of the broadcaster's and the public's legitimate First Amendment interests. It is with a real sensitivity to this potential danger and an equal awareness of our responsibilities to promote the ends and purposes of the First Amendment that we have confronted the task of restating and reformulating our approach to the fairness doctrine and the broadcasters' obligations thereunder.[7]

B. *Does the fairness doctrine inhibit broadcast journalism?* 14. A number of commentators have argued that, in spite of its worthy purposes, the actual effect of the fairness doctrine can only be to restrict and inhibit broadcast journalism. Far from inhibiting debate, however, we believe that the doctrine has done much to expand and enrich it.

15. We have already noted that, stripped to its barest essentials, the fairness doctrine involves a two-fold duty: (1) The broadcaster must devote a reasonable percentage of this broadcast time to the coverage of public issues; and (2) his coverage of these issues must be fair in the sense that it provides an opportunity for the presentation of contrasting points of view. It is impossible to believe that the first of these obligations could hamper broadcast news and commentary in any way. While such a requirement might be viewed as a restriction on the broadcaster as a businessman, there is no doubt that "it is a positive stimulus to broadcast journalism." Wood, Electronic Journalism 127 (1967).

16. We do not believe that the second part of the fairness doctrine should inhibit broadcast journalism any more than the first. It has frequently been suggested, however, that many broadcasters will avoid the coverage of controversial issues if they are required to present contrasting views. These broadcasters, it is argued, will find the opposing viewpoints too offensive, or their presentation too disruptive to their broadcast schedules, too expensive (assuming they are unable to find sponsorship for the presentation of contrasting views), or simply too much trouble. Our first response to this argument is that it represents an attitude which is completely inconsistent with the broadcaster's role as a public trustee.[8]

17. The Supreme Court in Red Lion considered the possibility that fairness principles might have a "chilling effect" on broadcast journalism, and found that this

> possibility is at best speculative. The communications industry, and in particular the networks, have taken pains to present controversial issues in the past, and even now they do not assert that they intend to abandon their efforts in this regard. It would be better if the FCC's encouragement were never necessary to induce the broadcasters to meet their responsibility. And if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications. The fairness doctrine in the past has had no such overall effect. 395 U.S. at 393.

In the years since Red Lion was decided, we have seen no credible evidence that our policies have in fact had "the net effect of reducing rather than enhancing the volume and quality of coverage."

18. In evaluating the possible inhibitory effect of the fairness doctrine, it is appropriate to consider the specifics of the doctrine and the procedures employed by the Commission in implementing it. When a licensee presents one side of a controversial issue he is not required to provide a forum for opposing views on that same program or series of programs. He is simply expected to make a provision for the opposing views in his overall programming. Further, there is no requirement that any precisely equal balance of views be achieved, and all matters concerning the particular opposing views to be presented and the appropriate spokesmen and format for their presentation are left to the licensee's discretion subject only to a standard of reasonableness and good faith.

19. As a matter of general procedure, we do not monitor broadcasts for possible violations, but act on the basis of complaints received from interested citizens. These complaints are not forwarded to the licensee for his comments unless they present prima facie evidence of a violation. Allen C. Phelps, 21 FCC 2d 12 (1969). Thus, broadcasters are not burdened with the task of answering idle

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[6] From the earliest days of radio regulation, it was recognized that a standard of fairness was an essential element of regulation in the "public interest." Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. 32, 33 (1929), rev'd on other grounds, 59 App. D.C. 197, 37 F. 2d 993, cert. dismissed, 281 U.S. 706 (1930). In 1959, Congress specifically amended the Communications Act so as to vindicate the Commission's view that fairness inhered in the general public interest standard of the Act. 47 U.S.C. section 315(a); see Red Lion Broadcasting Co. v. FCC, 395 U.S. at 380-81.

[7] Judge Skelly Wright of the District of Columbia Circuit has made the following observations with regard to the difficulties inherent in fairness regulation:

> "The problems of figuring out the right thing to do in this area—the system that will best serve the public's First Amendment interest—are enormous. In some areas of the law, constitutional values are clearly discernible, as where one is required to balance some right protected by the Constitution against an asserted countervailing governmental interest. * * *. [I]n some areas of the law it is easy to tell the good guys from the bad guys. In the current debate over the broadcast media and the First Amendment, however, each debater claims to be the real protector of the First Amendment, and the analytical problems are much more difficult than in ordinary constitutional adjudication." Commencement address, National Law Center, George Washington University, Washington, D.C., June 3, 1973.

[8] We concur with the views expressed on this subject by former Commissioner Cox several years ago:

> "[a]s a trustee for the public, a broadcaster must use his facilities to enlighten the public about the critical issues which it faces, and this obviously requires substantial effort and may involve presenting some viewpoints with which the licensee totally disagrees. But so long as he is permitted to express his own view editorially with respect to the matters discussed and is allowed to choose the formats to be employed and the spokesmen for the respective positions, he cannot, it seems to me, claim that his freedom to report and analyze the news has been impaired." Cox, The FCC and the Future of Broadcast Journalism in Survey of Broadcast Journalism 1969-1970 at 115.

or capricious complaints. By way of illustration, the Commission received some 2,400 fairness complaints in fiscal 1973, only 94 of which were forwarded to licensees for their comments.

20. While there may be occasional exceptions, we find it difficult to believe that these policies add significantly to the overall administrative burdens involved in operatng a broadcast station. It is obvious that any form of governmental regulation will impose certain costs or burdens of administration on the industry affected. The point is not whether some burden is involved, but rather whether that burden is justified by the public interest objective embodied in the regulation. Broadcasters are licensed to act as trustees for a valuable public resource and, in view of the public's paramount right to be informed, some administrative burdens must be imposed on the licensee in this area. These burdens simply "run with the territory." Furthermore, any licensee who might be discouraged by such a burden will have to take into account this Commission's requirement that he must provide a forum for the discussion of public issues. The Supreme Court has made it clear and it should be reemphasized here that "if present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues. "Red Lion Broadcasting Co. v. FCC," 395 U.S. at 393.

C. *The specifics of the fairness doctrine.* 21. In developing and implementing the fairness doctrine it has never been our intention to force licensees to conform to any single, preconceived notion of what constitutes the "ideal" in broadcast journalism. Our purpose has merely been to establish general guidelines concerning minimal standards of fairness. We firmly believe that the public's need to be informed can best be served through a system in which the individual broadcasters exercise wide journalistic discretion, and in which government's role is limited to a determination of whether the licensee has acted reasonably and in good faith. Fairness Doctrine Primer 40 FCC 598, 599 (1964). In this regard, we are still convinced that

> there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. Report on Editorializing, 13 FCC 1246, 1251 (1949).

22. It is obvious that under this method of handling fairness, many questionable decisions by broadcast editors may go uncorrected. But, in our judgment, this approach represents the most appropriate way to achieve "robust, wide open debate" on the one hand, while avoiding "the dangers of censorship and pervasive supervision" by the government on the other. "Banzhaf v. FCC.," 405 F. 2d 1082, 1095 (D.C. Cir. 1968), cert. denied sub nom. "Tobacco Institute v. FCC," 396 U.S. 842 (1969). In this respect, we are not unmindful of the dangers alluded to by the Court in BEM:

> Congress appears to have concluded • • • that of these two choices—private or official censorship—Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided 412 U.S. 94 at 105.

We therefore recognize that reaching a determination as to what particular policies will best serve the public's right to be informed is a task of "great delicacy and difficulty," and that the Commission must continually walk a "tightrope" between saying too much and saying too little. Id. at 102, 117. However, we also believe that this Commission has a clear responsibility and obligation to assume this task.

1. *Adequate time for the discussion of public issues.* 23. The first, and most basic, requirement of the fairness doctrine is that it establishes an "affirmative responsibility on the part of broadcast licensees to provide a reasonable amount of time for the presentation over their facilities of programs devoted to the discussion and consideration of public issues • • •" "Report on Editorializing," 13 FCC at 1249. Determining what constitutes a "reasonable amount of time" is—like so many other programming questions—a responsibility of the individual broadcast licensee. It is the individual broadcaster who, after evaluating the needs of his particular community, "must determine what percentage of the limited broadcast day should appropriately be devoted to news and discussion or consideration of public issues, rather than to other legitimate services of radio broadcasting • • •." Id. at 1247.

24. In reviewing the adequacy of the amount of a licensee's public issue programming, we will, of course, limit our inquiry to a determination of its reasonableness. We wish to make it plain, however, that we have allocated a very large share of the electromagnetic spectrum to broadcasting chiefly because of our belief that this medium can make a great contribution to an informed public opinion. See "Democratic National Committee," 25 FCC 2d 216, 222 (1970). We are not prepared to allow this purpose to be frustrated by broadcasters who consistently ignore their public interest responsibilities. Indeed, "we regard strict adherence to the fairness doctrine"—including the affirmative obligation to provide coverage of issues of public importance—"as the single most important requirement of operation in the public interest—the 'sine qua non' for grant of a renewal of license." "Committee for the Fair Broadcasting of Controversial Issues," 25 FCC 2d 283, 292 (1970).

25. The individual broadcaster is also the person "who must select or be responsible for the selection of the particular news items to be reported or the particular local, State, national or international issues or questions of public interest to be considered • • •." "Report on Editorializing," 13 FCC at 1247.[9] We have, in the past, indicated that some issues are so critical or of such great public importance that it would be unreasonable for a licensee to ignore them completely. See Gary Soucie (Friends of the Earth), 24 FCC 2d 743, 750–51 (1970). But such statements on our part are the rare exception, not the rule, and we have no intention of becoming involved in the selection of issues to be discussed, nor do we expect a broadcaster to cover each and every important issue which may arise in his community.

26. We wish to emphasize that the responsibility for the selection of program material is that of the individual licensee. That responsibility "can neither be delegated by the licensee to any network or other person or group, or be unduly fettered by contractual arrangements restricting the licensee in his free exercise of his independent judgments." "Report on Editorializing," 13 FCC at 1248. We believe that stations, in carrying out this responsibility, should be alert to the opportunity to complement network offerings with local programming on these issues, or with syndicated programming.

2. *A reasonable opportunity for opposing viewpoints.* 27. The usual fairness complaint does not involve an allegation that the licensee has not devoted sufficient time to the discussion of public issues. Rather, it concerns a claim that the licensee has presented one viewpoint on a "controversial issue of public importance" and has failed to afford a "reasonable opportunity for the presentation of contrasting viewpoints."

28. It has frequently been suggested that individual stations should not be expected to present opposing points of view and that it should be sufficient for the licensee to demonstrate that the opposing viewpoint has been adequately presented on another station in the market or in the print media. See WSOC Broadcasting Co., 17 P & F Radio Reg. 548, 550 (1958). While we recognize that citizens receive information on public issues from a variety of sources, other considerations require the rejection of this suggestion. First, in amending section 315(a) of the Communications Act in 1959, Congress gave statutory approval to the fairness doctrine, including the requirement that broadcasters themselves provide an opportunity for opposing viewpoints. See BEM, 412 U.S. at 110.

[9] Ordinarily, the problems which are identified by a station's ascertainment of its community's needs and interests would be featured prominently in the list of public issues selected by the station for program coverage. See generally, Primer on Ascertainment of Community Problems by Broadcast Applicants, 20 FCC 2d 650 (1971).

note 8.[10] Second, it would be an administrative nightmare for this Commission to attempt to review the overall coverage of an issue in all of the broadcast stations and publications in a given market. Third, and perhaps most importantly, we believe that the requirement that each station provide for contrasting views greatly increases the likelihood that individual members of the public will be exposed to varying points of view. The fairness doctrine will not insure perfect balance in debate and each station is not required to provide an "equal" opportunity for opposing views. Furthermore, since the fairness doctrine does not require balance in individual programs or series of programs, but only in a station's overall programming, there is no assurance that a listener who hears an initial presentation will also hear a rebuttal. Compare 47 U.S.C. 396(g)(1)(A). However, if all stations presenting programming relating to a controversial issue of public importance make an effort to round out their coverage with contrasting viewpoints, these various points of view will receive a much wider public dissemination. This requirement, of course, in no way prevents a station from presenting its own opinions in the strongest terms possible.

a. *What is a "controversial issue of public importance"?*. 29. It has frequently been suggested that the Commission set forth comprehensive guidelines to aid interested parties in recognizing whether an issue is "controversial" and of "public importance." However, given the limitless number of potential controversial issues and the varying circumstances in which they might arise, we have not been able to develop detailed criteria which would be appropriate in all cases. For this very practical reason, and for the reason that our role must and should be limited to one of review, we will continue to rely heavily on the reasonable, good faith judgments of our licensees in this area.

30. Some general observations however, are in order. First of all, it is obvious that an issue is not necessarily a matter of significant "public importance" merely because it has received broadcast or newspaper coverage. "Our daily papers and television broadcasts alike are filled with news items which good journalistic judgment would classify as newsworthy, but which the same editors would not characterize as containing important controversial public issues." Healey v. FCC, 460 F.2d 917, 922 (D.C. Cir. 1972). Nevertheless, the degree of media coverage is one factor which clearly should be taken into account in determining an issue's importance. It is also appropriate to consider the degree of attention the issue has received from government officials and other community leaders. The principal test of public importance, however, is not the extent of media or governmental attention, but rather a subjective evaluation of the impact that the issue is likely to have on the community at large.[11] If the issue involves a social or political choice, the licensee might well ask himself whether the outcome of that choice will have a significant impact on society or its institutions. It appears to us that these judgments can be made only on a case-by-case basis.

31. The question of whether an issue is "controversial" may be determined in a somewhat more objective manner. Here, it is highly relevant to measure the degree of attention paid to an issue by government officials, community leaders, and the media. The licensee should be able to tell, with a reasonable degree of objectivity, whether an issue is the subject of vigorous debate with substantial elements of the community in opposition to one another. It is possible, of course, that "programs initiated with no thought on the part of the licensee of their possible controversial nature will subsequently arouse controversy and opposition of a substantial nature which will merit presentation of opposing views." Report on Editorializing, 13 FCC at 1251. In such circumstances, it would be appropriate to make provision for opposing views when the opposition becomes manifest.

b. *What specific issue has been raised?* 32. One of the most difficult problems involved in the administration of the fairness doctrine is the determination of the specific issue or issues raised by a particular program. This would seem to be a simple task, but in many cases it is not. Frequently, resolution of this problem can be of decisional importance. See, e.g., David C. Green, 24 FCC 2d 171 (1970); WCBS-TV, 9 FCC 2d 921, 938 (1967).

33. This determination is complicated by the fact that it is frequently made without the benefit of a transcript or tape of the program giving rise to the complaint. Hence, it is necessary in such cases to rely on the recollections of station employees and listeners. While the availability of an accurate transcript would facilitate the determination of the issue or issues raised, it would not in many cases clearly point up those issues. This is true because a broadcast may avoid explicit mention of the ultimate matter in controversy and focus instead on assertions or arguments which support one side or the other on that ultimate issue. This problem may be illustrated by reference to a hypothetical broadcast which takes place during the course of a heated community debate over a school bond issue. The broadcast presents a spokesman who forcefully asserts that new school construction is urgently needed and that there is also a need for substantial increases in teachers' salaries, both principal arguments advanced by proponents of the bond issue. The spokesman, however, does not explicitly mention or advocate passage of the bond issue. In this case, the licensee would be faced with a need to determine whether the spokesman had raised the issue of whether the school bonds should be authorized (which is controversial), or whether he had merely raised the question of whether present school facilities and teacher salaries are adequate (which might not be at all controversial).

34. In answering this question, we would expect a licensee to exercise his good faith judgment as to whether the spokesman had in an obvious and meaningful fashion presented a position on the ultimate controversial issue of whether the school bond issue should be approved.[12] The licensee's inquiry should focus not on whether the statement bears some tangential relevance to the school bond question, but rather on whether that statement, in the context of the ongoing community debate, is so obviously and substantially related to the school bond issue as to amount to advocacy of a position on that question. If, for example, the arguments and views expressed over the air closely parallel the major arguments advanced by partisans on one side or the other of the public debate it might be reasonable to conclude that there had been a presentation on one side of the ultimate issue, i.e., authorization of the school bonds. Obviously, licensees in specific cases may differ in their answers to this inquiry. If a licensee's determination is reasonable and arrived at in good faith, however, we will not disturb it. Cf., Media Access Project (Georgia Power), 44 FCC 2d 755 (1973).

35. Before leaving this subject, we wish to make it clear that a fairness response is not required as a result of offhand or insubstantial statements. As we have stated in the past, "[a] policy of requiring fairness, statement by statement or inference by inference, with constant Governmental intervention to try to implement the policy, would simply be inconsistent with the profound national commitment to the principle that debate on public issues should be 'uninhibited, robust, wide-open' (New York Times Co. v. Sullivan, 376 U.S. 254, 270)." National Broadcasting Co. (AOPA complaint), 25 FCC 2d 735, 736-37 (1970).

c. *What is a "reasonable opportunity" for contrasting viewpoints?* 36. As noted above, the Commission's first task in

[10] One United States Senator has proposed that it might be desirable to apply the fairness doctrine only where less than four broadcast signals are received in a given area. See 119 Cong. Rec. S20358-62 (November 14, 1973) (remarks of Senator Ervin). We believe that such a proposal is clearly beyond our statutory authority. However, it may be appropriate at some future date to examine the possibility of a different application of the fairness doctrine to new technologies of electronic communication or of a different application in broadcast markets of varying size.

[11] In this regard, we note that the fairness doctrine was not designed for the purpose of providing a forum for the discussion of mere private disputes of no consequence to the general public. Rather, its purpose is to insure that the public will be adequately informed on matters of importance to major segments of the community.

[12] See discussion of the application of this standard to "editorial" advertising in Part III, infra.

handling a typical fairness complaint is to review the licensee's determination as to whether the issue specified in the complaint or the Commission's inquiry has actually been raised in the licensee's programming. Secondly, we must review the licensee's determination of whether that issue is "controversial" and of "public importance." If these questions are answered in the affirmative, either by admission of the licensee or by our determination upon review, we must then determine whether the licensee has afforded a "reasonable opportunity" in his overall programming for the presentation of contrasting points of view.

37. The first point to be made with regard to the obligation to present contrasting views is that it cannot be met "merely through the adoption of a general policy of not refusing to broadcast opposing views where a demand is made of the station for broadcast time." Report on Editorializing," 13 FCC at 1251. The licensee has a duty to play a conscious and positive role in encouraging the presentation of opposing viewpoints."[12]

We do not believe, however, that it is necessary for the Commission to establish a formula for all broadcasters to follow in their efforts to find a spokesman for an opposing viewpoint. As we stated in "Mid-Florida Television Corp.," 40 FCC 620 (1964):

> The mechanics of achieving fairness will necessarily vary with the circumstances, and it is within the discretion of each licensee, acting in good faith, to choose an appropriate method of implementing the policy to aid and encourage expression of contrasting viewpoints. Our experience indicates that licensees have chosen a variety of methods, and often combinations of various methods. Thus, some licensees, where they know or have reason to believe that a responsible individual or group within the community holds a contrasting viewpoint with respect to a controversial issue presented or to be presented, communicate to such an individual or group a specific offer of the use of their facilities for the expression of contrasting opinion, and send a copy or summary of material broadcast on the issue. Other licensees consult with community leaders as to who might be an appropriate individual or group for such a purpose. Still others announce at the beginning or ending (or both) of programs presenting opinions on controversial issues that opportunity will be made available for the expression of contrasting views upon request by responsible representatives of such views. Id. at 621.

If a licensee fails to present an opposing viewpoint on the ground that no appropriate spokesman is available, he should be prepared to demonstrate that he has made a diligent, good-faith effort to communicate to such potential spokesmen his willingness to present their views on the issue or issues presented. Columbia Broadcasting System, Inc., 34 FCC 2d 773 (1972). There may well be occasions, particularly in cases involving major issues discussed in depth, where such a showing should include specific offers of response time to appropriate individuals in addition to general over-the-air announcements.[14]

38. In making provision for the airing of contrasting viewpoints, the broadcaster should be alert to the possibility that a particular issue may involve more than two opposing viewpoints. Indeed, there may be several important viewpoints or shades of opinion which warrant broadcast coverage.[15]

39. In deciding which viewpoints or shades of opinion are to be presented, licensees should employ a standard similar to that used to decide which political parties or candidates represent a viewpoint of sufficient importance to deserve coverage. As we stated in Lawrence M. C. Smith, 40 FCC 549 (1963), the broadcaster (in programs not covered by the "equal time" requirement of 47 U.S.C. section 315) is not expected to present the views of all political parties no matter how small or insignificant, but rather:

> the licensee would be called upon to make a good faith judgment as to whether there can reasonably be said to be a need or interest in the community calling for some provision of announcement time to these other parties or candidates and, if so, to determine the extent of that interest or need and the appropriate way to meet it. 40 FCC at 550.

In evaluating a "spectrum" of contrasting viewpoints on an issue, the licensee should make a good faith effort to identify the major viewpoints and shades of opinion being debated in the community, and to make a provision for their presentation. In many, or perhaps most, cases it may be possible to find that only two viewpoints are significant enough to warrant broadcast coverage.[16] However, other issues may involve a range of markedly different and important policy alternatives. In such circumstances, the broadcaster must make a determination as to which shades of opinion are of sufficient public importance to warrant coverage, and also the extent and nature of that coverage.

40. The question of the reasonableness of the opportunity for opposing viewpoints goes considerably deeper, however, than a mere finding that some provision has been made for the opposing viewpoints. Indeed, it has frequently been suggested that the wide discretion afforded the licensee in selecting a reply spokesman and format may undermine any possibility that treatment of the opposition view will be either reasonable or fair. Accordingly, it has been argued that the Commission should promulgate regulations establishing standards for the selection of an appropriate reply spokesman and format. We believe, however, that it should be adequate to remind licensees that they have a duty not "'to stack the cards' by a deliberate selection of spokesmen for opposing points of view to favor one viewpoint at the expense of the other * * *" "Report on Editorializing," 13 FCC at 1253. In the final analysis, fairness must be achieved, "not by the exclusion of particular views because of * * * the forcefulness with which the view is expressed, but by making the microphone available, for the presentation of contrary views without deliberate restrictions designed to impede equally forceful presentation." Id. at 1253–54. (emphasis supplied); see also Brandywine-Main Line Radio, Inc., 24 FCC 2d 18, 23–24 (1970).

41. In providing for the coverage of opposing points of view, we believe that the licensee must make a reasonable allowance for presentations by genuine partisans who actually believe in what they are saying. The fairness doctrine does not permit the broadcaster "to pre-

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[12] This duty includes the obligation defined in Cullman Broadcasting Co., 40 FCC 576, 577 (1963):

"where the licensee has chosen to broadcast a sponsored program which for the first time presents one side of a controversial issue, has not presented (or does not plan to present) contrasting viewpoints in other programming, and has been unable to obtain paid sponsorship for the appropriate presentation of the opposing viewpoint or viewpoints, he cannot reject a presentation otherwise suitable to the licensee—and thus leave the public uninformed—on the ground that he cannot obtain paid sponsorship for that presentation." (emphasis in original).

We do not believe that the passage of time since Cullman was decided has in any way diminished the importance and necessity of this principle. If the public's right to be informed of the contrasting views on controversial issues is to be truly honored, broadcasters must provide the forum for the expression of those viewpoints at their own expense if paid sponsorship is unavailable.

[14] In a notice of inquiry and notice of proposed rulemaking in Docket No. 18859, 23 FCC 2d 27, we proposed the adoption of specific procedures to be followed under certain circumstances in seeking an opposition spokesman. We believe, however, that the policy set forth above adequately covers all situations, and consequently that it is now appropriate to terminate that proceeding.

[15] One student commentator has outlined this problem in the following terms:

"A principal purpose of the fairness doctrine is to educate the public on the major alternatives available to it in making social choices * * *. Acknowledging that there is a 'spectrum' of opinion on many issues, it is nonetheless true that there are often clearly definable 'colors' in the spectrum, even though the points at which they blend into one another may be unclear. The controversy concerning American policy in Indochina is illustrative. The alternatives (prior to America's withdrawal from the war) include[d] increasing military activity, maintaining the (then) present level of commitment, a phased withdrawal and an immediate withdrawal. It might be argued that any licensee who does not present some coverage of at least these views has failed to educate the public about the major policy alternatives available." Note, The FCC Fairness Doctrine and Informed Social Choice, 8 Harv J Legis 333 351–52 (1971).

[16] This is not to say that a broadcaster is barred from presenting the views of small minorities, but only that the government will not require the coverage of every possible viewpoint or shade of opinion regardless of its significance.

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side over a 'paternalistic' regime," BEM, 412 U.S. at 130, and it would clearly not be acceptable for the licensee to adopt a "policy of excluding partisan voices and always itself presenting views in a bland, inoffensive manner * * *." "Democratic National Committee," 25 FCC 2d 216, 222 (1970). Indeed, this point has received considerable emphasis from the Supreme court:

[n]or is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them. Red Lion Broadcasting Co. v. FCC, 395 U.S. at 392, n. 18, quoting J. S. Mill, On Liberty 32 (R. McCallum ed. 1947).

42. This does not mean, however, that the Commission intends to dictate the selection of a particular spokesman or a particular format, or indeed that partisan spokesmen must be presented in every instance. We do not believe that it is either appropriate or feasible for a governmental agency to make decisions as to what is desirable in each situation. In cases involving personal attacks and political campaigns, the natural opposing spokesmen are relatively easy to identify. This is not the case, however, with the majority of public controversies. Ordinarily, there are a variety of spokesmen and formats which could reasonably be deemed to be appropriate. We believe that the public is best served by a system which allows individual broadcasters considerable discretion in selecting the manner of coverage, the appropriate spokesmen, and the techniques of production and presentation.

43. Frequently, the question of the reasonableness of the opportunity provided for contrasting viewpoints comes down to weighing the time allocated to each side. Aside from the field of political broadcasting, the licensee is not required to provide equal time for the various opposing points of view. Indeed, we have long felt that the basic goal of creating an informed citizenry would be frustrated if for every controversial item or presentation on a newscast or other broadcast the licensee had to offer equal time to the other side. Our reasons for granting the licensee broad discretion with respect to the amount or nature of time to be afforded can be summarized as follows:

In our judgment, based on decades of experience in this field, this is the only sound way to proceed as a general policy. A contrary approach of equal opportunities, applying to controversial issues generally the specific equal opportunities requirements for political candidates would in practice not be workable. It would inhibit, rather than promote, the discussion and presentation of controversial issues in the various broadcast program formats (e.g., newscasts, interviews, documentaries). For it is just not practicable to require equality with respect to the large number of issues dealt with in a great variety of programs on a daily and continuing basis. Further, it would involve this Commission much too deeply in broadcast journalism; we would indeed become virtually a part of the broadcasting "fourth estate" overseeing thousands of complaints that some issue had not been given "equal treatment." We do not believe that the profound national commitment to the principle that debate on public issues should be "uninhibited, robust, wide-open" (New York Times v. Sullivan, 376 U.S. 254, 270) would be promoted by a general policy of requiring equal treatment on all such issues, with governmental intervention to insure such mathematical equality. Committee For the Fair Broadcasting of Controversial Issues, 25 FCC 2d 283, 292 (1970).

Similarly, we do not believe that it would be appropriate for this Commission to establish any other mathematical ratio, such as 3 to 1 or 5 to 1, to be applied in all cases. We believe that such an approach is much too mechanical in nature and that in many cases our pre-conceived ratios would prove to be far from reasonable. In the case of a 10-second personal attack, for example, fairness may dictate that more time be afforded to answer the attack than was given the attack itself. Moreover, were we to adopt a ratio for fairness programming, the "floor" thereby established might well become the "ceiling" for the treatment of issues by many stations, and such a ratio might also lead to preoccupation with a mathematical formula to the detriment of the substance of the debate. It appears to us, therefore, that no precise mathematical formula would be appropriate for all cases, and the licensee must exercise good faith and reasonableness in considering the particular facts and circumstances of each case.

44. While the road to predicting Commission decisions in this area is not fully and completely marked, there are, nevertheless, a number of signposts which should be recognizable to all concerned parties. We have made it clear, for example, that "it is patently unreasonable for a licensee consistently to present one side in prime time and to relegate the contrasting viewpoint to periods outside prime time. Similarly, there can be an imbalance from the sheer weight on one side as against the other." Committee for the Fair Broadcasting of Controversial Issues, 25 FCC 2d at 293. This imbalance might be a reflection of the total amount of time afforded to each side, of the frequency with which each side is presented, of the size of the listening audience during the various broadcasts, or of a combination of factors. It is incumbent upon a complainant to bring to the Commission's attention any specific factors which he believes point to a finding that fairness has not been achieved. From the standpoint of the licensee, however, the most important protection against arbitrary Commission rulings is the fact that we will not substitute our judgment for his. Our rulings are not based on a determination of whether we believe that the licensee has acted wisely or whether we would have proceeded as he did. Rather, we limit our inquiry to a determination of whether, in the light of all of the facts and circumstances presented, it is apparent that the licensee has acted in an arbitrary or unreasonable fashion.

45. The danger of an unwise Commission decision in this area is considerably reduced by the fact that no sanction is imposed on the broadcaster for isolated fairness violations during the course of the license term. The licensee is simply asked to make an additional provision for the opposing point of view, and this is certainly not too much to ask of a licensee who has been found to be negligent in meeting his fairness obligations. Indeed, it is to the benefit of both the licensee and his listening audience if broadcasters are informed of their fairness duties and given an opportunity to fulfill them on a timely basis.

D. *The complaint procedure.* 46. It has sometimes been suggested that fairness complaints should not be considered at the time they are presented to the Commission, but with few exceptions should simply be placed in the station's license file to be reviewed in connection with its renewal application. This review would focus on the station's overall performance for the license period, and not on the specific facts of individual fairness violations. Some have argued that this approach would have two major advantages over present procedures. First, it might considerably reduce the Commission's administrative workload, since complaints would not be given any consideration unless there were a number of complaints against a single station which indicated a serious pattern of violations. Secondly, it has been suggested that by avoiding a detailed review of individual complaints the Commission would be able to insure that it did not become too deeply involved in the day-to-day operations of broadcast journalism.

47. After giving careful consideration to this proposal, we believe that our present procedure of reviewing complaints on an ongoing basis is preferable.[17] First, we do not believe it would be possible to make an "overall" assessment of licensee performance at renewal time without considering the specifics of individual complaints. It simply would not be possible to look at the bare complaints on file and make any knowledgeable assessment of licensee performance. Secondly, we view consideration of fairness compliance only at renewal time as an inadequate safeguard of the public's paramount right to be informed and believe that we should continue our ongoing effort (through the complaint process) to advance the public's interests in receiving timely information on public issues. This, we believe, will provide an opportunity to remedy violations before a

[17] Some have argued that "[t]he practical effect of this approach [review at time of renewal] to fairness is that the doctrine would have been abandoned." Barrow, The Equal Opportunities and Fairness Doctrine in Broadcasting, 37 Cin. L. Rev. 447, 493 (1968).

flagrant pattern of abuse develops. In addition to the benefits which flow to the listening public, this procedure aids the broadcaster by helping to head off practices which could if left uncorrected place his license in jeopardy. For this reason, we believe that most licensees welcome the opportunity to receive guidance on specific fairness matters on a timely basis.

48. Finally, a review only at renewal time would remove a major incentive for interested citizens to file fairness complaints—that is, the chance to have an opposing view aired over the station before the issue has become stale with the passage of time. At present citizen complaints provide the principal means of insuring compliance with the fairness doctrine. If we were to remove the possibility that these complaints might result in broadcast time for a neglected point of view, we might well have to rely on government monitoring to carry out our investigative role. Such monitoring, of course, would represent an unfortunate step in the direction of deeper government involvement in the day-to-day operation of broadcast journalism.

49. There appears to be a misunderstanding on the part of some persons as to the manner in which the Commission administers the complaint process. On the one hand, some complainants have asserted that the Commission's procedures impose too great a burden on the complainant; on the other, some licensees and networks have claimed that our application of the doctrine may impose such a heavy burden on them as to discourage presentation of subjects which may be found to involve controversial issues of public importance.

50. We believe a brief explanation and restatement of our procedures is in order. As we stated in our "Fairness Doctrine Primer," 40 FCC 598 (1964):

> Where complaint is made to the Commission, the Commission expects a complainant to submit specific information indicating when the particular station broadcast (or failed to broadcast) time devoted to the particular issue of a controversial nature discussed over the air, (2) the date and time when the program was carried, (3) the basis for the claim that the station has presented only one side of the question, and (4) whether the station had afforded, or has refused to afford, an opportunity for the presentation of contrasting viewpoints in a time

51. The Commission requires that a complainant state that "basis for the claim that the station has presented only one side of the question" because the fairness doctrine does not require that each program present contrasting views on an issue, only that a licensee in its overall programming afford reasonable opportunity for presentation of contrasting views. Thus, when a complainant states that he heard or viewed a program which presented only one side of an issue, he has not, on the basis of this statement alone, made a fairness complaint upon which the Commission can act. Rather, we expect the complainant to state his reasons for concluding that in its other programming the station has not presented contrasting views on the issue.

52. This does not require, as some appear to believe, that the complainant constantly monitor the station. Although some groups having a particular interest in a controversial issue and a licensee's presentation of it have monitored such a station for periods of time and thus been able to offer conclusive evidence that contrasting views were not presented, the Commission realizes that such a requirement for every individual complainant would be an unduly burdensome one. While the complainant must state the basis for this claim that the station has not presented contrasting views, that claim might be based on an assertion that the complainant is a regular listener or viewer; that is, a person who consistently or as a matter of routine listens to the news, public affairs and other non-entertainment programs carried by the station involved. This does not require that the complainant listen to or view the station 24 hours a day, seven days a week. One example of a "regular" television viewer would be a person who routinely (but not necessarily every day) watches the evening news and a significant portion of the public affairs programs of a given station. In the case of radio, a regular listener would include a person who, as a matter of routine, listens to major representative segments of the station's news and public affairs programming. Also, the assumption that a station has failed to present an opposing viewpoint would be strengthened if several regular viewers or listeners join together in a statement that they have not heard a presentation of that viewpoint. Complainants should specify the nature and extent of their viewing or listening habits, and should indicate the period of time during which they have been regular members of the station's audience. We do not believe this requirement to be unduly burdensome, as contrasted to the heavy burden we would place on all stations if we required them to provide evidence of compliance with the fairness doctrine based on complaints which assert merely that one program has presented only one side of an issue.

53. The fact that regular viewers or listeners have not been exposed to an opposing viewpoint is obviously not conclusive evidence that the viewpoint has not been presented, but it does indicate that there is a reasonable basis for the viewer's conclusion that such is the case. See Alan C. Phelps, 21 FCC 2d 12 (1969). Accordingly, we believe that it is a sufficient basis for a Commission inquiry to the station.

54. In responding to such an inquiry, a station is not required to research everything it has broadcast on the subject over a considerable period of time, unless it believes it is necessary to do so in order to establish its compliance with the fairness doctrine with respect to the issue involved. The complaint must specify the date and time of the particular program or programs which presented one side of the issue. If the complaint specifies only a single program, it would be sufficient for the licensee to furnish evidence of having broadcast another program which did afford a reasonable opportunity for contrasting views. Thus, the licensee is not expected to make a showing as to his overall programming, but merely that he has provided contrasting viewpoints an opportunity to be heard which is reasonable when considered in relation to the specific programs complained of." In this regard, it should be kept in mind that the fairness doctrine does not require exact equality in the time provided for contrasting points of view, but only that a reasonable opportunity be afforded for their presentation.

55. After a complaint has been filed, some licensees have found it to be something of a burden to go back through their files and to question their news staff so as to construct a record of the programming they have carried on a given issue. For this reason, some licensees now keep a record of their public issue programming throughout the period of the license term. It should be a relatively simple matter for these stations to respond to a citizen complaint or to a Commission inquiry. Also, the keeping of such records should make it much easier for a licensee to satisfy himself that his station has achieved fairness on the various issues presented. While this Commission does not require the maintenance of a fairness log or diary, we expect that licensees will be cognizant of the programming which has been presented on their stations for it is difficult to see how a broadcaster who is ignorant of such matters could possibly be making a conscious and positive effort to meet his fairness obligations.

56. The fifth requirement set forth in the above excerpt from our Public Notice—relating to "whether the station has afforded or has plans to afford, an opportunity for the presentation of contrasting viewpoints"—also may require explanation. We have found in many cases that if the complainant first addresses his complaint to the station, the licensee is able to provide an explanation satisfactory to the complainant of what steps it has taken to broadcast contrasting views, or what steps it plans to take to achieve this end. It is for this reason that we ask complainants first to go to the station or network involved. If the

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Because of the [illegible] have taken place since 1964 we plan to issue a new fairness [illegible]

The procedure which we are [illegible] here is the one which we now require in the ordinary case. It is possible, however, that in some circumstances the Commission may find it necessary to inquire into a station's total programming effort on an issue or at least a significant portion of that programming. Also, in cases where a message on one side of an issue has obviously been repeated many times in an editorial advertising campaign, the complainant could not be expected to provide a list showing the time and date of each presentation. This information would have to be provided by the licensee in his response to a Commission inquiry.

station or network fails to answer the complaint at all, or to provide what complainant considers to be a satisfactory answer, then the complainant should address the complaint to the Commission, enclosing a copy of the complaint he sent to the station and a copy of its reply—or, if no response has been received after a reasonable period of time, so stating.

57. One further matter with respect to complaints and licensee responses thereto deserves some discussion. It would be a great assistance to the Commission, and would greatly expedite the handling of complaints, if all parties would be as specific as possible in defining the controversial public issue involved in the programs complained of. Also, it would save everyone concerned a great deal of time if, in listing those presentations on each side of an issue, parties would include only those programs which are truly germane to that specific issue.[29]

E. *Fairness and accurate news reporting.* 58. In our 1949 Report on Editorializing, we alluded to a licensee's obligation to present the news in an accurate manner:

> It must be recognized, however, that the licensee's opportunity to express his own views * * * does not justify or empower any licensee to exercise his authority over the selection of program material to distort or suppress the basic factual information upon which any truly fair and free discussion of public issues must necessarily depend * * *. A licensee would be abusing his position as public trustee of these important means of mass communication were he to withhold from expression over his facilities relevant news or facts concerning a controversy or to slant or distort the presentation of such news. No discussion of the issues involved in any controversy can be fair or in the public interest where such discussion must take place in a climate of false or misleading information concerning the basic facts of the controversy. 13 FCC at 1254–55.

It is a matter of critical importance to the public that the basic facts or elements of a controversy should not be deliberately suppressed or misstated by a licensee. But, we must recognize that such distortions are "so continually done in perfect good faith, by persons who are not considered * * * ignorant or incompetent, that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentations as morally culpable * * *." J. S. Mill, "On Liberty" 31 (People's ed. 1921). Accordingly, we do not believe that it would be either useful or appropriate for us to investigate charges of news misrepresentations in the absence of substantial extrinsic evidence or documents that on their face reflect deliberate distortion. See "The Selling of the Pentagon," 30 FCC 2d 150 (1971).

III. *Application of the fairness doctrine to the broadcast of paid announcements.* 59. We turn now to the fairness doctrine problems which stem from the broadcast of paid announcements. For the purpose of this discussion, we will consider three general categories of such announcements: (1) Advertisements which may properly be classified as "editorial" in nature; (2) advertisements for commercial products or services; and (3) advertisements included in the Federal Trade Commission's so-called "counter-commercial" proposal.

The role of advertising in broadcasting and its relationship to the licensee's responsibility to broadcast in the public interest was considered by the Federal Radio Commission in 1929. 3 F.R.C. Ann. Rep. 32 (1929). It seems to us that the Commission at that time placed advertising in its proper context and perspective. It first noted that broadcasters are licensed to serve the public and not the private or selfish interests of individuals or groups. The Commission then stated that "[t]he only exception that can be made to this rule has to do with advertising; the exception, however, is only apparent because advertising furnishes the economic support for the service and thus makes it possible." Id. "The Commission * * * must recognize that, without advertising, broadcasting would not exist, and must confine itself to limiting this advertising in amount and in character so as to preserve the largest possible amount of service for the public." Id. at 35. Accordingly, we believe that any consideration of the applicability of the fairness doctrine to broadcast advertising must proceed with caution so as to ensure that the policies and standards which are formulated in this area will serve the genuine purposes of the doctrine without undermining the economic base of the system.

A. *Editorial advertising.* 60. Some "commericials" actually consist of direct and substantial commentary on important public issues. For the purpose of the fairness doctrine, these announcements should be recognized for what they are—editorials paid for by the sponsor. We can see no reason why the fairness doctrine should not apply to these "editorial advertisements" in the same manner that it applies to the commentary of a station announcer. At present, editorial advertising represents only a small percentage of total commercial time, and we cannot believe that an application of fairness here would have any serious effect on station revenues.

61. An example of an overt editorial advertisement would be a thirty or sixty second announcement prepared and sponsored by an organization opposed to abortion which urges a constitutional amendment to override a decision of the Supreme Court legalizing abortion under certain circumstances. While the brevity of such announcements might make it difficult to develop the issue in great detail, they could, nevertheless, make a meaningful contribution to the public debate, and we believe that the fairness doctrine should be fully applicable to them.

62. Editorial advertisements may be difficult to identify if they are sponsored by groups which are not normally considered to be engaged in debate on controversial issues. This problem is most likely to arise in the context of promotional or institutional advertising; that is, advertising designed to present a favorable public image of a particular corporation or industry rather than to sell a product. Such advertising is, of course, a legitimate commercial practice and ordinarily does not involve debate on public issue. See, e.g., "Anthony R. Martin-Trigona," 19 FCC 2d 620 (1969). In some cases, however, the advertiser may seek to play an obvious and meaningful role in public debate. In such instances, the fairness doctrine—including the obligation to provide free time in the circumstances described in the "Cullman" decision—applies.

63. In the past, we have wrestled with the application of the fairness doctrine to institutional advertisements which appeared to have discussed public issues, but which did not explicitly address the ultimate matter in controversy. An example of this problem may be found in the so-called "ESSO" case. "National Broadcasting Co.," 30 FCC 2d 643 (1971). Here, the Commission found that certain commercials for Standard Oil Company constituted a discussion of one side of a controversial issue involving construction of the Alaskan pipeline. These advertisements did not explicitly mention that pipeline, but they did present what could be termed arguments in support of its construction. Specifically, we found that the advertisements argued that the nation's urgent need for oil necessitated a rapid development of reserves on Alaska's North Slope. Id. at 643. The commercials also referred to the ability of an ESSO affiliate to build a pipeline in the far north, and yet "preserve the ecology." Ibid. As we noted on rehearing, the problem involved here "is indeed a difficult one * * * because the pipeline controversy is not specifically referred to * * *." Wilderness Society, 31 FCC 2d 729, 733, reconsideration denied 32 FCC 2d 714 (1971).

64. In the face of such difficulties, what guidance can the Commission give to its licensees and to the public? Professor Louis Jaffe has offered the following suggestion:

> [I]t is not easy to formulate a fully satisfactory rule for applying the fairness doctrine to advertising. Its application is most obvious where the advertisement is explicitly controversial. But the advertiser may avoid the explicit precisely to foreclose a claim of rebuttal, or because he believes the subliminal is more effective. It should suffice to trigger the doctrine that by implication he intends to speak to a current, publicly-acknowledged controversy. Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv. L. Rev. 768, 777–78 (1972).

We believe that this suggestion comes close to the mark, but what we are really

[29] One station, in responding to a complaint concerning the issue of gasoline and air pollution, provided the Commission with a list of programs which included the following: "The Great Red Apes," "Turtle of the Sulu Sea," "The Night of the Squid," and "Return of the Sea Elephants." While such programming obviously would provide information on a part of the world's environment, it may not be germane to any specific issue concerning gasoline and air pollution.

concerned with is an obvious participation in public debate and not a subjective judgment as to the advertiser's actual intentions. Accordingly, we expect our licensees to do nothing more than to make a reasonable, common sense judgment as to whether the "advertisement" presents a meaningful statement which obviously addresses, and advocates a point of view on, a controversial issue of public importance. This determination cannot be made in a vacuum; in addition to his review of the text of the ad, the licensee must take into account his general knowledge of the issues and arguments in the ongoing public debate. Indeed, this relationship of the ad to the debate being carried on in the community is critical. If the ad bears only a tenuous relationship to that debate, or one drawn by unnecessary inference, the drawn by unnecessary inference, the fairness doctrine would clearly not be applicable.

65. The situation would be different, however, if that relationship could be shown to be both substantial and obvious. For example, if the arguments and views expressed in the ad closely parallel the major arguments advanced by partisans on one side or the other of a public debate, it might be reasonable to conclude that one side of the issue involved had been presented thereby raising fairness doctrine obligations. See, e.g., Media Access Project (Georgia Power), 44 FCC 2d 755, 761 (1973). We fully appreciate that, in many cases, this judgment may prove to be a difficult one and individual licensees may well reach differing conclusions concerning the same advertisement. We will, of course, review these judgments only to determine their reasonableness and good faith under the particular facts and circumstances presented and will not rule against the licensee unless the facts are so clear that the only reasonable conclusion would be to view the "advertisement" as a presentation on one side of a specific public issue.

B. *Advertisements for commercial products or services.* 66. Many advertisements which do not look or sound like editorials are, nevertheless, the subject of fairness complaints because the business, product, or service advertised is itself controversial. This may be true even though the advertisement does not mention any aspect of a controversy. Commercial announcements of precisely this type led to the current debate over fairness and advertising. This debate began in 1967 with our decision to extend the fairness doctrine to advertisements for cigarettes. WCBS–TV, 8 FCC 2d 381, stay and reconsideration denied 9 FCC 2d 921 (1967). These advertisements, like many others, addressed themselves solely to the desirability of the product. They tended to portray "the use of the particular cigarette as attractive and enjoyable * * *," but avoided any mention of the then raging smoking-health controversy. 8 FCC 2d at 382. At the time, broadcasters argued that, in the absence of an affirmative discussion of the health issue, the commercials could not realistically be viewed as part of a public debate, 9 FCC 2d at 938. We rejected this argument and insisted that the issue should be defined in terms of the desirability of smoking. *Id.* With the issue defined in this fashion, it was a simple mechanical procedure to "trigger" the fairness doctrine and treat all cigarette advertisements—regardless of what they actually said—as being presentations on one side of a controversial issue. It seemed to be clear enough that all cigarette advertisements suggested that the use of the product was desirable.

67. In retrospect, we believe that this mechanical approach to the fairness doctrine represented a serious departure from the doctrine's central purpose which, of course, is to facilitate "the development of an informed public opinion." "Report on Editorializing," 13 FCC 1246, 1249 (1949) (emphasis supplied). We believe that standard product commercials, such as the old cigarette ads, make no meaningful contribution toward informing the public on any side of any issue. Indeed, as the D.C. Circuit Court of Appeals succinctly stated:

> Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect. As a rule, it does not affect the political process, does not contribute to the exchange of ideas, does not provide information on matters of public importance, and is not, except perhaps for the ad-men, a form of individual self-expression * * * Accordingly, even if * * * [such] commercials are protected speech, we think they are at best a negligible part of any exposition of ideas, and are of * * * slight social value as a step to truth * * * Banzhaf v. FCC, 405 F. 2d 1082, 1101–02 (D.C. Cir. 1968), quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

In this light, it seems to us to make little practical sense to view advertisements such as these as presenting a meaningful discussion of a controversial issue of public importance.

68. In our view, an application of the fairness doctrine to normal product commercials would, at best, provide the public with only one side of a public controversy. In the cigarette case, for example, the ads run by the industry did not provide the listening public with any information or arguments relevant to the underlying issue of smoking and health. At the time of our ruling, Commissioner Loevinger suggested that we were not really encouraging a balanced debate but, rather, were simply imposing our view that discouraging smoking was in the public interest. 9 FCC 2d at 953.[21] While such an approach may have represented good policy from the standpoint of the public health, the precedent is not at all in keeping with the basic purposes of the fairness doctrine.[22]

69. This precedent would not have been particularly troublesome if it had been limited to cigarette advertising as the Commission originally intended.[23] In 1971, however, the D.C. Circuit ruled that the cigarette precedent could not logically be limited to cigarette advertising alone. "Friends of the Earth v. FCC," 449 F. 2d 1164 (D.C. Cir. 1971). In this decision, it was suggested that high-powered cars pollute the atmos-

[21] Following the Congressional ban on cigarette advertising, the Commission was criticized even more strongly for taking sides on this issue. At that time, we ruled that stations were free to broadcast anti-smoking messages without incurring any obligation to carry arguments in favor of smoking. This holding was based on a Commission determination that the issue was no longer controversial. Cigarette Advertising and Anti-Smoking Presentation, 27 FCC 2d 453 (1970), aff'd sub nom. Larus & Brother Co. v. FCC, 477 F. 2d 876 (4th Cir. 1971).

[22] In the conclusion to our second opinion in the cigarette case, we tried to make it clear that our holding was based more on public health considerations than on "the specifics of the Fairness Doctrine." WCBS–TV, 9 FCC 2d 921, 949 (1967). We recognized that, in view of the overwhelming evidence of danger to the public health, the question presented would ordinarily be "how the carriage of such commercials is consistent with the obligation to operate in the public interest." Id. We felt, however, that the question of removing these commercials from the air was one Congress had reserved to itself and that the only remedy we were free to implement was one along the lines suggested by the fairness doctrine. The fairness doctrine, therefore, served "chiefly to put flesh on these policy bones by providing a familiar mold to define the general contours of the obligation imposed." Banzhaf v. FCC, 405 F. 2d at 1093. Subsequent to our action in the cigarette case, the Congress developed a more complete remedy of its own by banning the broadcast of cigarette ads entirely in the Public Health Cigarette Smoking Act of 1969. See generally Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), aff'd mem sub nom. Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972). If in the future we are confronted with a case similar to that presented by the cigarette controversy, it may be more appropriate to refer the matter to Congress for resolution. For Congress is in a far better position than this Commission to develop expert information on whether particular broadcast advertising is dangerous to health or otherwise detrimental to the public interest. Furthermore, it is questionable whether this Commission has a mandate so broad as to permit it "to scan the airwaves for offensive material with no more discriminating a lens than the 'public interest' or even the 'public health.'" Banzhaf v. FCC, 405 F. 2d at 1090.

[23] At the time, cigarettes were thought to be a unique product because their "normal use has been found by congressional and other Governmental action to pose * * * a serious threat to general public health * * *." 9 FCC 2d at 943. In a concurring opinion, Commissioner Johnson expressed the view that "[b]y drawing the line at cigarette advertising we have framed a distinction fully as sound and durable as those in thousands of other rules laid down by courts every day since the common law system began." Id. at 958. In affirming our ruling, the D.C. Circuit agreed that cigarettes were, in fact, "unique." Banzhaf v. FCC, 405 F. 2d 1082, 1097 n. 63 (D.C. Cir. 1968).

phere more than low-powered cars.[24] It was then determined that the fairness doctrine was triggered by the advertisements there involved because they extolled the virtues of high-powered cars and thus glorified product attributes aggravating an existing health hazard, namely air pollution. The commercials, of course, made no attempt at all to discuss the product in the context of the air pollution controversy. If these advertisements presented one point of view on the issue, then, by the same reasoning, the "contrasting" viewpoint must have been similarly presented in ads for low-powered cars. The problem with this kind of logic is that it engages both broadcasters and the Commission in the trivial task of "balancing" two sets of commercials which contribute nothing to public understanding of the underlying issue of how to deal with the problem of air pollution.[25]

70. We do not believe that the underlying purposes of the fairness doctrine would be well served by permitting the cigarette case to stand as a fairness doctrine precedent. In the absence of some meaningful or substantive discussion, such as that found in the "editorial advertisements" referred to above, we do not believe that the usual product commercial can realistically be said to inform the public on any side of a controversial issue of public importance. It would be a great mistake to consider standard advertisements, such as those involved in the "Banzhaf" and "Friends of the Earth," as though they made a meaningful contribution to public debate. It is a mistake, furthermore, which tends only to divert the attention of broadcasters from their public trustee responsibilities in aiding the development of an informed public opinion. Accordingly, in the future, we will apply the fairness doctrine only to those "commercials" which are devoted in an obvious and meaningful way to the discussion of public issues.

C. *The Federal Trade Commission proposal.* 71. The Federal Trade Commission has filed a statement in this inquiry which proposes the creation of a right of access to respond to four categories of commercial announcements. Very generally, these categories are as follows: (a) Those advertisements that explicitly raise controversial issues; (b) those that raise such issues implicitly; (c) those that make claims based on scientific premises that are in dispute; and (d) those that are silent about negative aspects of the advertised products.

72. We have already discussed the first two categories and the applicability of the fairness doctrine with respect thereto. One of our major difficulties with the FTC's categories is that they seem to include virtually all existing advertising. As one commentator has stated, "it is hard to imagine a product commercial so pure that it would not be viewed as implicitly raising some controversial issue or resting upon some disputed scientific premise or remaining silent about negative aspects of the product." Putz, "Fairness and Commercial Advertising: A Review and a Proposal," 6 U.S.F.L. Rev. 215, 246 (1972). We believe that the adoption of the FTC proposal—wholly apart from a predictable adverse economic effect on broadcasting—might seriously divert the attention and resources of broadcasters from the traditional purposes of the fairness doctrine. We are therefore not persuaded that the adoption of these proposals would further "the larger and more effective use of radio in the public interest * * *" 47 U.S.C. Section 303(g), or contribute in any way to the promotion of genuine debate on public issues.

73. We do not believe that our policy will leave the public uninformed on important matters of interest to consumers. Certainly, we expect that consumer issues will rank high on the agenda of many, if not most, broadcasters since their importance to the public is self-evident. But our point is that the decision to cover these and other matters of similar public concern appropriately lies with individual licensees in the fulfillment of their public trustee responsibilities, and should not grow out of a tortured or distorted application of fairness doctrine principles to announcements in which public issues are not discussed.

74. A matter which relates directly to the FTC proposal was considered in the so-called "Chevron" case. Alan F. Neckritz, 29 FCC 2d 807 (1971), reconsideration denied 37 FCC 2d 528 (1972). This case involved a claim made by Chevron that its F-310 additive would reduce exhaust emissions and contribute to cleaner air. Chevron did not claim that its product would solve the air pollution problem caused by automobiles, but did extol the product's virtues in reducing pollution. Complainants argued that the claim was controversial within the meaning of the fairness doctrine. They supported this argument by pointing to a pending FTC complaint which alleged that the claims made on behalf of F-310 were false and misleading. 29 FCC 2d at 816. While the F-310 claim obviously did relate to a matter of public concern, we do not believe that the ads engaged in an obvious and meaningful discussion of a controversial issue of public importance. As we stated in "Chevron,"

> making a claim for a product is not the same thing as arguing a position on a controversial issue of public importance. That the claim is alleged to be untrue or partially deceptive does not change its nature * * *. It would ill suit the purposes of the fairness doctrine, designed to illumine significant controversial issues, to apply it to claims of a product's efficacy or social utility. The merits of any one gasoline, weight reducer, breakfast cereal or headache remedy—to name but a few examples that come readily to mind—do not rise to the level of a significant public issue * * *. We think this conclusion is required not only as a matter of reason, but also of practical necessity if fairness is to work for the public and not to its detriment. Alan F. Neckritz, 29 FCC 2d at 812.

75. We do not believe that the fairness doctrine provides an appropriate vehicle for the correction of false and misleading advertising. The fairness doctrine is only one aspect of the public interest. A Congressionally-mandated remedy for deceptive advertising already exists in the form of various FTC sanctions.[26] If an advertisement is found to be false or misleading, we believe that the proper course is to ban it altogether rather than to make its claims a subject of broadcast debate. We believe that the approach to advertising outlined here will do much to reduce the confusion which has existed in this area. Under the general fairness doctrine, broadcasters—as trustees for their communities—are required to make a positive effort to implement a meaningful discussion of major public issues and in practical effect consumer issues will receive a significant amount of coverage. But at the same time, we do not believe that it is in the public interest to stretch the fairness doctrine in an artificial way by applying it to commercials which play no meaningful or significant role in the debate of controversial issues.

76. In the separate but related area of deceptive advertising, we believe that the public interest can be best served through the existing, Congressionally-mandated scheme of regulation, and by a conscientious effort on the part of broadcasters to meet their obligations in this area.[27]

IV. *Access generally to the broadcast media for the discussion of public issues.* 77. Various parties to this proceeding have argued that, quite aside from the traditional fairness doctrine, there should be a system of mandated access, either free or paid, for persons or groups wishing to express a viewpoint on a controversial public issue. In the "BEM"

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[24] The case also considered a comparison of high-test and "regular" gasoline.

[25] The Court has further suggested that the cigarette precedent might logically have to be extended out of the health area entirely to cover some labor-management disputes. Retail Store Employees Union v. FCC, 436 F. 2d 248 (D.C. Cir. 1970). The Court, however, questioned whether such an application would truly serve the underlying purposes of the fairness doctrine:

> "Stripped to its essentials, this dispute is one facet of the economic warfare that is a recognized part of labor management relations * * *. Part of the Union's campaign was publicity for its boycott; part of management's arsenal was advertising to persuade the public to patronize its stores. If viewed in this light, it could well be argued that the traditional purposes of the fairness doctrine are not substantially served by presentation of advertisements intended to less inform than serve merely as a weapon in a labor-management dispute." Id. at 259.

[26] The problem may be further alleviated by the FTC's newly developed ad substantiation program. See 36 FR 12058 (1971); and generally, Note, The FTC Ad Substantiation Program, 61 Geo. L.J. 1427 (1973).

[27] See Licensee Responsibility with Respect to the Broadcast of False, Misleading or Deceptive Advertising, 32 FCC 2d 396 (1971); Consumer Association of District of Columbia, 32 FCC 2d 400 (1971).

case,[28] the Supreme Court made it clear that such access is not a matter of either constitutional or statutory right. The Court noted, however, that Congress has left the Commission with "the flexibility to experiment with new ideas as changing conditions require." Id. at 122. It was further stated that "at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable." Id. at 131.

78. Our studies during the course of this inquiry have not disclosed any scheme of government-dictated access which we consider "both practicable and desirable." We believe, to the contrary, that the public's interest in free expression through broadcasting will best be served and promoted through continued reliance on the fairness doctrine which leaves questions of access and the specific handling of public issues to the licensee's journalistic discretion. This system is far from perfect. However, in our judgment, it does represent the most appropriate accommodation of the various First Amendment interests involved, and provides for maximum public enlightenment on issues of significance with a minimum of governmental intrusion into the journalistic process.

79. In our opinion, this Commission would not be justified in dictating the establishment of a system of access to particular spokesmen on either a free or paid basis. If the access were free, the government would inevitably be drawn into the role of deciding who should be allowed on the air and when.[29] This governmental involvement in the day-to-day processes of broadcast journalism would, we believe, be antithetical to this country's tradition of uninhibited dissemination of ideas. With regard to the suggestion that we establish a system of paid access, we believe that "the public interest in providing access to the marketplace of 'ideas and experiences' would scarcely be served by a system so heavily weighted in favor of the financially affluent, or those with access to wealth," BEM, 412 U.S. at 123, or wherein "money alone determines what issues are to be aired, and in what format," "Business 'Executives' Move for Vietnam Peace v FCC," 450 F. 2d 642, 666 (D.C. Cir. 1971) (McGowan, J., dissenting). This problem would in no way be alleviated by the application of the fairness doctrine, including the Cullman corollary, to editorial advertising, since the agenda for public debate would be set solely by those financially able to take advantage of the right to purchase time in the first instance. Furthermore, there would be elements of unfairness in applying the Cullman principle in this situation, for it would require the licensee to correct an imbalance—at its own expense—which it had not created. On the other hand, if Cullman were suspended in the case of editorial advertisements, the public would be left in many if not most instances with one-sided presentations of those issues which the financially able chose to discuss.

80. We have given serious thought to the suggestion that broadcasters be required to maintain a policy of examining and considering—but not necessarily accepting—editorial advertisements tendered for broadcast. While this suggestion has some surface appeal, we believe that such a requirement would, in our judgment, inevitably draw this Commission into deciding a broadcaster's good faith in accepting or rejecting proffered material and into adjudicating competing claims to buy limited time on the basis of criteria that would necessarily favor one person's speech over another's. This is precisely the sort of governmental intrusion which we have sought to avoid in developing and administering the fairness doctrine, and why we believe that our present policy of leaving such decisions initially to the editorial discretion of the licensee, though imperfect, must be maintained. As Chief Justice Burger stated for the Court in BEM:

> For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. 412 U.S. at 124–125.

81. While we have rejected the suggestion that the Commission should establish a system of mandated access (either free or paid), we certainly do not mean to suggest any disapproval of efforts by broadcasters to provide for access to their stations. Indeed, the fairness doctrine itself insures that many citizens will be afforded a type of access, for the licensee

> is required to "present representative community views and voices on controversial issues which are of importance to [its] listeners," and it is prohibited from "excluding partisan voices and always itself presenting views in a bland, inoffensive manner." 25 FCC 2d at 222. A broadcaster neglects that obligation only at the risk of losing his license. BEM, supra at 131.

Under this system, many representative community spokesmen do express their views in newscasts, interviews, call-in programs, editorial replies, and through various other formats. Thus, while no particular individual has a guaranteed right of access to the broadcast microphone for his own self-expression, the public as a whole does retain its "paramount" right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences * * *." "Red Lion Broadcasting Co. v. FCC," 395 U.S. at 390 (emphasis supplied). In a real sense, therefore, there is a "right of access" in broadcasting, that right being guaranteed the listening and viewing public. However, in order to secure this right to the people, and to avoid unwarranted governmental supervision, Congress has delegated the primary responsibility for the selection of particular spokesmen and specific program material to private licensees who are required to serve as trustees for the public. As the Supreme Court stated in its BEM decision:

> This policy of concentrating the allocation of journalistic priorities in the licensee gives the public some assurance that the broadcaster will be answerable if he fails to meet its legitimate needs. No such accountability attaches to the private individual, whose only qualifications for using the broadcast facility may be abundant funds and a point of view. To agree that debate on public issues should be "robust and wide-open" does not mean that we should exchange "public trustee" broadcasting, with all its limitations, for a system of self-appointed editorial commentators. 412 U.S. at 125.

82. We do not mean to suggest that broadcasters are in any way required to maintain "tight editorial control" over the spokesmen who appear on their stations. Much to the contrary, we wish to give every encouragement to broadcasters to experiment with new ways of providing for wide-open debate of public issues. Our point here is that while genuine partisan debate should be encouraged, we cannot, at this time, justify or support its particularized imposition by Commission fiat.

83. Although we have here reaffirmed the present system of licensee responsibility and discretion and rejected requests for the creation of a direct "right" of access, we wish to emphasize that this system is predicated entirely upon the assumption that licensees will in fact make a reasonable, good faith effort to meet their public obligations. Licensee discretion is but a means to a greater end, and not an end in and of itself, and only insofar as it is exercised in genuine conformity with the paramount right of the listening and viewing public to be informed of the competing viewpoints on public issues can such discretion be considered an adequate means of maintaining and enhancing First Amendment interests in the broadcast medium. For the present, we remain convinced that the general rubric of the fairness doctrine, with its emphasis on licensee responsibility and discretion, provides the most desirable and practical means to that end. However, should future experience indicate that the doctrine is inadequate, either in its expectations or in its results, the Commission will have the opportunity—and the responsibility—for such further reassessment and action as would be mandated by the public interest and the First Amendment.

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[28] Columbia Broadcasting System, Inc. v Democratic National Committee, 412 U.S. 94 (1973).

[29] The only alternative to governmental involvement of this type would appear to be access on a first-come-first-served basis (or by lot or drawing). This system would, however, give no assurance that the most important issues would be discussed on a timely basis. Moreover, as the Supreme Court observed in BEM, "[t]he public interest would no longer be 'paramount' but rather subordinate to private whim especially since * * * a broadcaster would be largely precluded from rejecting editorial advertisements that dealt with matters trivial or insignificant or already fairly covered by the broadcaster." 412 U.S. at 124.

V. *Application of the fairness doctrine to political broadcasts—ballot propositions.* 84. The First Report on Part V. of the Fairness Doctrine Inquiry, 36 FCC 2d 40 (1972), dealt almost exclusively with appearances by the President and other public officials and with questions of the application of the Zapple doctrine[30] to such appearances. However, Part V of our Notice of Inquiry phrased the Zapple question in broader terms:

> We request comment on such relevant questions as the following: whether the quasi-equal opportunities approach should be restricted, expanded, or left alone, with a specific description of the feasibility and effect of any proposed revision on the underlying policies of the statute (see section 315 (a)). 30 FCC 2d 26, 34 (1971).

We now address ourselves specifically to application of the fairness doctrine to ballot propositions such as referenda, initiative or recall propositions, bond proposals and constitutional amendments.

85. Some comments filed in this inquiry have urged that Zapple rather than the Cullman doctrine be applied to ballot propositions on the ground that such situations are analogous to those covered by the "equal opportunities" requirement of Section 315 and the "political supporters" policy in Zapple. One party has suggested that not only should Cullman apply but that when one side buys spots, the licensee should be required to present opposing announcements in the same format (i.e., spots), and also to afford proponents of all sides opportunity for extended discussion of the issues. In this regard, the Commission also has received informal complaints that application of the Cullman doctrine to ballot propositions is unfair on the ground that it enables proponents of one side to spend their money on newspaper, billboard and direct mail advertising—where there is no Cullman requirement—and then to rely on Cullman to obtain free broadcast exposure of their views because the other side has spent its money in that medium.

86. After considering all comments, we find no substantial reason to alter our previous application of the fairness doctrine to ballot propositions. The Zapple doctrine, which some urge that we apply to this area, was adopted solely because it was analogous to the situation for which Congress itself had provided for "equal opportunities." As we explained in our First Report, Zapple was simply a common-sense application of the statutory scheme relating to appearances by political candidates, and we made clear the fact that we did not intend to extend its application further. While ballot propositions are similar to political candidacies in the sense that both are subject to popular vote, they are more closely analogous to ordinary public issues such as a bill pending in Congress or a state legislature. We are unable to perceive why such issues should be treated differently merely because they are subject to popular vote. In a case involving political candidacies, the natural opposing spokesmen are readily identifiable (i.e., the candidates themselves or their chosen representatives). In the case of a ballot proposition, however, there is generally no specific individual or group which is entitled to equal or comparable time. Furthermore, Congress has shown no intent to alter the Commission's traditional application of the fairness doctrine, including the Cullman corollary, to ballot propositions.

87. It has been argued that in the closing days of an election campaign, licensees may be overwhelmed by orders for large quantities of spot announcements favoring or opposing a proposition, and could be hard put to comply with the requirements of the fairness doctrine if only one side buys time. No licensee, however, is required to sell all the time that an advocate of a proposition (or even a legally qualified candidate) may wish to buy.[31] Indeed, some licensees in the past have discovered to their dismay that an employee has sold an inordinate amount of time in the closing days of campaign to one candidate—only to be confronted by a demand from the opposing candidate to buy an equal amount. It is the responsibility of the licensee in such situations to look ahead and commit himself to no more time for Candidate A than he is prepared to sell to Candidate B. Similarly, no licensee is required by statute or Commission rule or policy to yield his facilities to one side of a ballot proposition for a so-called "blitz." His clear obligation in fairness situations is, again, to plan his programming in advance so that he is prepared to afford reasonable opportunity for presentation of contrasting views on the issue, whether or not presented in paid time.[32]

88. Finally, it is argued that some ballot issue advocates take advantage of the Cullman principle by spending their available money on non-broadcast media, then waiting for the other side to buy time on the air, and finally demanding that their own views on the proposition be given free broadcast exposure, thus obtaining a broadcast "subsidy" for their views. To the extent that this could occur, the same criticism can be voiced against any application of Cullman. We believe, however, it is more important in a democracy that the public have an opportunity to receive contrasting views on controversial issues of public importance—that "robust, wide-open debate" take place—than that the Cullman principle be abandoned because of the possible practices of a few parties. Moreover, the fairness doctrine does not require equality of exposure of contrasting views, and those who rely solely on Cullman have no assurance of obtaining equality by such means.

89. Thus, we shall continue to deal with ballot proposition issues as we do with other controversial public issues. As in all fairness doctrine matters, the licensee is required to use his own discretion regarding issues to be presented, the amount of time to be devoted to each, parties to present contrasting views, and the formats to be employed. Upon receipt of a complaint, we shall as in the past review the licensee's actions only for reasonableness and good faith.

VI. *Conclusion.* 90. It is hoped that this inquiry and report will provide a needed restatement and clarification of the essential principles and policies of the fairness doctrine—both in terms of its theoretical foundations and its practical application. While we have here reaffirmed the basic validity and soundness of these principles and policies in ensuring that the medium of broadcasting will continue to function consistently with the ends and purposes of the First Amendment and the public interest, the Commission fully recognizes that their specific application in particular cases can involve questions determinations of considerable complexity and difficulty. For this reason, the administration of the doctrine must proceed, within the framework of general policies set forth herein, on a case-by-case basis according to the particular facts and circumstances presented. We do wish to emphasize that in the final analysis, the fairness doctrine can fulfill its purpose and function only

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[30] See Nicholas Zapple, 23 FCC 2d 707 (1970).

[31] However, stations are required to either give or sell reasonable amounts of time to candidates for federal elective office. 47 U.S.C. section 312(a)(7); See also Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 34 FCC 2d 510 (1972). While we do not dictate how much time should be devoted to the various issues being debated in a community, ballot propositions and other election matters will frequently receive considerable coverage on the basis of their importance to the community. In this regard, we recognize that

> "The existence of an issue on which the community is asked to vote must be presumed to be a controversial issue of public importance, absent unusual circumstances * * * It is precisely within the context of an election that the fairness doctrine can be best utilized to inform the public of the existence of and basis for contrasting viewpoints on an issue about which there must be a public resolution through the election process." King Broadcasting Co., 23 FCC 2d 41, 43 (1970) (staff ruling).

[32] In our public notice of March 16, 1972, 34 FCC 2d 510, setting forth our interpretation of the Federal Election Campaign Act of 1971, we stated that Congress, in amending section 312(a) of the Communication. Act to require licensees to allow reasonable access to or to permit purchase of reasonable amounts of time by candidates for federal elective office, "clearly did not intend, to take the extreme case, that during the closing days of a campaign, stations should be required to accommodate requests for political time to the exclusion of all or most other types of programming or advertising. Important as an informed electorate is in our society, there are other elements in the public interest standard, and the public is entitled to other kinds of programming than political. It was not intended that all or most time be preempted for political broadcasts * * *." (Question and Answer 3, section VIII). The same principle would, of course, apply to ballot propositions

to the extent that all the parties involved—the broadcasters, the Commission, and individual members of the public—participate with a sense of reasonableness and good faith.

91. Accordingly, the proceedings in Docket 19260 are terminated.

Adopted: June 27, 1974.

Released: July 12, 1974.

FEDERAL COMMUNICATIONS COMMISSION,[*]

[SEAL] VINCENT J. MULLINS, *Secretary*

APPENDIX A

[Docket No. 19260; FCC 72-534; 79505]

FIRST REPORT REGARDING HANDLING OF POLITICAL BROADCAST

In the matter of the handling of public issues under the Fairness Doctrine and the Public Interest Standards of the Communications Act.

I. *Introduction.* 1. The first report deals with Part V of our Notice—the fairness doctrine as it relates to political broadcasts. We would ordinarily consider this aspect in the context of the revisions made in the general fairness area, including possible public interest decisions as to access. However, we are operating under time constraints here that we must take into account—namely, the appropriateness of disposing of this aspect well before the commencement of the general election period. See DNC v. FCC, ___ U.S. App. D.C. ___, ___ F. 2d ___, Case No. 71-1738 (D.C. Cir. Feb. 22, 1972), (slip op. at 7). We therefore have expedited our consideration of this aspect and, if necessary, will re-examine this report in light of our later decisions in Parts II-IV.

2. While this was the last topic in this inquiry, it is not, of course, the one of least importance. Promotion of robust, wide-open debate in this field vitally serves the public interest.

II. *Background.* 3. In applying the fairness doctrine the Commission has traditionally required licensees to afford reasonable opportunity for the presentation of contrasting views following the presentation of one side of a controversial issue of public importance. The licensee has been given wide discretion in selecting the appropriate spokesman, format and time for the presentation of the opposing views on controversial issues, with two significant exceptions. Under § 315 of the Communications Act of 1934, as amended, licensees are required to afford equal time to legally qualified candidates; and under the Commission's political editorializing rules (§§ 73.123(c), 73.300(c), 73.598(c), 73.679 (c)) the licensee must afford a reasonable opportunity for a candidate or his spokesman to respond when the licensee has opposed him or supported his opponent in an editorial.

4. Under the ruling in "Letter to Mr Nicholas Zapple," 23 F.C.C. 2d 707(1970) the Commission further limited the licensee's discretion. The Commission held in "Zapple" that when a licensee sells time to supporters or spokesmen of a candidate during an election campaign who urge the candidate's election, discuss the campaign issues, or criticize an opponent, then the licensee must afford comparable time to the spokesmen for an opponent.[1] Known as the quasi-equal opportunities or political party corollary to the fairness doctrine, the "Zapple" doctrine is based on the equal opportunity requirement of section 315 of the Communications Act; accordingly, free time need not be afforded to respond to a paid program.

5. Since some controversy has been generated as to the applicability or wisdom of this doctrine, the Commission asked for public comment on the following questions in its Notice of Public Inquiry in Docket No. 19260 (hereinafter, Fairness Inquiry).

"Should the quasi-equal opportunities approach be restricted or expanded and what is the feasibility and effect of any proposed revision on the underlying policies of the statute (see section 315(a))?

"Should the Commission adopt a position that Zapple applies only to political campaigns and not to other times?

"Should Zapple be disassociated from the fairness doctrine and incorporated into Section 315?

"Should Zapple be limited by applying a 7-day deadline for requesting "quasi-equal opportunities"?

"Should Zapple continue to apply only to major parties (see Letter to Lawrence M. C. ___, 41 F.C.C. 2d 291 (1963)), or should it be extended to all parties or to some mathematically-defined category of "parties with substantial public support" (e.g., percentage of popular vote)? How should it apply to "new" parties?

"Should Zapple be extended to include spokesmen for ballot issues such as bond issues; amendments of state constitutions, etc.?"

6. One additional suggestion has been that the Zapple doctrine should be extended to include broadcast appearances of the President of the United States so that an automatic right to respond in comparable time, format, etc., would accrue to appropriate spokesman following a Presidential appearance. In "Complaint of Committee for the Fair Broadcasting of Controversial Issues," 25 F.C.C. 2d 283, 294-298 (1970), the Commission declined to extend the "Zapple" quasi-equal opportunities concept generally to Presidential appearances, although it held that the fairness doctrine was applicable to Presidential appearances when dealing with controversial issues of public importance. Upon re-examination in "Republican National Committee," 25 F.C.C. 2d 739, 744 (1970), the Commission again explained that Presidential broadcasts made in a non-election period do not come within the "Zapple" corollary but are included under the general fairness doctrine to the extent that controversial issues of importance are discussed. The question was raised once again and ruled on by the Commission in "Democratic National Committee," 31 F.C.C. 2d 708 (1971), aff'd. "Democratic National Committee v. F.C.C.," ___ U.S. App. D.C. ___, ___ F. 2d ___, Case No. 71-1738 (D.C. Cir. Feb. 22, 1972). However, we solicited the comments of the public on the questions raised in these cases in this inquiry.

III *Summary of comments.* 7. Extensive comments and reply comments addressing these questions were received in response to the Fairness Inquiry from fourteen parties. In addition, the Commission conducted panel discussions and heard oral argument for a full week in March 1972, during which these issues were exhaustively discussed. (A list of all participants is included in Appendix A below.) A variety of ideas, proposals, and criticisms were presented, a brief summary of which follows.

8. Storer Broadcasting Company observes that since the fairness doctrine, unlike Section 315, gives no particular person a right to reply to previously broadcast material, the extension of the fairness doctrine to a quasi-equal opportunities doctrine in Zapple is a contradiction of the fairness doctrine. As presently constituted, Zapple and its progeny provide insufficient direction to licensees as to when comparable responses to noncampaign appearances of public officials are required, as to which party spokesman is entitled to reply when different factions within a party wish to respond, and as to the rights of minority parties to comparable time. Storer recommends, therefore, that Zapple should be codified in Commission rules or be incorporated into section 315 to remove it from the ambit of the fairness doctrine. Storer further suggests that the Commission adopt a political broadcast primer to specify licensee obligations and responsibilities in this area.

9. The National Association of Broadcasters (NAB), General Electric Broadcasting Co., American Broadcasting Co. (ABC), National Broadcasting Co. (NBC), the Evening News Association, Lee Enterprises, Inc., Time Life Broadcasting, Inc. and others support the principles of the Zapple doctrine so long as the Cullman[2] doctrine continues to be inapplicable, and licensees are not required to subsidize the campaigns of opposing candidates by affording free response time Zapple is seen by those filing joint comments with the Evening News Association as an appropriate means to fulfill the purposes of section 315, ensuring the equality of treatment of political candidates by broadcast licensees. Consequently, they would impose obligations progress in which the broadcaster has afforded time and relinquished content control to a spokesman for a candidate to support that candidate or to oppose rival candidates.

10. The NAB, ABC, NBC, and G.E. Broadcasting Co. argue that the Zapple doctrine should also apply to "political" broadcasts where a campaign issue (bond proposal, constitutional amendment, etc.) that is supported or opposed by a political spokesman has been placed on the ballot. It is argued that this situation is analogous to both section 315 and Zapple, and, as is the case with the political spokesman doctrine, Cullman should not apply. NBC emphasizes that the quasi-equal opportunity approach of Zapple or its extension to ballot issues should apply only to paid presentations in campaign

[*] Commissioner Hooks concurring in part and dissenting in part and issuing a separate statement. Commissioner Quello concurring and issuing a separate statement. Statements of Commissioners Hooks and Quello filed as part of the original document.

[1] In Re Complaint of Committee for the Fair Broadcasting of Controversial Issues, 25 F.C.C. 2d 283 (1970), affirmed on reconsideration sub nom. Republican National Committee, 25 F.C.C. 2d 739 (1970), the Commission extended the "Zapple" ruling to a non-campaign period proffer of time to a political party chairman where the licensee did not specify the issue or issues to be discussed. This ruling was reversed in Columbia Broadcasting Co. v. F.C.C., 454 F. 2d 1018, (D.C. Cir. 1971).

[2] Cullman Broadcasting Co., Inc., 40 F.C.C. 576, 577 (1963) held that "* * * where the licensee has chosen to broadcast a sponsored program which for the first time presents one side of a controversial issue, has not presented (or does not plan to present) contrasting viewpoints in other programming, and has been unable to obtain paid sponsorship for the appropriate presentation of the opposing viewpoint or viewpoints, he cannot reject a presentation otherwise suitable to the licensee—and thus leave the public uninformed—on the ground that he cannot obtain paid sponsorship for that presentation."

periods, since the equal opportunities approach involving free time inhibits the presentation of political programming and interferes with a licensee's editorial judgment.

11. Two commentators, Democratic National Committee (DNC) and American Civil Liberties Union (ACLU) suggest that the Commission extend the fairness doctrine or adopt a specific rule that would require licensees to broadcast the opposing views of appropriate spokesmen following an appearance of a public official. It is claimed that there is an overriding national concern in informing the public on both sides of issues dealt with by public officials, and accordingly, that licensee discretion in presenting opposing views and selecting appropriate spokesman should be more limited than at present.

12. DNC specifically urges the adoption of a rule that: (1) Would establish a presumption that a Presidential broadcast appearance involves a controversial issue of public importance; (2) would require licensees to seek out appropriate spokesmen to present an opposing view and to afford them equal opportunities; and (3) would require licensees or networks to keep publicly available for three years a tape or transcript of every Presidential appearance. DNC asserts that such a rule is necessitated by the public interest standard of the Communications Act and by the First Amendment, in view of the public's need to be fully informed on important public issues discussed by the President. The public is not presently receiving balanced information on such issues, DNC believes, because the President's control of the time, format, and content of his appearances maximizes their impact and effectiveness while, on the other hand, the difficulties encountered by DNC in buying time to discuss public issues or in securing free time to respond to Presidential appearances limits the effectiveness of the presentation of their viewpoint. DNC's views are currently presented, it maintains, through news and panel show presentations in which DNC representatives are merely responding to questions and have no opportunity, comparable to the President's, to develop a reasoned and uninterrupted presentation of the issues. DNC thus argues that the First Amendment goal of promoting robust, wide-open debate is being thwarted by its rejection as an entity responsible for defining options for the American people on major public issues and by denying it access, comparable to the President's, to respond to his appearances.

13. ACLU maintains that the responsibility of the licensee under the fairness doctrine should extend to making available comparable opportunities for opposing spokesman to comment on the issues raised in the broadcast appearance of any public official, including the President. Because of the President's unquestioned power to command broadcasting time and to attract an audience, ACLU feels that comparable time can be afforded only if the contrasting viewpoint is presented immediately after each Presidential appearance. The President and other public officials should furnish copies of their statements sufficiently in advance of their broadcast to permit station licensees to fulfill these fairness obligations.

14. The proposals of DNC and ACLU were opposed by a number of parties. ABC and G.E. Broadcasting Co. argue that no justification for the proposed rule can be found in section 315 of the Act, since under that Section, the recipient of an equal time opportunity to respond to a candidate's appearance must himself be a legally qualified opposing candidate and not just a representative of a political party or some other appropriate group. To extend a quasi-equal opportunities doctrine to non-election period Presidential appearances would require Congressional amendment of section 315 because such extension would violate the intent of section 315, and specifically, would negate the newscast, news documentary, and news interview exemptions to the equal time provisions contained in section 315(a). Implementation of these proposals would also be a distortion of the fairness doctrine, it is argued, since the fairness doctrine focuses on issues, not individuals or candidates.

15. Those parties filing with the Evening News Association argue that the broadcast appearance of a public office holder should be treated as the appearance of a public official fulfilling the duties of his office, not as the appearance of a partisan spokesman presenting one side of a controversial issue absent some extrinsic evidence to the contrary. Otherwise, the public's right to be informed on important matters by its elected officials would be subordinated to the rights of a particular class (political candidates) to broadcast.

16. NBC believes that both DNC and ACLU have failed to show the necessity of their proposed policies or the present inadequacy of the fairness doctrine as a tool for informing the public on important public issues. Creation of an equal or quasi-equal time right to reply to all public official addresses would, as a practical matter, inhibit the appearance of public officials, NBC maintains. It would also ignore the difference in media use by different officials, as well as the fact that it is possible to distinguish the leadership appearances of an official from his political opinions. NBC also has argued that under present rules Presidential appearances during a campaign for his re-election are subject to the Section 315 equal time requirements, that Presidential appearances in a non-election period are subject to the fairness doctrine and the political party corollary, and that these doctrines are adequate to ensure that the electorate is informed.

17. WGN Broadcasting Co. (WGN) is also opposed to the DNC/ACLU proposals on the grounds that the standard proposed by DNC, that Presidential broadcasts that enhanced the political or personal image of the President would be subject to the rule and require the presentation of opposition programming, is too vague to be realistically applied by licensees; and that the FCC would be inexorably involved in politically sensitive adjudications which should be avoided.

18. Three parties argue that the Zapple doctrine should be repealed altogether. WGN maintains that Zapple exceeds the intent of section 315, which grants equal opportunities only to opposing candidates and not to their supporters. That question, WGN maintains, was settled in Felix v. Westinghouse, 186 F. 2d 1 (3d Cir. 1950), where it was held that the supporters of a candidate were specifically excluded from section 315.

19. The law firm of Haley Bader & Potts argues that the Zapple doctrine overlooks the fact that the informational needs of the public are of primary importance, and mistakenly confers rights on individual parties. The standards in Zapple are too vague for day-to-day application by the licensee, it maintains, and the resultant confusion will tend to inhibit licensee coverage of political matters. Moreover, it argues that Zapple unduly restricts licensee discretion in selecting spokesmen and regulating content.

20. The holding of Zapple would be acceptable to Public Broadcasting Service (PBS) as a fairness question if the Commission had limited itself to a discussion of the reasonableness of the balance of opposing views afforded by the licensee. PBS is opposed, however, to the extension of traditional fairness concepts of "reasonable balance" to a "comparable time" or "quasi-equal opportunity" doctrine because this restricts licensee discretion and creates artificial barriers to the discussion of controversial issues of public importance. Furthermore, PBS argues that Zapple cannot be limited to the two major parties nor to campaign periods only, but instead will engender a spiraling round robin of partisan responses. Several other parties also voiced this particular fear.

21. At the fairness panels, counsel for PBS further developed the foregoing argument by stating that the pricing mechanism and the economic realities of buying time on the commercial networks tend to discourage the broadcast appearances of minority candidates, but that no such economic barrier to access by minority parties exists in the Public Broadcasting Service. Counsel for PBS also argued that in extending quasi-equal opportunities to supporters of a candidate in Zapple, the Commission was doing what the Congress had decided not to do when it adopted section 315 of the Communications Act.

22. Several parties submitted comments on the procedural methods or standards by which the Commission should enforce fairness concepts in the political broadcast area. As previously mentioned, Storer Broadcasting Co. urges the Commission to adopt political broadcasting rules or to develop a political broadcasting primer that would specifically define those situations in which licensees would be required to afford comparable time and which would specify guidelines for the selection of the appropriate opposing spokesmen in order to minimize the confusion that has resulted from the recent series of ad hoc adjudications (Zapple, RNC, etc.) modifying the traditional fairness doctrine.

23. Those filing with the Evening News Association argue that the FCC frequently oversteps its authority in judging the "reasonableness" of licensee action in the political broadcasting area. The Commission should therefore adopt a "grossly unreasonable" test of licensee conduct, and impose penalties only when licensee conduct meets an "actual malice" test.

24. Two other general points raised by commentators were as follows:

A. The G.E. Broadcasting Company believes that the Commission's recent ruling in In re Rosenbush Advertising Agency, 31 F.C.C. 2d 782 (1971)[3] should be upheld since it affords discretion in making determination as to how a given licensee's facilities should be made effectively available to candidates or supporters of candidates. Section 315 itself permits a licensee to have discretion in scheduling and the Commission, it is contended, should not restrict this discretion any further in "quasi-315" situations.

B. During the panel discussions, former FCC Chairman Newton Minow discussed the recent study and recommendations of the bipartisan Twentieth Century Fund[4] on this

[3] The Commission held in Rosenbush that a licensee's policy of accepting only paid political advertising of five minutes or longer during a primary campaign was consistent with Commission precedent where the licensee recognized its public interest obligation to make its facilities effectively available to candidates. The licensee had stated its intention to make free time available to candidates for major offices in the primary; planned a one-hour special program presenting the candidates for mayor; and had announced the candidacies for the top three city offices in its regular news programs.

[4] Twentieth Century Fund, Voters' Time (1969).

subject. He recommended that the Commission support legislation that would enable the major party candidates in a Presidential campaign to obtain six one-half hour periods called "Voters' Time" in prime time for the simultaneous broadcast on all TV and radio stations of political presentations. Use of this time would be entirely within the candidates' discretion, and, since the beneficiary of these programs would be the American public who would thus receive information pertinent to the election of the President, public funds should be used to buy the time.

IV. *Discussion*—A. *The fairness doctrine with respect to appearances of the President or other public officials.* 26. The Commission can appreciate why so much attention is focused on the question of the application of the fairness doctrine to Presidential appearances. As the Court noted in Democratic National Committee v. FCC, C.A.D.C., No. 71–1637, decided February 2, 1972, petition for writ of certiorari filed April 28, 1972, No. 71–1405, O.T. 1971, "* * * the President's status differs from that of other Americans and is of a superior nature," and calls for him to make use of broadcasting to report to the nation on important matters:

"While political scientists and historians may argue about the institution of the Presidency and the obligations and role of the nation's chief executive officer it is clear that in this day and age it is obligatory for the President to inform the public on his program and its progress from time to time. By the very nature of his position, the President is a focal point of national life. The people of this country look to him in his numerous roles for guidance, understanding, perspective and information. No matter who the man living at 1600 Pennsylvania Avenue is he will be subject to greater coverage in the press and on the media than any other person in the free world. The President is obliged to keep the American people informed and * * * this obligation exists for the good of the nation * * *." (Sl. Op. pp 26–27)

Because of this use of broadcasting by the nation's most powerful and most important public office, the argument has been made by DNC and by ACLU that there must be special provision for a response by the opposition party—some specific corollary to the general fairness doctrine that ensures equal or comparable use of the broadcast media by an opposition party spokesman.

26. We make two preliminary observations. First, the issue is not whether the American people shall be reasonably informed concerning the contrasting viewpoints on controversial issues of public importance covered by Presidential reports. The fairness doctrine is in any event applicable to such reports—as indeed it is to a report by any public official that deals with a controversial issue of public importance. See section 315(a). Rather, the issue is whether something more—something akin to equal time—is to be required. The word "required" brings us to our second point. Because our goal is robust, wide-open debate, the Commission of course welcomes any and all programming efforts by licensees to present contrasting viewpoints on controversial issues covered by Presidential addresses. As we stated in our commendation of the CBS series, "The Loyal Opposition", Committee for the Fair Broadcasting of Controversial Issues, 25 FCC 2d 283, 300 (1970); Republican National Committee, 25 FCC 2d 739, 745–46 (1970, the more debate on such issues, the better informed the electorate. But the issue is not what programming judgment the licensee makes in this area but, rather, whether there should be an FCC requirement. With this as background, we turn to the proposal that equal time be afforded to an opposition spokesman to respond to a Presidential report.[5]

27. First, there is a substantial issue whether any such Commission prescription might not run counter to the Congressional scheme. In section 315(a), Congress has specified that equal opportunities shall be applicable to appearances of legally qualified candidates and that in other instances "fairness" be applicable—that is, that there be afforded "* * * reasonable opportunity for the discussion of conflicting viewpoints on issues of public importance." While fairness may entail different things in particular circumstances (see par. 30, *infra*), there is a substantial question whether it is not a matter for Congress to take the discussion of public issues by the President out of the fairness area and place it within the equal opportunities requirement—just as, for example, it was up to Congress in 1960 to take appearances by candidates for President out of equal opportunities and place them under fairness. There is a further troublesome issue here—whether we could create a special fairness rule for Presidential reports but then hold that a report by Governor Reagan in California or Mayor Lindsay in New York, for example, would come only under the "reasonable opportunities" standard of section 315(a), in the face of arguments that such reports dealt with State or local issues of the greatest importance. Again we do not say that distinctions cannot be made here (compare section 103(a)(2)(A) of the Federal Election Campaign Act of 1971, 86 Stat. 3 applicable only to Federal offices) but rather raise the issue whether such distinctions are not more appropriately the province of the Congress.

28. But in any event, it would not be sound policy to adopt the DNC or ACLU proposals. From the time of the Editorializing Report, 13 FCC 1246 (1949), to the present, broadcasters have been urged to adopt ever more precise rules—always in the cause of insuring robust debate (e.g., the argument, advanced in 1949 and now repeated by the ACLU, that fairness requires the contrasting viewpoint to follow immediately the presentation of the first viewpoint—see par. 8, Report on Editorializing by Broadcast Licensees, supra, at pp. 1250–51.). However well intentioned these arguments are, we believe that increasingly detailed Commission regulation militates against robust, wide-open debate. The genius of the fairness doctrine has been precisely the leeway and discretion it affords the licensee to discharge his obligation to contribute to an informed electorate. Editorializing Report, par. 10, supra, at pp. 1251–52. Thus, the arguments for flexibility, rather than rigid mechanical rules, discussed in Committee for Fair Broadcasting of Controversial Issues, 25 FCC 2d 283, 292, (1970), remain persuasive. Applying those principles, we do not believe it appropriate to adopt equal time policies that might well inhibit reports to the electorate by elected officials. Rather, the general fairness approach of facilitating such reports and at the same time insuring that the public is reasonably informed concerning the contrasting viewpoints best serves the public interest.[6] See DNC v. FCC, supra, Sl. Op. p. 27 ("* * * The President is obliged to keep the American people informed and as this obligation exists for the good of the nation, this court can find no reason to abridge the right of the public to be informed by creating an automatic right to respond reposed in the opposition party * * *"); Committee for Fair Broadcasting, supra, at pp. 296–98. The latter case demonstrates that fairness can and does operate to protect the public interest in this important area.

29. In this connection, we note that the Commission believes that the public interest would be served by revision of the equal opportunities requirement so as to make it applicable only to major party candidates, with such candidates liberally defined to include any candidate with significant public support (see infra, par. 35); it has also supported, as a less desirable alternative, suspension or repeal of that requirement as to the offices of President and Vice President.[7] It would surely be anomalous for us to seek relaxation of the equal opportunities requirement as to candidates for the office of President, and at the same time to apply a new policy akin to the equal opportunities to Presidential broadcasts not coming within the present statutory equal opportunities requirement. We decline to do so.

B. *The Zapple ruling.* 30. Our 1970 ruling, Letter to Nicholas Zapple, 23 FCC 2d 707 (1970), concerned campaign presentations that did not involve the appearance of the candidate. We pointed out that in some such presentations, the requirements of the fairness doctrine become subject to quasi-equal opportunities. There has been considerable comment on this ruling but in large part the interest in it may stem from a misunderstanding of the ruling (e.g., that the ruling extends quasi-equal opportunities to all candidates or parties, even of a fringe nature). We can appreciate how such a misunderstanding could arise. The terms we used, fairness and quasi-equal opportunities, are terms of art and have accumulated their own baggage. Thus, quasi-equal opportunities conjures up a notion of all parties—even those of a fringe nature—being treated equally. And fairness carries with it concepts such as Cullman (free time if the public has not been informed of the contrasting viewpoint). See, also, In re Complaint of George F. Cooley, 15 FCC 2d 828, 829 (1967). But, Zapple was neither traditional fairness nor traditional equal opportunities. It was a particularization of what the public interest calls for in certain political broadcast situations in light of the Congressional policies set forth in section 315(a).[8] With this as background, we turn to the ruling.

31. What we were stating in Zapple was simply a common sense application of the statutory scheme. If the candidate himself at years to some significant extent (cf. Gray Communications, Inc., 14 FCC 2d 766, 19 FCC 2d 532 (1968)), then the Congressional policy is clear: Equal opportunities, which means no applicability of Cullman but rather mathematical precision of opportunity. Suppose neither the picture or voice of the candidate is used—even briefly—but rather a political message devised by him and his supporters is broadcast.

[5] We are not dealing here with Presidential appearances during election campaigns where equal opportunities or Zapple (see B, infra) would ordinarily be applicable.

[6] For obvious reasons already developed, we strongly decline to make evaluations whether a report by an official is "partisan" or "political" and thus requires rebuttal by a spokesman for the other party, or the contending faction, or whatever. This would drag us into a wholly inadministrable quagmire. See, e.g., In re Complaint of Democratic National Committee, 31 FCC 2d 708, 712–713 (1971).

[7] See Hearings Before the Senate Communications Subcommittee, 91st Cong., 1st Sess., on S. 2876, p. 50.

[8] Similarly, the personal attack and political editorializing rules are a particularization of what fairness requires in those situations. See, e.g., Report on Personal Attack and Political Editorializing rules, 32 FR 10303 (1967); Editorializing Report, supra, at p. 1252.

In those circumstances, a common sense view of the policy embodied in section 315 would still call for the inapplicability of Cullman,[9] and for some measure of treatment that, while not mathematically rigid, at least took on the appearance of rough comparability. If the DNC were sold time for a number of spots, it is difficult to conceive on what basis the licensee could then refuse to sell comparable time to the RNC. Or, if during a campaign the latter were given a half-hour of free time to advance its cause, could a licensee fairly reject the subsequent request of the DNC that it be given a comparable opportunity?[10] Clearly, these examples deal with exaggerated, hypothetical situations that would never arise. No licensee would try to act in such an arbitrary fashion. Thus, the Zapple ruling simply reflects the common sense of what the public interest, taking into account underlying Congressional policies in the political broadcast area, requires in campaign situations such as the above (and in view of its nature, the application of Zapple, for all practical purposes, is confined to campaign periods). Significantly, because it does take into account the policies of section 315, the public interest here requires both more (comparable time) and less (no applicability of Cullman) than traditional fairness.[11]

Based on practical experience, we stress that in any event—taking into account the sum total of political broadcasts and news-type programs—the American people are reasonably informed on campaign issues, and thus that the basic public interest requirement is being met in this vital area. Green v. FCC, 447 F. 2d 323 (C.A.D.C.).

32. It follows that Zapple did not establish that in the political broadcast field there is now a quasi-equal opportunities approach applicable to all candidates and parties, including those of a fringe nature. This would clearly undermine any future suspension or repeal of the "equal opportunities" requirement, because it would mean that despite such suspension or repeal, the fairness doctrine would require that fringe party candidates be given comparable treatment with major party candidates. Further, it would negate the 1959 Amendments to the Communications Act. The purpose of these amendments was to permit presentation of candidates on, for example, a bona fide newscast, news interview, or news documentary, without the station having to present the fringe candidates.[12] We need not belabor the point further. The Zapple ruling did not overrule the holding in Letter to Lawrence M. C. Smith, 25 Pike & Fischer, R.R. 291 (1963).[13]

33. The foregoing discussion—and the general approach that we have adopted in the fairness area—also dispose of the questions raised as to the desirability of extending Zapple, codifying it, or otherwise supplementing it with procedural and other trappings (e.g., a seven-day procedural requirement). Because Zapple reflects simply a common sense distillation of the public interest in certain political broadcast situations, there is no need to try to codify it or engraft new corollaries onto it. On the contrary, we have concluded that, generally, traditional fairness works better by setting out broad principles and permitting the licensee to exercise good faith reasonable discretion in applying those broad principles. We think that this is true here. Further, we doubt if we will be confronted with a host of ad hoc rulings in this field. Most problems should be disposed of at the licensee level by the application of rudimentary concepts of fairness and common sense. Significantly, Zapple itself was a ruling on hypothetical questions; there have been very few times when the issue has arisen on concrete cases. As to its extension beyond political broadcasts, the short answer is that it is based in substantial part on Congressional policies applicable to such broadcasts.[14]

C. *Commission efforts to encourage the widest possible coverage of political campaigns.* 34. We have considered most seriously what steps we can take in this respect. There would appear to be little we can do on an administrative agency basis. Let us take the most obvious suggestion: That the Commission by rule specify that a certain amount of time be set aside for presentation of political broadcasts on a sustaining basis. See section 303 (r). There are a number of difficult policy issues that would have to be resolved in any such undertaking. But there is, we believe, again an overriding consideration here—namely, that this is truly a matter for Congressional resolution. Congress is aware of the high expense of running for political office, particularly in view of increasing broadcast costs. It has considered a number of worthwhile suggestions here—for example the subsidy plan in the Presidential Campaign Fund Act of 1966 (the now inoperative Long Act) to supply Federal funds to the national party candidates for the Presidency; the Political Broadcasting Hearings Before the Senate Communications Subcommittee, on S. 2876, 91st Cong., 1st Sess., pp. 24–34). Its response to this problem has been the Federal Election Campaign Act of 1971 (Pub. L. 92–225), with its limitations of spending, and requirement for reasonable access for those running for Federal office and reduced rates for all political candidates.

We do not see how we can sweep aside this scheme, and substitute our own. Indeed, we could not in any event be truly effective in any such agency action. Take the most important office—the Presidency. Were we to require free time for that office, we would run afoul of the equal time provision; we would find that we had required the broadcast to devote hours of prime time not just to the significant candidates but also to as many as 75 fringe party candidates (e.g., Socialist Labor, Socialist Worker, Vegetarian).[15] Our point is obvious: Reform here is needed, we believe, but it must come from the Congress because that is the only way it can be effectively accomplished.

35. Congress then can do much. We believe that consideration should again be given to the Voters Time concept or to some scheme akin to that used in Great Britain (i.e., blocs of free time to the major political parties). At the least, we propose again to urge Congress to adopt our proposed amendment to section 315, limiting to major party candidates the applicability of the equal time provision in partisan general election campaigns. We described that legislation in the following terms (see Hearings Before the Communications Subcommittee on S. 2876, 91st Cong., 1st Sess., p. 48):

"In any general election, other than nonpartisan ones, the draft legislation would make the equal opportunities requirement, as to free time, applicable only to major party candidates, leaving fringe candidates coming under the general fairness requirement. It would define major candidates very liberally so as to include any significant candidates—such as Henry Wallace as the candidate of the Progressive Party 1948, Strom Thurmond of the Dixiecrats 1948, or George Wallace in the last election. The figures in the draft legislation are set forth only as possible guidelines—namely, that the candidate's party garnered 2 percent of the vote in the state in the last election or, if the candidate represents a new party, that petitions be submitted signed by a number of voters equalling 1 percent of the votes cast in the last election. To obtain time on the national networks as distinguished from individual stations in particular states, there would also be a requirement that the candidate be on the ballot in at least two-thirds of the states.

"In short, section 315 in its present operational form is claimed and would appear to inhibit broadcasters from affording free time—and does so, we urge, without any significant practical compensating benefits. The Socialist Labor or Vegetarian candidate does not get free time; rather, no one gets any free time for the political broadcast. Further, and

[9] In this respect, Zapple did not break new ground. In our Report and Order on the personal attack rules (32 FR 10303, 10305), we noted the applicability of the Congressional standard in Section 315 to attacks involving candidates, their supporters, or authorized spokesmen, and accordingly made our rules—which result, as a practical matter, in free time—inapplicable to such attacks. See §§ 73.123(b), 73.300(b), 73.598(b), 73.679 (b).

[10] This example is stated as if the RNC program were the only matter to be considered. Of course in a particular factual situation this may well not be so. See CBS v. FCC, supra, n. 1, where the DNC program was presented by CBS to offset Presidential speech appearances, and the Court held that this was perfectly appropriate and reversed a Commission holding that to avoid coming within Zapple, CBS should have specified the issues to which the DNC was to address itself. This case is of course the law governing similar future factual situations. Thus, each case must be judged in its factual setting, with the licensee having considerable discretion to discharge fairness obligations.

[11] And for the foregoing reasons, we do not believe that we have acted contrary to the legislative history. We have, on the contrary, acted to carry out the Congressional scheme in section 316.

[12] In view of the 1959 Amendments, it follows that no quasi-equal opportunities doctrine is applicable when supporters or spokesmen for candidates are presented in bona fide newscasts; in this respect, the same general fairness principles that apply to the candidates are equally applicable to their supporters.

[13] We there held that as to fund raising announcements for political parties, fairness does not require equal or comparable treatment for the fringe parties but rather that the licensee can make reasonable good faith judgments as to the significance of a particular party in the area.

[14] Thus, we do not extend Zapple to the situation involving ballot issues.

[15] To give but one example, in 1960 when Congress acted to suspend the equal opportunities requirement for the President and Vice President races, there were on the ballots in the several States 14 different candidates for the office of President: C. Benton Coiner, Conservative Party of Virginia; Merrit Curtis, Constitution Party; Lar Daly, Tax Cut Party; Dr. E. L. Decker, Prohibition Party; Farrell Dobbs, Socialist Workers Party, Farmer Labor Party of Iowa, Socialist Workers and Farmers Party, Utah; Orval H. Faubus, National States Rights Party; Symon Gould, American Vegetarian Party, Minnesota; Clennon King, Afro-American Unity Party; Henry Krajewski, American Third Party; J. Bracken Lee, Conservative Party of New Jersey; Whitley Slocomb, Greenback Party; William Lloyd Smith, American Beat Consensus; Charles Sullivan, Constitution Party of Texas. See H. Rept. No. 1938, 90th Cong., 2d Sess., p. 3. Query how effective any agency action in 1960 would have been.

most important, there would appear to be little, if any, public benefits from insuring such equal treatment for candidates whose public support is wholly insignificant. We repeat that in defining the major party candidate, we would urge the selection of a numerical figure such as to insure equality to any candidate who did have some significant public support, regardless of what his chances of actually winning might be." This, by itself, will make a marked contribution to facilitating broadcast presentation of important political candidates.[18]

36. As an alternative, we propose an additional exemption to section 315(a) to cover any joint or back-to-back appearances of candidates. Additionally, consideration should be given, we think, to the further exemption that we urged upon Congress in connection with our 1970 Advocates ruling, 23 FCC 2d 462. We suggested the addition of the following provision to section 315(a):[19]

"(5) Any other program of a news or journalistic character—

"(i) Which is regularly scheduled; and

"(ii) In which the content, format, and participants are determined by the licensee or network; and

"(iii) Which explores conflicting views on a current issue of public importance; and

"(iv) Which is not designed to serve the political advantage of any legally qualified candidate."

37. At the least, we had thought that we could make a contribution here by giving the 1959 exemptions a reasonable construction in line with the broad remedial purpose of Congress. Accordingly, we did so in the recent Chisholm ruling, FCC 72–485, decided June 2, 1972. The validity of this construction of Section 315(a) is, however, now in doubt in view of the action of the Court of Appeals in its interim relief Order of June 3, 1972. Until the matter is definitely settled, licensees cannot plan with any certainty, and the area remains confused. This is, we believe, unfortunate. We continue to believe that our construction of the exemption in section 315(a)(2) is sound, meets the pertinent Congressional criteria, and markedly serves the public interest by allowing broadcasting to make a fuller and more effective contribution to an informed electorate. But unless and until that construction prevails upon appeal—or is in any event affirmed by Congressional revisions along the above stated lines—we cannot in good conscience urge licensees to act in this area as if there were no "equal opportunities" pitfalls. There clearly are.

D. Use in bona fide newscasts of film supplied by candidates. 38. One other political broadcast matter which has been brought to our attention merits comment here. Candidates, like many other news sources, have normally issued press releases to the news media containing statements of the candidates, advance copies of their speeches, their future speaking schedules, etc. Media news editors in turn made judgments whether and to what extent to use such material. Increasingly, candidates have been supplying radio and television broadcasters with audio recordings and film excerpts produced by the candidates, e.g., depicting their campaign efforts that day or containing statements of their positions on current issues. Obviously, these excerpts are designed to show the candidate in the best light and, if presented on a newscast, have the added advantage of increased impact or credibility over a paid political presentation. We do not hold that the station cannot exercise its good faith news judgment as to whether and to what extent it wishes to present these tape or film excerpts. If it believes that they are newsworthy, it can appropriately use them in newscasts. But the public should be informed that the tape or film was supplied by the candidate as an inducement to the broadcasting of it.

39. In fact, our rules require such disclosure in these circumstances; that is, "in the case of any political program or any program involving the discussion of public controversial issues for which any films, records, transcriptions, talent, scripts, or other material or services of any kind are furnished, either directly or indirectly, to a station as an inducement to the broadcast of such program * * *"[20] Disclosure of the furnishing of the tape or film is required to be made whether or not a candidate is involved in these types of programs. Accordingly, we take this opportunity to stress to all licensees their duty to comply with the rules and announce that the tape or film was supplied by the candidate in question.[21] If it was edited by the licensee, he may, of course, add a suitable phrase such as "and edited by the XXXX news department."

IV. Conclusion. 40. Much remains to be done in the fairness area (Parts II–IV).[22] We have acted here as best we could for the reasons stated in par. 1. The piecemeal approach is thus regrettable but necessary.

As stated, we shall reconsider this most important aspect in light of the conclusions reached in overall proceedings. Our final message is one urging broadcasting to make the maximum possible contribution to the nation's political process. That process is the bedrock of the Republic, and broadcasting is clearly the acknowledged leading medium for communicating political ideas. No area is thus of greater importance "* * * to the public interest in the larger and more effective use of radio." (section 303(g) of the Communications Act of 1934, as amended).

FEDERAL COMMUNICATIONS COMMISSION,[23]

[SEAL] BEN F. WAPLE,
Secretary.

Adopted: June 16, 1972.

Released: June 22, 1972.

ATTACHMENT TO APPENDIX A

I. Comments on the applicability of the fairness doctrine to political broadcasts were received from the following parties:

ACLU
American Broadcasting Company
Columbia Broadcasting Company
Democratic National Committee
Evening News Association, et al.
Haley, Bader & Potts
McKenna & Wilkinson
National Association of Broadcasters
National Broadcasting Company
Public Broadcasting Service
Republican National Committee
Storer Broadcasting
United Church of Christ
WGN Continental Broadcasting Company

II. The following parties participated in panel discussion on the applicability of the fairness doctrine to political broadcasts held, before the Commission, on March 29, 1972.

Roger E. Ailes, President Roger Ailes & Associates, Inc.
Charles A. Wilson, Jr., for the Democratic National Committee
James J. Freeman, Associate Special Counsel, Republican National Committee
Reed J. Irvine, Chairman of the Board, Accuracy in Media, Inc.
Newton N. Minow; Leibman, Williams, Bennett, Baird & Minow, Chicago, Illinois
Harry M. Plotkin, Counsel, Public Broadcasting Service
Paul A. Porter; Arnold & Porter, Washington, D.C.
Allen U. Schwartz, Counsel, Communications Media Committee, ACLU
Rosel Hyde; Wilkinson, Cragun & Barker, Washington, D.C.

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[18] Thus, in the above noted hearings, we stated (supra, at p. 50):

"* * * when freed from the constraints of equal opportunities requirement, there has been no failure on the part of the broadcasters with respect to affording time for the Presidential candidates, and see that that time has been in substantial amounts, and free, not just reduced. Thus, in the one instance where the equal time requirement was suspended (1960), the TV networks afforded 39 hours and 22 minutes of free time, including the four hours for the Great Debates. Further, the audience for these debates totaled 280 million, or an average of 70 million viewers per broadcast. We believe that the networks thus effectively discharged their responsibility to inform the electorate in 1960. They have stated that they stand ready to do so in every Presidential election, if freed from the equal time requirement."

[19] See Hearings Before the Subcommittee on Communications and Power of the House Interstate and Foreign Commerce Committee, on H.R. 8721 and S. 3637, 91st Cong., 2d Sess., p. 8.

[20] Sections 73.119(d), 73.289(d) and 73.654(d), relating, respectively, to AM, FM and TV. See also section 317(a)(2) of the Communications Act which specifically authorizes the Commission to require announcements disclosing that such matter was furnished.

[21] In order to avoid possible confusion in interpreting this rule in relation to one interpretative example in House Rept. 1800 (86th Cong., 2d Sess.) dealing with Section 317 of the Act and rules thereunder, we should add that we are not attempting to apply the above disclosure requirement to mere mimeographed news releases or typed advance copies of speeches. Example 11 of the House Report (see FCC Public Notice of May 6, 1963, FCC 63–409) states that no announcement is required when "news releases are furnished to a station by Government, business, labor and civic organizations, and private persons, with respect to their activities, and editorial comment therefrom is used on a program." We believe, however, that with respect to program material dealing with political or other controversial matters, the requirements of our rules must be followed strictly when audio tape or film is furnished.

[22] GE supports the Rosenbush ruling (see par. 24(A)). We have considered this issue generally in our recent Notice (Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 37 FR 5796, 5805; sec. 8, Q. 8), and will reexamine the matter as we gain experience. We thus may clarify our policies here either in a particular case or in our further reports in this Docket.

[23] Commissioner Johnson dissenting and issuing a statement; Commissioner H. Rex Lee concurring in the result. Statements of Commissioners Johnson and Lee filed as part of the original document.

III. Oral arguments on all aspects of the fairness proceeding in Docket No. 19260 were made by the following parties on March 30 and 31, 1972:

Michael Valder, on behalf of Urban Law Institute
Bernard Segal, on behalf of National Broadcasting Company
Sam Love, on behalf of Environmental Action
Malin Perkins, on behalf of the American Association of Advertising Agencies
Geoffrey Cowan, on behalf of Friends of the Earth, et al.
Theodore Pierson, on behalf of Combined Communications Corporation, et al.
Joseph A. Califano, Jr., on behalf of the Democratic National Committee
James J. Freeman, on behalf of the Republican National Committee
Edgar P. Czarra, Jr., on behalf of the Corinthian Stations and the Orion Stations
Tracy Weston, on behalf of National Citizens Committee for Broadcasting
J. Roger Wollenberg, on behalf of Columbia Broadcasting System, Inc.
Robert A. Woods, on behalf of National Assn. of Educational Broadcasters
David Lichenstein, on behalf of Accuracy in Media, Inc.
Mrs. Cara Siller, on behalf of Women for the Unborn
Rev. Paul G. Driscoll, Human Life Coordinator of the Rockville Centre (New York) Archdiocese
James A. McKenna, Jr., on behalf of American Broadcasting Companies, Inc.
Ben C. Fisher, on behalf of Commission on Population Growth and the American Future, and Population Education, Inc.
Miles David, on behalf of Radio Advertising Bureau
Absalom Jordan, on behalf of the Black United Front
Peter W. Allport, on behalf of Association of National Advertisers
Dr. Blue Carstenson, on behalf of National Consumer Organizations Ad Hoc Advisory Committee to Virginia Knauer
Leo Perlis, on behalf of Radio and TV Subcommittee of the Ad Hoc National Voluntary Organizations Advisory Committee on Consumer Interests
Warren Zwicky, on behalf of Storer Broadcasting Company
Madalyn Murray O'Hair, on behalf of Society of Separationists
John Summers, on behalf of National Association of Broadcasters
Beverly Moore, on behalf of Corporate Accountability Research Group
Allen J. Potkin, on behalf of Concerned Citizens of West Virginia
Daniel W. Toohey, on behalf of Basic Communications, Inc.
Domingo Nick Reyes, on behalf of National Mexican American Anti-Defamation Committee
Stewart Feldstein, on behalf of National Cable Television Assn.

APPENDIX B

A. S. Abell
American Advertising Federation
American Association of Advertising Agencies
American Broadcasting Company (ABC)
American Civil Liberties Union (ACLU)
American Civil Liberties Union of Maryland
American Jewish Committee
American Medical Association
American Petroleum Institute
Americans for Democratic Action (ADA)
Anti-Defamation League
Appalachian Research and Defense Fund, Inc.
Basic Communications, Inc. et. al.
Border Broadcasting, Inc.
Boulder Radio, KBOL
Broadcasting Association, Inc.
Business Executives Move for Vietnam Peace
Burger, John P.
Capitol Broadcasting Co., Inc.
Channel 7, Inc.
Channel Two Television Co.
Chronicle Broadcasting Co.
Columbia Broadcasting System, Inc.
Commission on Population Growth and American Future
Communications Media Committee
Communications Workers of America
Consumers Union
Corinthian Stations et. al.
Council on Economic Priorities
Democratic National Committee
Doubleday Broadcasting, Inc.
Environmental Action
Environmental Defense Fund
Evening News Association et. al.
Fairbanks Broadcasting Co., Inc.
Faulkner Radio, Inc.
Federal Trade Commission
Flower City Television
Friends of the Earth
Friak, Richard M.
General Electric Broadcasting Company, Inc. (GEBCO)
Georgetown Law Journal
Gill Industries
Graves, Frances A.
Great Plains Broadcasting Co.
Group W. Westinghouse Broadcasting Co., Inc.
Haley, Bader & Potts
Hubbard Broadcasting Inc.
Institute for American Democracy
Institute for Public Interest Representation
Jet-Co Radio Inc.
KALJ-FM Lan Jol Enterprises
KLAS-TV 8
KLTV
KPRC, Inc.
KTBS, Inc.
KWPC, Inc.
Lee Enterprises, Inc.
Maryland Undergraduate Students
McClatchy Newspapers
McKenna, Wilkinson & Kittner (various licensees)
Metromedia, Inc.
Metro Washington Coalition for Clean Air, Inc.
Milam, Lorenzo W.
National Association of Broadcasters
National Association of Educational Broadcasters
National Broadcasting Co. (NBC)
National Citizens Committee for Broadcasting
National Organization for Women (NOW)
National Welfare Rights Organization et. al.
National Wildlife Federation
Nebraska Broadcasters Association
Nebraska Television Corporation
Ohio Association of Broadcasters
Oregon Association of Broadcasters
Orion Stations
Parker, Edwin
Pierson, Ball & Dowd
Population Education, Inc.
Post Corporation
Post Newsweek Corporation
Project on Corporate Responsibility
Public Broadcasting Service
Radio Enterprises of Ohio, WREO
Radio Station KTCH
Radio Television News Directors Association
Republican National Committee
Retail Store Employees Union Local 880
Royal Street Corp.
Rust Craft Broadcasting of New York, Inc.
Salina Radio, Inc.
Screen Gems Stations, Inc.
Sierra Club
Society of Separationists
Southern Broadcasting Company
Stauffer Publications, Inc.
Storer Broadcasting Company
Students for Fair Access to the Media
Television Bureau of Advertising
Time-Life Broadcasting Inc.
United Church of Christ
Universal Communications Corp.
Urban Law Institute of Antioch College
WARA-TV Broadcasting Corp.
WBEN, Inc.
WBOC, Inc.
WDSU-TV, Inc.
WFTR
WGAN
WGAU
WGN, Continental Broadcasting
WIRY, Inc.
WKY
WPBS, Bulletin Co.
WTVM, Inc.
Washington County Broadcasting Company
Wintersteen, John D., Woonsocket Broadcasting Company
Young Men's Christian Association

[FR Doc.74-16379 Filed 7-17-74;8:45 am]

Exhibit 119: *In Re The Handling of Public Issues* (Reconsideration) Slip Opinion (March 19, 1976)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 76-265
39868

In the Matter of The Handling Of Public Issues Under The Fairness Doctrine And The Public Interest Standards Of The Communica- tions Act.	)	Docket No. 19260

MEMORANDUM OPINION AND ORDER ON
RECONSIDERATION OF THE FAIRNESS REPORT

Adopted: March 19, 1976 Released: March 24, 1976

By the Commission: Chairman Wiley issuing a separate statement; Commissioner Hooks concurring and issuing a statement; Commissioner Robinson dissenting and issuing a statement.

I. Introduction

1. During the past four years, the Commission has engaged in a comprehensive inquiry into the purposes and the application of the fairness doctrine. The extent of public input in this proceeding is documented in the Fairness Report, 48 FCC 2d 1 (1974). We now have before us various petitions for reconsideration of that Report. We here turn our attention to the questions raised by those petitions, and other questions which have come to our attention requiring further clarification of our fairness doctrine policy.

2. The petitions for reconsideration present a vigorous disagreement with the Report's position on applying the doctrine to standard product commercial advertising, and present a proposed alternative to the doctrine. They further suggest that the doctrine be invoked only in license renewal proceedings, and suggest applications of the doctrine for slanted or staged news, personal attacks, and editorial advertising.

3. Petitioner Henry Geller argues that the Commission is prohibited from applying the doctrine except as part of a license renewal proceeding. Mr. Geller's conclusion is based on his reading of two recent Supreme Court decisions 1/ and on the early history of the Fairness Doctrine. He proposes that licensees adopt a "ten issue" approach to meeting fairness obligations and that all complaints be

1/ Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); CBS v. DNC, 412 U.S. 94 (1973).

referred to the licensee when they are received. He further advocates a "hands-off" policy for the Commission concerning news distortion or slanting. 2/

4. Mr. Geller further urges the Commission to modify its "crazy quilt" personal attack rules. He suggests instead that if such an attack is made as part of the discussion of a controversial issue of public importance and the licensee has not achieved fairness nor made timely plans to do so, then the licensee must notify the attacked party within a "reasonable time" and offer an opportunity for response. Geller urges us to require broadcasters to examine and consider editorial advertising without requiring them to accept any. Finally, he opposes the decision not to apply the doctrine to product efficacy advertising. In this last position, he is joined by the Media Access Project (MAP) petitions. 3/ MAP contends that the Commission has failed to articulate its reasons for allegedly exempting product advertising from the doctrine and that hearings should have been held to determine that decision's economic impact. Moreover, MAP argues that prior Court decisions require that the Commission include product advertising within the ambit of the fairness doctrine, and that it is improper to conclude that advertisements for particular product line or brand cannot advocate a controversial issue of public importance.

5. MAP's position is opposed by Metromedia and McKenna, Wilkinson and Kittner (on behalf of broadcast clients). Metromedia cites the depth of the Commission's inquiry in this docket and argues that MAP's interpretation of certain Court decisions is overbroad. The McKenna response faults MAP for merely offering its own counter-assumptions supplemented with a few random and inconclusive statistics. It suggests that, under MAP's proposal, the Commission would have to make subjective evaluations of the informational impact of commercial messages.

6. MAP proposes that before a complaint may be filed with the Commission, the station must answer the complaint stating whether the

2/ Under his proposal, Commission action would be taken only upon extrinsic evidence showing that the owner or "top management" gave instructions for deliberate slanting. Deliberate slanting by other station personnel would be a matter to be resolved by the licensee without any Commission follow-up.

3/ For the United Farm Workers (UFW), the Council on Economic Priorities (CEP), and the Project on Corporate Responsibility (PCR).

issue is a controversial issue of public importance and what contrasting programming has been aired. Metromedia and McKenna argue that the proposal would be a significant departure from present standards by imposing the initial burden, that properly should remain with the complainant, on the individual station.

7. The final petition, by the Committee for Open Media (COM), proposes an optional plan which, if adopted by the licensee, would satisfy his general fairness obligations. COM proposes a scheme of access through "Free Speech Messages" (FSM), publicly available spot announcements aired at different times during the week. One half of the spots would be allocated on a first-come, first-served basis, and the remainder would be rotated among "representative spokespersons" from groups which have demonstrated significant community support. COM would not apply this system to partisan political access and recommends amending the personal attack rules to exempt such attacks made in an FSM.

II. Discussion

A. Purpose of the Fairness Doctrine

8. The purpose of the fairness doctrine was discussed in some depth in the Fairness Report, supra at 2-8, but events subsequent to the adoption of the Report indicate that a recapitulation of our views is called for here.

9. There is no principle of greater importance to understanding the fairness doctrine and the First Amendment than that "[i]t is the right of the viewers and listeners, not the broadcasters, which is paramount." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969). The fundamental concept which underscores this right is that the continued vitality of a democratic society and its freedoms requires the "widest possible dissemination of information from diverse and antagonistic sources..." Associated Press v. United States, 326 U.S. 1, 20 (1945). We must always keep in mind that "speech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).4 / The relationship of this principle to broadcasting was articulated in Green v. FCC, 447 F.2d 323 (1973). There it was held that "the essential basis of any fairness doctrine, no matter with what specificity the standards are defined, is that the American public must not be left uninformed." Id. at 329.

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4 / This conceptual approach to the right of free speech is supported by related holdings in cases dealing with fundamental rights and the continued vitality of the democratic process. The Supreme Court has stated that "no right is more precious in a free country than that of having a voice in the election of those who make the laws...Other rights, even the most basic, are illusory if the right to vote is undermined." Westberry v. Sanders, 376 U.S. 1, 17 (1964), cited with approval in (footnote continued on following page.)

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10. It is difficult to believe that the Court in Green, supra, intended the American public to be only half-informed, particularly in light of the language in Associated Press, supra, calling for the "widest possible dissemination of information from diverse and antagonistic sources..." Id. at 20 (emphasis added). Full information is the theoretical underpinning of the broadcaster's two duties; to cover controversial issues of public importance fairly by providing an opportunity for the presentation of contrasting points of view; and to devote a reasonable amount of broadcast time to the coverage of public issues.

11. We do not subscribe to the theory that recent Supreme Court decisions have established boundaries concerning the fairness doctrine. In Miami Herald v. Tornillo, supra, the Court's opinion was limited only to print media and cited language in CBS v. DNC, supra, which set apart broadcasting and newspapers. 418 U.S. 241, 255 (1974), quoting from 412 U.S. 94, 117 (1973). The language relied upon by Mr. Geller in his petition clearly places the Court's emphasis on "newspapers" in the context of the historical evolution of free "press" guarantees.

12. It is suggested that the Court's language in CBS, supra, that "[f]or better or worse, editing is what editors are for...," is a pronouncement that the Commission must abandon its current views on the fairness doctrine. Yet the lines preceding that quotation reveal that language as presenting a choice between the view "that every potential speaker is 'the best judge' of what the listening public ought to hear" and the view that such choices are better left to editors. 412 U.S. at 124. The Supreme Court did not address in CBS the question of licensee discretion vis-a-vis the Commission's role as the ultimate arbiter of the fairness doctrine. The Court did not generalize that overzealous invocation of the fairness doctrine might cause an "erosion of the journalistic discretion of broadcasters in the coverage of public issues." 412 U.S. at 124. The Court was instead specifically concerned with the question of licensee discretion

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(footnote continued from previous page)

4/ Williams v. Rhodes, 393 U.S. 23, 31 (1968). In Williams, the Courts went on to say that the individual's right to vote is "heavily burdened" where the number of parties allowed on the ballot is restricted without a showing of a compelling state interest for such a restriction, Id. This view was applied to candidates as well as parties in Lubin v. Panish 415 U.S. 709 (1974). The essential thread of reasoning in these cases, like Red Lion, is that it is the citizen who has the right to listen to and to vote for a diverse selection of views and candidates, rather than the rights of candidates to a ballot position, or of broadcasters to be heard, that is paramount.

vis-a-vis individuals demanding a right of access. The Court said that if the Fairness Doctrine were expanded to include mandatory access there would be a

> . . . substantial danger that the effective operation of that doctrine would be jeopardized. The result would be a further erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer of control over the treatment of public issues from the licensees who are accountable for broadcast performance to private individuals who are not. Id.

13. The CBS decision's denial of the right of access was predicated on the continued existence and enforcement of the fairness doctrine as it has developed over the years. In the language quoted above, the Court implied that it preferred control over the treatment of public issues to remain with licensees because they are "accountable for broadcast performance." Id. The Court further stated that it feared that a transfer of such control would jeopardize the effective operation of the fairness doctrine. In CBS, therefore, the Supreme Court reaffirmed its continued belief in and support for the fairness doctrine and Red Lion.

B. The Statutory Scheme - Balancing Rights and Burderns

14. The legislative framework regulating broadcasters is grounded in the "public interest" and the courts have consistently recognized that "[t]his mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power 'not niggardly but expansive.'" National Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943), cited with approval 395 U.S. at 380. The Supreme Court has made it clear that "[t]here is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all." 395 U.S. at 392. The Court also recognized that while the "initial and primary responsibility for fairness, balance and objectivity" rests upon the licensee, the Commission is the "overseer and ultimate arbiter and guardian of the public interest." CBS v. DNC, 412 U.S. 94, 117 (1973).

15. The statutory scheme calls for balancing the people's First Amendment rights and the rights of the media. Over the past half century, "Congress and its chosen regulatory agency have established a delicately balanced system of regulation intended to serve the interests of all concerned." CBS v. DNC, 412 U. S. 94, 102. This system is outlined with specific procedural requirements and with substantive guidelines upon which both viewer and licensee may rely. The Commission has tailored its actions so as not to become, in effect, the broadcast journalist or programmer. We do not believe that it would be in the public interest to upset this delicate balance.

16. In the Fairness Report, supra at 17-18, we rejected the notion that all fairness complaints should be reviewed only as part of license renewal proceedings There, we said that we believed it would be impossible to evaluate overall licensee performance at renewal time without considering the specifics of individual complaints. The public's right to be informed is best safeguarded by an ongoing review of all fairness complaints. For example, the incentive for citizens to file complaints would be removed if their complaints would not result in the opposing viewpoint being aired before the issue has become stale with the passage of time. Continuing enforcement helps the broadcaster by helping to remedy violations which would place his license in jeopardy before a flagrant pattern of abuse develops. Id. at 18. We do not believe that a departure from that position would be in the public interest. We conclude, therefore, that in view of the considerations enunciated above, it would be most appropriate to utilize this case by case approach to ensure that broadcasters fulfill their affirmative responsibilities under the fairness doctrine to adequately cover controversial issues of public importance and to present differing viewpoints on those issues. See Public Communications Inc., 50 FCC 2d 395 (1974).

17. As part of the ongoing review procedure of fairness complaints, the Commission will continue to make its determinations of licensee reasonableness in the context of overall programming on an issue rather than on a particular program. 5/ We recognize that there are difficulties inherent in selecting a finite period of time (i.e., a "cut-off" date) in which to view the "overall" programming on an issue. We see no advantage to the arbitrary selection of the license term as the period

5/ The only instance in which the Commission's determination might rest on a single program would involve a complaint where the licensee declares it has not presented prior programming on that issue and announces its intention not to present any future programming on that issue. Hence, that single program would be the overall programming on the issue.

over some other time period. 6/ Indeed, since the fairness doctrine is oriented toward issues and varying viewpoints, it is preferable to retain the present flexibility in reviewing a time period during which the issue is a matter of public controversy and public importance.

18. We are urged to reconsider our procedure for handling fairness complaints. The Commission's complaint procedures and substantive rulings attempt to strike and maintain a delicate balance between licensees and complainants to ensure that neither side is unduly disadvantaged. We noted in the Fairness Report, supra, at 18, that there seems to be a lack of understanding of Commission complaint procedures. In an effort to alleviate that problem, the procedures were discussed in some detail. Id. The instant petitions indicate that further explanation would be useful.7/

19. The Commission does not ordinarily invoke the fairness doctrine on its own motion. Action by the Commission must await a dispute between the complainant and the licensee which is not resolved by those parties. Thus, where the licensee agrees to present opposing views on an issue the Commission need not become involved. However, no specific action is required of the licensee until prima facie evidence of a violation is presented to the Commission by a complainant. Allen C. Phelps, 21 FCC 2d 12 (1969). This policy is part of the delicate balance allocating burdens between licensees and complainants. This policy prevents broadcasters from being burdened with the task of answering idle or capricious complaints. Report, supra, at 8.

6/ For the same reasons, we see little advantage in making arbitrary changes in the personal attack rules. No system is perfect, and there may be disadvantages to the present rules. However, proposals made to the Commission to change those rules have their own drawbacks which render them no more acceptable than our present rules. Indeed, Mr. Geller's proposal noted in para. 4, supra, merely would add another patch to the "crazy quilt." It ignores reality in accepting the premise that a licensee which "has not achieved fairness or made timely plans to do so" would see the need to do anything at all. The proposal adds delay to the application of the rule, replaces a precise deadline with an undefined "reasonable time," and removes Commission consideration to renewal time. Its net effect would be to prevent the victim of an attack from having an opportunity to respond in a timely fashion. Nor do we see any reason for departing from our present method for dealing with news slanting or distortion. See note 2 and accompanying text, supra, and Columbia Broadcasting System (Hunger in America), 20 FCC 2d 143 (1969).

7/ For example, MAP proposed that adverse fairness doctrine rulings against a network be applicable to its affiliates. The Commission traditionally has approached networks where a complaint is based on a network program, notwithstanding the fact that fairness obligations "attach to the individual station licensee."Cf. Letter to Blair Clark, Campaign Manager, McCarthy for President, 11 FCC 2d 511 (1968). It is settled that even though the TV networks are themselves licensees they respond as networks only and are not responsible for the overall programming of an affiliate on a controversial issue of public importance.

20. As part of the allocation of burdens and responsibility among complainants, licensees and the Commission, the initial burden has been placed on the complaining party. As stated in the Fairness Doctrine Primer, 40 FCC 598 (1964):

> Where complaint is made to the Commission, the Commission expects a complainant to submit specific information indicating (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the program was carried; (4) the basis for the claim that the station has presented only one side of the question; and (5) whether the station had afforded, or has plans to afford, an opportunity for the presentation of contrasting viewpoints.

Id. at 600.

21. In the Fairness Report, supra, at 19-21, we discussed the fourth and fifth items mentioned above. The suggestion there that licensees respond to the complainant stating whether there was a controversial issue of public importance leads to the burden placed on the complainant in the second item -- specifying the particular issue of a controversial nature discussed over the air.

22. The requirement of specificity was reemphasized in David C. Green, 24 FCC 2d 171 (1970), affirmed Green v. FCC 447 F. 2d 323 (D. C. Cir. 1971), where the court recognized that in order to allege that an issue is a controversial issue of public importance the complainant must first define the issue. Id. at 329. This requirement is needed so that complainants, licensees and the Commission will have a clearer understanding of the positions of the parties. This is particularly true because once the burden of specificity has been placed upon the complainant, our attention and that of the licensee is then directed to the issue as framed by the complainant We do not intend to be placed in the position of specifying the alleged controversial issue of public importance in a complaint. It is not the proper function of the administering agency to frame the complaints coming before it and it is incumbent upon the complaining party to bring before us a prima facie complaint.

23. After the complainant has presented prima facie evidence of a fairness violation, the licensee is called upon to answer an inquiry by the Commission staff which recites the issue specified by the complaint. The licensee is asked whether that issue is a controversial issue of public importance, whether the program in question addressed that issue,

and whether other programming has been or will be presented on that issue. The Commission must then decide whether the licensee's responses to these questions are reasonable. 8/

24. Within the parameters of law, the determination of reasonableness in each particular instance is a question of fact. This is true because reasonableness is not an absolute standard, but is situational in nature -- rooted in the facts which gave rise to the controversy. Wilderness Society, 31 FCC 2d 729, 732 (1971). Reasonableness is also inherently a comparative determination, the actions of a person being measured against a standard by the finder of fact, that standard being the "reasonable man." Therefore, before the reasonableness of one party may be decided, an independent (i.e. comparative) judgment on the question must be made by the finder of fact.

25. This does not mean that the Commission or its staff may substitute their judgment for that of the licensee. A hard look at all the facts and competing arguments is required before the determination on licensee reasonableness. WAIT Radio v. FCC 418 F. 2d 1153 (D. C. Cir. 1969). This examination is only one step toward that final determination. Having once made its initial examination, the staff then has the responsibility of determining the reasonableness of the licensee's judgment. Rather

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8/Where a licensee poses an alternative issue to that specified in the complaint, such alternative will be considered an implicit denial that the basic thrust of the program addressed the issue specified by the complaint. In such a case the Commission will continue to review the reasonableness of the licensee's denial, considering the alternative issue as evidence concerning the licensee's good faith and reasonableness. Any departure from this policy would render useless the requirement for specificity by the complainant and permit licensees to avoid presenting opposing viewpoints by sophistic distinctions entirely lost on the average viewer. We adhere, however, to our policy in National Broadcasting Co. (AOPA), 25 FCC 2d 735 (1970), where we found reasonable NBC's denial that its program addressed the issue specified by the complainant. There we looked to the basic thrust of the program and declined to apply the doctrine to sub-issues because if every statement could be made the subject of a separate fairness requirement, the doctrine would be unworkable and the Commission would become involved too deeply in broadcast journalism. Id. at 736-7. See also Gary Lane, 38 FCC 2d 45 (1972), Application for Review denied, 39 FCC 2d 938 (1973).

than substituting its views for those of the licensee, the staff at this stage decides the licensee's reasonableness based on the contentions of all parties and on its own evaluation of the evidence. 9/

C. Standard Product Commericals

26. In the Fairness Report, supra at 24-8, we declared after much deliberation that the public interest would be served best by not applying the doctrine to standard product commericals. 10/ At least two petitioners disagree strongly with this decision and suggest that the Commission was without power to effect such a change, and that it failed to articulate sufficient grounds for the policy. We disagree.

9/ The Commission's standard of review allows great discretion to the licensee and does not vary depending upon the particular case being reviewed. It has been suggested in the past that we abandon our established standards where the licensee has a financial interest concerning a controversial issue of public importance. That we cannot do. The Commission has adequate means to deal with licensees who use their facilities to gain commercial advantage in other enterprises, and who in other ways abuse their public trust. The fairness doctrine is not the proper vehicle for such enforcement nor is it the most effective. Such overbroad use of the doctrine would undermine its effective use where it is most needed. We adhere to the policy set forth in Public Communication, Inc., 50 FCC 2d 395 (1974). To the extent that WSOC Broadcasting Co., 40 FCC 468 (1958), Springfield Television Broadcasting Corporation, 45 FCC 2083 (1965) and 28 FCC 2d 339 (1971), and Pennsylvania Community Antenna Association, Inc., 6 R.R. 2d 112 (1965), conflict with this policy they are overruled.

10/ Commericals which simply sell a product and do not deal meaningfully with a controversial issue of public importance.

27. The Report, supra, articulates the rationale for adopting the policy and its substantive standards, and both the rationale and the standards are well within the Commission's discretion. The Commission clearly stated that the standard was being changed and not ignored, and it set forth a reasoned opinion explaining the change. Indeed, the U. S. Court of Appeals for the First Circuit, in sustaining the Commission, recently determined that the Commission had acted within its statutory authority when it "with appropriate notice and . . . sufficient clarity" concluded that it was in the public interest to "abandon [its] earlier precedents and frame new policies." Public Interest Research Group v. FCC, 522 F.2d 1060, 1065 (1975), cert. denied, March 22, 1976. The Court went on to say:

> Given the necessity of product advertisement in American broadcasting, and the administrative difficulties and costs of determining when a product is so controversial as to trigger fairness obligations, we cannot, merely from the generalized congressional endorsements described in Red Lion, say that the Commission acted contrary to statute when it struck the current balance between product advertising and the fairness doctrine.

Id. at 1067

28. In the Report, we concluded that the application of the doctrine to cigarette commercials had been a mistake because it departed from the doctrine's central purpose of developing an informed public opinion. 48 FCC 2d at 24. The extension of the cigarette ruling to other commercials, as in Friends of the Earth v. FCC, 449 F.2d 1164, compounded the problem, and forced broadcasters and the Commission to balance two sets of commercials "which contribute nothing to public understanding" of the underlying issues. Therefore we concluded:

> In the absence of some meaningful or substantive discussion..., we do not believe that the usual product commercial can realistically be said to inform the public on any side of a controversial issue of public importance.

48 FCC 2d at 76.

Furthermore, we said that the diversion of broadcasters' attention to the fairness implications of ads would hinder their fulfillment of responsibilities to develop informed public opinion in more meaningful ways.

29. Neither have court decisions constrained the Commission from changing its policy after due deliberation consistent with required administrative procedures. See Public Interest Research Group v. FCC, supra. The D. C. Circuit was careful in Banzhaf and Friends of the Earth to avoid implying that the fairness doctrine or the public interest standard mandated the Commission to make such a finding. In Friends of the Earth, the Court expressly noted the pending fairness inquiry, and pointedly suggested that its holding was based only on then-existing Commission policy concerning the fairness doctrine:

> Pending, however, a reformulation of its position, we are unable to see how the Commission can plausibly differentiate the case presently before us from Banzhaf insofar as the applicability of the fairness doctrine is concerned.

449 F.2d at 1170.

30. The Commission was given inconclusive statistics and told that it should have held a hearing on the economics of broadcasting before concluding that extension of the doctrine to product advertising would be detrimental to commercial broadcasting. The extensive proceedings in this docket provided more than ample opportunity for that question to be raised. Clearly, however, the economic impact on the broadcasting industry was only one of many factors contributing to our choice of policy, and that factor alone is not of such critical importance as to cause a change of policy. See, 48 FCC 2d at 24-27.

D. Free Speech Messages

31. In the Fairness Report, supra, suggestions for a system of mandatory access were rejected as neither practical nor desirable. In CBS v. DNC, 412 U. S. 94 (1973), the Supreme Court held that mandatory access is not a matter of either constitutional or statutory right. We are now presented instead with a proposal for an optional access system to be administered by the licensee, and supplemented by the fairness doctrine.

32. The essential requirements for any such system would be that licensee discretion be preserved and no right of access accrue to particular persons or groups. Further the access system would not be permitted to allow important issues to escape timely public discussion. Most importantly, the system must not draw the government into the role of deciding who should be allowed on the air and when.

33. The proposal of the Committee for an Open Media (COM) is the first serious attempt to meet these requirements. It is neither perfected nor ready for adoption as rule or policy. We do not envision that system as a substitute for fairness obligations, but it has the potential to offer a format which acts consistently and complementarily with the purposes of the doctrine. We view Free Speech Messages as a supplement to a licensee's fairness obligations, but we reiterate our view

that the licensee is responsible for seeing that important controversial issues are discussed and that opposing viewpoints are provided an opportunity for presentation.

III. Conclusion

34. It is hoped that this reconsideration Report and Order will help to clarify the responsibilities and procedures incumbent upon licensees, complainants and the Commission under the fairness doctrine, and the reasons for our policies. We are attempting to balance conflicting constitutional rights by choosing paths which minimize the interference with the rights of either party, and which minimize the role of government in evaluating media performance, consistent with the public interest.

35. Accordingly, IT IS ORDERED, That the petitions for reconsideration ARE DENIED in all respects other than as incorporated in this Report and Order. IT IS FURTHER ORDERED, That the proceedings in Docket 19260, ARE TERMINATED.[11/]

FEDERAL COMMUNICATIONS COMMISSION *

Vincent J. Mullins
Secretary

*See attached Separate Statement of Chairman Richard E. Wiley.
*See attached Dissenting Statement of Commissioner Glen O. Robinson.
*Commissioner Hooks' statement will be released at a later date.

11/ The Commission has decided not to proceed at this time with a proposal by the Chairman for an experimental suspension of the fairness doctrine in larger radio markets.

Separate Statement of Chairman Richard E. Wiley
In re
Reconsideration of Fairness Report
(Docket 19260)

In an address to the International Radio and Television Society on September 16, 1975, I proposed an experiment in which the Commission would discontinue enforcement of the fairness doctrine in the larger radio markets. I believe that this proposal has considerable merit and that it is unfortunate that a majority of the Commission has chosen not to pursue the idea at this time.

There is little reason to believe that fairness enforcement is necessary in the major radio markets. The doctrine, as we all know, is predicated upon the assumption that there is a scarcity of broadcast frequencies and that licensees should not be permitted to monopolize these channels so as to deny the public access to contrasting viewpoints on public issues. In the larger markets, it seems clear that the problem of scarcity is not so significant as to make it likely that radio debate could be monopolized by a single philosophy or point of view. In the Chicago market, for example, there are some 65 commercial radio stations; in Los Angeles the figure is 59; and in New York there are 43 stations. Even in the absence of governmental control and supervision, it seems to me that a wide variety of opinion would be presented in these markets.

The question of the Commission's legal authority to adopt a fairness experiment is somewhat more difficult and complex. Prior to 1959, there would have been no doubt that we had the discretion to conduct such an experiment. In that year, however, the Communications Act was amended so as to refer approvingly to the standard of fairness in broadcasting. The literal wording of the statute indicates only that the Commission's fairness policies were left undisturbed, but the provision has, nevertheless, been widely interpreted to stand as a "codification" or legislative enactment of the doctrine. See, e.g., Straus Communications, Inc. v. FCC, D.C. Cir. No. 75-1083, January 16, 1976, Slip op. at n. 11 (referring to the provision as amounting to an "explicit statutory enactment").

The Supreme Court in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1967), stated at one point that the 1959 amendment "ratified" the doctrine (p. 381) and at another point that the language was "merely approving" (p. 384). The question was discussed more recently in the so-called "snowmobile" case. Public Interest Research Group v. FCC, 522 F.2d 1060 (1st Cir. 1975). In this case, the First Circuit stated that the statutory language is not sufficiently specific to be construed as more than a general endorsement of fairness standards or an approval of the "general tenets" of the fairness doctrine (p. 1066). The Court indicated that questions of "application and accommodation" and of "how and when" the fairness doctrine should be applied should be left to agency discretion (p. 1067). It suggests, further, that these decisions should be arrived at under the general public interest standard and that the

Commission's decisions should be upheld unless they are "so plainly inimical to the public interest as to be illegal" (p. 1067).

As indicated, I believe there is ample justification for concluding that a large market fairness experiment would be consistent with the public interest and, indeed, that it would be in keeping with the "general tenets" of the fairness doctrine itself. We stated in the Fairness Report, 48 FCC 2d 1 (1974), that the basic goal of the fairness doctrine, like that of the First Amendment, was "to foster 'uninhibited, robust, wide-open' debate on public issues", quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). The whole legal and constitutional tradition of this country teaches us that (except in cases of serious technological scarcity) this goal cannot be advanced by government control of the media. It seems clear to me, therefore, that a radio experiment (in markets where scarcity is not a serious practical problem) would serve the purposes of both the First Amendment and the Commission's fairness doctrine.

While I recognize the fact that there is room for debate concerning the meaning of the 1959 amendments to the Act. I nevertheless believe that it would be desirable for the Commission to initiate a public inquiry which would afford interested parties an opportunity to comment on the question of our legal authority, and also examine the appropriate size and scope of an experiment. I am hopeful that, in the

not too distant future, the Commission or the Congress will look more favorably on the idea of reforming the fairness doctrine so as to apply it only in circumstances where there is a realistic need for government regulation.

It has been suggested that, while the Commission may not be moved to cut back on the fairness doctrine (as suggested by my experiment), it might nevertheless explore certain alternatives to the traditional fairness principles and procedures. In this regard, the proposal of the committee for Open Media that we allow "access" as an option in lieu of fairness has attracted some attention and support. Under the proposed system, any station which would agree to carry a reasonable number of "Free Speech Messages", and which would set up a mechanical formula for the selection of spokesmen, would be relieved of its fairness obligation to assure that contrasting views on particular issues are reasonably represented.

I do not believe that stations should be encouraged to abdicate editorial control in the fashion suggested by this proposal. The plan calls for heavy emphasis on a single programming technique: the access announcement. In my opinion, a more varied, interesting and informative coverage would be possible if professional journalists played a conscious and positive role in the process. It seems inescapable that editorial supervision would result in a presentation which is more coherent and enlightening than we could expect from a series of random and unstructured

individual appearances. Despite its problems, the present fairness system is, in my opinion, preferable to the alternative which has been suggested.

DISSENTING STATEMENT OF COMMISSIONER GLEN O. ROBINSON

I. The Vulnerability of Venerability

Now over a quarter century old, the fairness doctrine has become one of the venerable institutions of FCC jurisprudence. Unlike some venerable institutions, however, old age has hardly secured the fairness doctrine from the tarnish of corrosive controversy. On the contrary, age seems to have increased, not diminished, critical doubts about the doctrine--its purpose, its effects, its value. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), which put the Supreme Court's imprimatur on the legality of the fairness concept, has not set these doubts to rest. Indeed, the Court's subsequent decision in Miami Herald Pub. Co. v. Tornillo, 418 U.S. 251 (1974), has raised new doubts and fresh concern.

I agree with the Commission's conclusion that Red Lion is still good law, although Tornillo clearly does undermine the foundations on which Red Lion appeared to rest. The original Red Lion decision assumed (1) that the imposition of an obligation of fairness (including a private right to reply in certain instances) did not restrain ("chill") free speech, but actually served to promote it by ensuring greater diversity; and (2) that because the broadcast media operated under conditions of physical scarcity, the marketplace could not be relied upon to produce adequate diversity of speech and, therefore, some forms of regulation; such as the fairness obligation, were appropriate, and necessary. Clearly, Tornillo repudiates the first assumption of Red

Lion. Logically at least, this conclusion is necessary; otherwise there is no basis for the Court's invalidating the right of reply statute in that case. Can Red Lion stand on the second assumption independent of the first? I have some doubts whether it can as a matter of pure logic, for I do not think the condition of scarcity is a compelling basis for distinguishing between electronic and print media[1/]--particularly on the finding made in Tornillo that a compulsory right of reply tends to reduce public debate, contrary to the purpose of the fairness doctrine.[2/]

1/ See, e.g., Robinson, The FCC and the First Amendment: Observations on Forty Years of Radio and Television Regulation, 52 Minn. L. Rev. 67, 88 (1967). See also Barron, Access to the Press--A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967), who argues similarly but draws inferences the opposite of mine, concluding that the print media should be subject to some kind of fairness doctrine. Tornillo, of course, chilled that idea.

2/ In Tornillo the Court found the Florida right of reply statute to have such an effect, reasoning as follows:

> "The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. It is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.
>
> "Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.' New York Times Co. v. Sullivan, supra, 376 U.S. at 279, 84 S.Ct. at 725."

418 U.S. at 256, 257. It should be noted that this reasoning applies with even greater force to broadcasters inasmuch as there are (by the Court's

Nevertheless, however the logic of the matter may appear to me, I am forced also to admit that it appears to appear differently to the Supreme Court; as recently as two months ago, the Supreme Court indicated (albeit in dicta) that it still regards Red Lion as good law. See Buckley v. Valeo, ___U.S.___, 96 S.Ct.649, n.55 (1976).

The question remains whether, constitutional issues aside, the doctrine could nevertheless be repudiated by the Commission. I once thought so,[3/] but the Supreme Court appears to have disagreed. In Red Lion the Court said:

2/ (continued)
acknowledgment) greater "technological limitations" on the time which they can devote to meeting the obligation (therefore, by the Court's reasoning, higher cost and correspondingly greater incentive to "play it safe"). On the reasoning of Tornillo it is thus difficult to see that scarcity supports the fairness doctrine since the presumed necessity to compensate for inherent limitations on diversity which such scarcity creates aggravates the chilling effect.

3/ The question turns on the interpretation of the following language of the 1959 amendments to Section 315 of the Communications Act:

> "Nothing in the foregoing sentence [setting forth certain exemptions from the equal time provisions] shall be construed as relieving broadcasters. . .from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

I argued in my 1967 article (supra, footnote 1 at 134) that this language need not be read to codify the fairness doctrine, and that it is better understood simply as a clarification that Congress did not intend, by creating exemptions from the equal time obligation, to disturb the status quo as far as the fairness doctrine was concerned. Under this reading, the clause "and to afford reasonable opportunity. . ." would be read disjunctively rather than conjunctively with the preceding clause. This reading of the statute, which conforms with the legislative history, see Manelli, Legislative History of the Fairness Doctrine, Staff Study for the Committee on Interstate and Foreign Commerce, 90th Cong. 1st. Sess. 21-21 (1968), would preserve our discretion to abandon or alter the administration of the doctrine.

> "that Congress in 1969 [intended] that the phrase 'public interest,' which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard."

395 U.S. at 380. See also Straus Communications, Inc. v. FCC, ___ F.2d ____; No. 75-1083, Slip Opinion, p.10, n.11 (D.C. Cir., Jan. 16, 1976). It thus seems to be beyond our power to eliminate altogether the general requirement that licensees give a reasonably balanced presentation of controversial public issues. However, I do not interpret Red Lion (or Straus) as depriving the FCC of all power to reshape the rule according to changing perceptions of the public interest.[4/] While our discretion is circumscribed, I think we still have freedom to redefine how the basic fairness obligation may be satisfied by licensees. Given the Commission's action in narrowing the scope of the doctrine to exclude routine commercial product advertising from its coverage--an action with which I wholeheartedly agree[5/]--my colleagues evidently agree that some reshaping of the doctrine is still within our power.

4/ See Public Interest Research Group v. FCC, 522 F.2d 1060, 1066-67 (1st Cir., 1975) (affirming Commission change in the fairness doctrine as applied to commercial advertising). See also Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 131,132 (1973), where the Court concludes its discussion on the FCC's continuing investigation of the best feasible use of the broadcast band for the discussion of important matters by cautioning that "courts should not freeze this necessarily dynamic process into a constitutional holding."

5/ I will not elaborate in detail on the commercial advertising aspect. For a recent, detailed critique in Simmons, Commercial Advertising and the Fairness Doctrine: The New FCC Policy in Perspective, 75 Colum. L. Rev. 1083 (1975). Suffice it to say that I long ago thought the Commission's extension of the fairness doctrine to cigarette ads (see Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969)) was a feckless venture that the Commission would come to rue, for it would not be, and could not be, contained. See Hearings on the Fairness Doctrine Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 90th Cong., 2d Sess., ser. 90-33, p. 53,56 (1968). The Com-

The majority and I part company on whether that power should be exercised to seek alternatives to the present formulation of the fairness doctrine. In contrast to the Commission's evident satisfaction with the present fairness doctrine, I believe it has proved to be unworkable and, at least potentially, dangerous--raising public expectations that cannot be fulfilled within the limits which the First Amendment places on our oversight of electronic journalism. Accordingly, within the limits of our discretion under Section 315, I think we should explore alternative possibilities for achieving the underlying goals of the fairness doctrine.

II. The Right to Speak Versus the Right to Hear

Before turning to a critique of the fairness doctrine, a brief note on First Amendment philosophy is appropriate, for it is my belief that much of the debate over the fairness doctrine is needlessly

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5/ (continued)
mission's futile effort to limit the application of Banzhaf (see Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971)) has confirmed this conclusion.

The problem here is generally similar to that which has beset administration of the fairness doctrine elsewhere: if fairness requirements are to be meaningful, they must be enforced with a vigor and a regularity that would require a degree of government supervision that would be unwise. Indeed, such a level of control might also be unconstitutional for, as recent decisions make clear, commercial advertising does enjoy some degree of First Amendment protection. See Bigelow v. Virginia, 421 U.S. 809 (1975); Virginia Citizens Consumer Council, Inc. v. State Board of Pharmacy, 373 F.Supp.683 (E.D. Va.,1974), prob. juris noted, 95 S.Ct. 1389 (1975); California State Board of Pharmacy v. Terry, 395 F.Supp. 94 (N.D. Cal. 1975), appeal filed 9/2/75, 44 U.S.L.W. 3155 (9/23/75). Confronted, on the one hand, with the necessity of extensive control in order to effect even-handed enforcement or, on the other hand, with the equally unattractive alternative of pursuing selective and arbitrary enforcement, the Commission has wisely chosen to make a clean break (more or less; product advertising may still be within the doctrine in exceptional cases where viewpoints on controversial public issues are explicitly discussed) with past folly. Would that it were possible to do this with the entire fairness doctrine.

clouded and misdirected by superficial and sophistical reasoning about the free speech ideal. The Commission begins its defense of the fairness doctrine on a high constitutional plane, quoting from Red Lion:

> "There is no principle of greater importance to understanding the fairness doctrine and the First Amendment than that '[i]t is the right of the viewers and listeners, not the broadcasters, which is paramount.'"

Insofar as this dictum is intended merely to express the traditional utilitarian notion that free speech is protected not only in the interest of the individual speaker but also that of the broader social interest of the public as listeners, the "listener's right" theory is unexceptionable. Similarly, as a simple (if rather eliptical) statement that "free speech" is subject to some restrictions "in the public interest," it can pass without protest, at least pending the review of the specific restrictions imposed. But inasmuch as the above formulation suggests some general principle that the First Amendment gives positive rights to listeners/viewers to dictate what speakers shall tell them, I believe it is pregnant with mischief.

I concede that freedom of speech is conducive to social welfare (a small concession), and it is generally that social interest which underlies the constitutional protection. But I reject the notion that only speech which promotes government or social welfare policies in a

narrow sense is worthy of constitutional protection;[6/] and, in the same vein, I disagree with the implication that the First Amendment is a tool of social policy, to be used and interpreted in an activist, affirmative way which promotes the "spirit" and "purpose" of free speech--the view put forward, for example, in Business Executives Move for Vietnam Peace v. FCC, 540 F.2d 642 (D.C.Cir. 1971), reversed sub nom., Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973). Such an instrumentalist view of the First Amendment effectively reduces the constitutional guarantee of free speech to the same standing and dignity as that of any conventional governmental policy. See Columbia Broadcasting System, Inc., supra, at 132, 133 (concurring opinion of Justice Stewart). Therein lies the vice of the listeners' rights theory. If the speaker truly has the right to hear, it follows (from Hohfeld[7/] and from common sense) that the speaker has a correlative duty to speak. If a listener has a legal right to hear certain things for certain purposes, then a speaker--some speaker--must have correlative duty to speak to those things. On this theory the people have the right to determine what the speaker shall

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6/ Alexander Meiklejohn, one of the most admired modern theorists, insisted that the First Amendment protects only "public" speech of a kind useful to self government. A.Meiklejohn, Free Speech and Its Relation to Self Government, 61-63 (1948). As a corollary of this general proposition Meiklejohn excluded commercial broadcasting from his narrow sphere of relevant speech, on the apparent ground that profit-making was incompatible with free speech. A. Meiklejohn, Political Freedom, XV (M.Sharp, ed. 1960) (forward by Malcolm Sharp). Given Meiklejohn's very narrow conception of the value of free speech and the role of the First Amendment, I find it extraordinarily curious that he should enjoy such a high reputation as a libertarian. His views, if adopted, would sweep away the better part of all the positive First Amendment jurisprudence which has developed in the past score years, not only in the field of mass communications, but elsewhere.

7/ Hohfeld, Some Fundamental Legal Conceptions As Applied to Judicial Reasoning, 23 Yale L.J. 16, 31-32 (1913).

say--in order to serve the "spirit" of the First Amendment to advance the social welfare of "the people."

Once it is explained in this way, it becomes apparent why the listeners' rights theory has not taken hold as a general theory of the First Amendment and, indeed, appears to have now been at least impliedly repudiated even for the electronic media.[8/] As a general conception, the listeners' rights theory makes nonsense of the First Amendment; in fact, it stands it on its head. The First Amendment may indeed belong to everybody--as the listeners' rights theory suggests--but it cannot truly belong to everybody unless it first belongs to each and every particular somebody. To deny the individual right in the name of the collective right transforms the First Amendment from a guarantee of individual freedom into its very opposite, rule by public clamor. To be sure, this interference is intended to further the "spirit" and "larger purposes" of the First Amendment. For my part, however, I prefer to entrust my political freedoms to the Constitution rather than to the ardent schemes of well-meaning persons.

In summary, we err when we stray beyond the simple proposition that the First Amendment is a restraint on government--nothing less, but also nothing more. Of course, it does not follow from this that the First

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8/ Tornillo must be considered an implied repudiation of the theory so far as the print media are concerned; and with respect to the electronic media, Columbia Broadcasting System, Inc. v. Democratic National Committee seems basically hostile to the theory. Thus, the listeners' rights theory seems to have no real vitality except as a rhetorical bow to the unexceptional notion that free speech does not totally supplant the rights of the people at large to exercise their sovereign powers.

Amendment restrains every act of government touching free speech (whether that action is intended to further free speech, to restrain it, or is neutral with respect to it). Thus, rejection of the listeners' rights idea expressed in Red Lion would not necessarily alter the decision, but it would, at least, have the clear virtue of removing from the debate over fairness the misleading and mischievous notion that the First Amendment is an expression of the right of the public, through their government, to regulate speech in the interest of listeners.

III. The Concept of Fairness

I assume no one has any serious difficulties either with the concept of fairness or its applicability to the communications media. It is the administration of that idea, as legally obligatory conduct, which creates the hard problems. As Lewis Carroll reminds us, the linguistic barriers on the way to resolving a problem may be the most difficult to pass. In Through the Looking-Glass, Alice and Humpty Dumpty are debating how words mean what they mean:

> "I don't know what you mean by 'glory,'" Alice said. Humpty Dumpty smiled contemptuously. "Of course you don't - till I tell you. I meant 'there's a nice knock-down argument for you!'"
>
> "But 'glory' doesn't mean 'a nice knock-down argument,'" Alice objected.
>
> "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean--neither more nor less."
>
> "The question is," said Alice, whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master--that's all."

Through the Looking-Glass 94 (Random House ed., 1946). As with "glory" so with fairness: the important question is not how the word is to be defined but who is to be master. The idea of obligatory fairness

includes the idea of a standard of conduct external to the speaker, against which his conduct is to be measured. In short, unlike Humpty Dumpty, a speaker who is obligated to be "fair," according to the definition of another, is not completely master of his own wall. That is the problem. It is not simply that the need for enforced fairness is difficult to determine, but the fact that someone other than the speaker has the task of determining it. Particularly is this the case where that "someone" is a government agency with far-reaching enforcement powers, including sanctions like fines or license revocation, at its disposal. We must consider a second question--

We must therefore consider the question of the cost of mandating "fairness". That cost, of course, is the risk that government-mandated fairness impedes ("chills") speech. Clearly we are in the land of shadows here, for it is hard to prove that an enforceable fairness obligation has an adverse impact on a robust free press. The Supreme Court has been of two minds on whether such an impact is reasonably to be feared. In Red Lion, the Court found no reason to think that the fairness doctrine would discourage free speech by broadcasters;[9/] but in Tornillo, it found the opposite would hold for the print media.[10/] Those cases are difficult to reconcile. In neither was there any specific evidence of effects.

9/ On the contrary, the Court found that the Commission's fairness rules would "enhance rather than abridge the freedoms of speech and press protected by the First Amendment. . . ." 395 U.S. at 375.

10/ See footnote 2, supra.

Thus, as in other First Amendment cases,[11/] reliance had to be placed on certain general assumptions. What justified the different assumptions about the respective impact on the different media?

11/ "[W]e have never. . .demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist. . .[nor] required proof of the exact number of people potentially affected by government action, who would actually be dissuaded from engaging in government activity.

"Rather, on the basis of common sense and available information, we have asked, often implicitly, (1) whether there was a rational connection between the cause (the governmental action) and the effect (the deterence or impairment of the First Amendment activity), and (2) whether the effect would occur with some regularity, i.e., would not be de minimis. * * * And in making this determination, we have shown a special solicitude towards 'indispensible liberties' protected by the First Amendment. . . ."

Branzburg v. Hayes, 408 U.S. 665, 734-35 (1972) (Stewart, J., dissenting). See also New York Times Co. v. Sullivan, 376 U.S. 255 (1964); Time, Inc. v. Hill, 385 U.S. 374 (1967); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). The last two cases are particularly noteworthy in this regard insofar as they rest on the premise that even relatively slight burdens on journalism may have sufficient impact to justify a finding of unconstitutional impediment to free speech. This also appears to be the premise of Tornillo but not, as noted above, of Red Lion.

The technological differences between the two seem clearly insufficient to explain the different assumptions about the impact of enforced fairness.[12/] However, whatever the differences between the media of mass communications, the central point in either case is whether such obligations can have a tendency to impede free speech. Without suggesting that the answer is undebatable, it seems clear enough that reasonable people can, and plainly do, believe there is a significant risk of such a tendency.[13/] It may be that this possible inhibition is an acceptable cost when compared with the promised benefits to be derived from fairness. That evidently is what Red Lion decided for purposes of sustaining the constitutionality of the fairness doctrine. However, within our discretion to shape and modify the doctrine, we ought to continue to consider whether the possible benefits of fairness outweigh the possible costs.

12/ Indeed, as pointed out in footnote 2, supra, on the reasoning of Tornillo, the chilling effect of enforced fairness in broadcasting is greater than in the print media since the scarcer the resource, the greater the cost of requiring portions of that resource to be devoted to meeting fairness (or public access) obligations--hence the greater the "chilling effect."

13/ The risk, of course, is not simply or even primarily that the government will itself directly control speech (though that possibility cannot be totally discounted). It is rather that the media themselves will find it expedient to avoid controversial matters which might give rise to difficulties with the government. Therein lies the chilling effect of government interference. See footnote 2, supra.

Measuring the benefits of fairness is as difficult as assessing the costs. The expected benefits are simply described: increased diversity of viewpoints and greater balance in airing controversial public issues. If we can really obtain these desiderata, fine; but the question is whether they can be obtained through the use of the fairness doctrine. This consideration is the crucial one--and it has been somewhat slighted in the debate over fairness. Even if the risks of inhibiting free speech are slight, whether they are worth incurring turns not merely on the importance of the benefit sought, but also on the likelihood of achieving it. Cf., United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947). A clock that cannot keep time is no bargain even at garage-sale prices, unless it is esteemed as an ornament.

Can the Commission's fairness clock keep time, or is it merely an ornament? I am skeptical--and I become more skeptical with time--that this aging timepiece is anything more than an objet d'art, and at that, more objet than art. I do not think this Commission can in practice define "fairness" with sufficient clarity to enforce this norm as law. To be sure, there are some steps we "could" take, in theory, if we were willing. But we can in theory do many things that, in practice, we will not do, and should not do. One of these things is to second-guess licensee judgments on fairness, except in the most extraordinary cases. In a two year period, 1973 and 1974, the Commission received 4,280 formal fairness complaints. Of these only nineteen--4/10 of one percent--resulted in findings adverse to the licensee.[14/]

14/ This is the latest period for which complete data were readily available. Violations in this period included: seven violations of the political editorializing rules, seven personal attack rule violations and five general fairness doctrine rulings.

Adverse findings, few and far between in the past, are likely to be even more exceptional in the future as a consequence of Straus Communications, Inc. v. FCC, ___ F.2d ___, No. 75-1083 (D.C.Cir., Jan.16, 1976) and National Broadcasting Co. v. FCC, 516 F.2d 1101, 1117-1122 (D.C. Cir. 1974) ("Pensions") (opinion of Leventhal, J.), vacated, etc., at id.; cert. denied, 44 U.S.L.W. 3464 (2/24/76), which explicitly caution that the First Amendment requires the agency to defer to the licensee's judgment unless it is found to be unreasonable or in bad faith. The court, in Straus, underlines this point by noting that the "unreasonable/bad faith" standard "applies to all components of the doctrine; it is the licensee, in the first instance, who decides, for example, exactly what issue is involved and whether that issue is controversial and of public importance." (Slip Opinion at p. 14).[15/]

Data on the small number of adverse findings are frequently cited to show how small is the risk to licensees of government interference.[16/]

15/ Both in Straus and in Pensions, the court's language indicates that the standard by which the FCC reviews licensee discretion is similar to the standard by which the courts review the work of the agency. It is not enough, in order to disturb the licensee's conclusion, to find that the preponderance of evidence favors a different result from that reached by the licensee. Nor is it enough to find that the complainant's identification of the issue (and whether it was controversial and of public importance) is more sensible than the licensee's version of the story. The licensee's conduct must actually be unreasonable before its discretion may be rejected by the Commission. See Straus, Slip Opinion at 14-15; Pensions, 516 F.2d at 1120, 1122-23.

16/ I am not at all certain that the data will support that conclusion since the degree of the "chill" on free speech that may flow from government intrusion is not simply a function of the number of adverse findings or even the number of inquiries made of licensees. The chill stems from the licensee's perception of the costs of presenting certain programs, and those perceptions may be based more on anxiety than on any objective, actuarially sound, assessment of risk. In any case, the more immediate concern of the licensee will be whether the marginal benefit of broadcasting matter bearing on a controversial public issue outweighs the possible battling with citizen groups, disgruntled viewers/listeners, and last, but not least, the FCC.

What they show even more persuasively, however, is how small are the benefits. That there were only nineteen adverse findings in two years[17/] bears witness to one (or more) of three things: (1) incredible fairness by the media; (2) remarkably ineffective enforcement by the FCC; or (3) a standard of licensee discretion so broad as to permit almost any judgment to stand. On the first assumption, the

17/ An adverse finding is not necessarily followed by a separate punishment; indeed, usually it is not. Most adverse findings result either in a ruling that certain programming requires presentation of another viewpoint or a letter admonishing the licensee to comply with the fairness doctrine. Of the nineteen adverse findings in 1973 and 1974, only eight (seven political editorial cases and one personal attack) resulted in any tangible punitive action--forfeiture in each case. Of course, the forfeiture penalty is available to the Commission only in the case of personal attack--political editorializing violations inasmuch as these alone have been crystallized into specific rules. As for the ultimate sanction, non-renewal of license, the Commission will not consider this except in the most egregious case of licensee irresponsibility towards its fairness obligation, and it has found this but once, in Brandywine-Main Line Radio, Inc., 24 FCC 2d 18 (1970), aff'd. 473 F.2d 16 (D.C. Cir. 1972), cert. denied, 412 U.S. 922 (1973). (Parenthetically I might note that licensee misconduct such as that found in Brandywine might make one a believer in the fairness doctrine were it found more often. As it is, however, I think it hard to justify this, or any other rule, by the most extreme, and most rarely encountered, case.)

fairness doctrine seems to me unnecessary; on the second and third, it is ineffectual.[18/]

Innate suspicion tells me the first assumption is unlikely: I just cannot believe that with several thousands of licensees and millions of broadcast hours yearly, the fairness doctrine does not suffer many more violations than those few found. The second and third assumptions are interrelated. The FCC's enforcement of the fairness doctrine has always been less than rigorous. In the face of increasing demands to redress fairness grievances the Commission has evolved procedural barriers, such as the "Phelps Doctrine," see Alan C. Phelps, 21 FCC 2d 12 (1969), in order to forestall becoming too easily involved in licensee programming judgments. And, where we have become involved, we have, with few exceptions accorded the licensee broad discretion to define what constitutes a controversial issue of public importance, and almost equal latitude in satisfying the obligation of fairness with respect to such issues. While some critics have accused the FCC of lassitude or worse in its enforcement, I do not see how the Commission could be more rigorous in its demands upon licensees without undertaking a course of program surveillance that would almost certainly run afoul of the First Amendment. It is not so much that it is impossible

18/ Of course, the deterrent effect on all licensees of making an example of a few of them cannot be overlooked. But the proper limits to the practice of "making an example" of someone are rapidly reached. See Andenaes, The Morality of Deterrence, 37 U.Chi.L.Rev. 649 (1970). As a rule of elementary justice, a person can be so used only if he is first guilty of some misconduct. The idea of guilt, in this sense, includes the idea that A has done something which he should not have done, and which others similarly situated have refrained from doing. I doubt, as I have mentioned, that the average licensee who is found to have violated the fairness doctrine has done something which other licensees have refrained from doing. The old maxim, "Beat your boy every day--if you don't know what for, he will," may serve a purpose as a primitive rule of childrearing, but it is no way to run a government.

to define and enforce fairness obligations (though at best it is a difficult task), but rather that it is not possible to do so in a meaningful way without interfering in programming outside the intended focus of our enforcement. Judicial confirmation of this is suggested by the recent reversals of Commission decisions in the Straus and Pensions cases for failure to give sufficient discretion to licensee judgment.[19/] I do not quarrel with those court decisions, but it should be emphasized that the agency actions which prompted them were exceptional.[20/] This underscores my point about the futility of enforcement. The implication which I draw from these cases is that even the current level of enforcement--which results in adverse findings in less than one half of one percent of the cases--may be too high! At this point it surely must occur even to supporters of the fairness doctrine to ask whether the game is worth the candle.

The situation is untenable. The very existence of the fairness doctrine has given rise to public expectations that are quite unrealistic. The volume and the character of fairness doctrine mail which the Commission receives bears witness to such expectations. The Commission cannot come close to meeting those exaggerated expectations without infringing the Constitution; indeed, it apparently cannot even continue its own very limited enforcement course if I correctly gauge the direction of the prevailing judicial winds.

19/ National Broadcasting Co., Inc. v. FCC, 516 F.2d 1101 (D.C. Cir.1974); Straus Communications, Inc. v. FCC, ___F.2d___, No. 75-1083 (D.C. Cir. Jan.16, 1976).

20/ The exceptional character of the findings may, in fact, be additional reason to challenge the actions insofar as it evinces erratic (and hence discriminatory) enforcement. See my dissent in Straus Communications, Inc. 51 FCC 2d 385, 389 (1975).

IV. Alternatives

Given the infirmities of the fairness doctrine, it is time to start looking for alternatives. My preferred course--retiring the fairness doctrine altogether--is presumably beyond our power unless and until the Supreme Court reverses or reinterprets Red Lion. A second possibility is simply to forget about enforcement. But as I have argued above, this is about what we have done in effect, with an occasional exception; I regard this course as totally unsatisfactory. It breeds disrespect for the law. Worse, it is an unstable state, which produces not desuetude, but erratic (and hence discriminatory) enforcement. Just as nonenforcement is not a practicable option, so too is the similar proposal of Mr. Henry Geller to relegate enforcement of the fairness doctrine to the end of the license period. Under the Geller proposal the Commission would revert to its earlier (pre-1962) practice[21/] of examining the licensee's overall fairness as part of its three year performance record rather than, as now, evaluating individual complaints. I concur in the Commission's rejection of this proposal. I am sympathetic to what I discern to be the purpose of this proposal, to eliminate detailed scrutiny of, and interference with, licensee news judgments. However, I do not think Mr. Geller's proposal would necessarily work as he supposes. In fact, I think the Commission would still ultimately be led to responding to particular complaints as it does now, except that its response would be to an accumulation of complaints--most of them on a stale record. If this were the outcome of such a proposal, it could

21/ The change in practice, the Commission's rationale for it, and Geller's critique, are discussed in Pensions, supra, 516 F.2d at 1115-16.

increase the problem of discriminatory enforcement, and also aggravate the risk of adverse impact on licensee news judgments. The accumulation of complaints, the uncertainty of how they would be regarded, the increased scope of Commission scrutiny and finally the greater ultimate sanction to the licensee with a license renewal at stake (as opposed merely to an adverse finding of the kind now typically made in cases of violation), could increase the chilling effect of the fairness doctrine.[22/] In return for these new risks the Geller proposal offers no significant additional benefits in terms of surer enforcement, or more probable achievement of fairness. As has been explained, this last aspect is a crucial flaw in the present fairness doctrine: against the risk (however slight it may be) of adverse effects, the actual benefits are, as a practical matter, negligible.[23/]

In my view a more attractive alternative to either the present process or the Geller option is the optional access-in-lieu-of-fairness proposal of the Committee for Open Media (COM).[24/]

22/ It must again be emphasized that the adverse impact on speech derives not so much from what the Commission actually does than from the licensee's apprehension of what the Commission might do.

23/ It is not decisive counter to the above objections that the Commission once "enforced" the fairness doctrine as Geller now proposes. That was over a decade ago--almost in the paleolithic era of the fairness doctrine--when there was far less consciousness of this doctrine by the public or licensees. I doubt very much that the Commission could restore those relatively halcyon days simply by adopting the old process.

24/ The notion of mandated access has received much attention on both sides. For a bibliography and critique, see Lange, The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment, 52 N.Car.L.Rev. 1 (1973). However, I am not familiar with any discussion in the general legal literature of this particular scheme of access.

COM suggests a system of optional access in lieu of the fairness doctrine. Instead of being required to program discussions of controversial matters of public importance in a reasonably balanced manner, licensees might instead be allowed to choose to set aside time to allow members of the public to appear on the air.

As an alternative to what we have now, the access idea is appealing; by automating the process for permitting different views to be expressed, the subjective determinations that are now the core concern would be largely eliminated.[25/] I am not an admirer of access in and for itself, and for this reason have never supported the idea of mandatory access, per se. But mandatory access is not the issue here. The question is not whether a public access period is good, but whether it is better than what we now have. In fact, even the latter formulation is somewhat beside the point for the proposal is not to compel access in lieu of fairness, but to permit the licensee to opt for it.[26/] There is

25/ The access option would be more or less self-enforcing though there would possibly be some occasions for subjective determinations by the licensee and this, in turn, would require some supervision by the Commission, hopefully minimal.

26/ Because under this proposal access would be optional with the licensee, it would be entirely consistent with Columbia Broadcasting System, Inc., v. Democratic National Committee which involved the question whether access was required by the First Amendment or the Communications Act. It is also, I believe, consistent with the Red Lion holding that Congress incorporated the basic fairness obligation into Section 315. As discussed earlier, I do not think that was intended to freeze the fairness obligation precisely in its present form. See CBS v. DNC, 412 U.S. at 131-132; Public Interest Research Group v. FCC, 522 F.2d 1060, 1064.

reason to doubt that many licensees would select access over their present fairness obligations. But that is no concern of ours. To permit the substitution would at least give those licensees who are troubled by the fairness doctrine (or who may feel "chilled" by it) an opportunity to opt out in favor of an alternative that at least minimizes the risk of vexing the FCC.[27/]

At the outset it would be necessary to prescribe clear guidelines of how such an access alternative would work. COM proposes so-called "free speech messages"--short radio or television spots made available to any number of the public. Under this approach people could then get air time to criticize the fairness of the station's news or public affairs programming, or to talk about anything else that deserved public notice. Some administrative problems come to mind immediately. How much time must be allocated, and in what time periods, in order to exempt the licensee from its traditional fairness obligation? How are speakers to be chosen, assuming that more will want to speak than time can reasonably be provided for? Should stations have at least a minimal role in selecting the speakers?

27/ Under the COM proposal, access would not be a surrogate for the present fairness doctrine in cases of "editorial advertisements" on controversial public issues. The rationale of the exception is to "prevent powerful private interests from disserving the public interest by propagandizing their ideas in a blitz paid spot campaign without comparable response capable of being afforded through the access system." Committee for Open Media, Petition for Reconsideration, p.18. This fear is probably exaggerated, but there should be no objection to this exceptional retention of the traditional fairness doctrine.

These questions are not so difficult; but to a degree, their answers proceed on faith. If the Commission were to allow access as an alternative to fairness, it would be simple to frame rules requiring that access messages be aired at times throughout the day when significant segments of the viewing public were watching.[28/] Likewise, the FCC could provide by rule that speakers be chosen, either by lot or by queue, so as to minimize broadcaster bias and ensure that each chosen speaker was allowed to go before the public within a reasonable period--say a week--after requesting access time.[29/] The third point is related to the second. Whatever means of allocation were chosen would have to prevent monopolization by any one group. COM resolves the problem by providing that half the spots would be allocated by the licensee to representative speakers. But no allocation system to which our attention has been directed can completely automate the selection function or remove the practical need for a supervisory intelligence of some sort--at the very least to monitor what goes over the air to ensure

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28/ COM proposes 35 minutes per week or five minutes a day, scheduled at different times (including prime time).

29/ COM proposes that one half the access spots would be allocated on first-come, first-served basis, and the other half would be allocated on a "representative spokesperson" system.

that it is not defamatory nor obscene.[30/] Obviously, the pressure of this supervisory intelligence re-introduces the problem of licensee bias. But it would be a lesser problem than the one we have now. Certainly, it seems intuitively obvious that, if a licensee threw himself open to all comers (or a random selection of all comers) who fell somewhere in the zone of reasonableness, a greater diversity of viewpoints would more probably be represented than where the licensee himself generates the entire broadcast agenda. To be sure, the access message system could be perverted by licensee bad faith--this system has that vulnerability in common with all the institutions of democracy--but I do not fear this possibility. Broadcast journalism is becoming increasingly professional: it is attracting increasingly capable and well-prepared people at all levels, and the performance of licensees--especially television licensees--in the public affairs sector of their activities is beginning to show it. Under these circumstances, it

30/ I assume that a licensee would continue to be legally responsible unless and until public access were a matter of statutory right. In Farmers Educ. and Coop. Union v. WDAY, 360 U.S. 525 (1959), the Supreme Court held that a licensee could not be held liable for defamatory language uttered during a time period which was required to be supplied under Section 315 of the Communications Act. If the fairness obligation arises under Section 315, the same immunity arguably applies. It might be contended that this immunity ought to extend to the fairness surrogate, access, as well. It seems much more probable, however, that if the licensee had any significant discretion as to who was permitted access and what was to be said, it probably would be held responsible. That, in turn, would require the licensee to monitor. Of course, the obscenity or defamation laws could be changed by statute to insulate a broadcaster from liability for anything said on access messages, but such change seems unlikely. It also seems undesirable if one attaches, as I do, importance to the interests which the obscenity and defamation laws were meant to protect. In any event, nothing as radical as amending the Communications Act or Title 18 of the U.S. Code needs to be contemplated until time and experience clarified whether and to what extent such changes were necessary.

seems to me that we twentieth century bureaucrats ought to be willing to take a gamble on the broadcast media similar to that the Founding Fathers took on pamphlets and newspapers two hundred years ago.

Exhibit 120: *National Citizens Committee for Broadcasting* v. *FCC*, 567 F.2d 1095 (D.C. Cir. 1977)

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING and Friends of the Earth, Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

American Broadcasting Companies, Inc. (ABC), CBS, Inc., Intervenors.

COMMITTEE FOR OPEN MEDIA, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and the United States of America, Respondents,

Council on Economic Priorities and United Farm Workers of America and Henry Geller, Intervenors.

COUNCIL ON ECONOMIC PRIORITIES, Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents,

United Farm Workers of America, Intervenor.

Nos. 74-1700, 76-1351 and 76-1360.

United States Court of Appeals, District of Columbia Circuit.

Argued April 29, 1977.

Decided Nov. 11, 1977.

Petitioners sought review of various aspects of report of Federal Communications Commission on fairness doctrine. The Court of Appeals, McGowan, Circuit Judge, held that: (1) there is no right to broadcast a particular point of view simply because that point of view is protected by First Amendment; (2) Commission did not abuse its discretion in withdrawing most commercial advertisements from application of fairness doctrine; (3) Commission would be required to give further consideration to certain proposals concerning access and concerning how best to insure that licensees devote reasonable amount of time to programming on public issues, and (4) Commission was neither constitutionally nor statutorily required to return to its pre-1962 method of enforcing fairness doctrine by ascertaining at renewal time whether licensee had complied with fairness doctrine.

Affirmed in part and remanded in part.

1. Health and Environment ⇐25.10(2)

Federal Communications Commission was not required to file environmental impact statements when it removed product advertising from fairness doctrine application, despite assertion of petitioner which challenged such removal on ground that removal would result in more advertising for environmentally dangerous products, more use of such products, and therefore more harm to the environment. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

2. Telecommunications ⇐14

Function of Court of Appeals in reviewing validity of decision of Federal, Communications Commission to reverse its previous course of action is to insure that Commission has provided an opinion or analysis indicating that previous standard is being changed and not ignored and a showing that it is faithful and not indifferent to rule of law.

3. Telecommunications ⇐435

Under fairness doctrine, broadcast licensees are obliged both to cover controversial issues of public importance and to broadcast opposing points of view on them.

4. Telecommunications ⇐435

Threshold triggering of requirement that broadcast licensees broadcast opposing points of view on issues of public importance is lower than that which triggers requirement that broadcast licensees cover controversial issues of public importance.

5. Telecommunications ⇐435

For purpose of report of Federal Communications Commission which concerned fairness doctrine and which divided advertisements into the three general categories of editorial advertisements, standard product commercials, and advertisements making product efficacy claims about which there is dispute, distinctions set out in report were not unconstitutionally vague.

6. Constitutional Law ⇐90.1(9)

There is no right to broadcast a particular point of view simply because that point of view is protected by First Amendment. U.S.C.A.Const. Amend. 1.

7. Constitutional Law ⇐90.1(1)

Constitution does not require that any speech protected by First Amendment trigger application of fairness doctrine; while ultimate function of both First Amendment and fairness doctrine may be to encourage dissemination of viewpoints and information, the two principles do not necessarily cover exactly the same ground. U.S.C.A. Const. Amend. 1.

8. Health and Environment ⇐25.5(9)

While Federal Communications Commission must give consideration to questions of environmental quality, Commission is entitled and obligated to determine how best to accommodate mandate of National Environmental Policy Act of 1969 with its own mandate to afford reasonable opportunity for discussion of conflicting views on issues of public importance. Communications Act of 1934, §§ 1 et seq., 315(a) as amended 47 U.S.C.A. §§ 151 et seq., 315(a); National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

9. Telecommunications ⇐435

Communications Act of 1934 did not preclude Federal Communications Commission from deciding to no longer apply fairness doctrine requirements to noneditorial advertisements for controversial products. Communications Act of 1934, § 315(a) as amended 47 U.S.C.A. § 315(a).

10. Telecommunications ⇐435

Decision of Federal Communications Commission to no longer apply fairness doctrine requirements to noneditorial advertisements for controversial products was reasonable, was not an abuse of discretion, and was not precluded by statute or Constitution. U.S.C.A.Const. Amend. 1; Communications Act of 1934, §§ 1 et seq., 315(a) as amended 47 U.S.C.A. §§ 151 et seq., 315(a).

11. Telecommunications ⇐437

In deciding to exclude standard product commercials from scope of fairness doctrine, Federal Communications Commission failed to sufficiently consider proposals that Commission adopt requirement that licensee list annually ten controversial issues of public importance, local and national, which it chose for coverage in prior year and that Commission adopt, as an optional substitute for current fairness doctrine, a system whereby licensees would devote specified percentage of their broadcast time to "free speech messages" and other public issue programs.

12. Telecommunications ⇐437

Federal Communications Commission is not required in informal rule-making to consider exhaustively every idea put forth or to explain in detail reasons that certain alternatives were rejected.

13. Telecommunications ⇐433

In deciding to exclude standard product commercials from scope of fairness doctrine, Federal Communications Commission adequately considered proposal that Commission confine review of fairness doctrine complaints to time of license renewal, and Commission reasonably concluded that such proposal was not practicable.

14. Telecommunications ⇐433

Federal Communications Commission was neither constitutionally nor statutorily required to return to its pre-1962 method of enforcing fairness doctrine by ascertaining at renewal time whether licensee had complied with fairness doctrine. U.S.C.A. Const. Amend. 1; Communications Act of 1934, § 1 et seq. as amended 47 U.S.C.A. § 151 et seq.

Petitions for Review of Orders of the Federal Communications Commission.

Tracy Westen, Washington, D.C., with whom Geoffrey Cowan, Los Angeles, Cal., was on the brief, for petitioners in No. 74–1700.

Charles M. Firestone, Washington, D.C., with whom Frank W. Lloyd, III, Washington, D.C., was on the brief, for petitioner in No. 76–1351.

Harvey J. Shulman and Collot Guerard, Washington, D.C., with whom Carol J. Jennings, Washington, D.C., was on the brief, for petitioner in No. 76–1360 and intervenors, Council on Economic Priorities and United Farm Workers of America, AFL–CIO in No. 76–1351.

C. Grey Pash, Jr., Counsel, F.C.C., Washington, D.C., with whom Werner K. Hartenberger, Gen. Counsel, Daniel M. Armstrong, Associate Gen. Counsel, F.C.C., and Robert B. Nicholson, Atty., Dept. of Justice, Washington, D.C., were on the brief, for respondents. Ashton R. Hardy, Gen. Counsel, F.C.C., Washington, D.C., at the time the record was filed, entered an appearance for respondent F.C.C. Joseph A. Marino, and John E. Ingle, and Stephen A. Sharp, Counsel, F.C.C., Washington, D.C., also entered appearances for respondent F.C.C. Carl D. Lawson and Barry Grossman, Attys., Dept. of Justice, Washington, D.C., entered appearances for respondent United States of America.

Joel Rosenbloom, Washington, D.C., with whom J. Roger Wollenberg, Stephen A. Weiswasser, Michael S. Schooler, and Donald C. Langevoort, Washington, D.C., were on the brief, for intervenor CBS, Inc. in No. 74–1700 also argued for intervenor American Broadcasting Companies, Inc.

Henry Geller, Washington, D.C., for intervenor, Henry Geller in No. 76–1351.

James A. McKenna, Jr. and Carl R. Ramey, Washington, D.C., were on the brief for intervenor, American Broadcasting Companies, Inc. in No. 74–1700.

Before WRIGHT, McGOWAN and TAMM, Circuit Judges.

Opinion for the Court filed by McGOWAN, Circuit Judge.

McGOWAN, Circuit Judge:

These three consolidated petitions for review challenge various aspects of the Federal Communications Commission's *Fairness Report*. That *Report* was the product of an inquiry by the FCC, extending five years from its initiation in 1971, the issuance of the *Report* in 1974, and the denial of reconsideration in 1976, into the policies underlying the fairness doctrine and their implementation. It was the first such sustained review since the doctrine was originally articulated by the Commission nearly thirty years ago; and it was a proceeding in which written comments were received from over 120 persons or organizations, with eighty participants in a week-long series of panel discussions and oral arguments held by the FCC in 1972.

For the reasons hereinafter appearing, we leave undisturbed the *Report* itself, including its central determination to withhold application of the fairness doctrine to broadcast communications promoting the sale of commercial products. Our remand to the FCC, however, is with directions to pursue further inquiry into two of the alternative courses of action proposed by some of the petitioners as ways by which the general objectives giving rise to the fairness doctrine can be realized.

I

The fairness doctrine, which is not identified in terms in the statutes administered by the FCC, had its inception in 1949.[1] The Notice of Inquiry initiating the reexamination, 30 F.C.C.2d 26 (1971), stated that the ensuing investigation would center around four major topics:

1. The fairness doctrine generally;
2. Application of the fairness doctrine to broadcast of paid announcements;

1. Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

3. Access to broadcast media for discussion of public issues; and
4. Application of the fairness doctrine to political broadcasts.

The issues considered on this appeal relate to all but the last of these topics, which was the subject of a separate report issued in 1972.[2]

[1] In No. 74–1700, petitioners National Citizens Committee for Broadcasting (NCCB) and Friends of the Earth, and petitioner Council of Economic Priorities (CEP), in No. 76–1360, object to the decision in the *Fairness Report* not to apply the fairness doctrine to ordinary product advertisements, and further contend that the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.* (1970 & Supp. V 1975), requires the Commission to apply the fairness doctrine to advertisements for environmentally dangerous products.[3]

In No. 76–1351, petitioner Committee for Open Media (COM) challenges the Commission's failure, on reconsideration of the *Fairness Report*, to adopt, or order further inquiry into, its access proposal as an alternative to current fairness doctrine enforcement. Also in No. 76–1351, intervenor Henry Geller challenges the Commission's decisions to continue case-by-case consideration of fairness doctrine complaints, and its failure to consider and adopt his "10-issue" proposal relating to the fairness doctrine requirement that a broadcaster devote a reasonable amount of time to coverage of public issues.[4]

Because the fairness doctrine and its application have been the subject of extensive commentary in prior decisions of both this court[5] and the Supreme Court,[6] we do not consider it necessary in this opinion to delve into these matters beyond the extent to which they directly impinge on the issues now before us. Similarly, we shall not comment upon those parts of the *Fairness Report* and order denying reconsideration which are not challenged on these appeals except to the extent they cannot be disentangled from the particular questions we confront.

Accordingly, we shall first consider, in Part II hereof, the challenges to the Commission's decisions with respect to the reach of the fairness doctrine. Part III of the opinion will address the specific contentions

2. First Report—Handling of Political Broadcasts, 36 F.C.C.2d 40 (1972) (concerning application of the fairness doctrine to appearances by candidates and public officials).

The *Fairness Report* itself appears as The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1 (1974). The FCC response to the requests for reconsideration is to be found in Memorandum Opinion and Order on Reconsideration of the Fairness Report, 58 F.C.C.2d 691 (1976) [*Reconsideration Order*]. Part V of the *Report* itself (at 31–33) deals with application of the fairness doctrine to ballot propositions—a matter which is not in issue here.

3. Petitioner NCCB further urges that the FCC should have undertaken an Environmental Impact Statement before issuing the *Fairness Report*. NCCB argues that removal of product advertising from fairness doctrine application will result in more ads for environmentally dangerous products, more use of such products, and therefore more harm to the environment. We do not think that Congress intended to require preparation of an EIS dealing with such remote and speculative possibilities. *See Natural Resources Defense Council, Inc. v. Morton*, 148 U.S.App.D.C. 5, 458 F.2d 827 (1972).

4. In addition to petitioners and respondents Federal Communications Commission and United States of America and intervenors referred to above, additional intervenors in these cases are American Broadcasting Companies, Inc.; Columbia Broadcasting System, Inc.; and United Farm Workers of America, AFL–CIO. Each of these organizations participated in the FCC's fairness doctrine inquiry.

5. *National Broadcasting Co. v. FCC*, 170 U.S. App.D.C. 173, 516 F.2d 1101 (1974) [*Pensions*], *vacated as moot, id.*, 170 U.S.App.D.C. at 252, 516 F.2d at 1180 (1975), *cert. denied*, 424 U.S. 910, 96 S.Ct. 1105, 47 L.Ed.2d 313 (1976); *Democratic National Committee v. FCC*, 148 U.S.App.D.C. 383, 460 F.2d 891, *cert. denied*, 409 U.S. 843, 93 S.Ct. 42, 34 L.Ed.2d 82 (1972); *Healey v. FCC*, 148 U.S.App.D.C. 409, 460 F.2d 917 (1972); *Green v. FCC*, 144 U.S.App.D.C. 353, 447 F.2d 323 (1971).

6. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375–86, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969).

concerning the manner of enforcement of the fairness doctrine.

II

[2] The *Fairness Report* concludes that the fairness doctrine should not be applied to broadcast advertisements promoting the sale of a commercial product. This decision was made with a conscious awareness that it represents a marked shift from previous FCC policy. That previous policy, which was developed in a series of *ad hoc* decisions by the Commission and the courts, was never subject to precise articulation or definition, leading to uncertainty and difficulties in achieving full and fair enforcement. While we are under no illusion that the new policy, described more fully below, will solve all or perhaps even most of the implementation problems encountered heretofore, we believe that we are without warrant to deny the Commission the opportunity to attempt a new resolution of those difficulties provided that its action is consistent with constitutional and statutory commands and is otherwise in accordance with standards governing such an exercise of agency discretion. Our function in reviewing the validity of the Commission's decision to reverse its previous course of action is to ensure that it has

> provide[d] an opinion or analysis indicating that the [previous] standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law.[7]

This standard is a distillation of the general criteria governing judicial review of an exercise of agency discretion in the context of informal rulemaking such as that before us. Our

> responsibility is to assure that the agency has not abused or exceeded its authority, that every essential element of the order is supported by substantial evidence, and that the agency has given reasoned consideration to the pertinent factors.[8]

A. *Background*

[3] The basic principles of the fairness doctrine were established long before the doctrine was given a label: broadcast licensees are obliged both to cover controversial issues of public importance and to broadcast opposing points of view on them.[9] The Commission and petitioners disagree as to when it became FCC policy to apply these obligations to ordinary commercial advertising. In a decision rendered in 1946, the Commission noted that fairness principles could be applicable to product advertisements if the latter involved controversial public issues.[10] The FCC's first comprehensive statement of the fairness doctrine in 1949 did not mention its applicability to product commercials, although the statement did refer approvingly to the FCC's 1946 decision.[11]

[4] Whether or not these statements nearly three decades ago can be said to have established a policy of subjecting commercial advertisements to fairness requirements, it is undeniable that any such policy lay practically dormant until 1967.[12] In that year the Commission held in *WCBS–TV*, 8 F.C.C.2d 381, *upon reconsideration*, 9 F.C.C.2d 921, that cigarette commercials

7. *Columbia Broadcasting System, Inc. v. FCC*, 147 U.S.App.D.C. 175, 183, 454 F.2d 1018, 1026 (1971).

8. *Pensions*, *supra* note 5, 170 U.S.App.D.C. at 194, 516 F.2d at 1122.

9. *See, e. g., Great Lakes Broadcasting Co.*, 3 F.R.C.App.Rev. 32 (1929) ("Public interest requires ample play for . . . opposing views . . . [on] discussions and issues of importance to the public"), *rev'd on other grounds*, 59 App.D.C. 197, 37 F.2d 993, *cert. dismissed*, 281 U.S. 706, 50 S.Ct. 467, 74 L.Ed. 1129 (1930).

10. *Sam Morris*, 11 F.C.C. 197 (1946).

11. *Report on Editorializing*, *supra* note 1, at 1249–50 ("duty [to ensure dissemination of news and ideas] extends to all subjects of substantial importance to the community").

12. In 1963 the Commission had advised broadcasters that a "paid announcement" could be subject to fairness doctrine obligations. Controversial Issue Programming, 40 F.C.C. 571, 572 (1963).

raised the controversial and publicly important issue of whether smoking is desirable, and thus gave rise to the second obligation of the fairness doctrine.[13] In *Banzhaf v. FCC* this court affirmed the Commission's authority to apply the fairness doctrine to cigarette advertisements.[14] In so doing, we recognized the unique danger to health posed by cigarettes but did not in terms foreclose the possibility that the Commission would be obliged to follow the cigarette precedent with respect to other product advertisements raising controversial issues of public importance.

In *Friends of The Earth v. FCC*, 146 U.S.App.D.C. 88, 449 F.2d 1164 (1971), we held that, under the approach taken by the Commission with respect to cigarettes in *Banzhaf*, advertisements for high powered automobiles and leaded gasoline also gave rise to the fairness obligation to broadcast opposing points of view. Just as cigarette advertisements were thought to have raised the issue of the desirability of smoking, so also the advertisements at issue in *Friends of the Earth* posed the question of the desirability of motorist preferences which increased air pollution. Moreover, as had been true in the cigarette controversy, there existed uncontroverted evidence of the hazards to health caused by air pollution; and this was unquestionably a controversial issue of public importance. We thus found it impossible to ignore the analogy between the *Banzhaf* cigarette advertisements and the advertisements for cars and gasoline challenged in *Friends of the Earth*; and held that the FCC was obliged to follow the cigarette advertising precedent until and unless the Commission reformulated the policy that it had articulated in *WCBS-TV*.[15]

> We noted in *Friends of the Earth* that [i]t is obvious that the Commission is faced with great difficulties in tracing a coherent pattern for the accommodation of product advertising to the fairness doctrine.

146 U.S.App.D.C. at 94, 449 F.2d at 1170. This may, if anything, have understated the problem. Once the Commission determined in *WCBS-TV* that implicit advocacy gave rise to the fairness doctrine obligation to broadcast opposing points of view, it inevitably became necessary to draw a line between messages so opaque that it could not

13. Throughout the history of fairness doctrine enforcement, much more attention has been given to this second obligation—the provision of opposing points of view on controversial issues about which only one viewpoint has been broadcast—than to the first, namely, the affirmative obligation to provide coverage of controversial and important issues. FCC has only once sustained a complaint relating to the part one obligation. *Patsy Mink*, 59 F.C.C.2d 987 (1976).

It is also clear that issues giving rise to the part two obligation would not necessarily be required to be covered under the first obligation; the threshold which triggers the second fairness obligation is lower than that which triggers the first. *See Public Communications, Inc.*, 49 F.C.C.2d 27, *application for review denied*, 50 F.C.C.2d 395, 399–400 (1974). Certainly all parties in this case recognize this asymmetry with respect to product commercials. To our knowledge it was never suggested during the inquiry into operation of the fairness doctrine that broadcasters be affirmatively obligated to present views advocating use of controversial products. *Cf. Cigarette Advertising and Anti-Smoking Presentations*, 27 F.C.C.2d 453 (1970), *aff'd sub nom. Larus & Bros. Co. v. FCC*, 447 F.2d 876 (4th Cir. 1971) (broadcast of anti-smoking messages does not give rise to fairness doctrine obligation to broadcast views advocating smoking because the issue is no longer a matter of public controversy).

14. 132 U.S.App.D.C. 14, 405 F.2d 1082 (1968), *cert. denied sub nom. Tobacco Institute v. FCC*, 396 U.S. 842, 90 S.Ct. 50, 24 L.Ed.2d 93 (1969).

15. 146 U.S.App.D.C. at 93–95, 449 F.2d at 1169–71. Prior to *Friends of the Earth*, in *Retail Store Employees Union, Local 880, R.C.I.A. v. FCC*, 141 U.S.App.D.C. 94, 436 F.2d 248 (1970), this court determined that product advertising by a department store which was being boycotted as a result of a labor dispute implicitly raised the issue of whether or not the store should be patronized, which, given the union strike and boycott, was a controversial issue of substantial public importance. *Id.*, 141 U.S.App.D.C. at 104, at 258. As was true in *Banzhaf* and *Friends of the Earth*, decided subsequently, the advertisements in *Retail Store Employees Union* did not discuss or even allude to an important issue in controversy. Yet in all three of these cases viewers or listeners were subjected to implicit advocacy of one side of such an issue.

fairly be said a controversial issue was adumbrated, and messages which have the clear effect of advocacy, albeit in a subtle and nonexplicit manner.

In *Neckritz v. FCC*, 163 U.S.App.D.C. 409, 502 F.2d 411 (1974), this court refused to find that an advertisement for a gasoline additive purportedly helpful in reducing automobile emissions raised the controversial issue of auto pollution. Under the approach taken in *Banzhaf* and *Friends of the Earth*, the court could have reached a different conclusion under the following chain of reasoning: 1) the gasoline additive can be used only in conjunction with gasoline, and, indeed, the challenged advertisements promoted the sale of gasoline with the additive; 2) advocating the use of gasoline raises the desirability of such use; 3) gasoline use causes air pollution,[16] which is a controversial issue of public importance; 4) thus, the advertisements raised a controversial issue of public importance. An advertisement with the theme of reducing air pollution would have been held to give rise to the fairness obligation to present the point of view that the product promoted would not reduce air pollution.

This is different from the situations in *Banzhaf, Retail Store Employees Union*, and *Friends of the Earth*, where the advertisements implicitly took a position on the ultimate public issue, rather than a position on ways to solve the ultimate matter in controversy. The court in *Neckritz* thus limited the reach of the approach stated in *Banzhaf* for application of the fairness doctrine to product commercials: debate over the *efficacy* of a product in solving an issue of public concern does not raise that issue. The basic policy choice underlying the *Neckritz* holding is that the fairness doctrine should not be transformed into a vehicle for correction of allegedly false advertising.[17] However, it is understandable that some confusion was caused by the holding in *Neckritz*, on the one hand, that a commercial explicitly mentioning a matter of public concern does *not* give rise to fairness obligations, and the holding in *Friends of the Earth*, on the other, that a commercial only implicitly raising that same issue *does* give rise to fairness obligations.[18]

The difficulty of defining issues "implicitly" raised by product promotions is only one source of the confusion which resulted from the decision in *WCBS–TV* to apply the fairness doctrine to commercial advertisements. It has also proven difficult to apply the fairness doctrine to advertisements which do not directly promote a product. Thus, in *Green v. FCC* this court affirmed the FCC conclusion, 24 F.C.C.2d 171 (1970), that armed forces recruitment messages did not raise the issues of the military draft and the Vietnam war, which at the time were significant and controversial issues.[19] While we admitted that the issue of *voluntary* military recruitment was "implicit" in the challenged announcements, we were not prepared to conclude that the broader issue of the desirability of military service generally was thereby also raised.[20]

On the other hand, this court expressed agreement with the Commission's decision in *National Broadcasting*, 30 F.C.C.2d 643 (1971), that advertisements by Esso advocating oil exploration and drilling in Alaska raised the then-controversial issue of whether the Alaska pipeline should be built,

16. Petitioners argued that since the advertised additive was found only in leaded gasoline, the advertisements were in effect for leaded gasoline, which contributes more to auto pollution than does nonleaded gasoline.

17. 163 U.S.App.D.C. at 416, 502 F.2d at 418. The court stated that charges of false advertising are a proper subject of investigation by the Federal Trade Commission. *Id.*

18. *See* Simmons, Commercial Advertising and the Fairness Doctrine: The New F.C.C. Policy in Perspective, 75 Colum.L.Rev. 1083, 1094 (1975).

19. 144 U.S.App.D.C. 353, 447 F.2d 323 (1971).

20. *Id.*, 144 U.S.App.D.C. at 359–362, 447 F.2d at 329–332. The court also held that even if the issues of the draft, the Vietnam war, and the desirability of military service were raised sufficiently for application of the fairness doctrine, these fairness obligations were met by adequate and complete coverage of these issues. *Id.*

even though the advertisements under challenge did not refer to this issue or state explicitly that the pipeline should be built.[21]

Both *Green* and *National Broadcasting* involved a type of advertisement close to what has been called "institutional advertising"—that is "advertising that promotes the overall image of its sponsor and [only] indirectly its product." [22] In at least one important respect, it is even more difficult to articulate a workable standard for what constitutes an issue "implicitly raised" in the institutional advertising context than it is in the context of advertisements promoting a product or service, such as those in *Banzhaf, Retail Store Employees Union,* and *Friends of the Earth.* The latter *explicitly* advocate patronizing a product. In most cases, only one clear inference need be drawn in order to state the issue implicitly raised: the *desirability* of engaging in such purchases. Where the advertisement at issue merely presents the sponsor, or certain of its activities, in a favorable light, it could be concluded that every issue affecting the viability of the enterprise promoted is thereby "implicitly" raised.[23] The Commission refused to take such an approach with respect to institutional advertising,[24] but, as was true with respect to ordinary product commercials, neither the Commission nor the courts were able to articulate clear criteria for ascertaining which issues are and are not "implicitly" raised by institutional advertisements.

B. *New FCC Policy with Respect to Commercial Advertisements*

The failure of either the courts or the Commission to delineate clearly in the foregoing decisions the contours of the *Banzhaf* approach to commercial advertising and the fairness doctrine may be ascribed in part to the very proceeding now under review.[25] Aware that a thorough inquiry into the fairness doctrine was pending, neither the agency conducting that inquiry [26] nor the courts [27] reviewing agency execution of current fairness doctrine policy were eager to use specific fairness complaints as a vehicle for comprehensive analysis of the efficacy and contours of the *Banzhaf* approach.[28]

The *Report* divides advertisements into three general categories: editorial adver-

21. *See Friends of the Earth, supra,* 146 U.S. App.D.C. at 94, 449 F.2d at 1170 (1971).

22. *See* Simmons, *supra* note 18, at 1089.

23. *See also Media Access Project,* 44 F.C.C.2d 755 (1973), where the Commission held that advertisements contending that the sponsor power company needed to expand its operations raised the issue of whether a pending request for a rate increase should be granted. One of these advertisements did *explicitly* advocate the desirability of "[a]n increase in price." *Id.* at 765 (Appendix I).

24. *See, e. g., Anthony R. Martin—Trigona,* 19 F.C.C.2d 620, 622 (1969) (institutional advertising by network and "praise of commercial television . . . cannot be regarded as clear criticism of pay television" and thus do not raise the pay television controversy).

25. In *Green, supra,* 144 U.S.App.D.C. at 363, 447 F.2d at 333 n. 19, this court stated that the pending fairness inquiry "should provide a helpful and much-needed illumination of the commercial advertising aspects of the fairness doctrine."

26. *Cf. Neckritz,* 29 F.C.C.2d 807, 814 (1971) (Commission announced plan to undertake "thorough re-examination and rethinking" of broad issues relating to fairness doctrine and commercial advertising).

27. *See Green, supra,* 144 U.S.App.D.C. at 363, 447 F.2d [333] at 333 & n. 19 ("Other cases . . . will provide the appropriate occasions for critically tracing the contours of the public interest standard as it applies to commercial advertising," citing, *inter alia,* the Commission's plans to undertake thorough inquiry into fairness doctrine); *Friends of the Earth, supra,* 146 U.S.App.D.C. at 94, 449 F.2d at 1170 (noting pending fairness doctrine inquiry); *Neckritz,* 163 U.S.App.D.C. at 417, 502 F.2d at 419 (Bazelon, J., voting to deny application for rehearing *en banc* in part because review of recently issued *Fairness Report* was then being sought).

28. Thus, our general approval in this opinion of the decisions reached in the *Fairness Report* with respect to the applicability of the fairness doctrine to commercial advertisements should not be interpreted as expressing the view that an accommodation of fairness doctrine requirements with commercial advertisements consistent with the *Banzhaf* approach was not possible.

tisements; standard product commercials; and advertisements making product efficacy claims about which there is dispute. Henceforth, only those advertisements in the first of these categories will give rise to fairness doctrine obligations. While petitioners raise objection only to the *Report's* treatment of standard product commercials, we believe that, to be adequately analyzed and understood, this portion of the *Report* must be considered in the context of FCC policy generally concerning application of the fairness doctrine to advertisements. Therefore, we shall briefly examine the *Report's* conclusions with respect to each of the categories of advertisements listed above.

Editorial advertisements consist of "direct and substantial commentary" on controversial issues of public importance. *Fairness Report* at 22. The classic example of such an announcement is an "overt" editorial, *id.* at 22, referred to at another point in the *Report* as an advertisement "that explicitly raise[s] [a] controversial issue," *id.* at 26.[29] However, the *Report* recognizes that certain advertisements which do not *explicitly* or *overtly* discuss a controversial issue nevertheless should be considered editorial advertisements because they present "a meaningful statement which obviously addresses, and advocates a point of view on," controversial issues of public importance, *id.* at 23.

The *Report* concludes that one type of announcement which may give rise to fairness doctrine obligations even though it is not an overt editorial is institutional advertising "designed to present a favorable public image of a particular corporation or industry rather than to sell a product." *Id.* Although institutional advertising "ordinarily does not involve debate on public issues," if the advertiser "seek[s] to play an obvious and meaningful role in public debate[,] . . . the fairness doctrine . . . applies." *Id.*[30] The Commission has attempted to provide some guidance for determining whether fairness doctrine obligations apply to advertisements that are not "explicitly controversial."[31] Licensees are advised that when the relationship of an advertisement to ongoing debate in the community is substantial and obvious the ad is likely to represent "obvious participation in public debate."[32] In such circumstances, the fairness doctrine should be applied. *Id.* at 23–24.

We interpret the foregoing pronouncements concerning overt editorials and institutional advertising as reaffirmations of previous FCC policy in these areas. That portion of the *Report* dealing with standard product commercials, on the other hand, is an explicit departure from previous policy. The *Report* announces that advertisements for commercial products or services, such as the cigarette advertisements in *Banzhaf* and the automobile and gasoline advertisements in *Friends of the Earth*, henceforth will not give rise to fairness obligations

29. "An example of an overt editorial advertisement would be a thirty—or sixty—second announcement prepared and sponsored by an organization opposed to abortion which urges a constitutional amendment to override a decision of the Supreme Court legalizing abortions under certain circumstances." *Fairness Report* at 22.

30. The quoted phrase suggests that the advertiser's subjective intention is determinative of whether the commercial is an "editorial advertisement." However, the Commission at another point in the *Report* states it is not concerned with "the advertiser's actual intentions" in running an ad, but rather in whether the ad as presented "is an obvious participation in public debate." *Fairness Report* at 23.

31. In view of the difficulty inherent in making this judgment, the Commission expressed its intention to allow licensees considerable leeway in deciding whether the advertisement at issue incurs fairness obligations. The Commission will uphold the licensee's decision not to broadcast opposing points of view

> unless the facts are so clear that the only reasonable conclusion would be to view the "advertisement" as a presentation of one side of a specific public issue.

Id. at 24.

32. The *Report* gives as an example an advertisement in which the arguments and views presented "closely parallel" the position of advocates on either side of a public issue, and cites *Media Access Project*, discussed at note 23 *supra*. *Id.*

because they "make no meaningful contribution to informing the public on any side of any issue," even though "the business, product, or service advertised is itself controversial." *Fairness Report* at 24. The Commission thus explicitly rejects the chain of reasoning first enunciated in *WCBS–TV*: that because promoting a product raises the issue of the desirability of its use, such promotion triggers application of the fairness doctrine if use of the product is a controversial issue of public importance.

Under the policy announced in the *Fairness' Report*, promotion of controversial products will not require presentation of points of view opposing use or sale of the products. This does not mean that all product advertisements are exempt from fairness obligations, however. If in the course of promotion of a product there is "obvious and meaningful . . .. discussion" on one side of a controversial issue impinging on the desirability of the product, fairness obligations attach because such advocacy qualifies as an editorial advertisement. *See id.* at 26.

The third and final category of advertisements discussed in the *Fairness Report* are product claims alleged to be false or misleading, such as the claims for a gasoline additive at issue in *Neckritz*, discussed above.[33] The *Report* essentially takes the position enunciated by this court in that case. In refusing to apply the fairness doctrine to those claims, the court in *Neckritz* distinguished between raising the issue of the effect of a product on a problem which is a controversial issue of public importance and directly raising the controversial issue itself. The opinion went on to suggest that a Federal Trade Commission action for false advertising was the appropriate way to resolve disputes over the truthfulness of efficacy claims.[34] Likewise, the *Report* concludes that product efficacy claims "play no meaningful or significant role in the debate of controversial issues," *Fairness Report* at 28. Under the policy announced in the *Report*, the FCC will forego application of the fairness doctrine to product claims, however controversial those claims may be and however controversial the public issue to which they relate. The *Report* concludes that there exists an alternative and preferable "congressionally-mandated remedy for deceptive advertising . . . in the form of various FTC sanctions." *Id.* at 27–28.

C. *Constitutionality of the New FCC Policy*

As already mentioned, petitioners and intervenors in this case have not made specific objections to those portions of the *Fairness Report* that, in effect, reaffirm previous policy with respect to editorial advertisements and product efficacy claims. Nor does this court find any cause to upset these portions of the *Report*, which seem to us well reasoned and fully consistent with constitutional and statutory commands.

[5, 6] The *Report's* treatment of commercial advertising is vigorously challenged on both statutory and constitutional grounds. We believe that the challenges invoking the first amendment are based on a fundamental misunderstanding of the relationship between constitutional protection of commercial, or any other type of, speech and the functioning of the fairness doctrine.[35] As best we can determine, petition-

33. The *Fairness Report* has separate subsections dealing with editorial advertisements and standard product commercials. The application of the fairness doctrine to product efficacy disputes, however, is discussed in the course of the Commission's response to a specific proposal made by the Federal Trade Commission during the fairness doctrine inquiry. It nevertheless seems clear that the Commission intended to distinguish advertisements containing disputed product efficacy claims from standard product commercials generally promoting desirability and from editorial advertisements.

34. *See* 163 U.S.App.D.C. at 416, 502 F.2d at 418.

35. Nor do we find petitioners' other constitutional arguments persuasive. For reasons stated herein, we do not think that "the Commission has engaged in an arbitrary, irrational and unconstitutional discrimination between speakers based on the content of their speech," Brief of CEP and United Farm Workers at 19, by distinguishing for fairness doctrine purposes between speech which is editorial in nature and speech which promotes use of a product. We also do not think that the distinctions set out in

ers make two first amendment arguments. The first proceeds as follows:

(a) Commercial speech is protected under the first amendment because the public has an interest in the free flow of such information; [36]

(b) statements which oppose views presented in commercial advertisements are a form of commercial speech;

(c) thus, the public has an interest in the free flow of such statements;

(d) thus, the FCC must require its licensees to broadcast such statements.

But surely there is no right to broadcast a particular point of view simply because that point of view is protected by the first amendment. This was clearly established in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973), which held that a network need not sell time to persons wishing to present their views on important public issues. Of course, this court has also recognized that speech protected by the first amendment need not necessarily be broadcast under the second obligation of the fairness doctrine.[37]

Petitioners' other first amendment argument begins with a slightly different application of *Virginia State Board*:

(a) to the individual, commercial information may be of more interest than is "the day's most urgent political debate," and such advertisements "may be of general public interest;" [38]

(b) thus, commercial advertisements contribute meaningfully to public debate;

(c) the Commission's decision not to subject commercial advertisements to the fairness doctrine is therefore unconstitutional because it is based on the denial of (b).

[7] The last proposition is a non-sequitur. There is a missing link in the argument, which is that all speech which contributes meaningfully to public debate must be subject to the fairness doctrine. We reject the suggestion that any speech protected by the first amendment must, as a matter of constitutional law, trigger application of the fairness doctrine. While an ultimate function of both the first amendment and the fairness doctrine may be to encourage the dissemination of viewpoints and information, this does not mean that the two principles cover exactly the same ground.[39] There is an obvious difference between the standard employed by the Commission for determining whether the fairness doctrine applies to advertisements—that is, whether the advertisement advocates one side of a controversial public issue—and the holding in *Virginia State Board* that advertising is protected by the first amendment because it represents dissemination of valuable information important to the functioning of a free enterprise system. Nothing in the Supreme Court's decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969), upholding the constitutionality of the political editorializing and personal attack rules promulgated under the fairness doctrine, suggests that the obligation to present opposing points of view must be applied to all constitutionally protected speech. Indeed, in most instances in which the fairness doctrine has been held not to

the *Fairness Report* are unconstitutionally vague.

36. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).

37. *See, e. g., Neckritz v. FCC*, 163 U.S.App. D.C. 409, 502 F.2d 411 (1974); *Healey v. FCC*, 148 U.S.App.D.C. 409, 460 F.2d 917 (1972); *Green v. FCC*, 144 U.S.App.D.C. 353, 447 F.2d 323 (1971).

38. 425 U.S. at 763–64, 96 S.Ct. 1817.

39. In *CBS v. DNC, supra*, 412 U.S. at 131–32, 93 S.Ct. at 2101, the Court, after noting that the Commission was conducting the inquiry on the fairness doctrine which is the subject of this appeal, concluded that "courts should not freeze this necessarily dynamic process [of accommodating broadcast regulation and first amendment rights of broadcasters and the public] into a constitutional holding."

apply, the speech which it was contended triggered application of the obligation was clearly protected by the first amendment.[40]

We recognize that petitioners' confusion between the standard for first amendment protection and the standard for application of the fairness doctrine may result from misplaced reliance in the *Fairness Report* itself on the scope of first amendment protection. Issued before either *Virginia State Board* or *Bigelow v. Virginia*,[41] the *Report* appeared to equate its conclusion that standard product commercials "make no meaningful contribution toward informing the public on any side of any issue" with the statement by this court in *Banzhaf* (also decided prior to *Virginia State Board* and *Bigelow*), that "[p]romoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect." [42] The conclusion reached by the Commission is stated overbroadly; clearly, standard product promotions inform the public about many matters, such as price and efficacy. However, the *correctness* of the conclusion is not dependent upon whether or not advertisements are associated with first amendment values. The persuasiveness—or lack thereof—of the commission's essential finding, that standard commercials do not present "a meaningful discussion of a controversial issue of public importance," [43] is not altered by the recent expansion of first amendment protection in the area of commercial speech.

Indeed, it can be argued that the first amendment protection afforded commercial speech cuts precisely contrarily from the manner urged by petitioners. It has been contended by commentators,[44] although viewed skeptically by the Supreme Court,[45] that broadcasters are discouraged from presenting messages which trigger fairness doctrine obligations. If the fairness doctrine does have this chilling effect, then first amendment protection of commercial speech would make application of the fairness doctrine to such speech less, rather than more, desirable. This was certainly the context in which the *Banzhaf* court—upholding the Commission's decision to subject cigarette advertisements to the fairness doctrine—discussed the relevance of first amendment consideration.[46]

D. *Statutory Challenges to the New Commission Policy*

[8] It is alleged that the Commission's decision to withdraw standard product commercials from the purview of the fairness doctrine violates the standards of the Communications Act and was arbitrary, capricious and an abuse of discretion.[47]

40. *See, e. g.*, citations in note 37 *supra*.

41. 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975). In striking down a Virginia statute prohibiting the advertising of abortion services, the Court stressed the public's interest in receiving such information, *id.* at 822.

42. 132 U.S.App.D.C. at 33, 405 F.2d at 1101, *quoted at Fairness Report* at 24–25.

43. *Fairness Report* at 25.

44. *See, e. g.*, Dissenting Statement of Commissioner Robinson to the *Reconsideration Order*, *supra* note 2, at 703–11.

45. *See Red Lion*, *supra*, 395 U.S. at 392–94, 89 S.Ct. 1794. *But see Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974) ("Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate,'" quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279, 84 S.Ct. 710, 725, 11 L.Ed.2d 686 (1964)).

46. *See* 132 U.S.App.D.C. at 33, 405 F.2d at 1101 ("The speech which might conceivably be 'chilled' by this ruling barely qualifies as constitutionally protected 'speech.'").

47. Petitioners also contend that the mandate of the National Environmental Protection Act of 1969 (NEPA), that "to the fullest extent possible" federal agencies administer policies, regulations, and public laws in accordance with NEPA and make available information concerning the environment, 42 U.S.C. § 4332(1), (2)(F) (Supp. V 1975), requires that fairness doctrine obligations be imposed with respect to commercials for environmentally dangerous products. This position misinterprets the effect of NEPA on federal agency action. The FCC must give consideration to questions of environmental quality, *see Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*, 146 U.S.App.D.C. 33, 36, 449 F.2d 1109, 1112 (1971). Accordingly, the Commission has indicated that "broadcasters must cover pollution issues generally, under their obliga-

In the 1959 amendments to the Communications Act, 73 Stat. 557 (1959), 47 U.S.C. § 315(a), Congress made clear that the already existing statutory requirement that broadcasters operate in the "public interest" included the obligation "to discuss both sides of controversial public issues," *Red Lion, supra*, 395 U.S. at 380, 89 S.Ct. at 1801. Petitioners contend that under this obligation, which the Supreme Court has said gave "statutory approval to the Fairness Doctrine," *CBS v. DNC, supra*, 412 U.S. at 110 n. 8, 93 S.Ct. at 2090, the Commission must apply the fairness doctrine "to advertisements for products whose effects have engendered important controversies over the sale and use of the products." Brief of CEP and United Farm Workers at 32. This contention is based on the view that at the time of the 1959 amendments, it was Commission policy to apply the *WCBS–TV* approach to fairness obligations and commercial advertisements; that Congress recognized this policy; and that the 1959 amendments were intended to put the policy in statutory form. We believe that there is no persuasive evidence supporting the basic premise upon which this view is based. It was not clear Commission policy in 1959 to require broadcast of opposing views in response to the advertisements for controversial products.

The 1946 decision concerning commercial advertisements so heavily relied on by petitioners merely stated that debate over the "relative merits of one product or another" could raise "basic and important social, economic, or political issues."[48] The *WCBS–TV* approach extended upon this principle in determining that the promotion of a controversial product was an important and controversial issue. The *Fairness Report* contracts the potential scope of the principle in requiring that the controversial issue be directly and obviously raised in the debate. But neither the *WCBS–TV* approach nor the *Fairness Report* is inconsistent with the principle announced in the 1946 Commission decision.[49] Thus, while the 1959 amendments to the Communications Act "codifi[ed] the standards of fairness,"[50] we

tion to broadcast in the public interest." Letter to Russell Train, Chairman, Council on Environmental Quality (Nov. 30, 1970), discussing Letter to Gary Soucie, 24 F.C.C.2d 743 (1970). However, the Commission is certainly entitled, indeed is obligated, to determine how best to accommodate the mandate of NEPA with its own mandate to afford a "reasonable opportunity for the discussion of conflicting views on issues of public importance," § 315(a) of the Communications Act, 47 U.S.C. § 315(a) (1970). For reasons explained below, we think the Commission's view that this mandate would not be served by applying fairness doctrine requirements to advertisements for controversial products (whether controversial for environmental or other reasons) is not unreasonable. We also agree with the recent statement of the First Circuit in response to the same argument as that made here:

> Given the prohibition in section 326 of the Communications Act against Commission censorship, we do not believe that . . . NEPA can be interpreted to compel the Commission to use its licensing power as a lever to impose special standards upon private licensees in the interest of the environment.

Public Interest Research Group v. FCC, 522 F.2d 1060, 1068 (1st Cir. 1975), *cert. denied*, 424 U.S. 965, 96 S.Ct. 1458, 47 L.Ed.2d 731 (1976).

48. *Sam Morris*, 11 F.C.C. 197, 198 (1946).

49. In at least one instance prior to 1959, one member of the Commission did informally express a policy very similar to that of *WCBS–TV*. In a letter dated August 11, 1949, to the Chairman of the Senate Committee on Interstate and Foreign Commerce, the Acting Chairman of the FCC explained that *Sam Morris* stood for the proposition that the mere commercial "plug" of liquor "may assume the proportions of a controversial issue of public importance," and that such advertising by itself could "raise serious social, economic, and political issues for the community," *reprinted at* Hearings Before the U.S. Senate Committee on Interstate and Foreign Commerce on S. 2444, 82d Cong., 2d Sess., at 7 (1952). This letter is not referred to in the congressional history of the 1959 amendments to the Communications Act.

50. Remarks of Chairman Pastore of the Senate Subcommittee on Communications, 105 Cong. Rec. 14462 (July 28, 1959). *But see also Red Lion, supra*, 395 U.S. at 385, 89 S.Ct. at 1804, "When the Congress ratified the FCC's implication of a fairness doctrine in 1959 it did not, of course, approve every past decision or pronouncement by the Commission on this subject, or give it a completely free hand for the future."

are not convinced that the *WCBS–TV* standard was one of the standards referred to.[51]

[9] There still remains the possibility that the *WCBS–TV* approach inheres in the public interest standard of the Communications Act[52] regardless of whether Congress recognized this in 1959. We think that this view is unwarranted, and realize that both the Commission and this court used stronger language than was necessary in stating that the decision in *WCBS–TV* was "required by the public interest."[53] As this court[54] and the Supreme Court[55] have emphasized, the public interest would not be served by taking away from the FCC all discretion in its administration of the general principles of the fairness doctrine. Clearly, application of fairness doctrine requirements to commercial advertisements has been fraught with difficulties; remaining faithful to the general principles of the doctrine, the Commission should be allowed to alter the precise contours of the doctrine in a manner it reasonably believes will help resolve those difficulties. As we have demonstrated, two of the greatest uncertainties in administration of the *WCBS–TV* approach were (1) ascertaining what issues were "implicitly" raised by standard product commercials and institutional advertising, and (2) determining when a view on a controversial issue of public importance was expressed so elliptically that it could not be said to have been "raised" for purposes of the fairness doctrine. The policies announced in the *Fairness Report* seem to us to be a straightforward attempt to remove these uncertainties by all-but-completely removing "implicit" advocacy from the confines of the fairness doctrine. As long as the Commission strictly enforces the core part two fairness obligation to present opposing points of view whenever there is direct, obvious, or explicit advocacy on one side of a controversial issue of public importance, it will be acting consistently with the public interest standard.

[10] Nor do we believe that the Commission has acted arbitrarily or that it has abused its discretion in withdrawing most commercial advertisements from application of the fairness doctrine. Of course, the mere fact that the approach spelled out in the *Fairness Report* represents a definite change of policy does not require that it be struck down. *American Trucking Associations, Inc. v. Atchison, Topeka and Santa Fe Railway*, 387 U.S. 397, 416, 87 S.Ct. 1608, 18 L.Ed.2d 847 (1967). We further conclude that the Commission has "given reasoned consideration to each of the pertinent factors"[56] and that its policy choices with respect to the scope of the fairness doctrine are supported by substantial, though not necessarily conclusive, evidence.

It is important to track the exact reasoning employed by the Commission in its decision to overrule *WCBS–TV*. The Commis-

51. In *Banzhaf, supra*, 132 U.S.App.D.C. at 24, 405 F.2d at 1092, we stated that *Sam Morris* has "not been followed in the twenty years since it was decided," and was "not in any event a clear precedent for a ruling which instructs stations to broadcast opposition to their paid commercials." Statutory recognition of the fairness doctrine thus could not have included codification of the approach approved in *Banzhaf*.

52. Section 315(a) of the Communications Act, 47 U.S.C. § 315(a) (1970), defines this standard as affording "reasonable opportunity for the discussion of conflicting views on issues of public importance."

53. *Banzhaf, supra*, 132 U.S.App.D.C. at 24, 405 F.2d at 1092, quoting Applicability of the Fairness Doctrine to Cigarette Advertising, 9 F.C.C.2d 921, 943 (1967).

We expressly noted in a later decision that the Commission had authority to reformulate the commercial advertising policy established in *WCBS–TV*. *Friends of the Earth, supra*, 146 U.S.App.D.C. at 94, 449 F.2d at 1170.

54. *See, e. g., Banzhaf, supra*, 132 U.S.App.D.C. at 23, 25, 405 F.2d at 1091, 1093.

55. *See CBS v. DNC, supra*, 412 U.S. at 132, 93 S.Ct. at 2101 (fairness inquiry is one step in "a continuing search for means to achieve reasonable regulation compatible with the First Amendment rights of the public and the licensees").

56. *Permian Basin Area Rate Cases*, 390 U.S. 747, 792, 88 S.Ct. 1344, 1373, 20 L.Ed.2d 312 (1968).

sion did *not* contend that standard product promotions do not implicitly raise the issue of the product's desirability. Rather, it concludes that mere promotion of a controversial product (that is, a product the use or purchase of which is controversial) does not constitute "meaningful" advocacy with respect to the merits of a "controversial issue of public importance," *Fairness Report* at 25. Petitioners contend that the Commission has thus arbitrarily excluded from the operation of the fairness doctrine one type of controversial issue: product desirability.

Given the reasons that the Commission puts forth for its new policy, such an outright fairness doctrine exemption for product commercials would not be arbitrary or an abuse of discretion. However, we are not convinced that petitioners' contention even correctly states what the Commission has done. When read in conjunction with that portion of the *Report* dealing with overt editorial and institutional advertising, the Commission's conclusion with respect to standard product commercials is more aptly characterized as being based on the view that the ultimate controversial issue of public importance is not the desirability of the product but the issues raised in the debate over desirability. Merely advocating the use of a product does not present information or involve discussion of these underlying issues; that is, promotional presentations are not "meaningful discussion[s] of . . . controversial issue[s] of public importance." When read in this manner, the *Fairness Report* has not arbitrarily excluded one class of issues from operation of the fairness doctrine; it has, rather, stated one standard for fairness doctrine application, quoted above, and refined and reformulated the definition of a controversial issue of public importance.

In any event, we think that the Commission has adequately supported its decision to exclude standard product commercials from the scope of the fairness doctrine. Three major arguments are presented by the Commission. First, the Commission made the judgment that the *WCBS–TV* approach to the fairness doctrine and standard product commercials at most informed the public about only one side of a controversial issue.[57] Since the underlying purpose of the fairness doctrine is to contribute to an informed public opinion,[58] the Commission determined that a change from the *WCBS–TV* approach was called for.

Certainly it must be admitted that counter-commercials are of a very different genre than are the product commercials themselves. They do not simply state, "Do not buy X; it is not desirable," but rather argue one side of the issues underlying the debate over desirability. Given this fundamental asymmetry, we do not think it was unreasonable for the Commission to conclude that application of the fairness doctrine to standard product commercials does not further the objective of presenting all viewpoints on controversial issues of public importance.[59]

The second major argument put forth by the Commission is that application of the fairness doctrine to noneditorial advertisements would "divert the attention of broadcasters from their public trustee responsibilities in aiding the development of an informed public opinion," *id.* at 26. This argument is of course premised to some extent on the first. We understand the Commission to be indicating that even if enforcement of fairness doctrine obligations with respect to commercial advertisements might marginally contribute to an informed public opinion, these benefits are outweighed by the reduction in public information which results from the decreased attention that broadcasters will afford to other

57. "In the cigarette case, for example, the ads run by the industry did not provide the listening public with any information or arguments relevant to the underlying issue of smoking and health." *Fairness Report* at 25.

58. *Report on Editorializing, supra* note 1, at 1249.

59. The same arguments apply, albeit with less force, to institutional advertisements which do not overtly and obviously advocate one side of a controversial issue.

aspects of the fairness doctrine. Given the wide range of controversial products to which the *WCBS–TV* approach could be applied[60] and the difficulties, discussed above, in determining which issues implicitly addressed give rise to fairness obligations, it is indeed quite possible that the effort broadcasters would have to devote to enforcing the fairness doctrine with respect to commercial advertisements would contribute relatively little to the overall objectives of the doctrine. We caution, however, that it is doubtful that the new FCC policy will substantially lessen the difficulties of drawing the line between advertisements which do and those which do not incur fairness obligations. The difference between obvious and unobvious advocacy is not obvious.

Finally, the Commission suggested in the *Fairness Report*, though not in its arguments to this court, that application of the fairness doctrine to commercial advertisements could undermine the economic base of commercial broadcasting. It is possible that sponsors would be discouraged from broadcasting advertisements subject to mandatory counter-commercials, and that broadcasters could suffer additional losses through operation of the *Cullman* principle under which they must bear the cost of presenting opposing views where paid sponsorship is not available.[61] Yet no evidence has been presented which indicates that the *WCBS–TV* policy[62] had an adverse effect on commercial broadcasters, though admittedly this may be due to the rather unvigorous and confused enforcement of that policy. While we do not think this economic argument is conclusive standing alone,[63] the other two arguments put forth by the Commission provide adequate and substantial support for its decision.[64]

II

The FCC's decision to limit the applicability of the fairness doctrine lays upon it some obligation to consider carefully other serious suggestions that have been made to ensure sufficient and balanced coverage of important public issues. We conclude that two of the proposals rejected by the Commission in its *Fairness Report* and *Reconsideration Order* deserve further considerations at the agency level.

Both the Commission and reviewing courts have been acutely sensitive to the multiple dilemmas posed by government regulation of the broadcast media. First, there is the recognition that given the scarcity of broadcast channels, it is not possible that all who desire to speak through these media will be able to do so. A limitation both on the number of broadcast licensees

60. *See* Geller, *The Fairness Doctrine in Broadcasting: Problems and Suggested Courses of Action* 85 (Rand Corp. 1973) ("There are relatively few advertised products whose normal use does not involve some significant issue: automobiles (large or small), gasoline (leaded or unleaded), any type of medication, beer, airplanes, any product that does not have a biodegradable container, any foreign product—the list is virtually endless.").

61. *Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963).

62. No generalizations can be drawn from the effect of the order in *WCBS–TV* itself, since that order applied to only one product. We do find it relevant, however, that apparently the cigarette manufacturers preferred a policy of no cigarette advertisements on television at all over the policy of requiring anti-smoking commercials, *see Capital Broadcasting Co. v. Mitchell*, 333 F.Supp. 582, 588 (D.D.C.1971) (Wright, J., dissenting). This supports the suggestion in the *Fairness Report* that full enforcement of the WCBS–TV policy could undermine the economic base of current broadcasting system.

63. The Commission apparently agrees. In its *Reconsideration Order*, *supra* note 2, at 699, the FCC stated, "Clearly, however, the economic impact on the broadcast industry was only one of many factors contributing to our choice of policy, and that factor alone is not of such critical importance as to cause a change of policy."

64. As additional support for our conclusion that the Commission's new policies with respect to commercial advertising are not unreasonable or arbitrary, we note that two respected students of the fairness doctrine and of FCC regulation generally have made substantially similar proposals. *See* Geller, *supra* note 60; Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv.L.Rev. 768 (1973).

and on the number of viewpoints and topics covered is unavoidable.[65] It is further recognized that these limitations should be fashioned in a way that best furthers the interest of the public in receiving various viewpoints on important issues.[66] Inevitably this requires at least some government oversight of broadcasters' decisions as to which issues are covered. Enunciation and enforcement of the fairness doctrine is of course the primary mechanism employed by the FCC to accomplish this oversight. The Commission has chosen to rely primarily on third-party complaints and limited review of fairness doctrine decisions by individual broadcasters in order to avoid excessive governmental supervision of licensee operations. *Fairness Report* at 8.

Yet case-by-case, issue-by-issue enforcement of the second obligation of the fairness doctrine still requires considerable Commission intrusion into the licensee decision-making process. *Id.* at 10–11. At the same time, reliance on third party complaints means that many fairness violations will not be called to account with respect to both part one and part two obligations.[67]

The Commission procedures with respect to part two complaints are spelled out in the *Fairness Report*. The complainant must describe the station, issue, and program involved, and must also "state his reasons for concluding that in its other programming the station has not presented contrasting views on the issue." *Id.* at 19. An unavoidable consequence of these procedures is that complaints will not be received, or will not be acted upon, unless there exist persons or organizations who are simultaneously "regular" viewers or listeners of the relevant station,[68] aware that there exist opposing points of view to that presented by the station, and interested enough in having those opposing views aired that they are willing to initiate a Commission inquiry into the matter.

The potential for less than full enforcement of the first obligation under the fairness doctrine—provision of "a reasonable amount of time for the presentation . . of programs devoted to the discussion and consideration of public issues"[69]—is even greater. Given the Commission's view that it is rare that a particular issue is "of such great public importance that it would be unreasonable for a licensee to ignore [it] completely," *id.* at 10, there exists very little incentive for members of the public, whom we may conclude are vitally concerned with a limited number of public issues, to initiate complaints relating to the first fairness obligation. A citizen would almost have to consider himself a guardian of the general public interest in being informed in order successfully to initiate such a complaint. Thus, it is not surprising that the usual fairness complaint relates to the part two obligation, *id.* at 8.[70]

[11] The Commission received three major proposals designed to overcome these difficulties of current fairness doctrine enforcement.[71] Petitioner COM urged that

65. *See National Broadcasting Co. v. United States*, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943); *CBS v. DNC*, *supra*.

66. *See Report on Editorializing*, *supra* note 1; Section 315(a) of the Communications Act, 47 U.S.C. § 315(a) (1970) (requiring a "reasonable opportunity for the discussion of conflicting views on issues of public importance").

67. For a description of these obligations, *see* p. 8 & n. 13 *supra*.

68. *See Fairness Report* at 19 (complainants must state reasons for concluding that station has not presented contrasting views; complainants thus must "specify the nature and extent of their viewing or listening habits, and should indicate the period of time during which they have been regular members of the station's audience").

69. *Id.* at 9, quoting *Report on Editorializing*, *supra* note 1, at 1244.

70. *See generally* Comment, Enforcing the Obligation to Present Controversial Issues: The Forgotten Half of the Fairness Doctrine, 10 Harv.C.R.C.L.L.Rev. 127 (1975).

71. Commission rejection of certain other proposals is also objected to on this appeal. We affirm the Commission's actions on these proposals. Petitioner NCCB asserts that there is a constitutional right of access for counter-commercials, arguing that the *CBS v. DNC* rationale for denying an access right for controversial

the Commission adopt as an optional substitute for the current fairness doctrine a system whereby licensees devote a specified percentage of their broadcast time to what COM labeled "free speech messages" and other public issue programing. Intervenor Geller requested the Commission to adopt a requirement "that the licensee list annually the ten controversial issues of public importance, local and national, which it chose for coverage in the prior year." [72] Mr. Geller also proposed that the Commission confine review of fairness doctrine complaints to the time of license renewal.

A. *The COM Access Proposal*

The *Fairness Report* stated that the fairness inquiry did not disclose "any scheme of government-dictated access which we consider 'both practicable and desirable.'" The Commission concluded that (1) a system of paid access would favor wealthy spokesmen, (2) a system of first-come, first-served free access would "give no assurance that the most important issues would be discussed on a timely basis," and (3) any alternative system of free access would inevitably require the FCC to determine who should be allowed on the air. *Fairness Report* at 28–29 & n. 29.

After the *Report* was issued, COM petitioned the Commission to reconsider or clarify its position with respect to right-to-access policies voluntarily adopted by licensees. In its petition, COM proposed a specific access scheme, not presented to the Commission during the fairness inquiry itself, which would be deemed presumptive compliance with the fairness doctrine. Under the scheme suggested by COM:

1) A licensee would set aside one hour per week for spot announcements and lengthier programing which would be available for presentation of messages by members of the public.

2) Half of this time would be allocated on a first-come, first-served basis on any topic whatsoever; the other half would be apportioned "on a representative spokesperson system."

3) Both parts of the allocation scheme would be "nondiscretionary as to content with the licensee."

4) However, the broadcaster would still be required to ensure that spot messages or other forms of response to "editorial advertisements" are broadcast.

See J.A. at 421–22.

The Commission addressed COM's proposal in its order denying reconsideration, stating that while the proposal was "the first serious attempt to meet" what the Commission deemed the essential requirements of any access scheme, "[i]t is neither perfected nor ready for adoption as a rule or policy." *Reconsideration Order* at 699. The Commission also expressed the view that the COM system could be a supplement to, but not a substitute for, the current fairness doctrine requirements. *Id.*

[12] We recognize that the Commission is not required in informal rulemaking to consider exhaustively every idea put forth

speech is inapplicable because the latter speech is covered by the fairness doctrine. However, we are not convinced that the holding in *CBS v. DNC* was premised on the specifics of the fairness doctrine. Certainly there is no guarantee under that doctrine that the particular message denied broadcast under paid access will be presented as part of fairness obligations. In any event, we fail to see how individuals seeking to present uncontroversial messages could have constitutional protection not afforded to individuals seeking to present controversial speech.

Intervenor Geller requested that the Commission require broadcasters to "consider" all editorial advertisements, because, according to Mr. Geller, "many broadcasters now pursue . . . a flat ban on any advertisement dealing with a controversial issue." Geller Brief at 36. The Commission gave this proposal "serious thought" but concluded that it was not practicable, *Fairness Report* at 29. The Commission's concern that this rule would cause unwarranted Commission intrusion into licensees' broadcast decisions is ample support for its conclusion. Intervenor Geller also seeks to have the Commission modify its current policies, as set out in the *Fairness Report* and *Reconsideration Order*, with respect to news slanting and political editorializing. We find no basis upon which to upset the Commission's policies in these areas.

72. Brief of Henry Geller at 33.

or to explain in detail the reasons why certain alternatives were rejected, *see Consumers Union of the United States, Inc. v. Consumer Product Safety Commission*, 491 F.2d 810, 812 (2d Cir. 1974). Nevertheless, we think that the COM proposal has desirable aspects that the Commission may have overlooked, and indeed that the Commission may not have correctly understood the true nature of the proposal. In these circumstances, we conclude that the Commission should give further consideration to the proposal, including the solicitation of comments thereon.

Our conclusions are prompted by the Commission's own criteria for what would constitute an acceptable "optional access system to be administered by the licensee, and supplemented by the fairness doctrine:"

> The essential requirements for any such system would be that [1] licensee discretion be preserved and [2] no right of access accrue to particular persons or groups. Furthermore, [3] the access system would not be permitted to allow important issues to escape timely public discussion. Most importantly, [4] the system must not draw the government into the role of deciding who should be allowed on the air and when.

Reconsideration Order at 699.

First, it seems to us that the Commission has not explained adequately why the COM proposal does not meet most of these requirements. The fourth requirement would be furthered even more than it is under present fairness doctrine enforcement, since under the COM proposal the licensee would be subject to fairness complaints only with respect to "editorial advertisements." The nondiscretionary apportionment system in the COM proposal would appear to be responsive to the second requirement listed above. COM vigorously argues that the third requirement would be met because spokesmen will inevitably come forth to speak on important issues.[73]

The first FCC requirement is that "licensee discretion be preserved." COM argues that its proposal assures licensee discretion in that the licensee can decide not to adopt the access system and instead continue to operate under current fairness doctrine procedures. COM Brief at 43. But of course the discretion to which the Commission is referring is with respect to deciding which issues should be covered initially and which initial coverage requires the presentation of opposing points of view.

The Commission evidently bases this requirement on language in *CBS v. DNC, supra*, 412 U.S. at 125, 93 S.Ct. at 2097, that "the allocation of journalistic priorities should be concentrated in the licensee rather than diffused among many."[74] However, while the Court did state that " 'public trustee' broadcasting" should not be exchanged "for a system of self-appointed editorial commentators," *id.* at 125, 93 S.Ct. at 2098, it also stated that there might be devised "some kind of limited right of access that is both practicable and desirable," *id.* at 131, 93 S.Ct. at 2100. We cannot read *CBS v. DNC*—which held that broadcasters were not statutorily or constitutionally *required* to accept paid editorial messages—as indicating that voluntarily licensee adoption of a system of limited access such as that proposed by COM would violate the public interest standard of the Communications Act.[75] The COM proposal is of course not aptly characterized as solely "a system of self-appointed editorial commentators," because it would retain the broadcaster's present responsibility to present opposing points of view in response to editorial advertisements.

73. Brief of COM at 35. COM also points out that "under the present system, there is no assurance or requirement that once an offer of reply time is made, a contrasting viewpoint will actually be aired, if responsible spokespeople chose not to accept the offer." *Id.* We further note that where there is offered an opportunity to speak on an issue, but no one takes advantage of the opportunity, it is highly doubtful that the issues could qualify as one of importance.

74. The opinion in *CBS v. DNC* also states:

> For better or worse, editing is what editors are for; and editing is selection and choice of material.

412 U.S. at 124, 93 S.Ct. at 2097.

75. *See* note 66 *supra*.

Moreover, in stating its "essential requirements" for an access system as a substitute for the current fairness doctrine, the Commission appears to want to have its cake and eat it too. If the preservation of journalistic "discretion" under the first requirement is meant to mandate that all decisions with respect to which issues are covered be left to the licensee, then substantial government involvement in the form of agency oversight, contrary to the spirit if not the letter of the fourth requirement, cannot be avoided. We do not think that the Commission has demonstrated in the *Fairness Report*, in the *Reconsideration Order*, or in its written and oral arguments to this court that the COM proposal retains insufficient licensee discretion.

Nor do the Commission's stated requirements take into account all crucial elements of an access scheme, or indeed any other mechanism of fairness doctrine enforcement. Certainly, the "essential requirements" must include some consideration of the scheme's likely success in meeting the first obligation of the fairness doctrine: the coverage of controversial issues. We have already described the limited extent to which current enforcement procedures can assure that this obligation is fulfilled, and we understand the reluctance of the Commission to become more involved in dictating which issues must be covered under the obligation. COM's proposal will involve the Commission even less than do present procedures in overseeing compliance with the first obligation. At the same time, the proposal would ensure a minimum amount of coverage of public issues.

Similarly, we think that the Commission cannot ignore the advantage of an access system in providing information to the public which would not be provided under even full compliance with both obligations of the fairness doctrine as currently implemented. For instance, we have sustained the Commission's decision to exclude standard product commercials from the part two fairness obligation. Although we have determined that presentation of counter-commercials is not required by the public interest standard of the Communications Act, neither the Commission's decision nor our affirmance of it was based on the view that the information contained in counter-commercials is useless or harmful. Allowing presentation of these messages would certainly not be inconsistent with the Commission's statutory obligations. The only reservation about the utility of counter-commercials stated in the *Fairness Report* and *Reconsideration Order* was that they would present only one side of controversial issues of public importance.[76] But an access system could result in presentation of information opposing the purchase of certain products *and* messages opposing these counter-commercials.

We recognize of course, that there may be significant difficulties with the COM access proposal. For instance, there is no absolute assurance that the issues addressed during access time will be the most important or controversial issues facing the licensee's community, and even less assurance of balance in presentation of opposing viewpoints. In its further inquiry into the COM proposal, we expect the Commission to ascertain how serious these potential defects are and to examine whether they can be overcome. Throughout this process, it is especially important that the nature and scope of issue coverage under the proposed access scheme be compared to the degree of coverage actually achieved under the current system of fairness doctrine implementation, not to the coverage that would be achieved were both fairness obligations currently complied with and enforced.

B. *Other Proposals Relating to the First Fairness Obligation*

In conducting further inquiry on the COM proposal, the Commission will have to examine how best to ensure that licensees devote a reasonable amount of time to programing on public issues, as is required under the first obligation under the fairness doctrine. We do not think that this examination should be limited to comparison of only two alternatives: present procedures

76. *Fairness Report* at 25; *Reconsideration Order*, *supra* note 2, at 698.

for implementing this obligation, on the one hand, and the COM proposal, on the other. There may well exist other ways of achieving compliance with the first obligation that deserve critical consideration, either in conjunction with, or as alternatives to, the procedures referred to above.

One of the proposals submitted to the Commission during the fairness inquiry seems especially promising as one step toward fuller compliance with the first fairness obligation. Intervenor Geller suggests that

> the licensee list annually the ten controversial issues of public importance, local and national, which it chose for the most coverage in the prior year, set out the offers for response made; and note representative programing that was presented on each issue.[77]

Mr. Geller made this proposal both during the fairness doctrine inquiry and in his petition for reconsideration of the *Fairness Report*.[78] There is no indication that this rather modest proposal has received the serious consideration it deserves. Although the Commission alluded to the proposal in its order denying reconsideration, it failed to state even in conclusory terms why the proposal was being rejected. Therefore, we conclude that further inquiry into the Geller proposal would be appropriate as part of, or as a supplement to, additional examination of the COM access scheme.

Mr. Geller failed to state exactly what he believed the Commission should do with the issue reports that it receives, and it is not our role to flesh out the details of this proposal. It does seem to us, however, that issue reports could be useful to the Commission in one or more ways. For instance, the Commission initially could review each annual list to determine whether it appears that the licensee fulfilled his part one obligation. If this is not obvious from the list, or if the Commission had received complaints concerning the overall issue coverage afforded by the licensee, the Commission might conduct further inquiry into the licensee's issue coverage. Alternatively the Commission might take no immediate action with respect to the annual reports, but instead examine them at the time of license renewal. We leave it to the Commission's further examination to consider whether these or other uses of annual reports such as those proposed by Mr. Geller would be appropriate in enforcement of the fairness doctrine. The Commission may find it necessary to consider also under what standard the annual reports might be reviewed. We likewise leave to the Commission the determination of how best to conduct further inquiry into Mr. Geller's proposal, including whether this inquiry should be conducted separately from or as part of the further inquiry into the COM proposal.

C. *Review at Renewal Only*

Under a wholly separate proposal put forth by intervenor Geller, both during the fairness inquiry and in his petition for reconsideration, the FCC would abandon its current case-by-case consideration of fairness doctrine complaints, and return to its pre-1962 practice of ascertaining at renewal time whether or not the licensee has complied with the fairness doctrine.[79] The proposal further suggests that the standard of review at renewal time be limited to whether there is "an indicated pattern of a flagrant nature, akin to 'malice' or bad faith or 'reckless disregard' of fairness obligations." Brief of Henry Geller at 11–12.

[13, 14] This proposal is directed at reducing the amount of government interference in the everyday editorial decisions of licensees. This objective was a major consideration in the decision in *CBS v. DNC, supra*, which held that there exists no statutorily or constitutionally mandated right of access for paid editorial broadcasts. But we think that intervenor errs in inferring

77. Brief of Henry Geller at 33.

78. *See* J.A. at 469-472.

79. This change in practice was effected first with respect to cases involving personal attacks, *see Tri-State Broadcasting Co.*, 40 F.C.C. 508 (1962).

from isolated language in that decision[80] that the case-by-case determinations made by the FCC under current procedures for fairness doctrine enforcement are invalid under the Communications Act and under the Constitution. If the Court in *CBS v. DNC* had intended to invalidate all case-by-case procedures employed by the FCC, it is unlikely that it would have reaffirmed *Red Lion, supra*, decided by the Commission in just this manner, without at least mentioning its disapproval of the manner in which that case had come before it.[81]

We therefore conclude that the Commission is neither constitutionally nor statutorily *required* to return to its pre-1962 method of fairness doctrine enforcement. Nor do we think that its rejection of the proposal that it do so was unreasonable or arbitrary. It is not contended that the Commission failed to give the proposal serious consideration.[82] The Commission concluded that the proposed renewal assessment could not be made without inquiring into individual complaints, inquiries which would often be made on the basis of stale records. The Commission also argued—we believe convincingly—that review only at the time of renewal would discourage the filing of specific complaints from persons who sought to present opposing views in a timely fashion, and would deny the Commission the ability "to remedy violations before a flagrant pattern of abuse develops," *Fairness Report* at 18. In light of these considerations, we think the Commission correctly concluded that the specific renewal-only approach set forth by intervenor is not practicable at this time.

IV

In summary, we reject the challenges to the Commission's decision to exempt product commercials which do not "obviously and meaningfully address a controversial issue of public importance" from fairness doctrine obligations, and find no merit in the contentions that the Commission has violated the substantive and procedural requirements of NEPA. We also affirm the Commission's decisions to continue its policy of case-by-case consideration of fairness complaints and its policies relating to licensee consideration of editorial advertisements, news slanting and political editorializing. However, we remand the orders reviewed on this appeal with instructions that the Commission undertake further inquiry into petitioner COM's access proposal and intervenor Geller's "10 issue" proposal in accordance with this opinion.

It is so ordered.



80. 412 U.S. at 126–27, 93 S.Ct. at 2098 ("Under . . . [the] right-of-access system urged by respondents . . ., the Commission would be required to oversee far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether . . . a particular viewpoint has already been sufficiently aired"); *id.* at 125, 93 S.Ct. at 2097 ("It was reasonable for Congress to conclude that the public interest in being informed requires *periodic* accountability on the part of [broadcasters].") (emphasis added); *id.* at 120, 93 S.Ct. at 2095 (the "unmistakable Congressional purpose [is] to maintain . . . essentially private broadcast journalism held only *broadly accountable to public interest standards.*") (emphasis added) (opinion of Burger, C. J.).

81. *Red Lion* did not sustain the Commission's fairness doctrine procedures. Although the Court upheld the fairness doctrine and the Commission's finding of a violation in that case, it did not have occasion to rule on the validity of the process by which the licensee before it was found to have violated the doctrine. *See National Broadcasting Co. v. FCC [Pensions]*, 170 U.S.App.D.C. 173, 188, 516 F.2d 1101, 1116 (1974), *vacated as moot, id.* 170 U.S.App.D.C. at 252, 516 F.2d at 1180 (1975), *cert. denied*, 424 U.S. 910, 96 S.Ct. 1105, 47 L.Ed.2d 313 (1976).

82. As previously stated, "[Mr. Geller's] position is a serious one, and it deserves serious consideration." *Pensions, supra*, 170 U.S.App.D.C. at 188, 516 F.2d at 1116. The Commission explained the proposal and the reasons for its rejection in both the *Fairness Report* (at 18) and the *Reconsideration Order* (*supra* note 2, at 693–94).

Exhibit 121: *In Re Public Media Center* (Pacific Gas Nuclear) 59 FCC 2d 494 (May 17, 1976)

F.C.C. 76-453

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re complaint of

PUBLIC MEDIA CENTER; FRIENDS OF THE EARTH; CALIFORNIANS FOR SAFE NUCLEAR ENERGY; CALIFORNIA CITIZEN ACTION GROUP; SAN FRANCISCO ECOLOGY CENTER; SAN FRANCISCO CONSUMER ACTION AND ZERO POPULATION GROWTH. *Against:* RADIO STATION KATY, SAN LUIS OBISPO, CALIFORNIA; RADIO STATION KFOG(FM), SAN FRANCISCO, CALIFORNIA; RADIO STATION KFRE, FRESNO, CALIFORNIA; RADIO STATION KFYV, ARROYO GRANDE CALIFORNIA; RADIO STATION KJOY, STOCKTON, CALIFORNIA; RADIO STATION KMBY, MONTEREY, CALIFORNIA; RADIO STATION KPAY, CHICO, CALIFORNIA; RADIO STATION KRED, EUREKA, CALIFORNIA; RADIO STATION KROY, SACRAMENTO, CALIFORNIA; RADIO STATION KSMA, SANTA MARIA, CALIFORNIA; RADIO STATION KSRO, SANTA ROSA, CALIFORNIA; RADIO STATION KUZZ, BAKERSFIELD, CALIFORNIA AND RADIO STATION KVON, NAPA, CALIFORNIA.

MEMORANDUM OPINION AND ORDER

(Adopted: May 17, 1976; Released: May 18, 1976)

BY THE COMMISSION: COMMISSIONERS WILEY, CHAIRMAN, HOOKS, QUELLO AND ROBINSON CONCURRING IN THE RESULT.

1. The Commission has under consideration (1) a complaint filed September 11, 1974 by the above-captioned complainants against the above-captioned thirteen California radio stations; (2) the responses and comments thereon by the respective licensees; (3) a reply to the responses filed on March 31, 1975 by the complainants [1]; and (4) further responsive pleadings filed by various parties from April 11, 1975 through October 24, 1975.

The Complaint

2. In the above-captioned complaint it is asserted by the complainants that the respective licensees herein have failed to fulfill the re-

[1] The initial complaint, dated September 6, 1974, had also been brought against three additional California radio stations: KWAV(FM), Monterey; KWG, Stockton; and KLOC, Modesto. However, by letter dated October 7, 1974, the complaint against KWAV was withdrawn; similarly, in a letter dated November 27, 1974, the complainants withdrew their complaint against KWG, and, in their March 31, 1975 reply pleading, the complainants withdrew their claims against KLOC.

sponsibilities imposed upon them by the fairness doctrine in connection with the broadcast of certain announcements, each of which is 60 seconds in length, sponsored by the Pacific Gas and Electric Company (PG&E). The complainants claim that six such announcements[2] presented viewpoints on one side of a controversial issue of public importance, *viz.*, ". . . the immediate construction of nuclear power plants and use of nuclear power . . . ." The complainants assert that these 60-second announcements were broadcast during the months of June, July and August, 1974, ". . . throughout the day and night, including during periods of maximum listening . . . ," that the six PG&E announcements in question present the claims that ". . . nuclear power is environmentally clean, safe, practical and economical . . . ," and that there is much disagreement today with respect to such claims concerning nuclear power. The complainants assert that, in view of the foregoing, the six PG&E spots in question (hereinafter referred to as the PG&E "nuclear power spots") constitute "editorial" advertisements which present a "meaningful statement" on one side of the controversial issue of public importance specified above, and that, accordingly, the fairness doctrine is applicable to these spots. In this connection, the complainants cite the Commission's *Fairness Report*, 48 FCC 2d 1 (1974), in which we stated that ". . . in the future, we will apply the fairness doctrine only to those 'commercials' which are devoted in an obvious and meaningful way to the discussion of public issues." *Id.* at 26.

3. In support of their claim that the issue specified above constituted a controversial issue of public importance, the complainants assert that ". . . the PG&E ads come at a time when Californians are being asked to sign initiative petitions in favor of holding a referendum on the construction and use of nuclear power plants in California . . . ; if a sufficient number of signatures are obtained by February 1975, the proposed initiative will go to referendum in Spring 1976." The complainants further assert that, since "[t]he overriding theme of all the [PG&E 'nuclear power'] ads is . . . that all other sources of energy are 'already developed . . . , scarce . . . , costly . . . , experimental . . . and useful here over the short run . . . ,' and that nuclear power is the only power source 'whose time has arrived' . . . , [t]hese ads are making it more difficult for referendum proponents to obtain a significant number of signatures to put the issue of nuclear power before the voters." Additionally, the complainants submitted copies of several newspaper articles which, according to the complainants, ". . . attest to the fact that the question of the immediate commercial construction of nuclear power plants and use of nuclear power is a controversial issue of public importance in the [San Francisco] Bay Area, in California, and in the Nation." These newspaper clippings highlight the major points of controversy between environmentalists and nuclear power advocates on the issue of the desirability of utilizing nuclear power. The complainants also refer to recent legislative efforts regarding nuclear power plants; in this connection the complainants cite the legislation introduced by Congressman Waldie of California which calls for a five-year moratorium on the construction of nuclear power plants. 120

[2] Copies of the texts of the six announcements in question have been submitted by the complainants, and are attached hereto as Appendix I. The texts are numbered A-1 through A-6 and are referred to accordingly herein.

Cong. Rec. E5712 (August 22, 1974). The complainants also state that "Congress has already passed, over vociferous opposition, recent legislation extending the limitations on liability insurance for nuclear power plants, an issue addressed by one of the PG&E ads." It is asserted by the complainants that this legislation —H.R. 15323, 93d Cong., 2d Sess. (1974), which would extend for five years the Price-Anderson Act— passed the House of Representatives on July 11, 1974, and the Senate on August 8, 1974.[3]

4. The complainants have submitted a numerical summary, in chart form, of the media purchase records of Batten, Barton, Durstine & Osborn, Inc., San Francisco, PG&E's advertising agency. The summary sets forth the number of PG&E "nuclear power" spots broadcast in each California radio market in each time period of the broadcast day from June 10, 1974 through August 4, 1974. It appears from this summary that the spots in question were given considerable air time in a number of California radio markets at various times during the broadcast day.

5. The complainants assert that numerous regular listeners of the respective licensees, including members of the organizations who have filed the instant complaint, have stated to the complainants that they have heard no other programming on the respective stations which presented viewpoints, on the issue specified above, in contrast to the viewpoints on nuclear power which were presented in the PG&E spots. The complainants claim that in view of all the foregoing, they determined that ". . . there was a *prima facie* case that the licensees failed to comply with the fairness doctrine by neglecting to present contrasting views in their overall programming on the controversial issue addressed by the PG&E ads." The complainants further state that they brought their complaint to the attention of the respective licensees in a letter dated July 15, 1974, a copy of which was enclosed with their September 6, 1974 letter of complaint to the Commission. In the July 15 letter sent to each licensee the complainants set forth the information summarized above, asserted their conclusion that the licensee in question had failed ". . . to provide any adequate access for the presentation of contrasting views . . ." to those allegedly presented in the PG&E "nuclear power" spots, and requested that the licensee furnish them with information as to specific times and content of any contrasting programming which had been broadcast. The July 15 letter also contained the complainants' offer to furnish the licensee in question with several pre-recorded 30-second and 60-second spot announcements, prepared on behalf of nuclear power opponents, which the complainants claimed would help the licensee satisfy its fairness doctrine obligations ". . . if aired a sufficient number of times." The complainants asserted, however, that they were financially unable to purchase air time for the presentation of these spots.

6. The complainants claim that the July 15, 1974 letter was sent to each of the radio stations which had broadcast the PG&E "nuclear power" spots, and that, with the exception of the licensees involved in the instant matter, all of the addressed licensees of the respective stations had agreed to air the anti-nuclear power spots provided by the

[3] See discussion at footnote 12, *infra*, and accompanying text.

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complainants. With their September 6, 1974 letter to the Commission the complainants enclosed copies of the written responses of the instant licensees to the July 15 letter. These written responses, as well as several oral responses, are summarized by the complainants as follows:

(a) KUZZ offered complainants the opportunity to purchase time, but refused to provide free time for the broadcast of the anti-nuclear power spots.
(b) KRED, KSRO, KSMA and KVON have been ". . . consulting counsel for six weeks and . . . [have] . . . failed to substantively respond to complainants." However, KVON stated that it had ". . . aired a news story on complainants' efforts."
(c) KATY stated that ". . . we have fulfilled the fairness doctrine thru special programs with opponents of nuclear power plants presenting their views."
(d) KFOG stated in general terms that it had met its fairness obligation, without citing any specifics.
(e) KFYV stated in general terms that it "has covered the various views" on nuclear power and that it will report the complainants' views on the news.
(f) KFRE offered the complainants the opportunity to appear on "Fresno Forum," a 25-minute program which is aired twice each Sunday, and stated that generally it will "continue to cover the issue."
(g) KJOY offered the complainants the opportunity to appear on a Sunday call-in program which is aired from 9:00 p.m. until midnight.
(h) KPAY extended an invitation to the complainants to appear on a 30-minute discussion program which is aired twice each Sunday.
(i) KROY offered to have the complainants appear on a Sunday evening talk show for thirty minutes.
(j) KMBY offered program time to counter the PG&E "nuclear power" spots consisting of three 4-1/2 minute "exposures" on each of two days, for a total of approximately thirty minutes.

7. The complainants assert that as a result of their analysis of the responses of the respective licensees to their July 15 letter and, following consideration of reports from "regular station listeners" and the media schedule for the PG&E "nuclear power" spots, the complainants have determined that the thirteen instant licensees have failed in their overall programming to afford a reasonable opportunity for the presentation of views on nuclear power contrasting those contained in the PG&E spots.

8. The complainants state that in view of the fact that the licensee of station KUZZ has failed to offer any free time to nuclear power opponents, the licensee of that station has violated the fairness doctrine and the so-called *"Cullman* rule." See *Cullman Broadcasting Co., Inc.*, 40 FCC 576 (1963). The complainants further claim that in view of the failure of the licensees of KRED, KSMA, KSRO and KVON to respond substantively to the complainants' July 15, 1974 letter, each of these licensees ". . . must also be presumed to have violated the fairness doctrine, including its general requirement that a

station act in good faith in attempting to resolve citizen grievances." In this connection, the complainants state that the licensees of KRED, KSMA, KSRO and KVON have acted unreasonably in failing to respond with any concrete information concerning the instant complaint for some six weeks after having been initially contacted.

9. The complainants assert that the licensees of KATY, KFOG and KFYV have failed to act in good faith in the matter, since they failed to fully explain the rationale for their claims that they had complied with the fairness doctrine. The complainants state that by failing to specify past or future programming presenting viewpoints contrasting those contained in the PG&E "nuclear power" spots, the licensees of KATY, KFOG and KFYV ". . . have failed to rebut the *prima facie* case presented by the complainants." The complainants claim that they ". . . cannot adequately assess the performance of these stations without knowing the dates, times of day, lengths of programs, persons participating, etc., in regard to the programming by which the stations claim to have met their fairness obligations . . . ," and that, therefore, resort to the Commission became necessary.

10. The complainants assert that the licensees of KFRE, KJOY, KPAY and KROY have acted unreasonably in fulfilling their fairness doctrine obligations in connection with PG&E spots since these licensees have merely offered the complainants the opportunity to appear on particular programs to present their viewpoint on nuclear power. The complainants claim that in the absence of the broadcast of some other programming presenting viewpoints contrasting those expressed in the PG&E spots, the licensees of KFRE, KJOY, KPAY and KROY should be found to have acted unreasonably in fulfilling their fairness doctrine obligations, since the presentation of contrasting viewpoints in specified blocks of program time is ". . . insufficient to fulfill the obligations of these licensees . . ." as to viewpoints presented in a spot format. In this connection, the complainants state that although there is no precise formula for measuring the reasonableness of a licensee in meeting its fairness doctrine obligations, several factors must be taken into account in assessing reasonableness: (a) the total amount of time afforded to each side on a controversial issue of public importance, (b) the frequency with which each side is presented, (c) the size of the listening audience during the various broadcasts, (d) the time period over which the one-sided broadcasts have appeared, and (e) the reaching of different audiences. The complainants assert that an analysis of the actions of the licensees of KFRE, KJOY, KPAY and KROY in light of the foregoing factors has resulted in the conclusion that, "[o]n the facts in this case, only the use of a spot format for the presentation of counter-viewpoints can adequately satisfy the fairness doctrine. . . ." The complaints state that

> . . . a station acts unreasonably in offering 'block time' on one Sunday morning and/or evening to air views contrasting with those presented in one-sided spot advertisements which have appeared *dozens of times*, reaching *larger audiences* during drive times and other prime times, over a period of *several weeks*, and which have reached *different audiences* from those Sunday listeners. . . . [I]n this case the fairness doctrine requires the adoption of a spot response format for the airing of anti-nuclear power announcements in comparable time periods and over a comparable length of time, and that consequently the offer here of a 'one shot' piece of 'block time' is insufficient to satisfy the fairness doctrine. [Emphasis in original]

11. The complainants assert that the offer by the licensee of KMBY of three "exposures" on each of two days ". . . is simply outside the zone of reasonableness necessary to meet . . . [the station's] . . . fairness obligations." Specifically, it is claimed by the complainants that the licensee's offer of time ". . . is totally insufficient to present adequate information to listeners who have heard the PG&E ads for several weeks, on several days, over and over again."

12. In conclusion, the complainants state that ". . . as the difficulties of obtaining traditional fuels such as oil and coal increase, more and more utilities are expected to turn to nuclear power . . . , [a]nd as they do so, more utilities can be expected to disseminate their views on that subject via the airways." In view of the foregoing, and since, according to the complainants, ". . . spot ad campaigns on this subject by utilities present special problems about which licensees must be concerned if the public is to receive adequately both sides of the nuclear power debate . . . ," the complainants request that the full Commission rule on the instant complaint.

Letters of Inquiry

13. On November 22, 1974 a letter of inquiry was transmitted by the Commission's Broadcast Bureau to each of the licensees in which the views and comments of the respective licensees were sought as to the instant complaint. Although reply comments to this letter were to have been filed within ten days of the date of its issuance, by letter of December 10, 1974, the Bureau granted an extension of time until December 23, 1974 within which the licensees were to have submitted replies to the letter of inquiry.[4]

Responses by Licensees

14. *KATY*—In its December 4, 1974 response to the November 22 letter of inquiry, and in its January 21, 1975 response to the further letter of inquiry of January 17, 1975, Hill Radio, Inc.—licensee of Station KATY—asserts that all six of the PG&E "nuclear power" spots were broadcast on KATY, on a rotation basis, 19 times per week, at various times throughout the day, from June 10, 1974 to August 11, 1974. A total of 171 such spots were run over a 63-day period, and of these 171 spots, 72 were broadcast during periods of maximum audience potential. The licensee further asserts that each of the spots does, in its judgment, present a viewpoint on one side of a controversial issue of public importance. In this connection, the licensee states that the PG&E announcements ". . . present reasons for the desirability of nuclear power and specifically deal with the issues of safety and environmental effect." The licensee claims, however, that it has met its fairness doctrine obligations with respect to the issues addressed in the PG&E announcements by devoting "a considerable amount of broadcast time" to those opposed to nuclear power and that the topic of nuclear power and nuclear power plants has been frequently covered in regularly scheduled newscasts broadcast by KATY. Without

[4] Letters of further inquiry were also transmitted to several of the licensees involved in the instant matter. Such letters were sent by the Bureau on January 7, 1975 to the licensees of KFRE and KFOG; on January 8, 1975 to the licensees of KMBY, KPAY and KROY; on January 9, 1975 to the licensee of KVON; and on January 17, 1975 to the licensee of KATY.

specifying the precise length, content, and date and time of broadcast of each such news story, the licensee asserts that the viewpoints of nuclear power opponents ". . . have been presented many, many times . . . ," and that approximately 60% of such news stories contained material which ". . . would be considered unfavorable to nuclear power." In addition to the foregoing, the licensee cites other programming which it claims to have broadcast and which has presented the viewpoint of opponents of nuclear power and nuclear power plants. Thus, the licensee claims to have broadcast two hours and eighteen minutes of programming on Sunday, November 25, 1973 (8:00 to 9:09 p.m. and 10:50 to 11:59 p.m.) which presented two spokesmen opposed to construction of a local nuclear power plant. Similarly, the licensee claims to have broadcast two programs in 1974 which presented the viewpoints of those opposed to nuclear power plant construction. The first of these programs, allegedly presented in January 1974, was a one-hour broadcast, aired from 9:00 to 10:00 p.m. on an unspecified date, which presented three individuals opposed to nuclear power on safety and environmental grounds. The licensee claims that the second program, which was 35 minutes in length, was broadcast on Sunday, August 11, 1974, at 8:30 p.m. and was repeated that same evening at 10:30 p.m. The licensee asserts that this program was devoted to a discussion of the adverse environmental and safety effects of nuclear power plants. Additionally, the licensee states that from 9:00 to 10:00 p.m. on Sunday, December 2, 1973, it presented one hour of programming devoted to the presentation of the viewpoint of a PG&E spokesman on the issue of nuclear power plant construction. The licensee characterizes this presentation as "time devoted to proponents of nuclear power." The licensee further asserts that, from 9:00 to 10:00 p.m. on an unspecified date in October 1973, it broadcast a one-hour discussion between a PG&E spokesman and a representative of the California Department of Fish and Game on the subject of nuclear power, with particular emphasis on the possible detrimental effects on marine life from waste water discharge into the ocean. The licensee characterizes this presentation as "time both opponents and proponents [of nuclear power plants] were present in discussion." The licensee also states that even if it had presented no special programming presenting viewpoints in opposition to nuclear power, ". . . it is unreasonable for the complainant[s] to demand spot announcements to counter the Pacific Gas and Electric commercials"; and that the complainants are not entitled to have their spot announcements broadcast free of charge merely because they disagree with the message contained in a "commercial" presenting a viewpoint on a controversial issue of public importance.

15. *KFOG*—In its December 6, 1974 response to our November 22 letter of inquiry, and in its January 12, 1975 response to our further letter of inquiry of January 7, 1975, General Electric Broadcasting Company, Inc., licensee of Station KFOG asserts that all six of the PG&E "nuclear power" spots were broadcast on KFOG on a rotation basis, 24 times per week, at various times throughout the day, from June 10, 1974 through August 4, 1974. A total of 192 such spots were run over this 56 day period and, of these 192 spots, 83 were broadcast during periods of maximum audience potential. The licensee further

asserts that each of the spots does present a viewpoint on one side of a controversial issue of public importance; that although "the subject of nuclear power . . . is by itself not controversial . . . , when we did have the opportunity to hear the specific PG&E commercials we were able to . . . determine that potential controversy existed"; that it made a determination to cover the topic of nuclear power under the basic heading of energy; that it has adequately covered the issue of energy as well as the sub-issue of nuclear power in its programming; and that, accordingly, it has met its fairness doctrine obligations with respect to the issues addressed in the PG&E announcements. In this regard, the licensee cites two specific programs which it claims presented viewpoints on nuclear power contrasting those presented in PG&E's announcements. The first of these programs was broadcast on Sunday, December 9, 1973 from 10:00 to 10:30 p.m. and presented a member of the Board of Directors of the Sierra Club who gave his view of the "desirability of nuclear power plants along with a discussion of the potential danger they represent, in the context of the discussion of the energy crisis." The second program which the licensee cites was broadcast on Sunday, July 7, 1974 from 10:00 to 10:30 p.m. and presented a member of an organization known as Californians for Safe Nuclear Energy. This spokesman, according to the licensee, was afforded the opportunity to discuss his group's opposition to nuclear power plants. In addition, the licensee makes reference to certain comments made in passing by three guests on three public affairs programs broadcast over KFOG. These comments, in essence, indicated the speakers' belief that energy should be conserved; that new energy sources should be developed; and that "the energy crisis has both good and bad effects." The licensee further asserts that apart from the programming that it has presented in opposition to the viewpoints contained in the PG&E nuclear power announcements, it made the concerted effort to obtain spokesmen to present antinuclear power viewpoints over KFOG. Thus, the licensee asserts that its operations manager communicated with the counsel for the complainants and requested that counsel provide the licensee with individual statements from those KFOG listeners who have comments on KFOG programming. The licensee claims, however, that counsel for complainants never responded to this request. The licensee also claims that it attempted to contact the Californians for Safe Nuclear Energy, one of the instant complainants, in an effort to get some information concerning the ballot initiative petition being circulated by that group on the issue of nuclear power. However, according to the licensee, the local office of that organization had closed, and no forwarding address or phone number had been left. The licensee states that it contacted another of the instant complainants, the San Francisco Ecology Center, in an effort to obtain alternate views on the nuclear energy issue. However, according to the licensee, that office had not decided whether or not it wanted to take a stand on the nuclear energy question.[5]

16. *KFRE*—In its December 12, 1974 response to our November 22, 1974 letter of inquiry, and in its January 14, 1975 response to our

[5] In a supplementary pleading dated May 6, 1975, the licensee also claims to have broadcast a "free speech message" of an unspecified duration on the topic of "nuclear waste." The licensee asserts that this message was broadcast a total of five times during the period of March 6-9, 1975; however, information as to the exact times of broadcast was not furnished to the Commission.

further letter of inquiry of January 7, 1975, KFRE Broadcasting Inc., licensee of Station KFRE, asserts that all six of the PG&E "nuclear power" spots were broadcast over its station on a rotation basis at various times throughout the day from June 10 through August 4, 1974. A total of 166 such spots were run over a 56-day period, and 44 of these were broadcast during periods of maximum audience potential. The licensee further asserts that in its judgment none of the PG&E "nuclear power" spots presented viewpoints on one side of a controversial issue of public importance. As a basis for this conclusion, the licensee claims that the PG&E spots deal with the "need for nuclear power as an alternative to a dire shortage in other sources, the undisputed safety record of nuclear power, the cost factor of nuclear power, its cleanliness, and the fact that nuclear reactors are insurable." The licensee declares that when it ran the PG&E spots the assertions contained therein were "accurate and undebatable." The licensee further asserts that notwithstanding its conclusion that the spots did not address a controversial issue of public importance, it did encourage the presentation of viewpoints contrasting those contained in the PG&E spots, *viz.*, it offered the complainants a 25-minute interview program with nuclear power opponents to be run twice on a single Sunday, once at 11:05 a.m. and again at 10:05 p.m. The licensee contends that it never received any response to this offer of program time. The licensee's responses to our inquiries do not indicate that KFRE broadcast any viewpoints contrasting those contained in the PG&E nuclear power spots.[6]

17. *KFYV*—In its December 23, 1974 response to our November 22 letter of inquiry, Charles R. Scott, licensee of Station KFYV, states that all six of the PG&E "nuclear power" spots were broadcast over KFYV, on a rotation basis, over the course of 46 days between June 10, 1974 through August 3, 1974 during various periods of the broadcast day, that a total of 64 PG&E "nuclear power" spots were broadcast during this time period, and that, of these 64 spots, 34 were aired during periods of maximum audience potential. The licensee asserts that each of the PG&E announcements in question presented a viewpoint on a controversial issue of public importance, *viz.*, ". . . the dangers involved in the construction of nuclear power plants." The licensee claims that he has met his fairness doctrine obligations with respect to this issue and states:

> Pacific Gas and Electric's Diablo Canyon nuclear plant is only about seven miles from Arroyo Grande, and all during the last three years KFYV, through its regular news programming, has broadcast much news material about nuclear power plants, and specifically about Diablo Canyon . . . [W]e had carried many, many news stories, both pro and con, on Diablo's construction that would meet the requirements of the Fairness Doctrine.

The licensee asserts that since KFYV does not retain copies of news stories for a great length of time, and since the station has employed more than one news director over the past three years, the exact

[6] However, in a supplementary pleading dated April 29, 1975, the licensee claims to have broadcast a 25-minute program on which the topic of nuclear waste disposal was discussed. It is asserted that this program was broadcast twice on Sunday, March 9, 1975: once at 11:05 a.m. and again at 10:05 p.m. The program featured representatives of a group known as "Build the Earth"; the licensee asserts that "[t]he group is neither for nor against nuclear power plants," but that it does advocate safe disposal of nuclear wastes. The pleading does not indicate whether or not the program presented any viewpoints opposed to the development and use of nuclear power.

dates, times and content of any particular newscasts treating the issue of the "dangers involved in the construction of nuclear power plants" cannot be ascertained. However, the licensee states that he did retain copies of two news stories which were carried on the Associated Press wire service in November 1974 and which the licensee claims were broadcast on KFYV; copies of the two news items were attached to the licensee's response to our November 22 letter of inquiry. The two news items, which were carried over the Associated Press facilities on Friday, November 22 and Saturday, November 23, 1974, respectively, and presumably broadcast on those dates, as well, appear to be different accounts of the same news story, *viz.*, a short summary of the contrasting views of the former Chairperson of the Atomic Energy Commission, Dixy Lee Ray, and of biologist Dr. Paul Ehrlich, on the safety of nuclear power plants. Each of these two reports appears to be approximately 30 seconds in duration. The licensee further stated that, while he was unable to secure from the Associated Press copies of other stories on nuclear power which the wire service had carried, he was able to secure the assurance of the Associated Press that it has, over the past several years, carried stories on the construction of nuclear power plants, and that, in doing so, it has reported both sides of the issue of the possible hazards involved. In this connection, the licensee submitted a copy of a December 3, 1974 letter to him from the Assistant Chief of the Los Angeles Bureau of the Associated Press, wherein such assurances were given to the licensee. Also submitted with the licensee's response to our November 22 inquiry was a copy of a news story which the licensee claims was written and broadcast by the KFYV news department in August 1974. This news story, which appears to be approximately one minute in duration, summarizes the complainants' opposition to nuclear power plant construction and to the views contained in the PG&E "nuclear power" spots here at issue. A transcript of this news story, as submitted by the licensee to the Commission, indicates that the item was broadcast on August 20, 1974. The licensee's response to our inquiry provides no further details or particularized information regarding KFYV's newscasts. However, the licensee states that, to the best of his knowledge, KFYV has broadcast the news stories on nuclear power plant construction supplied to the station by the Associated Press, and that the station has given the issue coverage at the hands of its own staff, as well.

18. *KJOY*—In its December 2, 1974 response to our November 22, 1974 letter of inquiry [7] Joseph Gamble Stations, Inc., licensee of Station KJOY, states that all six of the PG&E "nuclear power" spots were broadcast by KJOY on a rotation basis at various times throughout the broadcast day during the following periods: July 8–July 12, 1974; July 15–July 19, 1974; July 22–July 26, 1974; and July 29–August 2, 1974. A total of 49 such spots were run over a 20-day period, and of these 49 spots, 23 were broadcast during periods of maximum audience potential. The licensee further asserts by its counsel that, in its judgment, each of the PG&E "nuclear power" spots does present a viewpoint on

[7] The Commission is also in receipt of a letter from the licensee's counsel dated September 27, 1974, which was filed in response to the complainants' September 6, 1974 complaint. The licensee's December 2, 1974 response to our November 22 letter of inquiry incorporates the September 27 letter by reference. The Commission is also in receipt of a supplementary reply to our November 22 letter of inquiry; this reply dated January 27, 1974 was filed by counsel for the licensee.

one side of a controversial issue of public importance.[8] The licensee claims, however, that it has fulfilled its fairness doctrine obligations with respect to the issues addressed in the PG&E "nuclear power" announcements. In this connection, the licensee claims that it offered the complainants the opportunity to appear on its three-hour "Hot Line" program, which is aired on Sunday evenings from 9:00 p.m. to midnight, for presentation of the complainants' point of view on the nuclear power issue. The licensee claims that the "Hot Line" program has been broadcast on KJOY continuously for the past six years, that the program has a large following and that the format of the program provides for an opening statement, approximately five minutes in length, followed by discussion by the guest or guests with the moderator of the program, and that this discussion is then followed by phone calls that are taken from the general public. The licensee claims that its offer to the complainants of an appearance on the "Hot Line" program was rejected by a representative of one of the complainants on the ground that the offer of time was "not good enough." The licensee further claims that by letter dated August 27, 1974 it repeated its offer to make a three-hour "Hot Line" program available to the complainants and that it requested them to pick an alternative date during the month of October. The licensee states, however, that it never received a response from the complainants to the August 27 letter, and that once it recognized that its offers of time to the complainants to provide contrasting points of view on the nuclear power plant issue would not be accepted, it arranged with qualified local authorities in the Stockton area to utilize the three-hour "Hot Line" program of October 20, 1974 for the presentation of contrasting points of view on the nuclear power issue. The licensee contends that this program was, in fact, broadcast as planned on Sunday, October 20, 1974, and that the broadcast featured spokespersons opposed to proposed nuclear power plant construction in California.[9] As to the complainants' claim that viewpoints contrasting those contained in the PG&E nuclear power announcements should have been presented in a spot announcement format rather than in a program length format, the licensee asserts that there has never been any question as to whether it would present contrasting viewpoints to those contained in the "nuclear power" announcements, and that the issue here is whether the licensee is required to use spot announcements as the exclusive means of presenting contrasting points of view to those contained in the PG&E spots. In this regard, the licensee contends that the Commission has consistently recognized that the licensee has the exclusive right to determine the program format and the individual spokesmen for the presentation of contrasting points of view.

19. *KMBY*—In its December 2, 1974 response to our November 22 letter of inquiry[10] and in its January 16, 1975 response to our further

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[8] See Letter of January 27, 1975 from licensee's counsel.

[9] In a supplementary pleading dated April 17, 1975, the licensee, by its counsel, claims that KJOY broadcast an additional three-hour "Hot Line" program on Sunday, April 13, 1975, in which the nuclear power plant issue was discussed. This program was to have featured members of a Stockton organization called "Women to Women Building the Earth for Children's Sake." It was further asserted that KJOY planned to present a third three-hour "Hot Line" program on this issue on Sunday, May 4, 1975; the featured guests were to have been spokesmen supporting nuclear power plant development, including a representative of the Pacific Gas and Electric Company.

[10] The Commission is also in receipt of a letter dated December 23, 1974, from counsel for the licensee; this letter supplements the licensee's December 2 response to our inquiry.

letter of inquiry of January 8, 1975, West Coast Broadcasters, Inc., licensee of Station KMBY asserts that all six of the PG&E "nuclear power" spots were broadcast on that station on a rotation basis and at various time throughout the broadcast day from July 8 through August 4, 1974. A total of 104 such spots were run over a 28-day period and, of these 104 spots, 28 were broadcast during periods of maximum audience potential. The licensee further asserts that although it did not believe at the time the PG&E spots were broadcast that the spots "touched upon an ongoing public debate in its own immediate service area," the licensee nonetheless believed that since the spots seemed to "possibly initiate such a debate," the station did consider each of the PG&E spots to have presented a viewpoint on one side of a controversial issue of public importance. The licensee contends that it has fulfilled its fairness doctrine obligations with respect to the issues presented by the spots by offering one of the complainants, Public Media Center, the opportunity to appear free of charge on six 5-minute programs in which that group could present its viewpoints on the nuclear power issue. The program time which the licensee claims to have offered was on a regularly scheduled daily public affairs program entitled "Report to the People," which is aired three times daily with two of the three programs scheduled in "drive time." The licensee further claims that it never received a firm reply to this offer of air time, and that, accordingly, on October 11, 1974 it telephoned a representative of Public Media Center to reiterate its offer of air time and to offer an additional three 5-minute programs for a total of 45 minutes of air time in which to present views opposed to nuclear power development, provided that the instant complaint was withdrawn. The licensee asserts that although a representative of Public Media Center promised that a response would be provided to the station within three or four days of the date of the offer of broadcast time, no response has yet been received from the organization. Moreover, the licensee states that its offer of program time remains current, and that the station remains ready and willing to fulfill its commitment of program time to the complainants. Additionally, it is asserted by the licensee that, if circumstances should develop whereby satisfactory arrangements cannot be worked out with the complainants, it intends to develop alternative arrangements for additional programming on the issues addressed in the PG&E spots. The licensee claims that although this has not been done to date, it remains the licensee's hope that the complainants will ultimately accept its offer of broadcast time. As to the complainants' claim that only the spot announcement format would adequately fulfill the licensee's fairness doctrine obligation with respect to the issues presented in the PG&E spots, the licensee states that under longstanding interpretation of the fairness doctrine, it is the responsibility of the licensee to make all determinations as to how and to what extent controversial issues are covered, as to what viewpoints should be presented and as to the format and spokesmen to be presented on any given controversial issue of public importance.

20. *KPAY*—In its December 2, 1974 response to our November 22 letter of inquiry and in its January 16, 1975 response to our further letter of inquiry of January 8, 1975, Richardson Broadcasting Co., licensee of Station KPAY, asserts that all six of the PG&E "nuclear power" spots were broadcast on that station on a rotation basis and at various times throughout the day on the following dates: July 8–11,

1974; July 13, 1974; July 15–July 20, 1974; July 23–July 26, 1974; and July 29–August 2, 1974. A total of 27 such spots were run over a 20-day period, and of these 27 spots nine were broadcast during periods of maximum audience potential. The licensee further asserts that it did not believe that any of the PG&E "nuclear power" spots presented a viewpoint on a controversial issue of importance, *viz.*, "the question of the desirability of using nuclear energy for the generation of electric power." The licensee states, however, that, since "an argument could be made to the contrary," it was, nonetheless, willing to present viewpoints on both sides of the question of whether the "use of nuclear energy for the generation of electric power was a desirable development." In this connection the licensee claims to have offered the complainants the use of a 30-minute discussion program to be aired at 7:00 a.m. and at 9:00 p.m. on a single Sunday in order to discuss the negative aspects of nuclear power. This program was to have been aired on Sunday, October 20, 1974. The licensee further asserts that although the complainants failed to accept this offer of broadcast time, KPAY nonetheless broadcast the 30-minute program on October 20 at 7 a.m. and at 9 p.m., as scheduled, and that this program featured two spokesmen who presented viewpoints contrasting those presented in the PG&E "nuclear power" spots. Moreover, the licensee asserts that, in its opinion, the use of the short spot announcement format would not be the most desirable method by which to present viewpoints opposed to nuclear power, since such short announcements would be "unable to deal with the subject in depth," and since "assertion and counter-assertion is neither a debate nor does it shed much light."

21. *KRED*—In its December 2, 1974 response to our November 22 letter of inquiry, Pauldon, Inc., licensee of Station KRED, asserts that all 6 of the PG&E "nuclear power" spots were broadcast on that station on a rotation basis, 12 times per week and at various times throughout the broadcast day during the following periods: June 10–14, 1974; June 17–21, 1974; June 24–28, 1974; July 1–5, 1974; July 8–12, 1974; July 15–19, 1974; July 22–26, 1974; and July 29–August 2, 1974. A total of 96 such spots were run over a 40-day period, and of these 96 spots, 56 were broadcast during periods of maximum audience potential. The licensee further asserts that none of the PG&E "nuclear power" announcements presented viewpoints on one side of a controversial issue of public importance. In this connection, the licensee claims that it knows of no public controversy in its service area regarding the construction of nuclear power plants. Indeed, the licensee claims that a nearby nuclear power plant has been in operation in the area for the past 11 years; that this nuclear power plant is "a source of local pride"; that the Chamber of Commerce of Eureka presently includes the nuclear power plant as a tourist point of interest and that, according to local government and power company officials, there are no plans to build or enlarge the nuclear capabilities of that plant. The licensee states that since it did not believe the PG&E announcements presented viewpoints on any side of a controversial issue of public importance, it has not presented contrasting viewpoints on the issues which the complainants claim were addressed in PB&E "nuclear power" spots. Notwithstanding the foregoing, the licensee claims to have offered to counsel for the complainants four three-minute pro-

grams on KRED for the presentation of anti-nuclear power views, but that this offer was rejected as failing to afford a reasonable opportunity for presentation of anti-nuclear power views. The licensee further claims that its offer of broadcast time remains open.

22. *KROY*—In its December 3, 1974 response to our November 22 letter of inquiry and in its January 14, 1975 response to our further letter of inquiry of January 8, 1975, Sacramento Broadcasters Inc., licensee of Station KROY, asserts that all six of the PG&E "nuclear power" spots were broadcast on that station on a rotation basis and at various times throughout the broadcast day, during the following periods: July 8-12, 1974; July 15-19, 1974; July 22-26, 1974; and July 29-August 2, 1974. A total of 72 such spots were run over a 20-day period, and of these 72 spots, 29 were broadcast during "drive periods of maximum audience potential." The licensee further asserts that in its judgment each of the PG&E spots in question does present a viewpoint on a controversial issue of public importance. The licensee claims, however, that it has met its fairness doctrine obligations with respect to the issues addressed in the PG&E announcements by broadcasting a one-hour call-in program on Sunday, October 6, 1974 from 10 p.m. to 11 p.m. The licensee asserts that the nuclear power issue was the only topic discussed during this program, that the moderator of the program played each of the six anti-nuclear power spot announcements furnished to the licensee by the complainants, and that listeners were encouraged to call in on the air and discuss their views on the subject. The licensee avers that the moderator took no stand at all on the nuclear power issue, and that after every second or third caller, the moderator played one of the "anti-nuclear power" announcements furnished by the complainants. The licensee states that an effort was made by the moderator to obtain a guest speaker in support of complainants' point of view, but that "no one was willing or available to be present at the time of the broadcast."

23. *KSMA*—In its November 29, 1974 response to our November 22, 1974 letter of inquiry, John I. Groom, licensee of Station KSMA, asserts that all six of the PG&E "nuclear power" spots were broadcast on that station on a rotation basis and at various times throughout the broadcast day, from June 10 through August 4, 1974. A total of 160 such spots were run over a 56-day period, and, of these 160 spots, 74 were broadcast during periods of maximum audience potential. The licensee further asserts that in his judgment none of the PG&E "nuclear power" spots present a viewpoint on a controversial issue of public importance. As a basis for the foregoing conclusion, the licensee claims that the station found "no evidence in its area of the existence of a significant issue of a controversial nature with respect to the content of the PG&E spots." Although the licensee does not claim to have presented viewpoints contrasting those presented in the PG&E "nuclear power" spots, it states that as a matter of routine practice, KSMA carries news and information on matters involving electrical power that come from the news wire service and other sources, but that the station does not keep a record of such news stories.

24. *KSRO*—In its November 29, 1974 response to our November 22, 1974 letter of inquiry, and in its supplementary response of January 30, 1975, Finley Broadcasting Company, licensee of Station KSRO, asserts

that all six of the PG&E "nuclear power" spots were broadcast on that station on a rotation basis and at various times throughout the broadcast day during the following periods; June 10-29, 1974; July 1-27, 1974; and July 29-August 4, 1974. A total of 146 such spots were run over a 54-day period and, of these 146 spots, 69 were broadcast during periods of maximum audience potential. The licensee states that in its judgment, none of the PG&E "nuclear power" announcements presented viewpoints on a controversial issue of public importance. As the basis for the foregoing conclusion, the licensee claims that "there was no local controversy with regard to nuclear power prior to broadcast of the announcements." The licensee states, however, that in line with its long-established policy of presenting varied viewpoints in its programming, it has presented several programs in opposition to nuclear energy, citing a one-hour program broadcast on Sunday, October 27, 1974 at 6:05 p.m. which presented both proponents and opponents of nuclear power development. The licensee also claims that, on October 22, 1974, it broadcast two 3-1/2 minute "Random Sample" programs soliciting the views of "persons-on-the-street"; however, the licensee states that "[u]nfortunately, the majority of those interviewed had little knowledge of nuclear power." Additionally, the licensee claims to have broadcast a total of 16 one-minute anti-nuclear power "free speech" messages over the course of 11 different days and that of these 16 one-minute messages, four were broadcast in periods of maximum audience potential.

25. *KUZZ*—In its December 6, 1974 response to our November 22 letter of inquiry, Thunderbird Broadcasting Company, licensee of Station KUZZ, asserts that all six of the PG&E "nuclear power" spots were broadcast on that station on a rotation basis and at various times throughout the broadcast day from June 10 through July 28, 1974. A total of 150 such spots were run over a 49-day period, and of these 150 spots, 63 were broadcast during periods of maximum audience potential. The licensee declares that in its judgment none of the PG&E announcements in question presented viewpoints on a controversial issue of public importance. As the basis for this conclusion, the licensee states that it has not received a single letter or request for air time to present anti-nuclear power viewpoints from any local person or group in its service area. Moreover, the licensee claims that "little if any attention has been paid to the issue by local government officials and community leaders . . . ," and that "the local media have carried or printed only a minimum of news on the issue." The licensee believes that, in view of the foregoing, there is only a "tenuous relationship" between the texts of the six PG&E "nuclear power" announcements and any controversial issue of public importance and that, accordingly, the fairness doctrine is inapplicable to the PG&E announcements. Although the licensee does not claim to have presented any significant contrasting viewpoints on the issues which the complainants claimed were addressed in the PG&E spots, it asserts that it is prepared to make available to the complainants "a reasonable amount of time" in which to discuss these issues ". . . in accordance with the standards that they have adopted as long as the time utilized is done so within our current Public Affairs Programming Policy." The licensee states,

however, that insofar as broadcast time is afforded to the complainants "the same amount will be accorded Pacific Gas and Electric." [11]

26. *KVON*—In its December 2, 1974 response to our November 22 letter of inquiry and in its January 17, 1975 response to our further letter of inquiry of January 9, 1975, Young Radio Inc., licensee of Station KVON, states that all six of the PG&E "nuclear power" spots were broadcast on that station on a rotation basis and at various times throughout the broadcast day from July 8 through August 4, 1974. A total of 94 such spots were run over a 28-day period, and of these 94 spots, 59 were broadcast during periods of maximum audience potential. The licensee further states that in its judgment none of these spots presents a viewpoint on one side of a controversial issue of public importance. In this connection, the licensee claims that the nuclear power issue did not arise in its recent ascertainment survey conducted in connection with KVON's recent license renewal application. The licensee asserts, however, that notwithstanding the foregoing, it has presented significant viewpoints contrasting those contained in the PG&E "nuclear power" spots by presenting a one-hour public affairs program broadcast from 5 to 6 p.m. on Saturday, October 12, 1974; this program allegedly featured spokespersons opposed to nuclear power plants, and, according to the licensee, 29 announcements were broadcast in advance of the program to promote it. The licensee declares that the complainants were offered the opportunity to appear on KVON's "Talk Show"; the licensee alleges that although the complainants stated, at the time of the offer, that they would furnish a spokesperson to appear on the program, nothing further has been heard from the complainants on this subject. In addition, the licensee claims to have broadcast two news stories in July 1974 which reported the complainants' opposition to the PG&E "nuclear power" spot campaign. The licensee alleges that one of these news stories was carried in each of KVON's major newscasts of the day (i.e., 7 a.m., 8 a.m., 12 noon, 5 p.m. and 6 p.m.).

Reply of Complainants

27. On March 31, 1975, the complainants filed their reply to the responses of the several licensees to our November 22, 1974 letter of inquiry, and to the responses of the several further letters of inquiry referred to *supra*. The complainants contend that the respective licensees of Stations KFRE, KSRO, KVON, KUZZ, KSMA and KRED have unreasonably concluded that the PG&E "nuclear power" spots did not present viewpoints on a controversial issue of public importance. In this connection, the complainants contend that "the record in this case establishes without a doubt that there is substantial disagreement on a state and national level over the safety, environmental, economic and insurance-related aspects of nuclear power plants"; and that the ques-

[11] In a supplementary pleading dated April 28, 1975, the licensee states that an 8-hour public forum on the topic of nuclear energy was recently held in the station's service area, that KUZZ recorded the event in its entirety, and that the entire 8-hour recording will be broadcast as part of KUZZ's public affairs programming. Additionally, the licensee claims that it is now in the process of editing the recording to produce 30- and 60-second public service announcements from the comments of various speakers on *both* sides of the nuclear power plant issue. The licensee asserts that, once these public service announcements are produced, they will be broadcast at "various times of the day;" the specific broadcast times contemplated were not specified, however.

tion of whether the implementation of nuclear power is desirable is a controversial issue of public importance on a state-wide level in California as well as national level. The complainants reiterate their contention that the PG&E "nuclear power" spots were broadcast at a time when Californians were being asked to sign initiative petitions in favor of holding a referendum on the construction and use of nuclear power plants in California. Moreover, the complainants allege that the PG&E advertising efforts to encourage Californians to affirmatively support increased and rapid construction of nuclear power plants "vitally affect the health and welfare of all citizens of the state," and that consequently the PG&E spot campaign inherently addresses a controversial issue of public importance in every California community. In further support of their contention that efforts to eliminate or delay construction of the nuclear power plants are bound to have a significant impact on the society and the community at large, the complainants contend that PG&E customers would likely pay higher utility rates if more nuclear power plants were built.

28. In support of their contention that the nuclear power issue is a controversial issue of public importance in the national arena, the complainants refer to recent legislative efforts designed to impose limitations on the expansion of nuclear power plants. In this connection, the complainants cite proposals made by several Congressmen for a moratorium on nuclear power plants and make reference to Congressional debate on a bill to extend for five years the Price-Anderson Act.[12] Apart from legislative efforts cited by the complainants, reference is also made to the efforts of various other individuals and groups seeking to impose limitations on the unbounded expansion of nuclear power. In sum, the complainants conclude that "this record reveals that there was and is a fierce national controversy surrounding the matter of rapid construction of nuclear power plants and use of nuclear power."

29. The complainants contend that the actions of each of the subject licensees are unreasonable, and that each of the licensees has failed to afford a reasonable opportunity for presentation of "anti-nuclear power" views, since each of the respective licensees has engaged in some or all of the following actions:

A. The licensee has afforded a significant amount of time with maximum audience potential for the presentation of viewpoints advocating implementation of nuclear power, but has failed to similarly afford a reasonable amount of time with maximum audience potential for the presentation of anti-nuclear power viewpoints.

B. The frequency with which the licensee broadcast pro-nuclear power viewpoints was unreasonably greater than the fre-

[12] H.R. 15323, 93d Cong., 2d Sess. (1974). The complainants claim that, ". . . although one PG&E ad claims that 'nuclear power plants *are* insurable,' Congress was debating H.R. 15323 to extend for 5 years the Price-Anderson Act which severely limits the liability imposed on nuclear power plants in case of accident, because otherwise sufficient insurance could not have been obtained . . . H.R. 15323 was passed by the House of Representatives on July 10, 1974 and by the Senate on August 8, 1974. It was vetoed by President Ford on October 11, 1974 because of the presence of the Nelson Amendment which postponed the new law's effective date until Congress could evaluate the dangers posed by nuclear power." See footnote 3 and accompanying text, *supra*.

quency with which anti-nuclear power programming was presented.

C. The total amount of broadcast time devoted by the licensee to viewpoints advocating nuclear power was unreasonably greater than the total amount of time afforded to presentation of viewpoints in opposition to nuclear power development.

D. The licensee has presented pro-nuclear power viewpoints during the course of, and interspersed with, entertainment programming, but has failed to similarly present anti-nuclear power viewpoints in the midst of entertainment programming and has, instead, confined the presentation of such views to non-entertainment programming, such that anti-nuclear power viewpoints reached smaller audiences than did pro-nuclear power viewpoints.

E. The licensee has presented pro-nuclear power viewpoints on a regular, continual basis, over the course of several weeks or months, but has failed to afford reasonably similar broadcast treatment to anti-nuclear power viewpoints.

F. The licensee has broadcast pro-nuclear power viewpoints in the context of presentations which present only pro-nuclear power views, but has broadcast anti-nuclear power viewpoints in ". . . less effective two-sided presentations, such as talk shows, call-in shows, etc."

G. The licensee has presented pro-nuclear power viewpoints in the format of brief announcements of 60-seconds duration interspersed throughout other non-public affairs-oriented programming, but has failed to afford similar treatment to anti-nuclear power viewpoints and has, instead, presented the viewpoints of nuclear power opponents exclusively in the format of ". . . longer-length public affairs-type programs which most persons either turn off, find less persuasive, or find difficult to follow."

H. The licensee presented identical pro-nuclear power slogans and themes [13] on a continual and repetitive basis, but failed to give anti-nuclear power slogans and themes some reasonable repetition in comparison with the degree of repetition afforded to pro-nuclear power slogans and themes.

I. The licensee presented pro-nuclear power viewpoints at various times throughout the broadcast day and primarily on weekdays, but presented anti-nuclear power viewpoints primarily on weekends during late-evening periods, with the result that anti-nuclear power viewpoints were presented to different listening audiences from those hearing the pro-nuclear power viewpoints.

J. The licensee has broadcast pro-nuclear power viewpoints in the context of professionally-prepared presentations produced under the direction and control of nuclear power proponents,

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[13] E.g., complainants assert that each of the PG&E "nuclear power" spots contained the slogan "Nuclear energy. It isn't the power source of the future. It's the solution to the electrical energy problem now . . . ," and that each such spot repeated the theme that "Nuclear power plants are safe. They're also practical, economical and environmentally clean."

but has presented the viewpoints of opponents of nuclear power in the context of less persuasive and less effective news and public affairs programming.

30. The complainants assert that, while there is no scientific formula of reasonableness to be applied in determining whether a licensee has complied with the fairness doctrine, the foregoing considerations highlight the signposts of reasonableness. In any event, the complainants assert, the Commission must take account of the Congressional mandate in the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.*, in interpreting the fairness doctrine. The complainants contend that, since the NEPA provides that, ". . . to the fullest extent possible . . . the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act . . . ," 42 U.S.C. § 4332, a "stricter standard of reasonableness" should be applied by the Commission in assessing the conduct of the subject licensees. The complainants claim, however, that, whether a "traditional" reasonableness test is used or a stricter standard is adopted under compulsion of the NEPA, the actions of each of the subject licensees is unreasonable.

Discussion

31. The fairness doctrine obligates a broadcaster presenting one side of a controversial issue of public importance to afford a reasonable opportunity in his overall programming for the presentation of contrasting viewpoints on that issue. We have further defined this obligation as follows:

> . . . [T]he licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming. *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 FCC 598, 599 (1964).

Both the Commission and the courts have held that on a complaint under the fairness doctrine, the burden is on the complainant to specify the particular issue involved and to substantiate its controversiality and public importance, and also to show that particular broadcast material has presented one side of that issue and that the licensee has not afforded a reasonable opportunity in its overall programming for the presentation of contrasting views. See *Fairness Report*, 48 FCC 2d 1, 19-20 (1974); *Allen C. Phelps*, 21 FCC 2d 12 (1969); *Healey* v. *FCC*, 460 F.2d 917 (D.C. Cir. 1972); *Green* v. *FCC*, 447 F.2d 323 (D.C. Cir. 1971). Should the licensee reach conclusions as to these matters which differ from those reached by the complainant, the Commission will review the licensee's judgments only to determine whether the licensee can be said to have acted reasonably and in good faith under all the facts and circumstances presented. See *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, supra*, 40 FCC at 599. See generally *Fairness Report, supra.*

32. With regard to the applicability of the fairness doctrine to the broadcast of paid spot announcements, we have stated that, although ". . . we do not believe that the usual product commercial can realistically be said to inform the public on any side of a controversial issue of public importance . . . , we will apply the fairness doctrine . . . to

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those 'commercials' which are devoted in an obvious and meaningful way to the discussion of public issues." *Fairness Report, supra*, 48 FCC 2d at 26.

33. With the foregoing principles in mind, the preliminary issue before us is the reasonableness of the determination reached by the licensees of Stations KFRE, KPAY, KRED, KSMA, KSRO, KUZZ and KVON that none of the PG&E "nuclear power" spots presented a viewpoint on one side of any controversial issue of public importance.

34. The complainants here contend that each of the six PG&E "nuclear power" spots presented a viewpoint on one side of the issue of the desirability of the immediate construction of nuclear power plants and use of nuclear power by presenting a viewpoint on one side of the inter-related issues of the safety, environmental cleanliness, insurability and economic soundness of nuclear power plants. The complainants have presented a significant amount of information in support of their contentions that the foregoing issues constitute controversial issues of public importance and that each of the PG&E announcements in question addressed these issues in an "obvious and meaningful" manner. See paragraphs 2, 3 and 27, *supra*. See also footnote 13, *supra;* Appendix I, *infra*.

35. In response to the significant information presented by the complainants, KFRE states, as the basis for its conclusion that none of the PG&E "nuclear power" spots addressed a controversial issue of public importance, that the assertions contained in those announcements are "accurate and undebatable." KPAY asserts that no controversial issue of public importance was addressed but presents no reasons supporting this conclusion. As the basis for its conclusion that the PG&E announcements failed to present viewpoints on a controversial issue of public importance, KRED states that it knows of no public controversy in its service area regarding the construction of nuclear power plants. Similar reasons are offered by KSMA and KSRO. Also, KUZZ states that it has received no letters or requests for air time, to present viewpoints opposed to nuclear power, from any local person or group in its service area. KUZZ also claims that ". . . little if any attention has been paid to the issue by local government officials and community leaders . . . ," that [t]he local media have carried or printed only a minimum of news on the issue . . . ," and that the nuclear power issue is not the subject of any ongoing debate. Similarly, the licensee of KVON asserts that the nuclear power issue ". . . never arose either in recent ascertainment probings . . . or in the continuing dialogue which . . . [the licensee] . . . maintains with community leaders and the public.

36. It is clear that each of the PG&E "nuclear power" announcements directly addressed the issue of the desirability of the immediate implementation of nuclear power and addressed the interrelated issues of the safety and environmental cleanliness of nuclear power. Thus, each of the six announcements in question contains the following claim: "Nuclear power. It isn't the power source of the future. It's the solution to the electrical energy problem *now*." [Emphasis in original.] Moreover, each of the six announcements contained the assertions that nuclear power is safe and environmentally clean. See Appendix I. Additionally, announcement A-1 (see Appendix I) contains the claim that "[t]he safety record of commercial nuclear power plants

is unmatched in industrial history. There has never been a nuclear caused death . . . not even a significant injury." As to the issue of environmental cleanliness, announcement A-2 (see Appendix I) contains the following statements:

> Nuclear power generation is clean . . . Moreover, the warm water discharged from a nuclear plant's condenser cooling system does no significant harm to marine life.

Announcement A-6 (see Appendix I) addresses the issue of the insurability of nuclear power plants by containing the claim that "[n]uclear power plants *are* insurable." [Emphasis in original.] Announcement A-4 (see Appendix I) addresses the issue of the desirability of the immediate construction of nuclear power plants by containing the following assertions:

> This year alone, in order to meet our customers' needs, PG&E will have to buy 20 million barrels of oil. And as your needs grow, so will our costs . . . and, ultimately, *your* costs. *Unless* . . . we're able to build more nuclear power plants. [Emphasis in original.]

Indeed, in light of the uncontroverted information and argument presented by the complainants,[14] it appears that the arguments and viewpoints expressed in the PG&E announcements in question regarding the safety and environmental cleanliness of nuclear power ". . . closely parallel the major arguments advanced by partisans on one side . . ." of the issue of the desirability of the immediate development and use of nuclear power and nuclear power plants. *Fairness Report*, *supra*, 48 FCC 2d at 24. Accordingly, it could not reasonably be concluded that each of the PG&E announcements in question did not present a viewpoint on one side of this issue.

37. The question which remains, then, is whether this issue and the interrelated issues of the safety and environmental cleanliness of nuclear power and of the insurability of nuclear power plants may reasonably be considered *not* to be controversial issues of public importance. The complainants have submitted uncontested information showing that the resolution of these issues involves the exercise of the sort of social choice the outcome of which is likely to have substantial impact on the public at large.[15] Thus, if, in fact, nuclear power plants were *not* safe, *not* environmentally clean, or *not* insurable against nuclear reactor accident claims, social choice to proceed, nonetheless, with immediate resort to nuclear power and immediate construction of nuclear power plants would necessarily have significant implications for the future of our society as a whole. Where the impact that an issue is likely to have on the community at large is so substantial, it could not be reasonably concluded that the issue is not one of public importance. See *Fairness Report*, *supra*, 48 FCC 2d at 12. As to the controversiality of the issues addressed in the PG&E "nuclear power" announcements, the complainants have presented uncontroverted information demonstrating that, at the time of the broadcast of these announcements during the summer months of 1974, the question of desirability of the rapid construction of nuclear power plants and use of nuclear power was the subject of vigorous debate between significant environmental and citizens groups—such as the Sierra Club,

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[14] See paragraph 3, *supra*.
[15] See paragraph 27, *supra*.

Friends of the Earth and others—on the one hand, and industry groups—such as PG&E and other public utility companies, the American Nuclear Society, and others—on the other hand.[16] Moreover, the complainants have submitted uncontested information that, at the time of the broadcast of the PG&E "nuclear power" spots during the summer of 1974, there was an effort underway in California to have the nuclear power issue put to the voters in a state-wide referendum: Californians were being asked to sign petitions in support of placing before the voters an initiative which, if adopted, would impose restrictions on construction and operation of nuclear power plants.[17] Additionally, the complainants have submitted uncontested information indicating that, at the time of the broadcast of the PG&E "nuclear power" spots, Congress, itself, was concerned with the safety and insurability of nuclear power plants.[18] Thus, it appears that there was "vigorous debate" on the issues addressed by the PG&E "nuclear power" announcements—both on a national basis and in California—with "substantial elements of the community in opposition to one another." *Fairness Report*, *supra*, 48 FCC 2d at 12. Under such circumstances, we are unable to view as reasonable the conclusion that the issues addressed in the PG&E announcements were not controversial.

38. In light of the foregoing, including our review of the texts of the PG&E announcements in question, the complainants' arguments with respect thereto, and the contentions of the respective licensees, we cannot find to be reasonable the judgment reached by the respective licensees of stations KFRE, KPAY, KRED, KSMA, KSRO, KUZZ and KVON that none of the PG&E announcements presented a viewpoint on any controversial issue of public importance. The merely conclusory statements, made by several licensees,[19] that the assertions contained in the announcements are "accurate and undebatable," or that there is no known controversy or ongoing public debate over the issues presented in the announcements, are not, in light of the discussion at paragraph 37, *supra*, reasonable bases on which to rest a conclusion that no controversial issue of public importance had been presented. Moreover, the claim made here by KVON that the nuclear power issue did not arise during recent ascertainment surveys or in dialogue with community leaders, is similarly not a reasonable basis upon which to rest a conclusion that the issues addressed in the PG&E announcements were not controversial issues of public importance. The matters cited by a licensee in its ascertainment survey as the prob-

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[16] Complaint of September 6, 1974 at Appendix B.

[17] The initiative measure, if approved by the voters, would effect a statutory amendment to the California Government Code by adding, as Title 7.8 of that Code, the Land Use and Nuclear Power Liability and Safeguards Act. The title and summary of this initiative statutory amendment, as prepared by the Office of the Attorney General of California, reads as follows:

"NUCLEAR POWER PLANTS. INITIATIVE. After one year, prohibits nuclear power plant construction and prohibits operation of existing plants at more than 60% of original licensed core power level unless federal liability limits are removed. After five years, requires derating of existing plants 10% annually unless Legislature, by two-thirds vote, has confirmed effectiveness of safety systems and waste disposal methods. Permits small-scale medical or experimental nuclear reactors. Appropriates $800,000 for expenses of fifteen-person advisory group and for legislative hearings. If the proposed initiative is adopted, undefined additional financing from state sources will be required in the amount of at least $800,000. However, if this initiative should restrict the operation of existing nuclear power plants, and the courts should uphold such action, there is a potential for substantial state damage claims from the owners of the plants." See par. 39, *infra*.

[18] See footnote [12], *supra*, and accompanying text. See also paragraph 3, *supra*.

[19] See discussion at paragraph 35, *supra*.

lems, needs and interests of the residents of the community which it serves do not necessarily correspond to local, state-wide or nationwide controversial issues of public importance. Moreover, not even the most thorough of ascertainment methods would guarantee that the licensee would identify all those issues which are matters of controversy and public importance. See generally *Ascertainment of Community Problems by Broadcast Applicants*, —— FCC 2d ——, FCC 75-1361 (January 7, 1976); *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (1971).

39. From all the information presently before us, it appears that the issues addressed in the PG&E "nuclear power" spots were not only controversial and of public importance at the time of broadcast during the summer of 1974, but also that these issues *currently* constitute controversial issues of public importance, as well. Thus, the petition drive to have the nuclear power issue put to California's voters, which failed in 1974 to gain a sufficient number of signatures to qualify for a place on the ballot,[20] met with success on May 5, 1975. On that date the Office of the Secretary of State of California certified that the requisite 312,404 signatures had been gathered within the prescribed time period, and that, accordingly, the initiative measure—which would, if adopted, impose restrictions on construction and operation of nuclear power plants—qualified for a place on the ballot and will be submitted to the voters of California on June 8, 1976. We have recognized that

> [t]he existence of an issue on which the community is asked to vote must be presumed to be a controversial issue of public importance, absent unusual circumstances. . . . It is precisely within the context of an election that the fairness doctrine can be best utilized to inform the public of the existence of and basis for contrasting viewpoints on an issue about which there must be a public resolution through the election process. *Fairness Report*, *supra*, 48 FCC 2d at 32, footnote 31.

Moreover, at the national level, legislation has been introduced in the present Congress which parallels the provisions of H.R. 15323, 93d Cong., 2d Sess. (1974), which met with a Presidential veto.[21] This legislation, H.R. 8631, 94th Cong., 1st Sess. (1975), was introduced by Representative Price on July 14, 1975, and hearings on the bill before the Joint Committee on Atomic Energy commenced on September 23, 1975. In sum, the public controversy concerning the nuclear power issue continues to exist.

40. In light of our determination that the licensees of stations KFRE, KPAY, KRED, KSMA, KSRO, KUZZ and KVON have been unreasonable in concluding that the PG&E announcements in question failed to address a controversial issue of public importance, and in view of the fact that each of the remaining subject licensees has concluded that each of the announcements addressed such an issue, or issues, it is evident that the broadcast of the announcements gave rise to a fairness doctrine obligation to afford a reasonable opportunity for presentation of viewpoints contrasting those contained in the PG&E announcements. See generally *Fairness Report*, *supra*. The issue now

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[20] See footnote 17, *supra*, and accompanying text.
[21] See footnote 12, *supra*, and accompanying text.

before us is whether each of the subject licensees has fulfilled this obligation.

41. Preliminarily, we reject the complainants' contention that, by virtue of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.*, a "stricter standard of reasonableness" should be applied by the Commission in assessing the conduct of the subject licensees. See paragraph 30, *supra*. We have noted that the

> . . . limitations placed on the scope of the Commission review of a licensee's programming as a result of a fairness doctrine complaint result from the "essential considerations of national policy" embodied by the First Amendment and Section 326 of the Communications Act, and NEPA does not expand the Commission's scope of review under the fairness doctrine. *Sierra Club, et al.*, 51 FCC 2d 569, 574 (1975).

Moreover, the Court of Appeals has refused to view the NEPA as ". . . imposing requirements upon the Commission's regulatory and licensing functions in the areas of program content and speech . . . ," stating, instead, that, in light of the prohibition against Commission censorship contained in § 326 of the Communications Act, it did not believe that the NEPA

> . . . can be interpreted to compel the Commission to use its licensing power as a lever to impose special standards upon private licensees in the interest of the environment. *Public Interest Research Group* v. *FCC*, 522 F.2d 1060, 1068 (1st Cir. 1975), *cert. denied*, Case No. 75-724, 44 USLW 3527 (March 22, 1976).

42. We also deny the complainants' contention that the only manner for a licensee to meet its fairness doctrine obligations when it has broadcast a series of spot announcements presenting one side of a controversial issue of public importance, is to permit the presentation of the contrasting points of view in a spot format, as well. As we have noted above, the licensee is afforded considerable discretion in fulfilling its fairness doctrine obligations, including the discretion to select the format, content and spokesmen to be presented in any broadcast. Thus, we have stated that we do not intend to

> . . . dictate the selection of a particular spokesman or a particular format, or indeed that partisan spokesmen must be presented in every instance. We do not believe that it is either appropriate or feasible for a governmental agency to make decisions as to what is desirable in each situation. . . . Ordinarily, there are a variety of spokesmen and formats which could reasonably be deemed to be appropriate. We believe that the public is best served by a system which allows individual broadcasters considerable discretion in selecting the manner of coverage, the appropriate spokesmen, and the techniques of production and presentation. *Fairness Report*, *supra*, 48 FCC 2d at 16.

43. Thus, there is no mathematical formula or mechanical requirement for achieving fairness. See *Mid-Florida Television Corp.*, 40 FCC 620, 621 (1964). We reiterate, however, that there are a number of factors which are relevant considerations in determining what constitutes a "reasonable opportunity" for the presentation of contrasting viewpoints on a controversial issue of public importance which has been addressed in a licensee's programming, to wit:

> . . . it is patently unreasonable for a licensee consistently to present one side in prime time and to relegate the contrasting viewpoint to periods outside prime time. *Committee for the Fair Broadcasting of Controversial Issues*, 25 FCC 2d 283, 293 (1970).

Similarly, an unreasonable imbalance in presentation of contrasting viewpoints may result ". . . from the sheer weight on one side as against the other." *Id.* We have stated that such an imbalance

> . . . might be a reflection of the total *amount of time* afforded to each side, of the *frequency* with which each side is presented, of the size of the listening *audience* during the various broadcasts, or of a combination of factors. [Emphasis in original.] *Fairness Report, supra*, 48 FCC 2d at 17.

It is against this background that we now assess the reasonableness of the actions of each of the instant licensees. In so doing, we apply the standard of *Green* v. *FCC*, 447 F.2d 323 (D.C. Cir. 1971), i.e., whether the public is left uninformed. Also, we note the warning in *Democratic National Committee* v. *FCC*, 460 F.2d 891, 900 (D.C. Cir. 1973), that "[n]o formula . . . will assure that the requirements of the doctrine have been met."

44. As broad, general guidelines for licensees, we have stated that an unreasonable imbalance in presentation of contrasting viewpoints may result ". . . from the sheer weight on one side as against the other." However, we desire to avoid formulae too specific and detailed, which can lead to excessive intrusion into licensee judgments. As we noted previously the essential test of fairness must be whether the public has been "left uninformed" as to contrasting viewpoints on an issue. See *Green* v. *FCC*, 447 F.2d at 329. Thus, given this background, we turn to consideration of the charges against each licensee. The statistics given are based on those programs whose dates and times of broadcast were submitted by the licensee. The figures cited in many instances refer to the frequency of presentation of viewpoints opposed to nuclear power and reflect inclusion of those broadcasts containing the exposition of the views of both opponents and proponents of nuclear power development.

45. *KATY*—The information before us indicates that KATY presented almost four and one-half hours of programming presenting viewpoints of nuclear power proponents presented a total of almost five hours of programming presenting viewpoints of nuclear power opponents. Thus, we are unable to conclude that the public in KATY's service area has been "left uninformed" as to contrasting viewpoints on the nuclear power issue. See *Green* v. *FCC*, *supra*. Accordingly, we cannot determine that the licensee of KATY has failed to afford a reasonable opportunity, in its overall programming, for the presentation of contrasting viewpoints on that issue.

46. *KFOG*—The information before us indicates that the licensee broadcast pro-nuclear viewpoints with such great frequency (see para. 15, *supra*) as to constitute a significant imbalance favoring pro-nuclear views. That, coupled with the over three hours of pro-nuclear programming as opposed to one hour of anti-nuclear programming, leads us to conclude that the licensee has not acted reasonably in presenting a contrasting viewpoint on this issue.

47. *KFRE*—The licensee of KFRE presented 166 minutes of programming favorable to pro-nuclear power and aired 50 minutes on the side of those opposing nuclear power plant building in absence of sufficient safeguards for disposal of nuclear wastes. However, our conclusions regarding *KFOG*, *supra*, are applicable here, as well. In addition to the considerable imbalance with which pro-nuclear views were aired

compared with the less frequent anti-nuclear views (see para. 16, *supra*), we note also the total omission of anti-nuclear views during periods of large audience potential. In view of the foregoing, we are unable to conclude that the licensee of KFRE has afforded a reasonable opportunity, in its overall programming, for the presentation of contrasting viewpoints on the nuclear power issue.

48. *KFYV*—The licensee of KFYV broadcast only 1-1/2 minutes of programming presenting the viewpoints of opponents of nuclear power, an unreasonable imbalance in relation to the 64 minutes of "pro-nuclear power" coverage. Although the licensee of KFYV states that the station did present numerous news stories other than the three cited on both sides of the nuclear power issue, we are unable to take cognizance of such claimed broadcasts in assessing the licensee's compliance with the fairness doctrine, in light of the licensee's submission that it is unable to provide details as to the dates, broadcast times, and contents of any such news reports. The unsupported claim here made by the licensee that its news reports have fulfilled its fairness doctrine obligations, is clearly an insufficient rebuttal to the *prima facie* case of noncompliance with the fairness doctrine which has here been established by the complainants. See paragraphs 2-12 and 27-30, *supra; Allen C. Phelps*, 21 FCC 2d 12 (1969). As we have stated:

> While this Commission does not require the maintenance of a fairness log or diary, we expect that licensees will be cognizant of the programming which has been presented on their stations for it is difficult to see how a broadcaster who is ignorant of such matters could possibly be making a conscious and positive effort to meet his fairness obligations. *Fairness Report*, *supra*, 48 FCC 2d at 20.

In light of the above-noted imbalances in KFYV's presentation of contrasting viewpoints on the nuclear power development and use issue, we are unable to conclude that the licensee of KFYV has afforded a reasonable opportunity, in its overall programming, for the presentation of contrasting viewpoints on this issue.

49. *KJOY*—With respect to the total amount of time afforded to each side, it appears that the licensee of KJOY broadcast nearly five hours of programming presenting the viewpoints of advocates of nuclear power, and broadcast a total of six hours of programming presenting the viewpoints of opponents of nuclear power. Thus, we cannot conclude that the public in KJOY's service area has been "left uninformed" as to contrasting viewpoints on the nuclear power issue. See *Green* v. *FCC*, *supra*. Accordingly, on balance, we are unable to determine, under all the facts and circumstances presented, that the licensee of KJOY has failed to afford a reasonable opportunity, in its overall programming, for the presentation of contrasting viewpoints on that issue.

50. *KMBY*—It appears that KMBY has broadcast no programming whatsoever in opposition to nuclear power implementation, an unreasonable imbalance in relation to the almost 1-3/4 hours of "pro-nuclear power" coverage. We note that the licensee claims to have contacted one of the instant complainants on two occasions to offer 45 minutes of broadcast time to present its views on the issues addressed by the PG&E "nuclear power" spots and that no firm reply was received in response to these offers. However, the licensee does not contend that it made any attempt to contact any of the remaining six complainants

to secure a spokesman to present the views of opponents of nuclear power development and use. Moreover, the licensee does not contend that it made any similar offer of broadcast time to any other individual or group opposed to nuclear power, nor does the licensee claim that it made any other effort (e.g., by means of broadcast announcements or by any other means) to obtain spokesmen to present viewpoints contrasting those contained in the PG&E "nuclear power" spots. Accordingly, the licensee's actions appear to fall short of the sort of "diligent, good-faith effort" which we expect a licensee to make in securing spokesmen to present viewpoints contrasting those already broadcast on a controversial issue of public importance. See *Fairness Report*, *supra*, 48 FCC 2d at 14. *Cf. Columbia Broadcasting System, Inc.*, 34 FCC 2d 773 (1972). Additionally, although the licensee asserts its intention to ". . . develop alternative arrangements for additional programming on the issue involved . . ." in the event that the complainant which had been offered broadcast time does not ultimately accept the offer, the licensee did not submit in response to our inquiries, any specific details as to the viewpoints that it intends to present and how it intends to present them. Thus, in light of all of the foregoing, we are unable to conclude that the licensee of KMBY has afforded a reasonable opportunity, in its overall programming, for the presentation of contrasting viewpoints on the nuclear power development issue.

51. *KPAY*—With respect to the amount of time afforded to each side, it appears that KPAY broadcast a total of 27 minutes of programming presenting the viewpoints of advocates of nuclear power, but broadcast a total of 60 minutes of programming presenting the viewpoints of opponents of nuclear power. Thus, we cannot conclude that KPAY's listening audience has been "left uninformed" as to contrasting viewpoints in the nuclear power issue. See *Green* v. *FCC*, *supra*. Accordingly, we are unable to determine, under all the facts and circumstances presented, that the licensee of KPAY has failed to afford a reasonable opportunity, in its overall programming, for the presentation of contrasting views on that issue.

52. *KRED*—It appears that KRED has broadcast no programming whatsoever in opposition to nuclear power development and use, an unreasonable imbalance in relation to the amount of "pro-nuclear power" coverage contained in the over 1-1/2 hours of PG&E spot announcements. We note that the licensee claims to have offered the counsel for the complainants four 3-minute programs in which to present anti-nuclear power views, but this offer was regarded by the counsel for the complainants as not affording a reasonable opportunity for the presentation of such views. Although the licensee states that it did discuss the instant matter with a representative of one of the instant complainants, the licensee does not contend that it directly offered any of the complainants an opportunity to have one of its spokesmen appear on KRED to present anti-nuclear power views. Moreover, the licensee does not contend that it made any offer of broadcast time to any other individual or group opposed to nuclear power development, nor does the licensee claim that it made any other effort (e.g., by means of broadcast announcements or by any other means) to obtain spokesmen to present viewpoints contrasting those contained in the PG&E "nuclear power" spots. Accordingly, the licensee's actions appear to fall short of the sort of "diligent, good-faith

effort" which we expect a licensee to make in securing spokesmen to present viewpoints contrasting those already broadcast by the licensee on a controversial issue of public importance. See *Fairness Report*, *supra*, 48 FCC 2d at 14. *Cf. Columbia Broadcasting System, Inc.*, *supra*. In light of all the foregoing, we are unable to conclude that the licensee of KRED has afforded a reasonable opportunity, in its overall programming, for the presentation of viewpoints contrasting those presented in the PG&E "nuclear power" spots.

53. *KROY*—It appears that KROY has broadcast over one hour of programming presenting the views of advocates of nuclear power but has broadcast a total of only 6 minutes of programming presenting the views of nuclear power opponents.[22] We note that the licensee claims that an effort was made to secure a spokesman opposed to nuclear power for an appearance on its October 6, 1974 telephone call-in program,[23] but that ". . . no one was willing or available to be present at the time of the broadcast." However, the licensee does not contend that it made an attempt to contact any of the instant complainants to secure a spokesman to present viewpoints opposed to nuclear power development and use. Moreover, the licensee does not contend that it made any offer of broadcast time to any individual or group opposed to nuclear power for an appearance at some time other than on the October 6, 1974 program, nor does the licensee claim that it made any effort, other than the one cited, to obtain a spokesman to present viewpoints contrasting those contained in the PG&E "nuclear power" spots. Accordingly, KROY's actions appear to fall short of the sort of "diligent good-faith effort" while we expect a licensee to make in securing spokesmen to present viewpoints contrasting those already broadcast on a controversial issue of public importance. See *Fairness Report*, *supra*, 48 FCC 2d at 14. *Cf. Columbia Broadcasting System, Inc.*, *supra*. In light of all the foregoing, we are unable to conclude that the licensee of KROY has afforded a reasonable opportunity, in its overall programming, for the presentation of viewpoints contrasting those presented in the PG&E "nuclear power" spots.

54. *KSMA*—It appears that KSMA has broadcast no programming whatsoever in opposition to 160 minutes of pro-nuclear power, an unreasonable imbalance in relation to the amount of "pro-nuclear power" coverage in the PG&E announcements carried. We note that the licensee claims that, as a matter of routine practice, KSMA broadcasts news reports on matters involving "electrical power," that such news reports are furnished by wire services and other sources, but that the station does not keep a record of such news reports. Thus, the licensee appears unable to provide details as to the dates, broadcast times and contents of any such news reports; indeed, in light of the licensee's submission that the news reports it has broadcast pertained to "electri-

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[22] The 6-minute figure reflects the broadcasts of the six 1-minute anti-nuclear power spots during the hour-long telephone call-in program presented by KROY on Sunday, October 6, 1974. For purposes of analysis, and in the absence of any indication to the contrary from the licensee, we are not considering the entire 60 minutes of that broadcast to have been devoted to presentation of viewpoints opposed to nuclear power. This determination is based on the licensee's submission that the moderator of the program took no position on the nuclear power issue but merely encouraged listeners to call the station to present whatever viewpoints opposed to nuclear power development and use.

[23] KROY offers no evidence to support a finding that the call-in program devoted a reasonable amount of time to the presentation of anti-nuclear power viewpoints.

cal power," it is questionable whether any of the referred-to news reports addressed the nuclear power issue. Accordingly, we are unable to take cognizance of these claimed news broadcasts in assessing the licensee's compliance *vel non* with the fairness doctrine. The unsupported claim here advanced by the licensee that its news reports have fulfilled its fairness doctrine obligations with respect to the issues addressed in the PG&E "nuclear power" spots is clearly an insufficient rebuttal to the *prima facie* case of noncompliance with the fairness doctrine which has here been established by the complainants. See paragraphs 2-12 and 27-30, *supra; Allen C. Phelps, supra.* In light of all the foregoing, we are unable to conclude that the licensee of KSMA has afforded a reasonable opportunity, in its overall programming, for the presentation of viewpoints on the nuclear power issue contrasting those presented in the PG&E "nuclear power" spots, or that the public has not been left uninformed. *Green* v. *FCC, supra.* As we have stated:

> While this Commission does not require the maintenance of a fairness log or diary, we expect that licensees will be cognizant of the programming which has been presented on their stations, for it is difficult to see how a broadcaster who is ignorant of such matters could possibly be making a conscious and positive effort to meet its fairness obligations. *Fairness Report, supra,* 48 FCC 2d at 20.

55. *KSRO*—The information before us indicates that KSRO has broadcast nearly three hours of pro-nuclear power views while airing only 46 minutes presenting anti-nuclear views.[24] That imbalance, when coupled with gross disparities in frequency and audience which also favor the pro-nuclear power viewpoint, forces us to conclude that the licensee has failed to afford a reasonable opportunity, in its overall programming, for the presentation of viewpoints contrasting those presented in the PG&E "nuclear power" spots.

56. *KUZZ*—The information before us indicates that the licensee of KUZZ has broadcast a total of 2-1/2 hours of programming presenting the views of nuclear power proponents but has, to date, broadcast no programming whatsoever in opposition to the development and use of nuclear power.[25] However, we note that the licensee states that it is prepared to make "a reasonable amount" of broadcast time available to the complainants to present anti-nuclear power views, but that, insofar as the complainants avail themselves of such broadcast time, the licensee intends to offer an equal amount of time to the Pacific Gas and Electric Company to present viewpoints favoring nuclear power development and use. Also, we note the licensee's submission that it intends to broadcast more programming—apart from any time to be afforded directly to the complainants or to PG&E—on both sides of the nuclear power issue. See footnote 11, *supra.* With regard to this promise of future programming on the issue, the licensee has submitted no particulars as to the total amount of time to be devoted to each side, as to the frequency of presentation of each side, or as to the audience poten-

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[24] Inasmuch as the licensee of KSRO states that its October 27, 1974, hour-long broadcast contained the expression of the viewpoints of both proponents and opponents of nuclear power development, it is assumed, for purposes of analysis and in the absence of any contention to the contrary, that this program contained 30 minutes of discussion on each side of the issue. Moreover, the figures indicated do not reflect inclusion of the two 3-1/3 minute "Random Sample" broadcasts. The licensee's claim that those individuals who were featured had little knowledge of the nuclear power issue leads us to conclude that these broadcasts did not present any meaningful discussion of the issue.

[25] But see footnote [11], *supra,* and accompanying text.

tials of broadcast(s) of presentations on each side. In view of the foregoing and in view of the previously noted continuing and "live" nature of the nuclear power controversy, we are unable, at this time, to reach a final determination as to the licensee's compliance with the fairness doctrine; such determination will be deferred pending receipt of further specific information from the licensee. See para. 59, *Infra.*

57. *KVON*—The information before us indicates that KVON has broadcast approximately 1-1/2 hours of programming presenting the views of advocates of the development and use of nuclear power. However, it presented a substantial amount of programming (66 minutes) which contained views opposed to nuclear power. In addition the licensee states that it had broadcast 29 announcements promoting the program of October 12, 1974. Under these circumstances we cannot conclude that KVON has failed to afford a reasonable opportunity, in its overall programming, for the presentation of viewpoints contrasting those presented in the PG&E "nuclear power" spots.

Conclusion

58. For the reasons set forth herein, we are unable to conclude that the respective licensees of stations KFOG, KFRE, KFYV, KMBY, KRED, KROY, KSMA and KSRO have acted reasonably in fulfilling their obligations under the fairness doctrine with respect to the issues addressed in the PG&E "nuclear power" spots. Accordingly, IT IS ORDERED, That the respective licensees of each of the aforementioned stations inform the Commission, within 10 days of the date of release of this Memorandum Opinion and Order, of the manner in which each intends, consistent with the principles hereinabove discussed, to meet its fairness doctrine obligation with respect to the issues addressed by the PG&E "nuclear power" spot announcements.

59. IT IS FURTHER ORDERED, That, for the reasons specified in paragraph 56, *supra*, the licensee of KUZZ submit to the Commission, within 10 days of the date of release of this Memorandum Opinion and Order, specific information as to its future programming plans regarding the issues addressed by the PG&E "nuclear power" announcements.

60. IT IS FURTHER ORDERED, That the fairness doctrine complaint filed September 11, 1974, by Public Media Center, *et al.* is GRANTED IN PART and DENIED IN PART, to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX I

A-1

(ANNOUNCER)—Nuclear energy. It isn't the power-source of the future. It's the solution to the electrical energy problem *now*. Some people are concerned about the "safety" of nuclear power. At PG&E, we, too, believe in safety first. So, let's talk about it. The safety record of commercial nuclear power plants is unmatched in industrial history. There has never been a nuclear caused death . . . not even a significant injury. And that record stands with 44 nuclear plants operating in the United States. And thousands of men live safely on more than 100 nuclear powered ships in the U.S. Navy. Nuclear power plants are *safe*. They're also practical, economical, and environmentally clean. If you'd like more facts, just write Nuclear Information, PG&E, 77 Beale Street,

San Francisco 94106. Let's plan—together—for the future now. Before we run out of energy . . . and time.

A-2

(ANNOUNCER)—Nuclear energy. It isn't the power-source of the future. It's the solution to the electrical energy problem *now*. PG&E would like to clear the air about nuclear power and the environment. Nuclear power generation is clean. Unlike burned fuels, it releases *no* combustion products into the environment at all. Moreover, the warm water discharged from a nuclear plant's condensor cooling system does no significant harm to marine life. Studies and experience prove that where the receiving water source is large enough and cold enough . . . like the Pacific Ocean . . . marine life tends to be more plentiful than it was originally. Nuclear power is environmentally *clean*. It is also safe, practical, and economical. If you'd like more facts, just write Nuclear Information, PG&E, 77 Beale Street, San Francisco 94106. Let's plan—together—for the future now. Before we run out of energy . . . and time.

A-3

(ANNOUNCER)—Nuclear energy. It isn't the power-source of the future. It's the solution to the electrical energy problem *now*. Most hydroelectric plants consume scarce and increasingly costly oil and natural gas. Geothermal energy can meet only a small part of future needs, and fusion power is decades away. Solar . . . wind . . . and tidal power? They're all in experimental stages. And while coal can supply some help, it will only be useful here over the short run. Nuclear-energy is the power-source whose time has arrived. It's safe, practical, and environmentally clean. If you'd like more facts, just write Nuclear Information, PG&E, 77 Beale Street, San Francisco 94106. Let's plan—together—for the future now. Before we run out of energy . . . and time.

A-4

(ANNOUNCER)—Nuclear energy. It isn't the power-source of the future. It's the solution to the electrical energy problem *now*. This year alone in order to meet our customers' needs, PG&E will have to buy 20 million barrels of oil. And as your needs grow, so will our costs . . . and, ultimately, *your* costs. *Unless* . . . we're able to build more nuclear power plants. You see, nuclear power is economical. For example . . . the electricity produced at PG&E's *Humboldt Nuclear Plant* for only two dollars would cost seventeen dollars at a plant burning low-sulfur fuel oil at today's prices. And nuclear power is not only economical, it's also safe, practical, and environmentally clean. If you'd like more facts, just write Nuclear Information, PG&E, 77 Beale Street, San Francisco 94106. Let's plan—together—for the future now. Before we run out of energy . . . and time.

A-5

(ANNOUNCER)—Nuclear energy. It isn't the power-source of the future. It's the solution to the electrical energy problem *now*. Some people have asked, "What happens to nuclear waste?" PG&E would like to answer them. First, more than 95% of the original fuel is recycled for re-use. The remaining waste is small—so small that the waste from a large nuclear unit operating for 30 years could be contained in a space no larger than a 2-car garage. It is radioactive, but it's treated as such—very carefully. Safety first. The waste will be solidified, and stored under the most stringent government controls. Nuclear power is *safe*. And it's environmentally clean, practical, and economical. If you'd like more facts, just write Nuclear Information, PG&E, 77 Beale Street, San Francisco 94106. Let's plan—together—for the future now. Before we run out of energy . . . and time.

A-6

(ANNOUNCER)—Nuclear energy. It isn't the power-source of the future. It's the solution to the electrical energy problem *now*. Some people claim that private insurance companies won't insure nuclear power plants. That's false. They provide 110 million dollars insurance per nuclear plant. The government has collected millions and has never paid out one cent. There've been no claims. Nuclear power plants *are* insurable. And nuclear power is safe, environmentally clean, and economical. If you'd like more facts, just write Nuclear Information, PG&E, 77 Beale Street, San Francisco 94106. Let's plan—together—for the future now. Before we run out of energy . . . and time.

Exhibit 122: *In Re Energy Action Committee* (Texaco) 64 FCC 2d 787 (April 5, 1977)

F.C.C. 77-243

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of

ENERGY ACTION COMMITTEE, INC. ET AL. AGAINST AMERICAN BROADCASTING COMPANIES, NATIONAL BROADCASTING COMPANY, STATION WRC-TV, STATION WTOP-TV

MEMORANDUM OPINION AND ORDER

(Adopted: April 5, 1977; Released: April 12, 1977)

BY THE COMMISSION: COMMISSIONERS WILEY, CHAIRMAN; HOOKS AND QUELLO CONCURRING IN THE RESULT; COMMISSIONER WHITE DISSENTING AND ISSUING A STATEMENT.

1. On August 10, 1976 a complaint was filed with the Commission on behalf of Senator James Abourzek of South Dakota, Senator Birch Bayh of Indiana and Energy Action Committee, Inc., alleging that the ABC television network, the NBC television network, NBC's owned and operated station in Washington, D.C., WRC-TV, and Station WTOP-TV, Washington, D.C., licensed to Post-Newsweek Stations, Inc.,[1] each violated the fairness doctrine by presenting views on one side of a controversial issue of public importance during a particular paid announcement sponsored by Texaco, Inc., without broadcasting in its overall programming contrasting views on that issue.

2. The complainants maintained that the Texaco commercial advocates a pro-industry position on the controversial issue of whether to require the divestiture of the major United States oil companies. The substance of that announcement is as follows:

> To get you the gasoline and oil you need, a lot of complex pieces must come together very efficiently. Such as finding oil in places where no one has discovered it before, constructing huge pipe lines, building complex refineries . . . , supplying these products to thousands of outlets in cities and towns and rural areas across the country. . . . Fortunately, an oil company like Texaco is in all phases of the business

[1] Hereinafter referred to as WTOP.

so it can link the complex parts together efficiently and economically. It took a great many years to build this organization and it's these various pieces working together that permits a company like Texaco to do its job for you.

3. Energy Action stated that each of the named broadcasters has aired the particular spot during its programming. It had sent correspondence to each broadcaster, prior to filing with the Commission, in order to determine exactly how many times the Texaco ad had been broadcast, and whether each broadcaster has presented any "additional" programming in connection with the divestiture issue. The correspondence and responses thereto were enclosed with the complaint.

4. In response to Energy Action's inquiry, NBC stated that it appeared that it had broadcast the particular Texaco spot in question a total of four separate times. Information provided by ABC indicated that the ad was broadcast on three occasions, twice on April 7 and once on April 12, 1976. While WTOP did not apprise Energy Action of the number of times it ran this ad, it did acknowledge that it began running the spot on January 30, 1976. Also the complaint included two affidavits submitted by Washington, D.C. residents which alleged that they viewed this ad over WTOP in early 1976. Energy Action also stated that WRC-TV, in addition to carrying the ad during NBC network programming, inserted the spot during its local programming.

5. Energy Action alleged that during the period within which this spot was presented a nationwide debate concerning the question of divestiture of major oil companies was taking place. According to the complaint, this public debate, while intensified by the introduction of Senate Bill 2387, the Petroleum Industry Competition Act of 1976, dates as far back as October 1975 when an amendment requiring divestiture attached to natural gas deregulation legislation was defeated 54-45 in the Senate. The introduction of S2387 on September 22, 1975 resulted in 15,000 pages of testimony comprising 26 volumes of discussion of the measure before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary. These hearings before the Subcommittee were held intermittently between September 23, 1975 and February 18, 1976. Upon termination of hearings, the Subcommittee met in open executive session on April 1, 1976, at which time the bill was reported favorably to the full Judiciary Committee. The Judiciary Committee took additional testimony on May 18 and on June 3 from spokesmen for the Ford Administration, and on June 15 in open executive session voted eight to seven to order the favorable reporting of the divestitute measure to the full Senate. The Committee issued both majority and minority committee reports to accompany the legislation. The text of S2387, as reported prior to the April 1 Subcommittee session, indicates that the stated purpose of the legislation is "to facilitate the creation and maintenance of competition in the petroleum industry, and to require the most expeditious and equitable separation and divestment of assets and interests of vertically integrated major petroleum companies." The measure would, if enacted, prohibit the major integrated oil companies from continuing to operate in more than one of their various functions, i.e., exploration, refining, transporting and marketing. The complainant asserted that since 1975 the question of the propriety of the breakup of the major domestic integrated oil companies (divestiture) and the various supporting arguments on each side have constituted a controversial issue of public importance.

According to Energy Action, the pendency of S2387 has produced a marked increase in the intensity of the debate and has resulted in "educational" campaigns conducted in the media by both proponents and opponents of divestiture in order to disseminate each view on the efficacy of the present structure of the domestic oil industry, and the probable result of a mandatory breakup. According to the complaint, "it is in the context of this vigorous debate over the oil divestiture legislation that the Texaco spot must be analyzed."

6. Energy Action stated that at the heart of the divestiture debate is what it characterizes as the economic/efficiency argument, or, put another way, the question of "whether the integrated oil industry is the most efficient and economical structure to bring gasoline and oil to the American public or whether restructuring the industry will bring more savings, efficiency, competition and other benefits to the consuming public." It claimed that in ads which have appeared in newspaper and magazine reports and editorials, industrial newsletters published and/or paid for by the American Petroleum Institute and individual oil companies including Texaco, opponents of divestiture have consistently utilized the argument that the present structure of the oil industry (vertical integration), where an oil company operates in all phases of petroleum production, provides the most economical and efficient method of satisfying the American consumers' need for gasoline and oil.

7. In the view of Energy Action, the Texaco ad, while never explicitly mentioning divestiture or the pending legislation in Congress, opposes divestiture in an obvious and meaningful way by utilizing this efficiency/economy position, "a main argument advanced in opposition to divestiture . . . [in order] to elicit support for the anti-divestiture view." Energy Action believes that the view presented by Texaco's statement in the televised ad that in order to maintain efficiency and economy in production of oil, companies like Texaco must be in "all phases" of the business, is identical to that which has appeared in other forums.[2]

8. In support of its view that the advertisement represents a position on divestiture, Energy Action cites the Senate Judiciary Committee's observation that:

> The major firms have devoted a great deal of effort, not to say money, to conjuring up in the public's mind an erroneous image of this integration. Texaco, for example, in a series of television and print advertisements, has portrayed crude oil flowing from Texaco wells to Texaco pipelines and tankers, then on to Texaco refineries and then to Texaco service stations. These advertisements claim that any 'breakup' would destroy this *efficient* and *orderly* flow. 'Costly and unnecessary middlemen' would emerge causing prices to rise . . . See June 28, 1976, *Report*, *supra*, at 20. (emphasis added)

Energy Action further states that in the April 5, 1976 *Oil Daily* there appeared a report in which Texaco candidly discussed the purpose of its ad campaign which is to explain "the benefits of integration [and]

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[2] In a footnote, Energy Action stated that it intended to separately address similar anti-divestiture ads sponsored by Mobil Oil and Standard Oil of California (Chevron). Later, it noted that ABC and WTOP broadcast at least one Chevron spot on July 27. In addition, in a subsequent letter dated August 12, Energy Action describes the Chevron and Mobil ads as both arguing against divestiture and reiterates its earlier position that, although it does not have information relating to if and when the named broadcasters aired these ads, its request for relief concerns the Texaco ads "and other anti-divestiture advocacy which has been broadcast, especially paid editorials from the oil companies."

. . . to help correct [and to rebut the misinformation being received by the public] about the efficiencies of America's integrated oil companies." Energy Action contends that although the Texaco announcements which were broadcast never actually used the term divestiture, the fairness doctrine requires stations which have presented them to afford a reasonable opportunity for the presentation of contrasting viewpoints since they clearly advocate a definite position on a principal issue relating to the divestiture debate.

9. In responses to the aforementioned correspondence sent by Energy Action, ABC, NBC and WTOP have taken the position that the Texaco ad in question does not discuss one side of a controversial issue of public importance. In addition to this, ABC and NBC have listed programming which each submits indicates the presentation of pro-divestiture views. WTOP on the other hand did not initially indicate to the complainants whether or not it presented any pro-divestiture programming.

10. In response to ABC and NBC, Energy Action argued that the broadcasts cited by each are not sufficient to satisfy the stations' obligation under the fairness doctrine since they either constitute "mere reportage of news" or do not adequately set forth the views taken by proponents of divestiture legislation. Energy Action requested Commission action to require remedial programming, stating that only enforcement of the fairness doctrine "will preclude divestiture opponents from having nearly exclusive access to television viewers [and] radio listeners . . ."

11. Upon receipt of the Energy Action complaint the Commission determined, in view of the claim stated therein concerning the substance of the broadcast Texaco ads, the apparent controversy surrounding the proposed divestiture legislation, and Energy Action's assertion that each licensee had been unreasonable either by denying that the ad discussed one side of a highly controversial issue or by failing to present opportunity for opposing viewpoints or both, that for the Commission to successfully adjudicate this matter it would need to have before it any further comments the broadcasters wished to submit on the complaint. Thereupon, letters of inquiry were sent to ABC, NBC and WTOP.

12. On September 1, ABC filed its response with the Commission. ABC states that it had broadcast the 30-second Texaco ad on January 24 and 25 and on April 12, 1976. It acknowledges that the issue of divestiture is presently a controversial issue of public importance but asserts that the ad neither advocated a position nor can be said to be "substantial and obvious" in its relationship to the divestiture issue. Rather, it states that the ad "bears only a tenuous relationship to the [divestiture] debate," since it neither mentions divestiture nor discusses the issue generally and does not address the underlying matters in connection with the debate, such as "the degree of competition, effect on prices or other alleged harmful consequences of divestiture." Therefore, ABC argues it did not act unreasonably or in bad faith when it determined that the advertisement is not a presentation of one side of the divestiture issue.

13. Moreover, ABC submits that regardless of whether the ad constitutes advocacy on divestiture it has fulfilled any fairness obligation since it has reported extensively on the pro-divestiture viewpoint dur-

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ing its overall programming. To illustrate, it refers to the August 17, 1975 broadcast of *Issues and Answers* which featured Senator Birch Bayh, one of the complainants, wherein he was afforded an opportunity to discuss the introduction of divesture legislation and its ultimate effect on the petroleum industry.

14. During the May 16, 1976 *Issues and Answers* broadcast, ABC claims, Congressman Morris Udall commented on his proposal to break up the major oil companies. ABC also cites the comments of Jack Anderson dated April 1, 1976 on *Good Morning America* in connection with proposed divestiture legislation and the major oil companies' efforts to block such a measure, and the views relevant to divestiture of Representative Udall on *ABC Evening News* on February 18, 1976 and *Good Morning America* of April 22. ABC dismisses Energy Action's attempt to discount these programs, stating that the network determined in good faith that this was an appropriate means of covering this controversial issue of public importance.

15. NBC, in a September 1 reply, states that it aired the 60-second Texaco ad on four occasions between February and April 7, 1976, and that WRC-TV twice presented a similar 30-second spot. NBC considers divestiture to be a controversial issue of public importance and takes the position that the Texaco ad "did not express a view on that issue." NBC supports this conclusion by citing Energy Action's reliance in its complaint on the alleged discussion by Texaco of the economy/efficiency question, and states that although "the economy and efficiency of vertical integration in the oil industry is certainly a part of the current legislative debate on divestiture, NBC does not believe that the question of what is the most efficient and economical structure is a controversial issue within the meaning of the fairness doctrine." Rather, the network perceives this as a "subsidiary facet" of the general issue and not one of the central issues of the public debate.[3] To this extent, NBC maintains that Energy Action should not be able to "seize upon an isolated argument in the legislative divestiture debate and claim that the commercial expresses a view on that debate simply because there is *some* similarity between the commercial and an isolated point raised in the debate." NBC characterizes the Texaco ad as a "typical and legitimate institutional message" relating to the desirability of Texaco's operation, and asserts that it neither discusses what is the most economical or efficient structure nor argues that the integrated structure is the most economical or efficient. Therefore, NBC asserts, pursuant to the standards set out in the *Fairness Report*, it does not believe that its judgment in this instance is unreasonable.

16. NBC states that regardless of whether the Commission determines that the Texaco spot presents a view on a controversial issue of public importance, it has met any fairness obligation which might result from the broadcast of the ad by its presentation of "substantial coverage of the pro-divestiture position." In this regard it cites the programming to which it referred in its letter to Energy Action dated May 11. There it advised Energy Action that the February 23, 1975 *NBC Sunday Night News* reported the AFL-CIO's call for legislative action to halt horizontal integration of the energy industry and "to

[3] NBC states that the main elements of the divestiture debate are "high prices, oligopoly power, competition, predatory practices [and that the] commercial touched on none of these."

force [oil companies] to get rid of their sales operations"; that on the July 4, 1975 *Today* program Senator Birch Bayh was interviewed on divestiture; that *NBC News Update* of October 18, 1975 reported Senator Philip Hart's intention to propose divestiture legislation; and that comments on advantages of divestiture by Anthony Sampson were aired on the October 28, 1975 *Today* show. NBC also states that its February 25, 1975 *Nightly News* described former Presidential candidate Fred Harris's support for anti-trust action against the integrated oil companies and that Representative Morris Udall on the November 30, 1975 *Meet the Press* similarly discussed the need for the divestiture. NBC states that Energy Action's attempts to dismiss these programs because several occurred prior to the introduction of pending legislation in January 1976 or because it was reportage of news rather than advocacy and as such, would not, according to Energy Action, serve to balance views contained in the Texaco spots, cannot be supported in fact or in law.

17. In addition to this earlier documentation, NBC submits that during coverage of the Democratic National Convention on July 13 it afforded actor Paul Newman the opportunity to discuss at some length his pro-divestiture viewpoint. Moreover, NBC states that Station WRC-TV, in addition to carrying the above programs, presented three local news reports between January 29 and August 10, 1976 in connection with Energy Action Committee and its pro-divestiture views.

18. WTOP filed its reply on September 1 and acknowledges that it carried the 60-second Texaco ad between late January and mid-April 1976, characterizing it as advertising "designed to present a favorable public image of a particular corporation or industry," namely Texaco. WTOP states that the spot did not address the divestiture issue and it is a station policy not to accept for broadcast editorial advertising.

19. The licensee refers to its "procedures for carefully reviewing commercial copy to make sure it does not argue controversial issues." To illustrate, WTOP states that it utilizes "special monitoring procedures" for review of advertising copy and "a trained continuity acceptance director" who screens commercial copy with assistance from the licensee's Manager of Broadcast Standards and Practices at the Corporate level. In this instance, WTOP states, Texaco approached WTOP with a proposed concept for a spot announcement "which eventually became the spot in question." The station then reviewed the advertising proposal and, according to WTOP, determined that it "raised questions under the station's policy." WTOP states that Texaco then submitted a revised proposal which the licensee reviewed, and that "[o]nly when WTOP-TV was satisfied in its own judgment that the advertisment, as reconstituted, did not advocate a viewpoint on a controversial issue of public importance, did it accept the advertising. The entire process took approximately eleven weeks."

20. WTOP concluded at the end of January 1976 that the Texaco ad did not advocate a viewpoint on a controversial issue, after taking into account "all relevant circumstances at that time, including the Congressional situation described in Energy Action's complaint." It is alleged that this situation began to change somewhat in April since Subcommittee approval of the bill occurred on April 1. WTOP notes that full Committee action sending the measure to the Senate floor did not occur until June 15. However, WTOP claims that at the time these

ads appeared neither divestiture nor the economy/efficiency of oil companies standing alone was a controversial issue of public importance although they may have been newsworthy. With regard to the latter, WTOP states that during the time within which these spots were run, the economy/efficiency of large oil companies "had not become so associated in public debate with the divestiture issue that the economy/efficiency of an oil company could not be addressed without preface advocating a point of view on divestiture." WTOP argues that only after the Congressional action of April 1976 did the issue of divestiture "rise above" the "sometimes hard-to-draw line of what is a controversial issue of public importance," and by that time WTOP determined that, in view of the changing circumstances, it would terminate the spot. WTOP states that it last ran the ad on April 18 and inadvertently on April 28, and that it was not until after it terminated the spot that attention started to be directed to the relationship between the divestiture issue and the economy/efficiency of oil companies. WTOP states that under these circumstances it was not unreasonable to conclude that when broadcast the ad did not "obviously address, and advocate a point of view on a controversial issue of public importance." Even now, WTOP states that it may be reasonable to conclude that either divestiture is not a controversial issue of public importance or that the discussion of "efficiency/economy is not so intertwined with the divestiture issue" to require licensees to present contrasting viewpoints on the basis of the Texaco ad.

21. WTOP maintains that by virtue of the facts before it, the determination that this ad did not meaningfully discuss one side of a presently controversial issue is not unreasonable. It states that the Commission ought not to "second-guess the station's determination of what it will cover and what it will not cover unless its decision is plainly unreasonable or in bad faith, [and that it] is proper that the government not intrude in *such editorial decisions*." (emphasis added)

22. As additional support for its conclusion, WTOP notes that its most recent ascertainment of the community needs and interests has not uncovered evidence either of controversiality or of public importance of the issue of divestiture.

23. WTOP also refers to programming it has presented on the issue of divestiture. WTOP cites seven individual news reports each produced by the CBS network broadcast between February 24 and June 16, 1976 in connection with divestiture. The licensee indicates that these items included a report that one of seven Democratic presidential candidates supported divestiture; that Senator Birch Bayh supported divestiture; and that the Democratic Platform Committee adopted the principal of ownership restrictions on integrated oil companies. WTOP also cites an interview with proponent Senator Abourzek where he described his reasons for supporting divestiture; coverage of the Senate Judiciary Committee's vote on this measure and an additional explanation of the legislation; and finally a report "directed to the divestiture issue."

24. WTOP argues that Energy Action's three and a half month delay from the time that the licensee responded to Energy Action's initial inquiry to the date of the filing of the complaint with the Commission would necessitate the denial of the complaint, because "Energy Action cannot be allowed to spend three and a half months amassing

evidence largely after the commercial was terminated, and thereby wait to file at a time when divestiture may be considered controversial"; and that "a ruling that initiated a last minute flood of free spots explicitly advocating divestiture could tilt the public's perception of the issue in a manner inconsistent with the policies of the fairness doctrine."

25. In its reply of September 10 to the broadcaster, Energy Action reiterates its position that the Texaco ad addressed the controversial divestiture issue during January to mid-April 1976, the period within which it broadcast the ad. Referring to the licensee's acknowledging earlier rejection of a similar Texaco ad, Energy Action argues that this rejection and the circumstances surrounding it indicate that WTOP itself believed that the topic of divestiture was a controversial issue of public importance and refused to carry the ad because of its explicit reference to the divestiture debate. Energy Action asserts that in its view, WTOP eventually decided to carry the Texaco ad only after it received a new ad with such explicit references deleted. Concerning the alleged controversiality of this issue, Energy Action submits that the extensive amount of press coverage (some of which is cited, *infra*) indicates involvement in the debate by President Ford and other high ranking administration officials and by members of Congress, and demonstrates that divestiture is a major Presidential election campaign issue. Energy Action argues that this material, considered with the additional fact that all three major television networks have taken a position that divestiture was controversial, reveals the unreasonableness of WTOP's position that divestiture was not of sufficient controversiality prior to mid-April.

26. Next, Energy Action attacks the claim that the ad did not address or advocate a view on the above issue. It re-emphasizes the relationship between the so-called economy/efficiency argument which it claims is the essence of the Texaco message and the "contemporaneous public debate over divestiture." Energy Action characterizes the ad as a " 'reasoned' argument in favor of integration and in opposition to divestiture in terms similar to those employed by industry spokesmen, regardless of the omission of explicit reference to divestiture or to pending legislation." Energy Action refers to the broadcasters' characterization of the divestiture issue as "self-serving" and asserts the topics which ABC and NBC do acknowledge as being integral to the meaningful discussion of the issue of divestiture, such as "competition" and "high prices," are implicitly addressed by Texaco during this ad in terms which parallel the public positions of opponents of divestiture. Moreover, Energy Action claims that the spot belies the assertion that it is an "institutional" advertisement aimed at enhancing Texaco's corporate image, citing the language included in the spot to the effect that a company like Texaco is in all phases of the oil industry and is able to link the parts together efficiently and economically. Energy Action continues to assert that the economy/efficiency argument has become "inextricably intertwined with the divestiture debate," and therefore advocacy of the industry's economy and efficiency is a meaningful position on that issue.

27. Finally, Energy Action attacks as inadequate each broadcaster's programming submitted to illustrate the presentation of contrasting viewpoints. Specifically, in response to NBC and in addition to the

arguments raised in the original complaint, it argues that the cited interview of actor Paul Newman during the Democratic National convention, although a presentation of pro-divestiture views, falls short of the necessary balance of viewpoints inasmuch as it was balanced by the interview at that convention of a Texas delegate who opposed divestiture, and occurred near midnight and therefore outside of prime time. Energy Action refers to the news reports concerning Energy Action's press conference as "mere reportage of news" and therefore insufficient to balance the "advocacy" of the Texaco ads.

28. Concerning ABC's programming, Energy Action asserts that since much of it occurred in 1975, prior to Senate consideration of the divestiture bill now before it, it is insufficient. Moreover, it claims that the public affairs program *Issues and Answers* appearing on Sunday, is outside the periods of prime audience potential and would not constitute a reasonable opportunity for the presentation of contrasting views. Energy Action maintains that the May 16 appearance of Representative Udall, while discussing a "pro-divestiture position did not mention the economy/efficiency argument, the alleged thrust of the Texaco ad."

29. Energy Action in its analysis of the programming cited by WTOP refers to WTOP's reliance entirely on network programming, which in Energy Action's opinion is generally internally balanced and therefore insufficient for purposes of balancing the anti-divestiture views presented in the Texaco ads. Moreover it characterizes these news reports as "random network items," all but one of which constituted "mere reportage of fact," and none of which presented a discussion of the merits or any advocacy of divestiture but rather merely neutral reportage of pending legislation. Energy Action concludes that this cannot be said to constitute a sufficient balance in light of what it assumes are a large number of Texaco spots carried by WTOP.

30. Energy Action denies that by its complaint it is requesting the Commission to intrude on licensees' journalistic judgment. It asserts that it neither asks for the removal of the spots nor the right to present its own counterspots. All that is being asked, asserts Energy Action, is that stations deal with the divestiture issues fairly. Moreover, Energy Action disputes WTOP's claim that it was in the exercise of its editorial judgment that it decided not to discuss divestiture in its other programming. Rather, it is claimed that this judgment relates to whether the licensee felt that it incurred fairness obligations by the broadcast of the Texaco ads and had little to do with the ultimate journalistic judgment of how best to cover the issue. Thus, should the Commission find WTOP's conclusion in this regard to be unreasonable, claims Energy Action, it would not indicate thereby an attempt to supplant WTOP's program judgment with that of the Commission.

31. At the request of the Commission, WTOP, in a follow-up letter dated September 9, advised that it carried the Texaco 60-second spots on 28 occasions between January 31 and April 18, 1976 and carried the 30-second spot on 25 occasions between January 30 and April 15, 1976 with an extra 30-second broadcast on April 28.

32. On September 14, Energy Action filed additional comments in connection with WTOP's reply to the Commission. With a specific reference to the licensee's September 9 pleading, Energy Action asserts that, contrary to WTOP's claims, the broadcast of the seven CBS news

reports is insufficient for purposes of providing a reasonable opportunity for the presentation of contrasting views. It claims that eight times as much anti-divestiture material was broadcast as compared to pro-divestiture material in WTOP's overall programming, and that there was a significant disparity in the frequency with which each side was presented.

33. Energy Action restates its view that the news reports in question "are either initially balanced (CBS Evening News, 6/15/76) or anti-divestiture (CBS Evening News, 6/17/76) . . . [and that in its opinion not] a single news report conveys a pro-divestiture viewpoint." Moreover, Energy Action submits, except for the June 15 interview with Senator Abourzek, "not a single news report contains the views of a partisan, pro-divestiture spokesperson."

34. WTOP filed an additional pleading dated September 16 claiming that Energy Action "fundamentally misconstrued WTOP-TV's position." To clarify, WTOP states that it accepted the ad because it felt that the ad neither addressed nor advocated a point of view on a controversial issue; that this judgment is supported by the language in the spot "which WTOP-TV was careful to assure merely lauded Texaco and oil company efficiency"; that this reasonable judgment as of mid-April was that "oil industry efficiency" had not become "so inextricably tied to the divestiture issue" that such an "institutional" message necessarily constitutes advocacy on the divestiture issue; and that it was not unreasonable for WTOP to conclude that divestiture was "not so clearly an issue of sufficient public importance." WTOP maintains that it did not argue that if carriage of Texaco ads imposed fairness obligations, carriage of CBS news reports discharge that obligation, but only that the station's "treatment of the divestiture issue and energy matters generally has been fairly and properly determined by its bona fide news and programming judgment, taking into account community needs and interests. . . ."

Discussion

35. Pursuant to the fairness doctrine, broadcasters are required to cover adequately and fairly controversial issues of public importance, making an effort during the coverage of those issues to afford a reasonable opportunity in their overall programming for the presentation of contrasting points of view. They are afforded wide journalistic discretion under this doctrine to determine the content of their programming and how best to satisfy their fairness obligations. As we have on many occasions emphasized, we do not view the fairness doctrine as an intrusion on licensee day-to-day editorial decision making, such intrusion being clearly prohibited under the Communications Act. 47 U.S.C. 326. When a licensee presents one side of a controversial issue he is not required to provide a forum for opposing views on that same program or series of programs. He is simply expected to make a provision for the opposing views in his overall programming. Neither is he required to present an "equal balance" of views on a particular public issue. Our steadfast commitment to a system of electronic communication in which an individual broadcaster is free to exercise wide journalistic discretion is illustrated by the fact that under this doctrine the broadcast licensee is called upon and is responsible for the determination in each instance of the most appropriate means of informing his listeners.

Unless clearly unreasonable, editorial decisions of this nature will not be disturbed. *Fairness Report*, 48 FCC 2d 1 (1974); *Neckritz* v. *FCC*, 502 F2d 411 (D.C. Cir. 1974).

36. As part of the basic statutory responsibility to inform the public, mandated by Section 315(a) of the Communications Act, 47 U.S.C. 315(a) as amended; *Straus Communications, Inc.* v. *FCC*, 530 F2d 1001 (D.C. Cir. 1976), "[t]he licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming." *Applicability of the Fairness Doctrine on the Handling of Controversial Issues of Public Importance*, 40 FCC 598, 599 (1964).

37. If a complaint presents *prima facie* evidence to substantiate the claim of controversiality of an issue cited in the complaint and of apparent presentation of only one viewpoint thereon in the station's overall programming, the licensee is called upon to respond to an inquiry by the Commission wherein he is asked whether the issue was addressed during the programming in question, whether that issue was then a controversial issue of public importance and if so, whether the station has or intends to afford reasonable opportunity for the presentation of opposing views. If the licensee's conclusions are substantially different from those of the complainant, the Commission must then determine the reasonableness of those judgments. *Reconsideration of the Fairness Report*, 58 FCC 2d 691 (1976).

38. In *Public Media Center* v. *Radio Station KATY, et al.*, 59 FCC 2d 494 (1976), we reiterated our view that while ". . . we do not believe that the usual product commercial can realistically be said to inform the public on any side of a controversial issue of public importance . . . , we will apply the fairness doctrine . . . to those 'commercials' which are devoted in an obvious and meaningful way to the discussion of public issues." *Fairness Report*, 48 FCC 2d 1,26 (1974). Thus, we distinguished those editorial advertisements which do trigger fairness obligations, from product advertisements which merely discuss "the desirability of the product" and institutional advertising which is "designed to present a favorable public image of a particular corporation or industry" and which "ordinarily does not involve debate on public issues." *Fairness Report, supra.* See *Public Interest Research Group* v. *FCC*, 522 F2d 1060 (1st Cir. 1975) cert. denied —— U.S. —— (1976).

39. In response to the Commission's inquiry in this matter each licensee denies that the Texaco ad discussed one side of a controversial issue of public importance and concludes that no fairness obligations occur as a result of the carriage of these ads. In maintaining that divestiture and the economy and efficiency of the present industry structure were both controversial and of public importance, Energy Action has furnished voluminous documentation indicating the existence of considerable debate on the merits of divestiture dating as far back as the fall of 1975, prior to the introduction of pending divestiture legislation. The subject of "economy/efficiency," we note, is argued only within the context of the larger divestiture issue and does not appear to be independently debated. While ABC and NBC do not challenge the controversiality of divestiture, per se, WTOP specifically

maintains that at the time it aired the ad neither the issue of divestiture nor the economy/efficiency of the oil companies was controversial or of public importance. It does not, however, specifically address Energy Action's documentation, instead relying solely on its own established monitoring procedures and its programming judgment.

40. In our *Fairness Report*, *supra*, we delineate what we believe are the appropriate standards to be applied by licensees when attempting to determine whether an issue is of requisite controversiality to envoke the fairness doctrine. There we emphasize the relevance of the degree of attention paid to an issue by government officials, community leaders and the media, and whether this issue is the subject of vigorous debate with substantial elements of the community in opposition to one another. *Id.* at 12. Under these standards, we do not believe WTOP's judgment is reasonable. Evidence before us includes information that divestiture was a significant political campaign issue during the period in question, the subject of major legislation and Congressional debate, and the focus of numerous national and local (in Washington, D.C.) editorial comments, occupying the attention of the President, members of Congress and members of the oil industry. Likewise, considering the almost universally shared view that the ultimate determination of the divestiture debate will have substantial impact on the present and future standard of living in this country, we do not believe it can reasonably be said the issue is not of sufficient public importance.[4] Although WTOP cites the fact that divestiture was not named by community leaders as of importance to its community, we do not believe this alone is a reasonable basis for determining that an issue is not a controversial issue of public importance. As we stated in *Public Media Center* v. *KATY et al.*, *supra:*

> The matters cited by a licensee in its ascertainment survey as the problems, needs and interests of the residents of the community which it serves do not necessarily correspond to local, state-wide or nationwide controversial issues of public importance. Moreover, not even the most thorough of ascertainment methods would guarantee that the licensee would identify all those issues which are matters of controversy and public importance. (citation omitted).

Moreover, while we accept the licensee's claim of closely scrutinizing commercial advertisements prior to this presentation to avoid discussion of controversial matters, we do not believe there is an adequate basis for the conclusion that in this instance its determination that divestiture was not a controversial issue was reasonable. In fact, all evidence points to a contrary conclusion.[5]

41. Each licensee contends that whether or not the divestiture issue is deemed to be controversial, it is not unreasonable to conclude that the Texaco ad does not address that issue in an obvious and meaningful way, since that spot has but a "tenuous" relationship to the divestiture debate, and is merely an institutional message relating to the desirability of Texaco's operation. Moreover, each asserts that al-

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[4] Also in our *Fairness Report* we state the principal test of public importance of an issue is in terms of a subjective judgment of "the impact that the issue is likely to have on the community-at-large" or put another way, if the issue involves a social or political choice, "whether the outcome of that choice will have a significant impact on society and its institutions." *Id.* at 11-12.

[5] WTOP has stated that it rejected Texaco's initial proposal because it "raised questions under the station's policy" of not airing commercials that "argue controversial issues." We believe this represents a tacit admission that discussion of divestiture amounted to discussion of a controversial issue eleven weeks prior to the first Texaco ad broadcast in January.

though the ad mentions economy and efficiency, this is but a "subsidiary facet" of the general divestiture issue rather than a central issue of the public debate, noting that neither divestiture nor pending legislation are mentioned during the ad. WTOP specifically argues that ". . . [i]t would have been different (indeed, WTOP-TV would not have cleared the spot), if the commercial had stated that *only* through the common ownership of various elements may economy and efficiency in the oil industry be achieved. But the spot didn't say that . . . The spot stated that Texaco achieved economy and efficiency through its operation of various elements in the oil industry."

42. In our *Fairness Report*, *supra*, we discussed the standards by which licensees can reasonably determine whether a program raised a particular issue. We recognized that a broadcast may avoid explicit mention of the ultimate matter in controversy and still address the issue by "focus[ing] instead on assertions or arguments which support one side or the other on that ultimate issue." This was the case in *Wilderness Society*, 31 FCC 2d 729, reconsideration denied 32 FCC 2d 714 (1971), where we determined that advertisements which did not explicitly mention the Alaskan pipeline, did, in any event, present what could be termed arguments in support of its construction which was at that time a controversial issue. We emphasized in the *Fairness Report*, *supra*, that proponents and opponents of public issues [6] should inquire "not on whether the statement bears some tangential relevance to the [issue] but rather on whether that statement in the context of the ongoing community debate, is so obviously and substantially related to [the] issue as to amount to advocacy of a position on that question." We further stated that if the arguments and views expressed over the air "closely parallel the major arguments advanced by partisans on one side or the other of the public debate it might be reasonable to conclude that there had been a presentation on one side of the ultimate issue."

43. This is consistent with the view that the First Amendment does not "require the Commission to force the presentation of alternative views in response to product advertisements which do not explicitly expound a point of view on a public issue." *Public Interest Research Group* v. *FCC*, *supra*. An ad advocating the use of a particular brand of gasoline would not constitute advocacy of a position on a controversial issue. *Neckritz* v. *FCC*, *supra; Public Interest Research Group* v. *FCC*, *supra*. Further, when ruling in this sensitive area, we take cognizance only of what statements were actually presented in the advertisement and the relationship of those statements to ongoing public debate. Most important, it must be reasonably evident that the commercial contributed to the public's understanding of the controversial issue cited in the complaint. To reasonably judge whether an ad advocates a position on a controversial issue of public importance, a licensee therefore must first look at the ad and then to the nature and substance of the "ongoing public debate."

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[6] We state that the determination on this point "cannot be made in a vacuum; in addition to this review of the text of the ad, the licensee must take into account his general knowledge of the issues and arguments in the ongoing public debate." Moreover, we advise licensees that we will not rule against a licensee "unless the facts are so clear that the only reasonable conclusion would be to view the 'advertisement' as a presentation on one side of a specific public issue." *Fairness Report* at paragraphs 64-65.

44. The nature and the extent of the divestiture debate is best illustrated by the contrasting committee reports issued by the Judiciary Committee of the Senate. The main report, which supports proposed mandatory divestiture, analyzes the structure and profitability of the oil industry in the present structure and concludes that "a handful of large integrated companies have effectively monopolized the supply of the domestic crude oil . . . [are] able to restrict entry into refining and limit the competitiveness of independent refiners . . . [and] force on the consuming public a wasteful, inefficient, and extremely costly system of marketing . . ." The Committee attempts to raise and then answer the major questions surrounding the ultimate issue of whether divestment of the integrated oil companies is necessary. These questions concern the alleged monopolistic or oligopolistic control large companies exert on the production and price of petroleum products, the profitability and need for increased capital of these companies, whether the present structure of the industry allows for the maximum supply of petroleum at the lowest possible price to the consumer or conversely whether divestiture would create inefficiencies in production and retailing resulting in the loss of the "market economies" of the present structure and therefore high consumer prices, and finally the ultimate issue of whether divestiture would have the effect of increasing supply and lowering prices. That report states that industry opponents of divestiture argue that "interference with this [present] structure [of oil companies] would result in tremendous losses of efficiency and consequent increases in cost to consumers," citing American Petroleum Institute President Frank Ikard who is quoted as stating that "the cost of [the] inefficiency of breaking up the continuous flow through production of crude oil through the channels of a single ownership and management to the final consumers . . . would be borne by the consumers." The Report, in response to this loss of efficiency argument, states that to the contrary, "[t]here is no reason to believe that [the continuous flow resulting from integrated producers] is more efficient—and considerable reason to believe that it is less efficient . . ." To support this, it is maintained that "vertical integration itself creates the conditions that make integration a more 'efficient' means of doing business. Such strategic benefits, however, can scarcely be categorized as economic efficiencies." The Report characterizes the industry as "a wasteful, inefficient and extremely costly system of marketing."

45. The Report on the minority views of the Judiciary Committee takes an opposite position on the issue of divestment of integrated oil companies. It is the basic position of the opponents of the measure that enactment would have the effect of reducing domestic production and employment, increasing dependence on foreign crude oil, weakening national security, destroying the savings of small investors and causing an increase in consumer prices. In fact, in relation to the last point, the minority forecasts an increase in the cost of energy to U.S. consumers of a billion dollars annually.

46. It is also argued that "proponents are persistent in ignoring the efficiency of the vertically integrated structures and its effect upon price. After all, one of the things all legislators are concerned about is the high level of petroleum prices at the consumer level." The minority report includes a statement by Federal Energy Administration Chief Frank G. Zarb, wherein he states that ". . . it is not at all clear that

vertical divestiture in the petroleum industry would result in reduced prices of petroleum products. Any direct cost advantages obtained through reducing inefficiencies and achieving economies inherent in large scale operations would obviously be lost. Such losses would tend to increase prices . . . [and] will tend to reduce supplies and place upward pressure on prices . . ." The minority report includes a statement by Senator Quentin N. Burdick wherein he states that "Financial experts, numerous economists, Securities Exchange Commission Chairman Roderick Hills, Federal Energy Administrator Frank Zarb and other administration witnesses all have testified that divestiture will lead to higher prices for petroleum products. These increases in the cost of petroleum prices will arise because of the costs of implementing divestiture, because of the loss of economies of scale and efficiencies of vertical integration, and because of the increased power of the [OPEC] to control the price of petroleum imported by the United States after divestiture plans have been implemented . . ."

47. From the information submitted in this case, it is clear that while the ad does not explicitly mention divestiture it does show visually pieces of a puzzle, each representing one particular phase of the oil business, and refers to these "pieces" coming together efficiently, thus espousing the view that an oil company "like Texaco" can link the complex parts together efficiently and economically. It concludes by saying it took a great many years to build this organization and it is these various pieces working together that permit a company like Texaco to do its job for you. This language rebuts the view that this was an institutional ad on behalf of Texaco only. The ad ties together facts and statements in an attempt to justify the view that it is in the public's interest for one such company to be in all phases of the oil industry. Even if the advertisement had not included the language of an oil company "like Texaco," we must conclude that it is unreasonable to characterize it as merely an institutional ad. The assertions made therein concerning the economy and efficiency of vertical integration go to the very essence of the divestiture issue. We do not believe that it is reasonable to conclude that the ad discussed the economy and efficiency only of Texaco's operation and not of the entire oil industry.

48. As the Senate reports indicate, the views presented by Texaco are neither new nor are they unique. Indeed, the argument that an industry composed of big integrated oil companies like Texaco provides an economical, efficient way of supplying America with oil has been utilized by opponents of divestiture and reported innumerable times. For example: "Our growth has been logical. We've been efficient and we've given the consumer what he wanted—huge amounts of energy at cheap prices," (Quoting one oilman, January 22, 1976 *Washington Star*); "the major, vertically integrated oil companies—those in every level of the business from production to marketing—say their size and structure provide real benefits to consumers. For one thing, they say, an integrated company can more efficiently coordinate the smooth flow of oil . . ." February 9, 1976 *Wall Street Journal*. "Divestiture would eventually mean high prices and would damage the U.S. oil industry's efficiency," February 12, 1976 *Wall Street Journal;* "economies and operating efficiencies of the integrated firms would disappear if the companies were split apart," says economics Professor Edward W. Ericson, March 28, 1976 *L.A. Times;* opponents of divesti-

ture maintain that "split would make industry less efficient . . . cause higher prices," April 1, 1976 *S.F. Examiner;* "Vertical integration is more efficient, Mobin argues, and that divestiture is a step towards higher prices," April 2, 1976 *Washington Post;* "Divestiture would force dismantling of efficient industrial machines which provide economic energy," March 18, 1976 *L.A. Times.*

49. These are a few of the newspaper reports submitted by Energy Action which discuss or advocate a position on divestiture by employing the so-called "economy/efficiency" argument. This evidence, we believe, refutes the licensees' position that the spot has but a "tenuous" relationship to the divestiture debate. Considering the information before us, we must conclude that the licensees are unreasonable in determining that the Texaco ad does not bear a substantial and meaningful relationship to the ongoing public debate, and does not, in obviously and meaningful terms, address the issue of the high price of oil and the very structure of the industry under attack—main components of what has come to be known as the divestiture debate. Significantly, none of the responding licensees specifically refute the information furnished by Energy Action in support of its view that the statements made by Texaco do not obviously and meaningfully relate to the divestiture issue. We must conclude therefore that the licensees' determinations are unreasonable. It is therefore necessary to determine whether the programming referred to by each licensee as representing the discussion of contrasting viewpoints on the issue of divestiture satisfies the fairness obligations incurred by the broadcast of the Texaco ad.

50. It appears that along with the presentation of four network spots and two WRC-TV local Washington spots, NBC has presented considerable news and public affairs programming related to divestiture, including on-the-spot coverage of the filing of Energy Action's complaint. We cannot agree that this programming constitutes "mere reportage of fact." See *Media Access Project* v. *WJBF et al.*, (Georgia Power), 44 FCC 2d 755 (1972). Several reports clearly discuss the merits and advocate passage of the divestiture bill. Considering the few spots carried by NBC, we cannot conclude that it failed to fulfill its obligations under the fairness doctrine.

51. We reach a similar result in connection with ABC's programming. ABC aired the Texaco ad only three times while presenting a considerable amount of pro-divestiture discussion.

52. The question of the reasonableness of WTOP's position is more complex. One reason for this is that rather than broadcasting a handful of Texaco spots as ABC and NBC, it aired 53 spots comprising 41 minutes of anti-divestiture programming. As to the broadcast of contrasting views, WTOP submits references to seven individual CBS network news reports which it carried as a CBS affiliate station.

53. In its September 16 letter referred to earlier, WTOP maintains that it has not asserted "that if the Texaco commercial triggered a fairness doctrine obligation, its carriage of CBS news reports discharged that obligation [but rather] . . . that its treatment of the divestiture issue and energy matters generally has been fairly and properly determined by its bona fide news and programming judgment, taking into account community needs and interests, . . ." If we are correct in concluding from WTOP's statements that it has pro-

duced no programming and that it apparently stops short of asserting that the CBS news items are in themselves adequate means of presenting contrasting views to those included in the Texaco ads, we must conclude that it has yet to fulfill its fairness obligations in the matter. For if it acknowledges that it carried over 40 minutes of Texaco ads which we believe must reasonably be considered to constitute 40 minutes of anti-divestiture programming over a period of three and a half months, without affording a reasonable opportunity for the presentation of contrasting views, it cannot at the same time claim that it has acted reasonably. In specific terms, the information submitted in this matter indicates that WTOP has presented 53 individual Texaco ads comprising over 40 minutes of program time in which a partisan viewpoint on divestiture was presented. In contrast, WTOP submits that it has carried seven CBS news reports, totaling approximately five minutes, according to Energy Action, which included discussion of pro-divestiture views. Copies of the transcripts of these reports reveal that these seven discussed this issue in general terms, reporting the progress of divestiture legislation.[7] Considering the disparity between the amount of anti-divestiture and pro-divestiture programming and the frequency of broadcasts in which one viewpoint was advocated over WTOP, we are unable to conclude that WTOP has reasonably fulfilled its fairness obligations.

54. WTOP asserts that its coverage (or lack of coverage) of divestiture is determined "by its news and programming judgment, taking into account community needs and interests." Thus, WTOP's present position is that if, in its editorial judgment, it concluded that divestiture does not warrant specific programming, it is within its discretion to decide not to present anything on divestiture. Generally, it is true that the decision on whether to cover a particular issue is a decision for the licensee to make. (cf. *Representative Patsy Mink et al.* v. *WHAR*, 59 FCC 2d 987 (1976)). However, WTOP, by its presentation of the Texaco ads on 53 separate occasions, has already broadcast a significant amount of anti-divestiture programming and, therefore, it is beyond that point of deciding for the first time whether or not to enter into a discussion of divestiture. It has already incurred the obligation to afford a reasonable opportunity for the presentation of opposing views. Since, as stated above, WTOP has failed to afford such opportunity, it appears to have failed to fulfill its obligations under the fairness doctrine.

55. Since it is apparent that this issue is presently controversial and of public importance, more programming to fulfill the obligation of presenting a balance of opinion on this issue would appear to be necessary. Therefore, WTOP is requested to advise the Commission within ten days of the release of this ruling as to how it intends to meet this obligation under the fairness doctrine.

56. Accordingly, in view of the above, Energy Action's complaint is hereby DENIED to the extent that it concerns ABC and NBC, and is

[7] For the record, of the CBS programs cited by WTOP one stated that divestiture legislation would not probably pass through Congress; one reported on a Treasury Department study adverse to divestiture; one balanced the pro-divestiture views of Senator James Abourzek with the anti-divestiture views of John Tower; one mentioned briefly the views on divestiture of Senator Birch Bayh and Jimmy Carter; and one talked of a possible filibuster of the measure and possible Presidential veto if it passes. Of these, only one actually discussed the essence of the bill and another presented arguments in favor of passage.

GRANTED in connection with respect to WTOP to the extent set forth herein.

FEDERAL COMMUNICATIONS COMMISSION,*
VINCENT J. MULLINS, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER MARGITA E. WHITE

In explaining the application of the fairness doctrine to the broadcast of paid announcements in its *Fairness Report*, 48 FCC 2d 1 (1974), the Commission stated:

> . . . (W)hat we are really concerned with is an obvious participation in public debate and not a subjective judgment as to the advertiser's actual intentions. Accordingly, we expect our licensees to do nothing more than make a reasonable, common sense judgment as to whether the "advertisement" presents a meaningful statement which obviously addresses, and advocates a point of view on, a controversial issue of public importance.

While some objective standards can be applied to determine what constitutes a controversial issue, the judgment as to whether an institutional advertisement addresses such an issue in an obvious, meaningful and substantive manner is even more subjective. That is why the Commission wisely has recognized that "individual licensees may well reach differing conclusions concerning the same advertisement" and has held that "we will, of course, review these judgments *only* to determine their *reasonableness and good faith* under the particular facts and circumstances presented and will not rule against the licensee unless the facts are so clear that the only reasonable conclusion would be to view the 'advertisement' as a presentation on one side of a specific public issue." *Fairness Report, supra,* emphasis added.

Although the Commission has made a persuasive case for identifying the Petroleum Industry Competition Act of 1976 as a controversial issue of public importance, I do not agree that the Texaco advertisement in question presents a meaningful, obvious or substantial statement on the issue of divestiture. But it is precisely because this is a subjective judgment that the Commission also has the burden of determining whether the licensee has made a reasonable, common sense and good faith judgment. I believe the Commission has failed to meet that burden and, in fact, has chosen to give more weight to the advertiser's alleged intent than to WTOP's considerable effort to ensure that the advertisement was reconstituted to satisfy its own judgment that it did not advocate a viewpoint on a controversial issue. Therefore, I dissent.

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* See attached dissenting Statement of Commissioner White.

INTERNAL REVENUE SERVICE JURISDICTION

Exhibit 123: Article 143 of Treasury Regulations 33

TREASURY DEPARTMENT
UNITED STATES INTERNAL REVENUE

U.S. Office of internal revenue,

REGULATIONS NO. 33
(REVISED)

GOVERNING THE COLLECTION OF THE

INCOME TAX

IMPOSED BY THE ACT OF SEPTEMBER 8, 1916
AS AMENDED BY THE ACT OF OCTOBER 3, 1917

ARTICLE 143



WASHINGTON
GOVERNMENT PRINTING OFFICE
1918

Art. 143. Lobbying expenses.—Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, and contributions for campaign expenses are held not to be an ordinary and necessary expense in the operation and maintenance of the business of a corporation, and are therefore not deductible from gross income in arriving at the net income upon which the income tax is computed. (T. D. 2137.)

33-291 O - 78 - 113

Exhibit 124: Article 562 of Treasury Regulations 45

TREASURY DEPARTMENT
UNITED STATES INTERNAL REVENUE

REGULATIONS 45

RELATING TO THE

INCOME TAX

AND

WAR PROFITS AND EXCESS PROFITS TAX

UNDER THE

REVENUE ACT OF 1918

WITH ADDENDA

CONTAINING ALL TREASURY DECISIONS TO DECEMBER 2, 1919

ARTICLE 562

57
1339

WASHINGTON
GOVERNMENT PRINTING OFFICE
1920

ART. 562. **Donations.**—Donations made by a corporation for purposes connected with the operation of its business, when limited to charitable institutions, hospitals or educational institutions conducted for the benefit of its employees or their dependents, are a proper deduction as ordinary and necessary expenses. Donations which legitimately represent a consideration for a benefit flowing directly to the corporation as an incident of its business are allowable deductions from gross income. For example, a street railway corporation may donate a sum of money to an organization intending to hold a convention in the city in which it operates, with the reasonable expectation that the holding of such convention will augment its income through a greater number of people using the cars. Expenses incurred in advertising and promoting the sale of liberty bonds and war savings stamps over the corporation's name are deductible. Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

Exhibit 125: *Los Angeles and Salt Lake Railroad Co.* v. *Commissioner,* 18 B.T.A. 168 (1929) [1]

LOS ANGELES & SALT LAKE RAILROAD CO., PETITIONER, *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Docket No. 21741. Promulgated November 11, 1929.

1. An amount paid by the petitioner in 1920 to the Association of Railway Executives, of which it was a member, to cover the petitioner's share of an advertising campaign carried on by the association, *held* to be deductible from gross income as an ordinary and necessary business expense.

2. The respondent's determination as to the amount of income realized by the petitioner from the settlement made by it and the Director General of Railroads for materials and supplies taken over by the Director General from the petitioner, sustained.

Henry W. Clark, Esq., and *Harry J. Gerrity, Esq.*, for the petitioner.

R. W. Wilson, Esq., for the respondent.

This proceeding is for the redetermination of a deficiency in income tax asserted by the respondent for the year 1920 in the amount of $9,912.84. The petitioner alleges that the respondent erred:

(1) In including in the petitioner's income the amount of $12,782.16, representing donations of property or labor by corporations or individuals for the construction of spur tracks and sidings which became the property of the petitioner.

(2) In refusing to allow the petitioner a deduction in the amount of $641.40, as an allowance for depreciation of a certain wood-preserving plant.

(3) In computing the tax to be borne by the petitioner at the rate of 10 per cent instead of computing it at 9⅔ per cent, and leaving ⅓ of one per cent to be borne by the Director General of Railroads as his share of the tax liability for January and February, 1920.

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[1] Case interprets article 562 of regulations 45.

(4) In disallowing as a deduction from gross income the amount of $2,134.06, representing a portion of an assessment paid by the petitioner in 1920 to the Association of Railroad Executives.

(5) In refusing to eliminate from the petitioner's income the amount of $8,717.43, representing certain items charged to the petitioner's "Transportation and Investment" account.

(6) In adding to the petitioner's income the amount of $458,219.88 on account of property returned to the petitioner by the Director General of Railroads at the end of the period of Federal control.

At the hearing counsel for the respondent conceded the errors claimed by the petitioner in assignments 1, 2, and 3, and the petitioner withdrew assignment of error 5, thus leaving for decision only the questions raised by assignments 4 and 6.

FINDINGS OF FACT.

The petitioner is a corporation with its office address at 120 Broadway, New York City. It is and was during the year 1920 engaged in operating a railroad between Los Angeles, Calif., and Salt Lake City, Utah.

During the year 1920, and for a number of years prior thereto, there was an organization known as the Association of Railway Executives, which was an association of railroad corporations, through their chief executives, owning the greater part of the railroad mileage of the United States. Its functions were conferences and cooperation with respect to matters of common interest to the railroads. The railroads were represented generally in such matters by committees or agents. The petitioner was a member of the association.

The Association of Railway Executives was organized in 1914, under another name, for the purpose of representing the railroad corporations generally in matters of common interest, but particularly and immediately in dealing with a situation resulting from a substantial and alarming decline in railroad credit. A committee of the association conferred with President Wilson in 1914, with the result that the President issued a public statement calling the attention of the country to the necessity of sustaining railroad credit and helping the railroads in every possible way, whether by private cooperative methods or by governmental agencies, and characterising the existing situation as an extraordinary emergency. This was followed by a joint resolution of Congress approved July 30, 1916, appointing a joint committee, known as the Newlands Committee, to make a comprehensive study of the whole transportation question. The association was active in presenting to this joint committee the views of the railroads as to conditions affecting railroad credit and the appropriate remedy therefor.

During the period of Federal control the association represented the common interests of the railroad corporations in respect of their properties which had been taken over by the Government, conducted through its representatives the negotiations which resulted in the standard form of Federal control contract, and generally represented the common interests of the railroad corporations upon questions and matters arising between them and the Railroad Administration. During the Federal control period the association also took over the support and maintenance of certain preexisting organizations functioning in the interest of the railroads generally, and organized and supported new agencies in lieu of former organizations which had become agencies of the Railroad Administration, viz: The Bureau of Railway Economics, the Presidents' Conference Committee on Federal Valuation of Railroads, the Railway Corporate Accounting Conference, and the Railroad Corporate Engineers Association. During the year 1919 the association coordinated with said agencies and exercised a general leadership and control of all common activities in behalf of the railroad corporations. It dealt with all the practical problems with which the corporations were confronted, and was in special charge of railroad credit generally, and the problem of providing revenues adequate to enable the railroads to furnish the transportation facilities and service needed by the public.

It was the practice of the association to raise funds to defer its expenses by assessments upon the member railroads, which were usually made annually. In October, 1919, the standing committee of the association voted an assessment upon the member railroads in the amount of $1,600,000, and the chairman of the association issued under date of November 1, 1919, a call for payment thereof, one-half immediately and one-half on certain dates in 1920. The purposes of the assessment were officially stated to be to meet the cost for the year 1920 of advertising and publicity, $1,000,000; Bureau of Railway Economics, $90,000; Railway Corporate Engineers Association, $10,000; Railroad Corporate Accounting Conference, $10,000; Presidents' Conference Committee on Federal Valuation, $200,000; general and legal expenses of the association, $290,000. The appropriation of $1,000,000 for advertising and publicity was based upon a recommendation of a committee, which recommendation was distributed among the member railroads as an enclosure with the notification of the assessment. Pursuant to this assessment the petitioner paid to the association $3,414.50 in 1919 and $3,415 in 1920. These amounts were charged to operating expenses under the head of "General Expenses," and were deducted in computing net income.

The association, following the making of said assessment, conducted an advertising and publicity campaign consisting of the publication of a series of eight advertisements from the middle of December, 1919, until the middle of February, 1920, at intervals of about a week, in substantially all of the daily newspapers published in the United States printed in English, and in a large number of weekly newspapers and in some farm journals and other magazines. These advertisements were prepared by publicity experts, and each one was published throughout the United States in the same text and with the same cuts and ornamental matter.

The first of said advertisements was addressed "To the American People," and had appended to it the names and official designations of the chairman and general counsel of the Association of Railway Executives and of 85 railroad officers. The text of this advertisement was as follows:

It is the declared purpose of the United States Government to restore the railroads at an early date to the control of their owners.

The Association of Railway Executives represents those upon whom at that time responsibility will again rest for the prompt and successful movement of the country's commerce.

Those constituting this association are keenly conscious of their accountability to the public.

They have accordingly determined to present as fully as they can, the fundamental facts and considerations which they themselves must face in their efforts to provide satisfactory railroad service.

It is hoped to engage the interest of the whole American people, whose welfare is so vitally dependent upon adequate transportation.

The country can grow only as the railroads grow. The railroad problem must be solved—and solved rightly and soon—if our country is to prosper.

It is to promote that prosperity—permanently and in the interest of the whole people—that railroad executives will present to the public the situation as they see it.

Each of the seven other advertisements contained the statement that it was published by the Association of Railway Executives. These seven advertisements, except for a brief text purporting to be a quotation from some public official or commission or well known private individual were as follows:

SECOND ADVERTISEMENT.—Ask any doughboy who was "over there" and he will tell you that American railroads are the best in the world.

He saw the foreign roads—in England and France, the best in Europe—and in other Continental countries—and he knows.

The part railroads have played in the development of the United States is beyond measure.

American railroads have achieved high standards of public service by far-sighted and courageous investment of capital and by the constant striving of managers and men for rewards for work well done.

We have the best railroads in the world—we must continue to have the best. But they must grow.

To the $20,000,000,000 now invested in our railroads, there will have to be added in the next few years, to keep pace with the nation's business, billions more for additional tracks, stations and terminals, cars and engines, electric power houses and trains, automatic signals, safety devices, the elimination of grade-crossings—and for reconstruction and engineering economies that will reduce the cost of transportation.

To attract to the railroads in the future the investment funds of many thrifty citizens, the directing genius of the most capable builders and managers, and the skill and loyalty of the best workmen—in competition with other industries bidding for capital, managers and men—the railroad industry must hold out fair rewards to capital, to managers, and to the men.

American railroads will continue to set world standards and adequately serve the Nation's needs if they continue to be built and operated on the American principle of rewards for work well done.

THIRD ADVERTISEMENT: WORK MORE—PRODUCE MORE—SAVE MORE.—But we can't continue increasing our production unless we continue increasing our railroad facilities.

The farms, mines and factories cannot increase their output beyond the capacity of the railroads to haul their products.

Railroads are now near the peak of their carrying capacity.

Without railroad expansion—more engines, more cars, more tracks, more terminals—there can be little increase in production.

But this country of ours is going to keep right on growing—and the railroads must grow with it.

To command in the investment markets the flow of new capital to expand railroad facilities—and so increase production—there must be public confidence in the future earning power of the railroads.

The nation's business can grow only as fast as the railroads grow.

FOURTH ADVERTISEMENT.—The old-time pack-bearer could carry a hundred pounds ten miles a day.

The railroad is the modern pack-bearer. For every employee it carries 2,000 times as much.

Back of each railroad worker there is a $10,000 investment in tracks and trains and terminals, with steam and electricity harnessed like a great beast of burden.

Without this mighty transportation machine the railroad worker could do no more than the old-time packer. But with it he is enabled to earn the highest railroad wages paid in the world, while the country gains the lowest-cost transportation in the world.

The modern railroad does as much work for half a cent as the pack-bearer could do for a full day's pay.

The investment of capital in transportation and other industries increases production, spreads prosperity and advances civilization.

To enlarge our railroads so that they may keep pace with the Nation's increasing production, to improve them so that freight may be hauled with less and less human effort—a constant stream of new capital needs to be attracted.

Under wise public regulation the growth of railroads will be stimulated, the country will be adequately and economically served, labor will receive its full share of the fruits of good management, and investors will be fairly rewarded.

FIFTH ADVERTISEMENT.—The successful farmer raises bigger crops and cuts down costs by investment in labor-saving machinery.

Good prices for the farmers' crops encourage new investment, more production and greater prosperity.

But the success of agriculture depends on the growth of railroads—the modern beasts of burden that haul the crops to the world's markets.

The railroads—like the farms—increase their output and cut down unit costs by the constant investment of new capital.

With fair prices for the work they do, the railroads are able to attract new capital for expanding their facilities.

Rates high enough to yield a fair return will insure railroad growth, and prevent costly traffic congestion which invariably results in poorer service at higher cost.

National wealth can increase only as our railroads grow.

Poor railroad service is dear at any price. No growing country can long pay the price of inadequate transportation facilities.

SIXTH ADVERTISEMENT.—The war could not have been won without railroads. Transport—by rail and sea—is an indispensable arm of national defense.

Carrying capacity, from the wheat fields and the mines and the steel mills to the front lines in France, was the measure of our power in war.

And it is the measure of our power in peace.

Industrial expansion—increasing national prosperity—greater world trade—are vitally dependent on railroad growth.

The limit to the productive power of this country is the limit set by railroad capacity to haul the products of our industry.

The amount of freight carried on American rails *doubled* from 1897 to 1905—since that year it has doubled *again*.

It will double *still again*.

To haul this rapidly growing traffic the country must have more railroads—more cars and engines—more tracks and terminals.

Sound national legislation, broad-visioned public regulation, will encourage the expansion of railroads, without which the nation cannot grow.

SEVENTH ADVERTISEMENT—CARRYING A TON A MILE FOR LESS THAN A CENT.—Freight rates have played a very small part in the rising cost of living.

Other causes—the waste of war, under-production, credit inflation—have added *dollars* to the cost of the necessities of life, while freight charges have added only cents.

The average charge for hauling a ton of freight a mile is less than a cent.

A suit of clothing that sold for $30 before the war was carried 2,265 miles by rail from Chicago to Los Angeles for 16½ cents.

Now the freight charge is 22 cents and the suit sells for $50.

The cost of the suit has increased *20 dollars*.

The freight on it has increased only *5½ cents*.

Other transportation charges enter into the cost of the finished article—carrying the wool to the mills and the cloth to the tailors—but these other charges amount to but a few cents more.

The $10 pair of shoes that used to sell for $5.00 goes from the New England factory to the Florida dealer for a freight charge of 5⅔ cents—only one cent more than the pre-war rate.

Beef pays only *two thirds of a cent* a pound freight from Chicago to New York.

American freight rates are the lowest in the world.

EIGHTH ADVERTISEMENT—THEY COULDN'T BE BUILT NOW FOR TWICE $71,000.—When the talk turns from politics to railroads, and the traveler with the cocksure air breaks in with, "Theres an awful lot of 'water' in the railroads", here are some hardpan facts to give him:

American railroads have cost $80,000 a mile—roadbed, structures, stations, yards, terminals, freight, and passenger trains—everything from the great city terminals to the last spike.

A good concrete and asphalt highway costs $36,000 a mile—*just a bare road*, not counting the cost of culverts, bridges, etc.

Our railroads couldn't be duplicated today for $150,000 a mile.

They were capitalized for only $71,000 a mile—much less than their actual value. *Seventy-one thousand dollars today will buy* one locomotive.

English railways are capitalized at $274,000 a mile; the French at $155,000; German at $132,000; even in Canada (still in pioneer development) they are capitalized at $67,000 a mile. The average for all foreign countries is $100,000.

Low capitalization and high operating efficiency have enabled American railroads to pay the highest wages while charging the lowest rates.

The association expended in said advertising and publicity campaign, $714,871.34 for advertising and $113,647.06 for the services of publicity experts and artists and for other expenses incidental to the campaign, a total of $828,518.40, and the balance of the $1,000,000 appropriated for the campaign was used for the general purposes of the association. No funds of the association were expended for lobbying or were used in any way to affect the action of the Congress of the United States, except through the influence of general public opinion.

The conditions, actual and contemplated, under which said advertising and publicity campaign was undertaken, were as follows: The railroads of the country had been under Federal control since December, 1917. It was contemplated that in the near future they would be returned to their owners for private operation. The Railroad Administration had sought to operate all of the railroad properties as a unit, with the result that the rolling stock of the several railroads was scattered throughout the United States without regard to its ownership. Federal control, in the opinion of the officers of the several railroad corporations, had resulted in demoralization of the working forces and neglect of proper maintenance. Labor costs were high and were believed to be excessive. In fact, the number of railroad employees was reduced from 1,913,422 in 1919 to 1,659,513 in 1921, and by a series of orders of the Labor Board, the first of which became effective on July 1, 1921, reductions in wages were made which effected an estimated saving in labor costs of $587,000,000 per year. The managements of the railroads believed that in view of the conditions resulting from Federal control they would

be confronted with great difficulties in resuming private operation. They believed that they could not properly operate their properties and furnish the transportation service the public needed unless the nature of the problems confronting them and the efforts they were making to meet their transportation responsibilities were understood by the public, and unless they could receive the cooperation and support of public opinion. An hostile public opinion tends substantially to increase the cost of railroad operation through labor costs and in many other respects, and it was essential, in the opinion of the responsible officers of the railroad corporations, that they explain their problems to the public in the hope of creating an informed body of public opinion favorable to the railroads and sympathetic toward their problems.

It was known at the time said advertising and publicity campaign was undertaken that the Congress intended to enact legislation for the purpose of returning the railroads to private operation and dealing with the regulatory policies under which the railroad properties were to be operated in the future. It was believed by the managements of the railroads that such legislation, if adopted without knowledge and appreciation of the problems confronting the railroad corporations, might add greatly to the cost of operation and impair the power of the railroads to furnish adequate transportation service.

From December 31, 1917, to and including February 29, 1920, the railroad properties of the petitioner were possessed, used, controlled and operated by the United States through the United States Railroad Administration, under the direction of the Director General of Railroads, under and pursuant to the Proclamation of the President of the United States dated December 26, 1917.

The Director General and the petitioner entered into a contract dated March 10, 1919, fixing the compensation to be paid the petitioner for the use of its properties and embodying other terms and conditions governing said Federal operation and use. Said contract provided, among other things, that the petitioner's system of transportation of which the United States had taken possession, use, control and operation, included all material and supplies on hand at midnight of December 31, 1917, and all of the petitioner's material and supplies at that time were taken over by the Director General. Said material and supplies had a total book value or cost according to the petitioner's books of account of $2,647,519.92.

Said contract entered into by the petitioner and the Director General of Railroads provided, by section 9 (b) thereof, that:

> At the end of Federal control the Director General shall return to the Company all uncollected accounts received by him from the Company and also materials and supplies equal in quantity, quality, and relative usefulness to that of the materials and supplies which he received and to the extent that

the Director General does not return such materials and supplies he shall account for the same at prices prevailing at the end of Federal control. To the extent that the Company receives materials and supplies in excess of those delivered by it to the Director General it shall account for the same at the prices prevailing at the end of Federal control, and the balance shall be adjusted in cash.

The 1917 inventory, that is, the material and supplies taken over from the petitioner by the Director General, included materials and supplies that were replaced in kind at the end of Federal control, and material and supplies for which cash settlement was made by the Director General. The book value of the 1917 inventory was not segregated to ascertain the book value separately of the material and supplies replaced in kind and of the material and supplies for which cash settlement was made.

At the end of Federal control on March 1, 1920, the Director General returned to the petitioner material and supplies having an aggregate book value or cost, according to the material and supplies accounts of the Director General, of $2,365,336.89. The Director General also paid the petitioner $740,402.91 in full settlement of the Government's obligation to pay for material and supplies taken over from the petitioner and not replaced in kind. The material and supplies turned over to the petitioner on March 1, 1920, did not in their entirety represent replacements in kind, but included excess material and supplies for which the petitioner was charged in the final settlement at the market prices then prevailing. Neither the book value nor the market value of the replacement material and supplies was separately ascertained. The book value of the excess material was more than $459,000.

The respondent, upon audit of the petitioner's income-tax return for 1920, disallowed as a deduction from gross income ten-sixteenths or $2,134.06 of said amount of $3,415, paid by the petitioner in 1920 to the Association of Railway Executives as above set forth, and he also determined that the petitioner realized a profit of $458,219.88 on the settlement between it and the Director General for material and supplies, which profit he computed as follows:

Value of material and supplies turned over to the Director General of Railroads, Jan. 1, 1918		$2,647,519.92
Less amount allowed in final settlement for net shortage of units	$813,761.57	
Adjustments of prices of materials and supplies used in additions and betterments	73,358.68	
		740,402.91
		1,907,117.01
Value of material and supplies taken over from the Director General of Railroads, Feb. 29, 1920		2,365,336.89
Net increase		458,219.88

The respondent also made other adjustments in the petitioner's income for 1920 which are not material here, and determined that there is a deficiency in tax in the amount of $9,912.84.

OPINION.

MARQUETTE: The first of the issues that we are called upon to consider in this proceeding is whether the respondent erred in disallowing as a deduction from gross income for 1920, ten-sixteenths, or $2,134.06, of the amount of $3,415 paid by the petitioner to the Association of Railway Executives. This question was before the Board in *Great Northern Railway Co.*, 8 B. T. A. 225; *Texas & Pacific Railway Co.*, 9 B. T. A. 365; and *Western Maryland Railway Co.*, 12 B. T. A. 889. Under the pleadings in those cases the burden was upon the respondent to show that the petitioners were not entitled to the deductions they had taken, and, the respondent having failed to meet the burden, our decisions were in favor of the petitioners. This is, therefore, the first proceeding in which the question is presented for determination on its merits.

It appears from the evidence that the Association of Railway Executives is an association of railroad corporations, acting through their chief executives, formed for the purpose of promoting the welfare of the railroads and of representing and acting for them in matters of common interest. These activities were supported by the member railroads through contributions or assessments, and it is the assessment paid by the petitioner in 1920 which is the subject matter of this issue.

The respondent has not disallowed as a deduction from gross income the entire amount of the assessment, but only that part thereof which was used or intended to be used by the association in the advertising and publicity campaign described in the findings of fact. He contends that the disallowance is proper under article 562 of Regulations 45, which provides, among other things, that:

> Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

It is clear that the purpose of the advertising and publicity campaign conducted by the association was to create a body of intelligent public opinion favorable to the railroads of the country, and to avert the enactment of legislation unfavorable or injurious to them. The campaign was made by carrying in the newspapers of the country a series of advertisements setting forth the services rendered by the railroads, the problems confronting them, and suggesting sound legislation and wise regulation.

The regulation quoted above contains no definition of the words "lobbying" and "propaganda," as they are used therein. These words are often employed to convey a sinister meaning and to suggest illegitimate activities or illegal and unethical methods. However, all activities which may properly be considered as coming within the scope of these terms are not illegal.

In *Independent Brewing Co.*, 4 B. T. A. 870, the petitioner was a member of brewery associations organized and legally conducted for the purpose of furthering the interests of its members. In 1919 the petitioner paid dues to the Western Pennsylvania Brewers Association, the Westmoreland County Association, and the United States Brewers Association. In addition, it paid to the last-named association $8,340.16 as its pro rata share of the fees of attorneys employed by the United States Brewers Association to test the constitutionality of the prohibition amendment to the Constituion. In holding that the amounts paid by the petitioner to the several brewery associations, including its share of the attorneys' fees, were deductible from its gross income, we said:

> We think that the amounts paid constituted ordinary and necessary expenses. All of the brewers associations mentioned were, so far as the record indicates, performing lawful services for their members and such services were in furtherance of the members' business. It does not appear from the record that the taxpayer was under any legal obligation to make a contribution for the attorneys' fees, but it was perfectly legal for the brewers' association to test the constitutionality of the prohibition amendment and the payment by the taxpayer of its proportion of the fees was an ordinary and necessary expense of doing business.

In *George Ringler & Co.*, 10 B. T. A. 1134, the petitioner, a manufacturer of beer, contributed to the Lager Beer Board of Trade to cover the expenses of employing counsel to test the constitutionality of the prewar prohibition legislation and to carry on a campaign against assertions made by the Anti-Saloon League that the brewers were wasting food products. In that case we said:

> The money paid to the Lager Beer Board of Trade was expended by it and the United States Brewers Association for the benefit of the petitioner. We are of the opinion that the expenditure was for a purpose coming within the provisions of the taxing act allowing a deduction for ordinary and necessary expenses paid or incurred in carrying on a trade or business.

In *G. T. Wofford*, 15 B. T. A. 1225, the petitioner was engaged in buying and selling gasoline, oils, greases, and benzol, and in selling a motor fuel consisting of benzol and gasoline and known as Woco Pep. Because of the ingredients of Woco Pep the standard test for gasoline could not be applied to it. In 1919 or 1920 the Governor of Alabama called a special session of the Legislature, one of the purposes of such session being the enactment of legislation covering motor fuels and gasoline, with provision for an inspection

fee or charge. The petitioner knew that an inspection bill fixing standards of motor fuel for the State of Alabama, based on tests of high-grade gasoline, would prohibit the sale of Woco Pep. Realizing that if a bill of the kind proposed were adopted by the State of Alabama he would be put out of business, the petitioner employed an attorney for the purpose of forestalling, to the best of his ability, the proposed adverse legislation. The attorney drafted an inspection bill containing regulations and provisions that would permit the sale of Woco Pep in Alabama, and he appeared before the Governor and the Attorney General of Alabama in behalf of the bill drafted by him. He also appeared before the several committees of the Legislature to which the bill drafted by him was referred, and explained the bill and advocated its passage. The petitioner paid the attorney $7,750 for his services. In holding that the amount so paid was an ordinary and necessary business expense and deductible in computing net income this Board said:

> A special session of the Legislature of Alabama had been called by the Governor and one of the purposes of such session was the passage of a bill covering motor fuel and gasoline, with provision for an inspection fee or charge. Petitioner knew that an inspection bill fixing the standards of motor fuel for the State of Alabama based on tests of high-grade gasoline would prohibit the sale of Woco Pep, which was the principal product of his business and, in order to keep his business alive, he employed an attorney to protect his interest in connection with the legislation. The expense was an ordinary and necessary one and the services which the attorney was employed to render were entirely legitimate. The deduction is allowed.

We are unable to perceive any vital difference between the situations in the cases cited and that which gives rise to the present inquiry. There is no difference in principle between an expenditure of money to invalidate legislation already enacted and an expenditure to avert or forestall the enactment of legislation, assuming that in each instance the means or methods employed are legitimate. Nor do we see any distinction between an undertaking by an individual or corporation to avert or defeat, by direct action, legislation unfavorable to or destructive of his or its business, as in the *Wofford* case, and a joint undertaking by a number of individuals or corporations to avert or defeat, by indirect action, legislation unfavorable to or destructive of their business. We are of opinion that the expenditure in question was for a legitimate purpose vitally connected with the welfare and for the benefit of the petitioner's business, that it was made in a legal and ethical manner, and that it was an ordinary and necessary expense of the petitioner's business within the meaning of the revenue act then in force and should be allowed as a deduction from gross income.

The other issue that we are called upon to decide relates to the amount of income, if any, that the petitioner realized upon the ma-

terial and supplies settlement made by and between it and the Director General of Railroads. The respondent has determined that the profit on the settlement was $458,219.88, which he computed in the manner and on the basis set forth in the findings of fact. It is the contention of the petitioner that in the "1920 Inventory," which means all the material and supplies delivered by the Director General to the petitioner at the end of Federal control, there was included "Excess Material," that is, material which was in excess in physical quantity of material of like kind in the "1917 Inventory," and for which the petitioner was required to pay at the market price prevailing at the end of Federal control; that excluding from the "1920 Inventory" the value of the "Excess Material," which was more than $459,000, the remaining value of the "1920 Inventory" would not exceed the book value of that part of the "1917 Inventory" which was replaced in kind, and, that therefore, the petitioner realized no profit from the settlement. The petitioner also contends that even if the "1920 Inventory" be considered as wholly "Replacement Material," the increased value does not constitute taxable income or profit, citing *Indiana Harbor Belt Railroad Co.*, 16 B. T. A. 279. Under the facts as disclosed by the record herein the petitioner's contention as to this issue is not well taken. The situation is entirely different from that found in *Indiana Harbor Belt Railroad Co.*, *supra*, for in this case a cash settlement is involved which was not present in that case. Nor does the fact that the "Excess Material" is included in the "1920 Inventory" affect the result. It is true that the "Excess Material" should be excluded from the "1920 Inventory," but the amount of the "Excess Material" should be added to the cash settlement to reflect the "Short Material" for which the Director General accounted to the petitioner at the prices prevailing at the end of Federal control. This is obvious from the contract, which provides that the Director General shall account for "Short Material" and the petitioner pay for "Excess Material" at the prices prevailing at the end of Federal control, and that the "balance shall be adjusted in cash." Making this adjustment, the "Replacement Material," plus the value of the "Short Material," computed at prices prevailing at the end of Federal control, would still be in the total amount of $3,105,739.89.

The profit or loss from the settlement can be computed as follows: The items of "Replacement Material" and their cost or book value, should be excluded from the "1917 Inventory," but the cost to the petitioner of the "Excess Material" should be added to the amount of the cash settlement, and the difference between the "1917 Inventory" thus reduced and the sum of the cash settlement and "Excess Material" is profit or loss, depending upon whether the

sum of the cash settlement and the "Excess Material" is greater or less than the reduced "1917 Inventory."

The respondent has determined that the petitioner realized a profit of $458,219.88 from the settlement in question. The burden of showing the respondent is in error is upon the petitioner. It has failed to meet that burden and we have before us no evidence that would justify us in disturbing the respondent's determination. The "Replacement Material" and the "Excess Material" were not segregated and separately inventoried, and we are not informed as to whether the "Replacement Material" is included in the "1920 Inventory" at a greater or a less value than in the "1917 Inventory" or is included at the same value in both inventories. Excluding from the "1920 Inventory" the value of the "Excess Material" as suggested by the petitioner, but adding the same amount to the cash settlement, the situation, on the record before us, is that the petitioner in 1917 turned over to the Director General material and supplies having a cost or book value of $2,647,519.92 and in 1920 received from the Director General material and supplies and cash having a total cost or value of $3,105,739.80. The excess of the property and cash received at the end of Federal control over the cost or book value of the property turned over to the Director General, was $458,219.88, and to the extent that it was represented by cash it constituted income to the petitioner. *Lehigh & Hudson River Railway Co.*, 13 B. T. A. 1154. The respondent's determination as to this item is approved.

The petitioner's tax liability for 1920 will be recomputed on the basis of this opinion and the agreements as to the other issues made by counsel at the hearing.

Reviewed by the Board.

Judgment will be entered under Rule 50.

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Exhibit 126: *Sunset Scavenger Co.* v. *Commissioner*, 84 F.2d 453 (1936) [1]

SUNSET SCAVENGER CO., Inc., v. COMMISSIONER OF INTERNAL REVENUE.

COMMISSIONER OF INTERNAL REVENUE v. SUNSET SCAVENGER CO., Inc.

No. 7999.

Circuit Court of Appeals, Ninth Circuit.

June 8, 1936.

1. Internal revenue ⇐7(32)

Incorporated association of garbage collectors *held* not exempt from federal income tax as co-operative "farmers', fruit growers', or like associations," since words "like associations," under principal of ejusdem generis, are limited by words "farmers'" and "fruit growers'" to mean only such associations as market agricultural products or purchase supplies and equipment for those engaged in producing agricultural products (Revenue Act of 1926, § 231 (12), 26 U.S.C.A. § 103 note).

2. Internal revenue ⇐25

Circuit Court of Appeals, on review of decision of Board of Tax Appeals, could not consider contention that agreement between members and incorporated association whereby members were to receive all net profits exempted association from income tax, where Board's opinion did not disclose that contention was presented to Board and there was no finding that any such agreement was made.

3. Internal revenue ⇐25

Whether salaries of members of incorporated association of garbage collectors were reasonable, so as to entitle association to deduct such salaries from its net income, *held* fact question on which finding of Board of Tax Appeals was conclusive if supported by any substantial evidence.

4. Internal revenue ⇐25

Finding of Board of Tax Appeals that reasonable salaries for members of incorporated association of garbage collectors, which association was entitled to deduct from its net income, was $3,600 rather than claimed $6,120 per year, *held* supported by substantial evidence (Revenue Act 1926, § 234 (a) (1), 44 Stat. 41).

5. Internal revenue ⇐7(18)

Expenditures made by incorporated association of garbage collectors to avert passage of unfavorable legislation *held* not deductible from association's net income as "ordinary and necessary expenses," in view of administrative regulation prohibiting deduction of money expended for promotion or defeat of legislation and exploitation of propaganda (Revenue Act 1926, § 234 (a) (1), 44 Stat. 41).

[Ed. Note.—For other definitions of "Ordinary Expenses," see Words & Phrases.]

6. Internal revenue ⇐7(18)

Re-enactment of provision of Internal Revenue Act for deduction from corporation's net income of all "ordinary and necessary expenses" *held* to make controlling continued administrative regulation prohibiting deduction of sums expended for lobbying purposes, promotion or defeat of legislation, exploitation of propaganda, and for campaign contributions, in view of ambiguity created by failure of statute to specify what constitutes "ordinary and necessary expenses" (Revenue Acts 1926, 1924, 1921, 1919, § 234 (a) (1), 44 Stat. 41, 43 Stat. 283, 42 Stat. 254, 40 Stat. 1066).

Upon Petitions to Review an Order of the United States Board of Tax Appeals.

Petitions by the Sunset Scavenger Company, Incorporated, and by the Commissioner of Internal Revenue, to review decisions of the Board of Tax Appeals in three consolidated proceedings redetermining deficiencies in taxes imposed by the Commissioner of Internal Revenue.

Decisions affirmed in part, and reversed in part.

James C. Espey, of San Francisco, Cal., for taxpayer.

Robert H. Jackson, Asst. Atty. Gen., and Sewall Key, Joseph M. Jones, and Louise Foster, Sp. Assts. to Atty. Gen., for the Commissioner.

Before WILBUR, MATHEWS, and HANEY, Circuit Judges.

HANEY, Circuit Judge.

Petitions for review of the decisions of the Board of Tax Appeals in three proceedings, which were consolidated before the Board, have been filed by the Commissioner and Sunset Scavenger Company, Inc., hereinafter referred to as petitioner.

* * *

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[1] Case interprets article 562 of Regulations 45, 62, and 65 and article 262 of Regulations 74.

enactment which might reasonably be expected to injure greatly petitioner's business. The expenditures in question were for printing and distributing pamphlets, newspaper advertising, and the hire of speakers to argue advisability of the proposed changes in the law * * * It is true that the purpose of the expenditures was to avert the enactment of legislation unfavorable to petitioner and calculated to damage its business, but the means used, argument addressed to the public, were legitimate * * * We can see in these expenditures by petitioner merely the cost of legitimate efforts made to protect its property and business. Such cost is an ordinary and necessary expense of business * * *"

Under the statute above quoted, petitioner is entitled to make deductions of "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." Article 562 of Regulations 69, promulgated under the Revenue Act of 1926, and Article 262 of Regulations 74, promulgated under the Revenue Act of 1928, provide: "Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income." Article 562 of Regulations 65, promulgated under the Revenue Act of 1924, of Regulations 62, promulgated under the Revenue Act of 1921, and of Regulations 45, promulgated under the Revenue Act of 1918, have the same provision quoted.

The statute makes only two requirements to be met before expenses paid or incurred during the taxable year in carrying on any trade or business may be deducted. Such expenses must be (1) ordinary, and (2) necessary. Welch v. Helvering, 290 U.S. 111, 54 S.Ct. 8, 78 L.Ed. 212. In so far as the statute is concerned, the expenses under discussion could be deducted if they met the two requirements mentioned. However, the regulations limit the sweeping terms of the statute by prohibiting the deduction of: (1) Sums of money expended for (a) lobbying purposes, (b) or for the promotion or defeat of legislation, (c) or for the exploitation of propaganda, including advertising other than trade advertising; (2) contributions for campaign expenses. Since the Board specifically found that "the purpose of the

[5] With respect to the remaining issue, arising under the Commissioner's petition for review, petitioner expended a sum of money in 1927 and a further sum in 1929, under circumstances substantially the same. The Board said: "* * * In each of those years ordinances were proposed for

expenditures was to avert the enactment of legislation unfavorable to petitioner," it is clear that the expenditures fall within (1) (b), specified above, and possibly (1) (c), supra, and therefore such expenditures are not deductible under the regulation.

[6] The statute does not attempt to determine what are "ordinary and necessary expenses." The regulation quoted above has determined, we think, that expenditures in the first class, and contributions in the second class, specified above, are not "ordinary and necessary expenses." The Act of Feb. 24, 1919 (40 Stat. 1057, 1066), Revenue Act of 1921 (42 Stat. 227, 254), and the Revenue Act of 1924 (43 Stat. 253, 283), each contained the provision quoted from the Revenue Act of 1926 in identical language. The regulation under each of the acts was identical. Under such circumstances the following, from Massachusetts Mutual Life Ins. Co. v. United States, 288 U.S. 269, 273, 53 S.Ct. 337, 339, 77 L. Ed. 739, is applicable: "This action [of Congress in re-enacting a statute] was taken with knowledge of the construction placed upon the section by the official charged with its administration. If the legislative body had considered the Treasury interpretation erroneous, it would have amended the section. Its failure so to do requires the conclusion that the regulation was not inconsistent with the intent of the statute (National Lead Co. v. United States, 252 U.S. 140, 146, 40 S.Ct. 237, 64 L.Ed. 496; Poe v. Seaborn, 282 U.S. 101, 116, 51 S.Ct. 58, 75 L.Ed. 239; McCaughn v. Hershey Chocolate Co., 283 U.S. 488, 492, 51 S.Ct. 510, 75 L.Ed. 1183; Costanzo v. Tillinghast, 287 U.S. 341, 53 S.Ct. 152, 77 L.Ed. 350), unless, perhaps, the language of the act is unambiguous and the regulation clearly inconsistent with it." See, also, Williams v. Burnet, 61 App.D.C. 181, 59 F.(2d) 357; Simmons Co. v. Commissioner (C.C.A.1) 33 F.(2d) 75.

In the instant case, the statute is ambiguous because it makes no determination of what is or is not an "ordinary and necessary" expense. We believe the regulation to be controlling, and in the manner outlined.

This conclusion is in accord with Old Mission Portland Cement Co. v. Commissioner (C.C.A.9) 69 F.(2d) 676, affirmed on other issues, Old Mission Portland Cement Co. v. Helvering, 293 U.S. 289, 55 S. Ct. 158, 79 L.Ed. 367.

Kornhauser v. United States, 276 U.S. 145, 48 S.Ct. 219, 72 L.Ed. 505, cited by petitioner, does not deal with expenditures made to avert the passage of legislation, and therefore is not in point. Likewise, Lucas v. Wofford (C.C.A.5) 49 F.(2d) 1027, at page 1028, is not applicable because the expenditure was not made "to secure the passage or defeat of any legislation." In G. T. Wofford v. Commissioner, 15 B.T.A. 1225, and Los Angeles & Salt Lake Railroad Co. v. Commissioner, 18 B.T.A. 168, relied on by petitioner, the Board took the view, as it did in this case, that the expenditure must have been for some illegal purpose. In none of these cases is there anything to indicate that the Board considered the effect of the regulations quoted. To uphold the Board's decision would be equivalent to reading something into the regulation which cannot there be found.

We hold that petitioner is not exempt from taxation under the statute quoted; that there is substantial evidence to support the Board's finding that $3,600 is a reasonable sum to be allowed the members for salaries; and that the expenditures made by petitioner to avert the passage of unfavorable legislation may not be deducted.

Affirmed in part, and reversed in part.

Exhibit 127: *Kyne* v. *Commissioner*, 35 B.T.A. 202 (1936) [1]

MRS. WILLIAM P. KYNE, PETITIONER, *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

WILLIAM P. KYNE, PETITIONER, *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Docket Nos. 83302, 83303. Promulgated December 23, 1936.

Amounts expended in promoting legislation which would legalize horse racing in a state are not legal deductions from gross income.

William B. Hornblower, Esq., and *Robert L. Schwerin, C. P. A.*, for the petitioners.

Owen W. Swecker, Esq., for the respondent.

OPINION.

SMITH: These proceedings are for the redetermination of deficiencies in petitioners' income tax for 1932 as follows:

Petitioner	Docket No.	Deficiency
Mrs. William P. Kyne	83302	$3,281.52
William P. Kyne	83303	3,249.52

The proceedings were consolidated for hearing. The only question in issue, which is common to both proceedings, is the right of the petitioners to deduct from gross income certain amounts expended during the taxable year to secure legislation which would legalize horse racing in the State of California.

The petitioners are husband and wife. They resided together in the State of California in 1932 and for that year filed separate income tax returns on the community property basis.

Petitioner William P. Kyne, hereinafter referred to as the petitioner, is general manager of the California Jockey Club and the Riverside Jockey Club of Kansas City, Missouri. He became interested in horse racing in the State of California in 1928. In 1932 he owned a one-third interest in the Tanforan Race Track located near San Francisco, California, which had been in operation for about three years.

From 1928 until 1933 horse racing or betting on horse racing was illegal in the State of California, but was practiced at the Tanforan track under a so-called "option" system. The petitioner was manager of the option department.

In May or June 1932 the petitioner began a campaign to have horse racing legalized in the State of California. Threats of arrest against officers of the Tanforan Race Track were being made at that

[1] Case interprets 262 of Regulations 74 and 77.

time. The petitioner's associates in the Tanforan Race Track refused to cooperate with him in this undertaking and as a result the petitioner, on July 8, 1932, sold his one-third interest in the business for $90,000. He received $40,000 cash and notes for the balance. The petitioner continued his efforts to have horse racing legalized in the state and during the taxable year 1932 expended for that purpose $56,284.85. Of that amount $44,113.71 was his own money and $12,171.14 represented contributions made by others. The bulk of the expenditures was for office rent, printing and stationery, postage, attorneys' fees, radio time, and advertising. A petition to have the question submitted to the people for a vote was circulated and the signatures of about 200,000 registered voters were secured.

As a result of the petitioner's efforts a proposed act to legalize horse racing in the state was submitted to the voters in 1932 and failed by only one-half of one percent of the total vote cast. In the following year, however, a bill to make horse racing legal in the state was passed and became law.

In December 1933 the petitioner secured a permit from the Racing Commission of the State of California and acquired an interest in the California Jockey Club, which operates a race track at Bay Meadows, San Mateo, California.

In their separate income tax returns for 1932 each of the petitioners claimed the deduction of $22,056.86, representing one-half of the said amount of $44,113.71, as an ordinary and necessary business expense of that year. The respondent has disallowed the deduction of these amounts in determining the deficiencies herein.

Section 23 (a) of the Revenue Act of 1932 authorizes the deduction from gross income of "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."

In *Welch* v. *Helvering*, 290 U. S. 111, it was said that allowable deductions from gross income under this provision of the statute must be both "ordinary" and "necessary." The Court there held that the payment of another's debt without legal or other obligation was, in a high degree, "extraordinary" and not within the deductions contemplated by the statute. No less so, we think, are expenditures for the purpose of bringing about the enactment of laws favorable to horse racing.

In *Kornhauser* v. *United States*, 276 U. S. 145, the Supreme Court held that an expenditure directly connected with or which proximately resulted from the taxpayer's business was a deductible business expense under the statute. It is to be noted that at the time the expenditures here were made the petitioner was not engaged in horse racing or, so far as the evidence shows, in any related business

within the State of California. He had sold his interest in the Tanforan Race Track before the expenditures were made and did not acquire an interest in the California Jockey Club race track until some time during the following year. In the light of these facts it can in no wise be said that the expenditures in question were directly connected with or proximately resulted from any business carried on by the petitioner.

The case of *Sunset Scavenger Co.* v. *Helvering*, 84 Fed. (2d) 453, is in point. The court there held, reversing the Board on this issue (31 B. T. A. 758), that expenditures made by the Sunset Scavenger Co. during 1927 and 1929 in printing circulars, newspaper advertising, and employment of speakers to address civic organizations and public gatherings to prevent enactment of certain proposed ordinances which were calculated to damage its business, were not ordinary and necessary business expenses and were not deductible from gross income. In its decision the court relied upon the Commissioner's regulations—article 562 of Regulations 69, promulgated under the Revenue Act of 1926, and article 262 of Regulations 74, promulgated under the Revenue Act of 1928. These regulations provide in part that:

> * * * Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

The same provision is found in article 262 of Regulations 77, promulgated under the Revenue Act of 1932. The quoted provision of the regulations relates to deductions allowable to corporations, but we see no reason why the same rule should not apply to deductions of individuals. In both instances the statute provides for the deduction of the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

In *Adler Co.*, 10 B. T. A. 849, we disallowed the deduction of an expenditure for the purpose of influencing laws favorable to the taxpayer's liquor business. See also *Old Mission Portland Cement Co.* v. *Commissioner*, 69 Fed. (2d) 676; affd., 293 U. S. 289.

The respondent's determination that the expenditures made by the petitioner to bring about the enactment of laws favorable to horse racing in the State of California are not deductible from gross income is sustained.

Judgments will be entered for the respondent.

Exhibit 128: *Textile Mills Securities Corp.* v. *Commissioner*, 314 U.S. 326 (1941) [1]

TEXTILE MILLS SECURITIES CORP. *v.* COMMISSIONER OF INTERNAL REVENUE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 34. Argued November 10, 1941.—Decided December 8, 1941.

1. A Circuit Court of Appeals may be composed of all the circuit judges of the circuit in active service, more than three in number, sitting *en banc*. P. 333.
2. The expenses of lobbying and propaganda paid by an agent employed to secure legislation from Congress authorizing the recovery of German properties seized during the World War under the Trading with the Enemy Act, are not deductible as "ordinary and necessary expenses" of the agent within the meaning of § 23 (a) of the Revenue Act of 1928, construed by Art. 262 of Treasury Regulations 74. P. 335.

117 F. 2d 62, affirmed.

CERTIORARI, 312 U. S. 677, to review a judgment reversing a decision of the Board of Tax Appeals, 38 B. T. A. 623, which had overruled a deficiency assessment based on the disallowance of certain deductions.

[1] Case interprets article 262 of Regulations 74.

Mr. Edmund S. Kochersperger for petitioner.

Mr. Arnold Raum, with whom *Attorney General Biddle*, *Assistant Attorney General Clark*, and *Miss Helen R. Carloss* and *Mr. Samuel H. Levy* were on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case presents two problems: (1) whether a Circuit Court of Appeals may be composed of all the circuit judges of the circuit in active service, more than three in number, sitting *en banc;* (2) whether petitioner may deduct under the Revenue Act of 1928 (45 Stat. 791) certain expenses incurred by it under contracts in connection with the presentation of claims to Congress on behalf of former enemy aliens for the procurement and enactment of amendatory legislation authorizing the payment of the claims. We granted the petition for certiorari because of the public importance of the first problem and the contrariety of the views of the court below (117 F. 2d 62) and judges of the Circuit Court of Appeals for the Ninth Circuit (*Lang's Estate* v. *Commissioner,* 97 F. 2d 867) as respects its solution.

Second: The expenses in question are sought to be deducted as "ordinary and necessary expenses" within the meaning of § 23 (a) of the Revenue Act of 1928. Petitioner, a Delaware corporation, was employed to represent certain German textile interests, whose properties in this

country had been seized during the World War under the provisions of the Trading with the Enemy Act. 40 Stat. 411. Petitioner's employment was made with a view towards procuring legislation which would permit ultimate recovery of the properties. The estimated aggregate value of the properties was $60,000,000. Petitioner was to be compensated on a percentage basis in case it was successful. It, however, was to bear all the costs and expenses. Petitioner launched its campaign. A publicist was retained to arrange for speeches, news items, and editorial comment. Two legal experts were retained to prepare propaganda concerning international relations, treaty rights and the policy of this nation as respects alien property in time of war. The objective of the campaign was accomplished by the passage of the Settlement of War Claims Act of 1928, 45 Stat. 254. Deductions for the amount paid to the publicist and the two lawyers were taken in 1929 and 1930, thereby producing a net loss in each of those years. Pursuant to § 117 of the 1928 Act, the net loss was carried forward two years and applied against income for 1931. The Commissioner disallowed the deductions and determined a deficiency. The Board of Tax Appeals disagreed, holding that there was no deficiency. 38 B. T. A. 623. The Circuit Court of Appeals reversed the Board.

We agree that the expenses in question were not deductible. Art. 262 of Treasury Regulations 74, promulgated under the 1928 Act, was entitled "Donations by corporations" and provided:

"Corporations are not entitled to deduct from gross income contributions or gifts which individuals may deduct under section 23 (n). Donations made by a corporation for purposes connected with the operation of its business, however, when limited to charitable institutions, hospitals, or educational institutions conducted for the benefit of its employees or their dependents are a proper

deduction as ordinary and necessary expenses. Donations which legitimately represent a consideration for a benefit flowing directly to the corporation as an incident of its business are allowable deductions from gross income. For example, a street railway corporation may donate a sum of money to an organization intending to hold a convention in the city in which it operates, with the reasonable expectation that the holding of such convention will augment its income through a greater number of people using the cars. Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income."

If this is a valid and applicable regulation, the sums in question were not deductible as "ordinary and necessary expenses" under § 23 (a), since they clearly run afoul of the prohibition in the last sentence of the regulation.

Plainly, the regulation was applicable. The ban against deductions of amounts spent for "lobbying" as "ordinary and necessary" expenses of a corporation derived from a Treasury Decision in 1915. T. D. 2137, 17 Treas. Dec., Int. Rev., pp. 48, 57–58. That prohibition was carried into Art. 143 of Treasury Regulations 33 (Revised, 1918) under the heading of "Expenses" in the section on "Deductions." [16] Beginning in 1921 the regulation was entitled "Donations." (Art. 562, Treasury Regulations 45.) And in the regulations here in question Art. 262 appeared under § 23 (n), which covered "Charitable and other contribu-

[16] Art. 143 provided: "Lobbying expenses.—Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, and contributions for campaign expenses are held not to be an ordinary and necessary expense in the operation and maintenance of the business of a corporation, and are therefore not deductible from gross income in arriving at the net income upon which the income tax is computed."

tions" by individuals. It assumed that form and content in 1921 and appeared since then without change in all successive regulations.[17] Sec. 23 (n) and § 23 (a) both deal with deductions; and a "donation" by a corporation though not deductible under the former might be under the latter. Art. 262 purports to specify when a certain type of expenditure or donation by a corporation may or may not be deducted as an "ordinary and necessary" expense. The argument that it was not applicable because it was not specifically incorporated under § 23 (a) is frivolous.

Petitioner's argument that the regulation is invalid likewise lacks substance. The words "ordinary and necessary" are not so clear and unambiguous in their meaning and application as to leave no room for an interpretative regulation. The numerous cases which have come to this Court on that issue bear witness to that. *Welch* v. *Helvering,* 290 U. S. 111; *Deputy* v. *du Pont,* 308 U. S. 488, and cases cited. Nor has the administrative agency usurped the legislative function by carving out this special group of expenses and making them non-deductible. We fail to find any indication that such a course contravened any Congressional policy.[18] Contracts to spread such insidious influences through legislative halls have long been condemned. *Trist* v. *Child,* 21 Wall. 441; *Hazelton* v. *Sheckells,* 202 U. S. 71. Whether the precise arrangement here in question would violate the rule of those cases is not

[17] Art. 562, Regulations 62, Revenue Act of 1921; Art. 562, Regulations 65, Revenue Act of 1924; Art. 562, Regulations 69, Revenue Act of 1926; Art. 262, Regulations 74, Revenue Act of 1928.

[18] In the Revenue Act of 1936 (26 U. S. C. § 23 (q), 49 Stat. 1648) Congress specifically provided for deductions of certain contributions by corporations to specified corporations, trusts, funds, or foundations, "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation." And see the Revenue Act of 1938, 26 U. S. C. § 23 (q), 52 Stat. 447.

material. The point is that the general policy indicated by those cases need not be disregarded by the rule-making authority in its segregation of non-deductible expenses. There is no reason why, in absence of clear Congressional action to the contrary, the rule-making authority cannot employ that general policy in drawing a line between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction. The exclusion of the latter from "ordinary and necessary" expenses certainly does no violence to the statutory language. The general policy being clear it is not for us to say that the line was too strictly drawn.

Affirmed.

MR. JUSTICE JACKSON took no part in the consideration or disposition of this case.

Exhibit 129: Article 23(o)–2 of Treasury Regulations 86

U. S. TREASURY DEPARTMENT

BUREAU OF INTERNAL REVENUE

REGULATIONS 86

RELATING TO THE

INCOME TAX

UNDER THE

REVENUE ACT OF 1934

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1935

ART. 23(o)-2. **Donations by corporations.**—Corporations are not entitled to deduct from gross income contributions or gifts which individuals may deduct under section 23 (o). Donations by a corporation for purposes connected with the operation of its business, however, when they are made to charitable institutions, hospitals, or educational institutions and result in a direct benefit to the employees of the corporation or their dependents are a proper deduction as ordinary and necessary expenses. Donations which bear a relationship to the corporation's business and are made with a reasonable expectation of a financial return commensurate with the amount of the donation are allowable deductions from gross income. For example, a street railway corporation may donate a sum of money to an organization intending to hold a convention in the city in which it operates, with the reasonable expectation that the holding of such convention will augment its income through a greater number of people using the cars. Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

Exhibit 130: Article 23(q)–1 of Treasury Regulations 94

U. S. TREASURY DEPARTMENT

BUREAU OF INTERNAL REVENUE

REGULATIONS 94

RELATING TO THE

INCOME TAX

UNDER THE

REVENUE ACT OF 1936

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1936

ART. 23(q)-1. **Contributions or gifts by corporations.**—A corporation is entitled to deduct from gross income for a taxable year beginning after December 31, 1935, contributions or gifts to organizations referred to in section 23(q), whether or not such contributions or gifts constitute business expenses, but only to the extent provided in that section.

Corporations may deduct, for a taxable year beginning after December 31, 1935, to the extent provided by section 23(q), contributions or gifts to organizations referred to in that section, only for the taxable year in which they are actually paid, regardless of when pledged and regardless of whether the books and records of the corporation are kept on the cash receipts and disbursements basis or the accrual basis.

The provisions of the first paragraph of article 23(o)-1, relating to (1) the statement in returns of the name and address of each organization to which a contribution or gift was made and the approximate date and the amount of the contribution or gift, (2) the substantiation of the claims for deductions when required by the Commissioner, and (3) the basis for calculation of the amount of a contribution or gift which is other than money, are equally applicable to claims for deductions of contributions or gifts by corporations under section 23(q).

Donations to organizations other than those referred to in section 23(q) which bear a direct relationship to the corporation's business and are made with a reasonable expectation of a financial return commensurate with the amount of the donation may constitute allowable deductions as business expenses. For example, a street railway corporation may donate a sum of money to an organization (of a class not referred to in section 23(q)) intending to hold a convention in the city in which it operates, with the reasonable expectation that the holding of such convention will augment its income through a greater number of people using the cars. Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

33-291 O - 78 - 115

Exhibit 131: *Luther Ely Smith* v. *Commissioner*, 3 T.C. 696 (1944)

LUTHER ELY SMITH, PETITIONER, *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Docket No. 109631. Promulgated May 1, 1944.

1. Petitioner, an attorney, was employed on a contingent fee basis in litigation, and performed legal services over a period beginning May 16, 1934, and ending May 22, 1939, on which latter date he was paid in full. *Held*, fee taxable to petitioner pursuant to section 107, Internal Revenue Code, *John Bell Keeble, Jr.*, 2 T. C. 1249.

2. Petitioner contributed $2,500 to the Missouri Institute for the Administration of Justice, an organization having as its immediate purpose the establishment by constitutional amendment of a new modified appointive system for the selection of judges to take the place of selection by primary and general election. This movement was caused by a general feeling in the community that the local judiciary was controlled by unwholesome political influences. One result of this feeling was a disinclination to litigate causes before the local courts. Petitioner was motivated in making this contribution by civic considerations and also by a desire to protect and improve the practice of law in which he was engaged. *Held*, contribution deductible as ordinary and necessary business expense.

3. Petitioner contributed $12 to a Civil Liberties Committee. *Held*, under the facts shown, such contribution not deductible.

4. Petitioner contributed $1 to the International Committee for Political Prisoners. *Held*, under facts shown, such contribution not deductible.

5. Petitioner contributed $35 to the St. Louis League of Women Voters. *Held*, under facts, such contribution is deductible.

6. Petitioner borrowed a book from a public library. He left it on a bus and it was later recovered and returned to the library in a damaged condition, on account whereof petitioner paid to the library $3.50. *Held*, this sum not deductible as a loss under section 23 (e) (3), Internal Revenue Code.

Harold C. Hanke, Esq., for the petitioner.

Richard A. Jennings, Esq., and *J. Marvin Kelley, Esq.*, for the respondent.

The Commissioner determined a deficiency of $888.57 in petitioner's income tax for the calendar year 1939, all of which is here in issue. The deficiency arises by reason of respondent's determination (1) that a fee earned by petitioner as an attorney for work beginning May 16, 1934, and ending May 22, 1939, and paid in full on May 22, 1939, was not taxable pursuant to section 107, Internal Revenue Code, but was includible in full in petitioner's taxable income for 1939, (2) that a contribution made by petitioner to the Missouri Institute for the Administration of Justice was not deductible either as a business expense or as a contribution deductible under section 23 (o), Internal Revenue Code, (3) that a contribution made by petitioner to a Civil Liberties Committee in the sum of $12 was not deductible, (4) that a contribution made by petitioner to the International Committee for Political Prisoners in the sum of $1 was not deductible, (5) that a contribution made by petitioner to the St. Louis League of Women Voters was not deductible, and (6) that petitioner was not entitled to a loss deduction in the amount of $3.50, the amount paid by him to a public library on account of damages to a book borrowed by him.

FINDINGS OF FACT.

Petitioner is an attorney at law who has practiced in St. Louis, Missouri, for more than forty-four years. He is engaged in general practice, including corporation, probate, and tax matters, and damage suits.

First Issue.—Petitioner performed legal services upon a contingent fee contract for a client beginning May 16, 1934, and ending May 22, 1939, on which latter date he received the entire fee for such services, in the amount of $2,333.33.

Second Issue.—In December 1939 petitioner contributed $2,500 to the Missouri Institute for the Administration of Justice, here-

inafter called the institute, a corporation organized August 22, 1938, under *pro forma* decree of the Circuit Court pursuant to article 10, chapter 33, Revised Statutes of Missouri, 1939, relating to beneficial, educational, scientific, and miscellaneous associations. The purposes of the organization, as set out in its articles of incorporation, were to promote, foster, and improve the administration of justice. About one-third of its members were lawyers and two-thirds were laymen.

The ultimate purpose of the institute was to secure the amendment of the Missouri State Constitution with respect to the methods of selecting the judges of certain state courts, and to that end a campaign was initiated in 1939 for the education of the electorate concerning the need for such a change. During the first half of 1940 the institute circulated petitions throughout the state to have its plan for the nonpartisan selection of judges placed on the ballot, and then urged the adoption of the amendment at the polls in November 1940. Speeches and round table discussions were broadcast by radio, under the institute's sponsorship, and literature explaining and supporting the plan was widely distributed. The amendment was adopted by a 90,000 majority, and became self-operative thirty days thereafter, without action of any kind by the legislature or the governor.

The amendment applied to the judges of the Circuit and Probate Courts of the city of St. Louis, and Jackson County, including Kansas City, the Supreme Court of Missouri, and the Kansas City, St. Louis, and Springfield Courts of Appeal. These constituted all the courts of record of original jurisdiction in the two metropolitan centers, and all the appellate courts of the state. It was optional as to the other circuit and probate courts. The plan, briefly stated, provided for the establishment of nonpartisan judicial commissions, one for the appellate courts, consisting of the Chief Justice of the Supreme Court of Missouri and six other members, and one for each judicial circuit, consisting of the presiding judge of the court of appeals and four members, half of whom were to be selected by members of the bar from among their own membership and half to be laymen appointed by the governor as provided.

It was to be the duty of these commissions to nominate three candidates for each judicial vacancy occurring within their respective jurisdictions, one of whom should be appointed by the governor. The judge so appointed was to serve until the end of the year following the next general election, at which election his name should be submitted to the voters on a separate nonpartisan judicial ballot reading "Shall Judge ———— of the ———— Court be retained in office? Yes. No." If a majority of those voting on the question should vote against him, upon the expiration of his term, the vacancy would be filled in the manner referred to above; other-

wise, he would remain in office for its full term and be eligible for retention in office thereafter by nonpartisan election in the manner outlined.

Prior to the adoption of this amendment, judges in St. Louis were nominated and elected by direct primary and general election. There existed a considerable amount of dissatisfaction among both lawyers and laymen with that method of selecting judges, and a widespread feeling that the courts were subservient to the wishes of the politicians, rather than to the course of justice, led to a loss of confidence in the integrity of the courts on the part of those who shared this opinion.

There was a growing reluctance on the part of the citizens to litigate their legal difficulties and increasing tendency to compromise such differences, which resulted in a loss of business to the practicing lawyers of the city.

Petitioner made his contribution to the institute in the belief that the reform resulting from the adoption of the sponsored amendment would benefit the legal profession generally, and his own practice specifically. More than 50 percent of the attorneys in St. Louis contributed to the organization.

Third issue.—Petitioner contributed $12 in the year 1939 to the Civil Liberties Committee, which is affiliated with a national organization. The committee has defended cases involving the civil liberties of persons who are unable to defend themselves in cases where matters of principle are concerned.

Fourth issue.—Petitioner contributed $1 in 1939 to the International Committee for Political Prisoners because "it seemed a good thing to contribute to."

Fifth issue.—Petitioner contributed $35 during 1939 to the St. Louis League of Women Voters, an organization affiliated with the Missouri League of Women Voters and the National League of Women Voters.

The purpose of the St. Louis League for Women Voters, according to its articles of incorporation, is to "increase, by means of education, the effectiveness of women's votes, in furthering better government." Its constitution expresses its object in substantially the same language, with the additional sentence that the league, as an organization, shall be strictly nonpartisan. It is affiliated with the National League of Women Voters, the object of which in 1939 was "to promote political education through active participation of citizens in government." Prior to 1938 one of the stated purposes of the national league was "to promote * * * needed legislation * * *." This was deleted from the constitution and bylaws in 1938. The St. Louis league is supported by minimum dues of $2, and contributions in excess of

that amount. Its activities during 1939 consisted chiefly of conducting study groups on questions of the day and assembling and furnishing to its members and the public nonpartisan information on candidates for office. No substantial part of the activity of the league was for the purpose of influencing legislation.

Sixth issue.—Petitioner borrowed a book from the St. Louis Public Library in 1939, and inadvertently left it on a bus. It was later returned to the library in a badly damaged condition, apparently as a result of having been dropped in water, and the petitioner paid the library $3.50 because of such damage.

OPINION.

KERN, *Judge: First issue.*—The facts out of which this issue arose are undisputed.

Section 107, I. R. C., added by section 220 of the Revenue Act of 1939, provides in part that in the case of the receipt of compensation for personal services rendered by an individual "covering a period of five calendar years, or more, from the beginning to the completion of such services" at least 95 percent of which is paid only on completion of such services, and which is required to be included in the gross income of such individual for any taxable year after December 31, 1938, the tax attributable to such compensation shall not be greater than the aggregate of the taxes attributable thereto had it been received in equal portions in each of the years included in such period.

The parties here agree that the facts meet all the requirements of section 220, except the period of time over which the services are rendered. The respondent argues that although the services were admittedly rendered over a period of five full years, or sixty months, they did not cover a period of five calendar years or more, since they began May 16 of 1934 and ended May 22 of 1939, which period, in respondent's view, covers only the four calendar years of 1935, 1936, 1937, and 1938, ignoring those months of 1934 and 1939 which totaled more than a year.

Respondent in his regulation has interpreted the term used in the statute, "calendar years," to mean a year beginning January 1 and ending December 31, and petitioner challenges the correctness of that interpretation.

The regulation seems to be based on the assumption that the term "calendar year" can mean only the period beginning January 1 and ending on December 31. And that definition is, indeed, one meaning of the term. But the phrase does not have, in law, one fixed and definite meaning. It may mean the period from January 1 to the succeeding December 31, or it may mean a period of 365 days, or in leap year 366, or 12 calendar months, depending upon its use in the

context in which it appears. The courts have held in a number of cases that, ordinarily, and in common acceptation, a calendar year means 365 days, except leap year, and is composed of 12 calendar months. *Shaffner* v. *Lipinsky*, 194 N. C. 1; 138 S. E. 418; *Geneva Cooperage Co.* v. *Brown*, 124 Ky. 16; 98 S. E. 279.

The Senate Finance Committee, in its discussion of this measure, used the expression "five years" throughout, no mention being made of calendar years, and the whole tenor of that discussion leaves no doubt of their intention to relieve all those whose services extended over a period of five years.

The phrase "calendar year" as used in other parts of the internal revenue laws is generally used in contrast to a fiscal year, and in that context it can not be doubted that it refers to the period January 1 to December 31. But in section 220 it is not used in contradistinction to a fiscal year. The language in which it appears, as well as the legislative history of the provision, seems to require that, as used in section 220, it must be construed to mean a year of 365 days. The statute itself provides that the "period of five calendar years" is to be "from the beginning to the completion of such services." It seems obvious therefore that the period may begin on any day of the year and not, perforce, on January 1. *John Bell Keeble, Jr.*, 2 T. C. 1249. The respondent erred in his refusal to give effect to section 107 in computing petitioner's tax for 1939.

Second issue.—Petitioner claims the right to deduct his contribution of $2,500 to the Missouri Institute for the Administration of Justice on two grounds—under section 23 (a) (1), as an ordinary and necessary expense paid during the taxable year in carrying on his trade or business; and under section 23 (o) (2) of the Internal Revenue Code as a contribution to a corporation organized and operated exclusively for educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda or otherwise attempting to influence legislation.

The latter contention is the more easily disposed of. We do not think it can be said that the organization here in question was organized and operated exclusively as an educational organization. It was organized and operated to bring about an amendment to the Constitution of Missouri so as to permit the selection of judges of certain courts by a different method than had theretofore prevailed. The educational activities in which it engaged so successfully were simply one of the means by which the end for which it was organized could be achieved. It went further than mere education; it utilized that education to achieve the purpose for which it was organized. To hold this organization to have been organized and operated exclusively for

educational purposes would be to distort the fundamental meaning of the term "educational" and enlarge the applicability of section 23 (o) far beyond its intended scope. The deduction claimed under this section was properly denied.

The application of section 23 (a) (1) (A) to the peculiar facts surrounding this expenditure presents a more difficult problem. The evidence shows that the law business of petitioner, as well as of other lawyers in St. Louis, generally, was adversely affected by the lack of confidence of a considerable segment of the public, including clients of petitioner, in the integrity of the courts. Public interest in and aversion to the close relationship which existed between the politicians and the judges was keen. Editorials and cartoons in all St. Louis newspapers, depicting and deploring the political control of the courts, gave wide publicity to the existing state of affairs, and it was a matter of common public belief that the administration of justice by the courts was subordinate to the cultivation of helpful political associations.

Petitioner had been a member of the St. Louis Bar Association committee which had studied the problem of the selection and tenure of judges for a number of years, and the plan evolved by the institute had the full support of the Bar Association. It seemed to petitioner to be the best available plan for freeing the courts of political control and assuring the selection of capable judges, thus restoring public confidence in the administration of justice, a condition which he considered essential to his continued success in the practice of law. He made his contribution to the institute in the hope of bringing about an improvement in the administration of justice and also in his own business.

It should be noted that the institute engaged in no lobbying of any kind before any legislative body. No legislation was needed or involved in its plan. It contemplated an amendment to the constitution, proposed by the initiative of the people, voted upon at a general election, and becoming selfoperative thirty days thereafter, without the necessity of any action or approval by either the legislature or the governor.

The statutory requirements that an expense, to be deductible, must be ordinary and necessary seem to us to be met by the facts in the instant case, when examined in the light of the decided cases on the subject.

In the sense in which the word "necessary" has been defined as "helpful or appropriate," this expenditure was necessary. *Welch* v. *Helvering*, 290 U. S. 111; *Cannon Valley Milling Co.*, 44 B. T. A. 763; *Edw. J. Miller*, 37 B. T. A. 830; *L. T. Alverson*, 35 B. T. A. 482. The fact that it was not compulsory, in that petitioner was under no legal

obligation to make it, is not material. Petitioner makes the interesting suggestion that he may have been under some compulsion as a member of the bar of the Supreme Court of Missouri, one of the canons of ethics of which adjures its member to assist in bringing about improvement in the method of selecting judges. But, aside from any such obligation, we think this expenditure was necessary, within the meaning of the statute, since it was beneficial and appropriate under the circumstances. Petitioner and other contributors similarly situated testified that they considered it necessary to their business welfare to support the movement inaugurated by the institute, and we are reluctant to override their judgment, under the circumstances.

Whether it was "ordinary," or not, has been somewhat more difficult to determine. The Supreme Court, in *Welch* v. *Helvering*, 290 U. S. 111, has indicated that an expense need not be of an habitual or recurring nature, in order to be considered ordinary. It has also said there that, although a payment may be unique in the life of an individual, if it is ordinary in the life of the group of which he is a part it may still be allowable as an ordinary expense.

It is an ordinary thing for lawyers to take an active personal and financial interest in movements designed to improve the processes of justice. This is so not only by reason of their moral obligation, as members of the bar, but because the administration of justice is the business of lawyers, and the measure of their professional success depends upon the integrity and efficiency of those processes. Legal societies and organizations, which are simply lawyers acting in concert, quite generally initiate such movements. So it is a common activity of bar associations throughout the country to conduct preprimary nonpartisan polls among their members, the purpose of which is to secure, by recommending to the electorate, the best available judges for the courts. Such polls are financed by the bar associations, which, in turn, are financed by the lawyers who make up their membership through the payment of dues. Such dues are deductible as ordinary and necessary business expenses. See art. 23 (a) 5, Regulations 101.

We have heretofore allowed the deduction of expenses which seem indistinguishable in all essential particulars from the situation confronting us here. In *Independent Brewing Co. of Pittsburgh*, 4 B. T. A. 870, the petitioner was allowed to deduct a contribution made to a national brewers' association which maintained offices in Washington, D. C., and used the particular contribution in question to conduct litigation seeking to establish the unconstitutionality of the Eighteenth Amendment to the Constitution of the United States.

Cases upholding the deductibility of contributions to trade organizations organized to promote the interests of the particular trade or

business group to which the respective petitioners belonged are too numerous to cite. The "business" of this petitioner was a component element of the administration of justice, and a contribution by him to an organization which promotes the interest of this "business" by improving the administration of justice should likewise be deductible.

It is impossible to perceive any reasons of public policy for disallowing contributions to the institute. In the absence of some such reason, since it bears a proper relationship to the petitioner's business, we are of the opinion, in view of all the facts and circumstances surrounding it, that petitioner's contribution to it is deductible.

Third and fourth issues.—The evidence before us relating to petitioner's contributions to the Civil Liberties Committee and the International Committee for Political Prisoners is altogether insufficient to enable us to say that respondent was in error in denying the deduction. We have before us no evidence covering the purpose and activity, in the conjunctive, of either organization. These are matters concerning which we do not have judicial knowledge and in regard to which we are required to limit our consideration to the evidence properly presented. That evidence being conspicuously inadequate on these issues, the respondent's determination will be sustained.

Fifth issue.—Petitioner's contribution to the St. Louis League of Women Voters is deductible as a contribution to a corporation organized and operated exclusively for educational purposes. *Charles W. Dahlinger*, 20 B. T. A. 176, 181. The evidence discloses that neither the St. Louis league nor the national league, with which it was affiliated, had any provision in their respective constitutions in 1939 for legislative activity. Such appearances as the St. Louis league may have made before legislative bodies (and it was not definitely established that any were made in the tax year in question) did not constitute any substantial part of their activity. We think these departures from the facts shown to have existed in *Henriette T. Noyes*, 31 B. T. A. 121, decisively distinguish this case, and bring it within the rule of the *Dahlinger* case, *supra*.

Sixth issue.—Petitioner claims a deduction in the amount of $3.50 sustained as a result of his having paid that amount to the St. Louis Public Library as damages to a book borrowed by him, left on a bus, and later returned to the library in a badly damaged condition by an unidentified person. The damage was apparently caused by the book having been dropped in water. The deduction is claimed under section 23 (e) (3) of the Internal Revenue Code, which allows a deduction for loss "of property not connected with trade or business, if the loss arises from fires, storms, shipwreck, or other casualty."

The contract between petitioner and the public library is not shown. We may assume that the loan of the book was a bailment for the ex-

clusive benefit of the bailee and that petitioner would be liable to the library for the payment of damages to the book arising from slight negligence on his part. By leaving the book unguarded in a public conveyance petitioner was guilty of negligence. The payment of $3.50 to the library was apparently in satisfaction of such damages. This payment was made to the owner of property by a gratuitous bailee for damages to the property caused by the bailee's negligence. The amount thus paid is not a loss of property arising from casualty within the meaning of the statute, and the petitioner is not entitled to the deduction claimed.

Reviewed by the Court.

Decision will be entered under Rule 50.

OPPER, *J.*, concurring: I agree that on the first point this proceeding is indistinguishable from the *Keeble* case, which I see no compelling reason for overruling now. But I do not think the result is otherwise supportable. Not only does it require that we eliminate the word "calendar" from the statute, an amendment I think beyond our province under the familiar rule that words employed in legislation are not lightly to be taken as meaningless, but the prevailing view also overlooks what seems to me a fairly evident purpose in the use of that word, that is, an intention to make it consistent with the normal taxable year, which, especially in the case of individuals, is likely to be the calendar year. See Internal Revenue Code, sec. 48. Thus, a taxpayer who comes squarely within the statutory definition with services extending over "a period of" exactly "five calendar years," for example, would be at a tax disadvantage compared with another whose services covering a period of similar length fell into six taxable years and thus permitted allocation to each of the years included in "such period," or a division of the compensation into six parts instead of five.

Exhibit 132: Revenue Ruling 58–255

Rev. Rul. 58–255

Amounts expended by a taxpayer in furtherance of a campaign to influence the adoption or defeat of legislation are not deductible, for Federal income tax purposes, as ordinary and necessary trade or business expenses within the meaning of section 162 of the Internal Revenue Code of 1954.

Reconsideration has been given to the acquiescence by the Commissioner in the decision in *Luther Ely Smith* v. *Commissioner*, 3 T. C. 696, issue 2, acquiescence, C. B. 1944, 26, involving the deductibility, for Federal income tax purposes, of a contribution to the Missouri Institute for the Administration of Justice.

In the *Smith* case, supra, the taxpayer, during the taxable year involved, contributed funds to the Missouri Institute for the Administration of Justice. The ultimate purpose of such organization was to procure the adoption of an amendment to the State Constitution relating to the selection of judges which might be of some benefit to the legal profession of which the taxpayer was a member. To this end, the Institute initiated and carried on an extensive campaign, consisting of radio broadcasts and the circulation of printed literature to the public, urging the adoption of the amendment. The expense of the campaign was defrayed by contributions to the Institute, a part of which was the contribution of the taxpayer. The Tax Court of the United States held, on the facts presented, that the amount contributed by the taxpayer was deductible as an ordinary and necessary

business expense under section 23(a)(1)(A) of the Internal Revenue Code of 1939, now section 162 of the Internal Revenue Code of 1954.

It has long been the position of the Internal Revenue Service that amounts expended in furtherance of an attempt to promote or defeat legislation, either before a legislature or before the general electorate, are not deductible, for Federal income tax purposes, as ordinary and necessary business expenses within the meaning of section 162 of the Internal Revenue Code of 1954 or corresponding provisions of the 1939 Code. This position has been sustained in *Textile Mills Securities Corporation* v. *Commissioner*, 314 U. S. 326 (1941), C. B. 1941-2, 200; *Sunset Scavenger Co., Inc.* v. *Commissioner*, 84 F. 2d 453 (9th Cir. 1936); *Revere Racing Association* v. *Scanlon*, 232 F. 2d. 816 (1st Cir. 1956); *Commarano* v. *U. S.*, 246 F. 2d. 751 (9th Cir. 1957), cert. granted March 3, 1958; and *F. Strauss & Son, Inc.* v. *Commissioner*, 251 F. 2d. 724 (8th Cir. 1958).

Inasmuch as a constitution is a general or fundamental law, an attempt to influence the adoption or rejection by the general electorate of a constitutional amendment is basically an attempt to promote or defeat legislation. Accordingly, expenditures to promote or defeat a constitutional amendment are not deductible as ordinary and necessary business expenses within the meaning of section 162 of the Code.

In view of the foregoing, the prior acquiescence in *Luther Ely Smith* v. *Commissioner*, 3 T. C. 696, C. B. 1944, 26, has been withdrawn and non-acquiescence as to issue 2 and acquiescence as to the remaining issues has been substituted therefor. See page 7.

The Commissioner does NOT ACQUIESCE in the following decisions:

Taxpayer	Docket No.	Report	
		Volume	Page
Smith, Luther Ely [21]	109631	3	696

[21] Acquiescence published in C. B. 1944-26, in the issue as to the deductibility of petitioner's contribution to the Missouri Institute for the Administration of Justice, is withdrawn and nonacquiescence is substituted therefor. Acquiescence in the issues as to the reporting of compensation received for the performance of legal services, and the deductibility of petitioner's contribution to the St. Louis League for Women Voters, remains unchanged. See Rev. Rul. 58-255, page 91.

Exhibit 133: Articles 19.23(o)–1 and 19.23(q)–1 of Treasury Regulations 103

U. S. TREASURY DEPARTMENT

BUREAU OF INTERNAL REVENUE

U.S. Office of internal revenue.

REGULATIONS 103

RELATING TO THE

INCOME TAX

UNDER THE

INTERNAL REVENUE CODE

ARTICLES 19.23(o)-1 and 19.23(q)-1



UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1940

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SEC. 19.23(o)-1. **Contributions or gifts by individuals.**—A deduction is allowable under section 23(o) only with respect to contributions or gifts which are actually paid during the taxable year, regardless of when pledged and regardless of the method of accounting employed by the taxpayer in keeping his books and records. A deduction is not allowable, however, for the actual payment of a contribution or gift if the amount of such payment already has been deducted on the accrual basis in computing net income for any taxable year beginning before January 1, 1939. A contribution or gift to a domestic organization described in section 23(o), prior to its amendment, and (for any taxable year beginning after December 31, 1939) to an organization described in section 23(o), as amended, is deductible even though some portion of the funds of such organization is or may be used in foreign countries for charitable and educational purposes. This section does not apply to contributions or gifts by estates and trusts (see section 162).

A contribution or gift to the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, or (for any taxable year beginning after December 31, 1939) any possession of the United States, exclusively for public purposes, is deductible.

No deduction is allowed in computing the net income of a common trust fund or a partnership for contributions or gifts made to organizations described in section 23(o). (See sections 169 and 183.) However, a partner's proportionate share of contributions or gifts actually paid by a partnership during its taxable year to such organizations may be allowed as a deduction in his individual personal return for his taxable year with or within which the taxable year of the partnership ends, to an amount which, when added to the amount of contributions made by the partner individually and claimed as a deduction, is not in excess of 15 percent of his net income computed without the benefit of the deduction for contributions. In the case of a nonresident alien individual or a citizen of the United States entitled to the benefits of section 251, see sections 213(c) and 251. For contributions or gifts by corporations, see section 19.23(q)-1.

Whether a husband and wife make a joint return or separate returns, the 15 percent limitation on the deduction for contributions or gifts is based on the separate net income (computed without regard to such contributions or gifts) of the spouse making the contributions or gifts. (See section 19.51-1.)

A donation made by an individual to an organization other than one referred to in section 23(o) which bears a direct relationship to his business and is made with a reasonable expectation of a financial return commensurate with the amount of the donation may constitute an allowable deduction as business expense.

Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

If the contribution or gift is other than money, the basis for calculation of the amount thereof shall be the fair market value of the property at the time of the contribution or gift.

In connection with claims for deductions under section 23(o), there shall be stated in returns of income the name and address of each organization to which a contribution or gift was made and the amount and the approximate date of the actual payment of the contribution or gift in each case. Claims for deductions under section 23(o) must be substantiated, when required by the Commissioner, by a statement from the organization to which the contribution or gift was made showing whether the organization is a domestic organization, the name and address of the contributor or donor, the amount of the contribution or gift and the date of the actual payment thereof, and by such other information as the Commissioner may deem necessary.*

SEC. 19.23(q)-1. **Contributions or gifts by corporations.**—A corporation may deduct from its gross income, for taxable years beginning after December 31, 1938, and before January 1, 1940, contributions or gifts to organizations described in section 23(q), prior to its amendment, and for taxable years beginning after December 31, 1939, contributions or gifts to organizations described in section 23(q), as amended. Such deduction shall, to the extent provided by that section, be allowed only for the taxable year in which such contributions or gifts are actually paid, regardless of when pledged and regardless of the method of accounting employed by the corporation in keeping its books and records. As to charitable contributions by corporations not deductible under section 23(a), see section 19.23(a)-13. Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses are not deductible from gross income.

The provisions of the last paragraph of section 19.23(o)-1, relating to (1) the statement in returns of the name and address of each organization to which a contribution or gift was made and the amount and the approximate date of the actual payment of the contribution or gift, (2) the substantiation of the claims for deductions when required by the Commissioner, and (3) the basis for calculation of the amount of a contribution or gift which is other than money, are equally applicable to claims for deductions of contributions or gifts by corporations under section 23(q).

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Exhibit 134: Articles 29.23(o)–1 and 29.23(q)–1 of Treasury Regulations 111

U. S. TREASURY DEPARTMENT

BUREAU OF INTERNAL REVENUE

U.S. Office of internal revenue.

REGULATIONS 111

RELATING TO THE

INCOME TAX

UNDER THE

INTERNAL REVENUE CODE

(APPLICABLE ONLY TO YEARS BEGINNING AFTER DECEMBER 31, 1941)

ARTICLES 29.23(o)-1 and 29.23(q)-1

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1943

SEC. 29.23(o)-1. CONTRIBUTIONS OR GIFTS BY INDIVIDUALS.—A deduction is allowable under section 23(o) only with respect to contributions or gifts which are actually paid during the taxable year, regardless of when pledged and regardless of the method of accounting employed by the taxpayer in keeping his books and records. A deduction is not allowable, however, for the actual payment of a contribution or gift if the amount of such payment already has been deducted on the accrual basis in computing net income for any taxable year beginning before January 1, 1938. A contribution or gift to an organization described in section 23(o) is deductible even though some portion of the funds of such organization is or may be used in foreign countries for charitable and educational purposes. This section does not apply to contributions or gifts by estates and trusts (see section 162). For computation of deductions for charitable contributions where the taxpayer also has an allowable deduction for medical expenses, see section 29.23(x)-1.

A contribution or gift to the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, or any possession of the United States, exclusively for public purposes, is deductible.

No deduction is allowed in computing the net income of a common trust fund or a partnership for contributions or gifts made to organizations described in section 23(o). (See sections 169 and 183.) However, a partner's proportionate share of contributions or gifts actually paid by a partnership during its taxable year to such organizations may be allowed as a deduction in his individual personal return for his taxable year with or within which the taxable year of the partnership ends, to an amount which, when added to the amount of contributions made by the partner individually and claimed as a deduction, is not in excess of 15 percent of his net income computed without the benefit of the deduction for contributions. In the case of a nonresident alien individual or a citizen of the United States entitled to the benefits of section 251, see sections 213(c) and 251. For contributions or gifts by corporations, see section 29.23(q)-1.

In the case of a husband and wife making a joint return, the deduction for contributions or gifts is the aggregate of such contributions or gifts made by the spouses, and is limited to 15 percent of the aggregate net income of the spouses (computed without regard to such contributions or gifts) as shown by the joint return.

A donation made by an individual to an organization other than one referred to in section 23(o) which bears a direct relationship to his business and is made with a reasonable expectation of a financial return commensurate with the amount of the donation may constitute an allowable deduction as business expense.

Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

If the contribution or gift is other than money, the basis for calculation of the amount thereof shall be the fair market value of the property at the time of the contribution or gift.

In connection with claims for deductions under section 23(o), there shall be stated in returns of income the name and address of each organization to which a contribution or gift was made and the amount and the approximate date of the actual payment of the con-

tribution or gift in each case. Claims for deductions under section 23(o) must be substantiated, when required by the Commissioner, by a statement from the organization to which the contribution or gift was made showing whether the organization is a domestic organization, the name and address of the contributor or donor, the amount of the contribution or gift and the date of the actual payment thereof, and by such other information as the Commissioner may deem necessary.

SEC. 29.23(q)–1. CONTRIBUTIONS OR GIFTS BY CORPORATIONS.—A corporation may deduct from its gross income contributions or gifts to organizations described in section 23(q) (see section 29.22(b)(4)–1 for definition of "political subdivision"). Where payment is made in a taxable year beginning prior to the first taxable year beginning after the date of the cessation of hostilities in the present war, as proclaimed by the President, the charitable deduction prescribed is allowable to corporations even though the gifts or contributions are used outside of the United States or its possessions. Such deduction shall, to the extent provided by that section, be allowed only for the taxable year in which such contributions or gifts are actually paid, regardless of when pledged and regardless of the method of accounting employed by the corporation in keeping its books and records. As to charitable contributions by corporations not deductible under section 23(a), see section 29.23(a)–13. Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses are not deductible from gross income.

The provisions of the last paragraph of section 29.23(o)–1, relating to (1) the statement in returns of the name and address of each organization to which a contribution or gift was made and the amount and the approximate date of the actual payment of the contribution or gift, (2) the substantiation of the claims for deductions when required by the Commissioner, and (3) the basis for calculation of the amount of a contribution or gift which is other than money, are equally applicable to claims for deductions of contributions or gifts by corporations under section 23(q).

Exhibit 135: *Addressograph-Multigraph Co.* v. *Commissioner*, 4. T.C.M. 147 (February 5, 1945) [1]

[CCH Dec. 14,387(M)] Addressograph-Multigraph Corporation et al.,[1] v. Commissioner.

Docket Nos. 108181-108187, 111395. Entered February 5, 1945.

(1) Basis for depreciation: Cost: Liabilities of subsidiaries of acquired corporation.—Where a taxpayer purchases assets of a corporation which include stock of subsidiaries, only the liabilities of the vendor may be taken into account in computing cost of the assets to the taxpayer for purposes of depreciation.

(2) Basis for depreciation: Cost of assets: Legal fees.—Where legal services relate to the acquisition of the assets of another corporation, fees paid therefor are capital expenditures, and enter into the cost of the assets.

(3) Basis for depreciation: Cost of assets: Book value of stock of acquired subsidiaries.—Taxpayer did not purchase assets of a corporation's subsidiaries even though they were shown on a balance sheet used in the transaction, inasmuch as taxpayer was primarily interested in securing a new lithographing process, and to do so, it was required to purchase the parent corporation, with its assets. The book value of the stock of the subsidiaries was $2,620,138.52, and this amount was allocable to such stock.

(4) Basis for depreciation: Cost of assets: Reserves of acquired corporations.—Where officers of an acquiring corporation purchase another corporation on the basis of balance sheets, giving full effect to the values shown thereon, the fact that subsequent developments indicate that the reserves shown on the balance sheet were insufficient will not be taken into account.

(5) Basis for depreciation: Cost of assets: Allocation of cost to patents.—The cost of patents of an acquired corporation is increasable or decreasable with corresponding allocations to intangible assets. In evaluating good will and other intangibles by the capitalization of earnings method, it is essential that the period selected be representative of the earning ability of the business enterprise involved, and that it fairly reflect probable future earnings.

(6) Nondeductible items: Patent: Capital asset v. expense.—Taxpayer entered into contract with an inventor, under which taxpayer acquired ten patents. The inventor was paid approximately $100,000 at the rate of $20,000 per year. Taxpayer treated the first

[1] Proceedings of the following petitioners are consolidated herewith: Addressograph Company, Addressograph-Multigraph Corporation; Multigraph Company, Addressograph-Multigraph Corporation; Speedaumat Manufacturing Company, Addressograph-Multigraph Corporation; Addressograph-Multigraph Corporation, Transferee-Addressograph Company; Addressograph-Multigraph Corporation, Transferee-Multigraph Company; and Addressograph-Multigraph Corporation, Transferee-Speedaumat Mfg. Co.

[1] Case interprets article 29.23 of Regulations 111.

$20,000 payment as a capital expenditure in 1935 and amortized it. The remaining payments were treated as ordinary and necessary business expenses in the years paid. Upon the facts, it is held that $100,000 represented the cost of the ten patents. Deductions allowed as ordinary and necessary business expenses were disallowed and the aggregate amount was amortizable.

(7) Amortization of patents: Amortization "not allowed".—Upon the facts, it is held that taxpayer failed to show that the deductions for amortization of patents claimed for the years 1929 to 1933 were disallowed.

(8) Deductions: Depreciation: Failure to allocate among affiliated companies.—Where evidence does not show the proportion of patent cost amortized or deducted as expense, or how such cost was allocated among several affiliated taxpayers filing a consolidated return, no part of the payments made during those years may be deducted in the ensuing taxable years.

(9) Deductions: Depreciation: Cost of patent infringement and interference suits.—Where expenditures in connection with infringement suits were incurred in defending the suits, and there was no evidence indicating that such suits had anything to do with the acquisition of capital assets, the amounts so expended are ordinary and necessary business expenses.

(10) Deductions: Depreciation: Failure to amortize cost of patents.—Where a taxpayer was inconsistent in its treatment of costs of patents, first charging them to expense, then deferring costs, then again charging them off as ordinary and necessary expenses, the taxpayer cannot recompute such expenses over the years from the inception, at least for years *not* before the Tax Court. As to the taxable year, the Tax Court holds as fact that the aggregate amount determined as capital expenditures is $265,000, and allocates them among the taxpayers with amounts previously allowed as ordinary and necessary business expenses proportionately reduced.

(11) Nondeductible items: Expenses: Cost of moving.—Amounts expended in moving a plant are capitalizable but cannot be amortized except in the case of expenses arising out of an item having "useful life."

(12) Deductions: Loss on guaranty of stock dividends.—If payments made by a guarantor are part of a consideration paid for common stock, they are capital expenditures rather than losses or ordinary and necessary business expenses, and are not deductible.

(13) Nondeductible items: Legal fees arising out of merger.—A loss deduction is not allowable for legal fees arising out of services rendered in connection with a merger or consolidation.

(14) Deductions: Losses: Enterprise abandoned.—Where services were rendered at least seven years prior to the hearing with no reorganization eventuating up to that time, and a resolution of the corporation states that it is inadvisable to proceed with the contemplated financing, it is reasonable to assume that the reorganization had been abandoned, and the deduction is allowable.

(15) Deductions: Expenses: Amounts actually expended as additional compensation to employees.—Where no obligation is imposed upon an employer to make extra payments to his employees, because the payments are unknowable, the basis for a deductible accrual has not been laid, and only amounts actually paid are deductible.

(16) Deductions: Expenses: Contributions to National Association of Manufacturers.—Where the purpose of a campaign of the National Industrial Information Committee of the National Association of Manufacturers to which taxpayer contributed was to correct unsympathetic public opinion, resulting from attacks upon industry because of unemployment during the depression, against a group to which taxpayer belongs, the claimed deductions are allowable as ordinary and necessary business expenses.

(17) Determination of gain or loss: Exchange of merchandise for stock of corporation.—Where a corporation has no assets and no outstanding stock prior to an exchange for its stock, the value of such stock issued in exchange for assets (merchandise) is best measured by the value of the assets received.

(18) Recognition of gain or loss: Transfer to corporation controlled by transferor.—Where taxpayer failed to prove title to property transferred to a corporation, or the amount of such property transferred, the Tax Court cannot find that the stock interest acquired was substantially in proportion to the interest in the property of the corporation prior to the exchange, and Sec. 112 (b) (5) of the Internal Revenue Code cannot be applied.

(19) Corporation dividends paid credit: Refinancing.—Dividends paid credit is allowed by the Tax Court on first loan, even though taxpayer had two different creditors due to refinancing.

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Cited 4 TCM **149**
Addressograph-Multigraph Corp. et al

(20) Corporation dividends paid credit: Distributions in liquidation: Deficit at date of liquidation.—Additional credit under Sec. 27 (f), Act of 1936 is disallowed where taxpayer had a deficit in its accumulated earnings and profits at the time it was liquidated. —CCH.

Leo H. Hoffman, Esq., 120 Wall St., New York, N. Y., for the petitioners. Laurence H. Bloomenthal, Esq., and W. W. Kerr, Esq., for the respondent.

Memorandum Findings of Fact and Opinion

MELLOTT, Judge:

Cited 4 TCM **181**
Addressograph-Multigraph Corp. et al.

Issue VIII

Did the Commissioner err in refusing to allow deductions of amounts paid by A-MC in 1938 and 1939 to the National Industrial Information Committee of the National Association of Manufacturers?

Findings of Fact

A-MC paid $1,500 in 1938 and $750 in 1939 to the National Industrial Information Committee of the National Association of Manufacturers and deducted these amounts on its income tax returns for 1938 and 1939.

The Commissioner disallowed the deductions on the ground that the amounts so paid constituted a contribution to an organization which is carrying on propaganda or otherwise attempting to influence legislation within the meaning of section 23 (q) of the Internal Revenue Code.

The payments of $1,500 in 1938 and $750 in 1939 are substantially less than 5 percent of the net income of A-MC for each of these years.

The certificate of incorporation of the National Association of Manufacturers, provides, *inter alia*:

"The general objects and purposes for which the said corporation is formed are the promotion of the industrial interests of the United States, the fostering of the domestic and foreign commerce of the United States, the betterment of the relations between employer and employee, the protection of the individual liberty and rights of employer and employee, the education of the public in the principles of individual liberty and

ownership of property, the support of legislation in furtherance of those principles and opposition to legislation in derogation thereof.

"The particular objects and purposes of said corporation are to establish and maintain a mutual and co-operative organization of American manufacturers in the United States for the fostering of their trade, business and financial interests, to reform abuses relative thereto, to secure freedom from unlawful and unjust exactions, to diffuse accurate and reliable information as to the standing of merchants and other matters, to procure uniformity and certainty in the customs and usages pertaining to the trade, business and financial interests of the members of said corporation, to settle differences between its members, to promote a more enlarged and friendly intercourse between the manufacturers of the United States, and to do all things necessary to carry out the aforesaid purposes for the mutual benefit and protection of its members, under and subject to such regulations, conditions and limitations as may be prescribed by the By-Laws.

* * * * *

"The corporation is not organized for pecuniary profit, and shall not make or declare dividends."

In 1938 the National Association of Manufacturers submitted evidence to the Commissioner of Internal Revenue in support of its claim to exemption from filing Federal income tax returns. Among the evidence was an affidavit concerning the activities of the association which reads, in part, as follows:

"In general * * * it may be said that the Association in all its activities is devoted to the promotion of the industrial interests of the country, the fostering of domestic and foreign commerce, improvement of relations between employers and employees, public education as to the principles and functions of industry, and expressions of attitude with respect to legislation or other public policies or actions of direct interest to industry."

The National Industrial Information Committee, sponsored by the National Association of Manufacturers, solicited the financial support of A-MC for a public information program entitled "Re-Selling THE AMERICAN WAY to America". This program had its inception in attacks upon industry because of the widespread distress and unemployment during the depression. It provided for the dissemination of information by radio, motion pictures, booklets, outdoor advertisements, newspapers and speakers concerning the American free enterprise system—its contribution to the building and the preservation of a democratic society and its promise for the future—and the need for "the preservation of the industrial system as a way of life, a way of both making a living and improving the standard of that living." The purpose of the program was "to regain full public regard for industry."

Opinion

Petitioner claims the right to deduct the amounts paid to the committee under the provisions of section 23(a)(1) or 23(q) I. R. C.

This tribunal and the courts have heretofore allowed, as ordinary and necessary business expense, amounts contributed by railroads to an association conducting a campaign to create favorable public opinion. *Texas & Pacific Ry. Co. v. United States*, 52 Fed. (2d) 1040 [1931 CCH ¶ 9587], affd. on another issue 286 U. S. 285 [3 USTC ¶ 936]; *Los Angeles & Salt Lake R. R. Co.*, 18 B. T. A. 168 [Dec. 5620]; *Kansas City Southern Ry. Co. et al.*, 22 B. T. A. 949 [Dec. 6833], affd. 75 Fed. (2d) 786 [35-1 USTC ¶ 9151]; *Norfolk Southern Ry. Co.*, 22 B. T. A. 302 [Dec. 6717], revs'd. on another point 63 Fed. (2d) 304 [1933 CCH ¶ 9103], certiorari denied 290 U. S. 672; *Missouri Pacific R. Co.*, 22 B. T. A. 267 [Dec. 6719]. In the cited cases the association, a voluntary organization, prior to World War I, had adopted a plan for correcting unsympathetic public opinion which was believed to impair the credit of railroads. After the war, the association renewed its plan for presenting the cause of railroads to the public by means of a nation-wide advertising campaign. Each of the railroad's was allowed to deduct the amount contributed as an ordinary and necessary business expense.

The purpose of the campaign of the committee to which petitioner contributed was to correct unsympathetic public opinion against manufacturers resulting from attacks upon industry because of unemployment during the depression. On the authority of the cited cases, we hold that respondent should have allowed the deductions claimed as ordinary and necessary business expenses. It is unnecessary to determine whether they may be allowed under section 23(q), *supra*.

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Exhibit 136: *Revere Racing Association* v. *Scanlon*, 137 F. Supp. 293 (D. Mass. 1955) [1]

REVERE RACING ASSOCIATION, Inc., Plaintiff,

v.

Thomas E. SCANLON, District Director of Internal Revenue, Defendant.

Civ. A. 54-96.

United States District Court
D. Massachusetts.
Oct. 25, 1955.

Action for income tax refund based on disallowance of deductions for expenditures made to persuade voters to decide favorably to taxpayer on question whether pari mutuel betting should be permitted. The District Court for the District of Massachusetts, Sweeney, Chief Judge, held that the deductions claimed were not ordinary and necessary expenses of business.

Action dismissed.

1. Internal Revenue ⇐7

In determining whether expenditures made to persuade voters to vote favorably on permitting pari mutuel betting was within treasury regulation denying deduction for sums spent on lobbying, federal court was not limited to narrow interpretation or definition of "lobbying" in state statute as involving appearance of paid "legislative counsel" or "legislative agent" before a public hearing of general court or to promote opposed legislation. 26 U.S.C.A. (I.R.C. 1939) § 23(a) (1) (A); G.L. (Ter.Ed.) Mass. c. 3, § 39.

2. Internal Revenue ⇐558

Taxpayer's expenditures in form of office rentals, advertising, legal fees and salaries to persuade voters to decide favorably to taxpayer on whether pari mutuel betting on licensed dog racing should be permitted, were not deductible for income tax purposes as "ordinary and necessary business expense." 26 U.S.C.A. (I.R.C.1939) § 23(a) (1) (A).

See publication Words and Phrases, for other judicial constructions and definitions of "Ordinary and Necessary Business Expense".

3. Internal Revenue ⇐558

In determining whether expenditures are deductible for income tax purposes as ordinary and necessary business expense, words "ordinary" and "necessary" are to be given their reasonable and practicable meaning. 26 U.S.C.A. (I.R.C.1939) § 23(a) (1) (A); G.L. (Ter.Ed.) Mass. c. 3, § 39.

Louis L. Lobel, Boston, Mass., for plaintiff.

Anthony Julian, U. S. Atty., Arthur I. Weinberg, Asst. U. S. Atty., Boston, Mass., for defendant.

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[1] Case interprets article 29.23 of Regulations 111.

SWEENEY, Chief Judge.

The plaintiff in the above entitled action is seeking a tax refund in the amount of Eleven Thousand Five Hundred Twenty-Four Dollars and Sixty-Two Cents ($11,524.62). All the facts have been stipulated.

Findings of Fact

During the taxable year ending April 30, 1951, the plaintiff expended the sum of Twenty-Three Thousand One Hundred Forty-Eight Dollars and Fifty-One Cents ($23,148.51) to persuade the voters of Suffolk County to react favorably to the question whether pari-mutuel betting on licensed dog racing should be permitted. These expenditures took the form of office rentals, advertising, legal fees, and salaries. The plaintiff deducted these expenses in computing his income tax liability. The defendant Director of Internal Revenue disallowed the expenses in question and asserted a deficiency. This the plaintiff paid.

The questions presented are two—first whether the deduction is specifically disallowed under Treasury Regulation 111, Sec. 29.23(q)–1, and secondly, if not, does the deduction nevertheless qualify under Section 23(a) (1) (A) of the Internal Revenue Code of 1939, 26 U.S.C.A. § 23 (a) (1) (A).

The Treasury regulation specifically denies a deduction for sums spent on (1) lobbying, (2) the promotion or defeat of legislation, (3) the exploitation of propaganda, including non-trade advertising, and (4) contributions for campaign expenses. Clearly, the deduction in question does not run afoul of the latter two prohibitions. The question is raised, however, as to whether the plaintiff's activities constituted lobbying or the influencing of legislation.

[1] While Section 39, Chapter 3, of the General Laws of the Commonwealth of Massachusetts defines lobbying as the appearance of a paid "legislative counsel" before a public hearing of the General Court, or the engagement of a paid "legislative agent" to promote or oppose legislation, we are not limited to this narrow interpretation or definition. In this case, the lobbying of course was not before a legislature, but nevertheless it was for the purpose of seeking the favor of the voters for dog track racing.

[2, 3] Even if the activities of the plaintiff did not come within Treasury Regulation 111, Sec. 29.23(q)–1, I think that they cannot properly be classified as proper business deductions under Section 23(a) (1) (A) of the Internal Revenue Code of 1939. The monies expended by this plaintiff were not an ordinary and necessary expense to business. It well might have kept its money and allowed the voters to decide on the racing question free of its influence. It must be remembered, as pointed out in New Colonial Ice Co. v. Helvering, 292 U.S. 435, 54 S.Ct. 788, 78 L.Ed. 1348, that whether there is a deduction and to what extent it should be allowed, depends entirely upon legislative grace, and only as there is clear provision therefor can any deduction be allowed. The words "ordinary" and "necessary" are to be given their reasonable and practical meaning. These expenses were not the expenses of doing business in any sense of the word, but were to put the voters in a frame of mind that would give them a possible opportunity to do business later.

Conclusion of Law

From the foregoing, I conclude and rule that the deductions claimed here were not usual or necessary expenses of doing business. The case is to be dismissed.

Exhibit 137: *Revere Racing Association* v. *Scanlon*, 232 F.2d 816 (1st Cir. 1956)[1]

REVERE RACING ASSOCIATION, Inc., Plaintiff, Appellant,

v.

Thomas E. SCANLON, District Director of Internal Revenue, Defendant, Appellee.

No. 5066.

United States Court of Appeals
First Circuit.

Heard April 3, 1956.

Decided May 9, 1956.

Action by dog racing corporation to recover alleged overpayment of income taxes. The United States District Court for the District of Massachusetts, George C. Sweeney, Chief Judge, 137 F.Supp. 293, entered judgment dismissing the action and corporation appealed. The Court of Appeals, Hartigan, Circuit Judge, held that money expended by dog racing corporation to persuade a majority of voters to vote in the affirmative on a question put before them as to whether a pari-mutuel system of betting on licensed dog races should be permitted in their county, was not deductible from gross income as an ordinary and necessary expense paid or incurred in carrying on a trade or business.

Judgment affirmed.

1. Internal Revenue ⇐558

Whether an expenditure is directly related to a business and whether it is ordinary and necessary and therefore deductible under statute providing for deductions from gross income for ordinary and necessary business expenses are pure questions of fact in most instances. 26 U.S.C.A. (I.R.C.1939) § 23 (a) (1) (A).

2. Internal Revenue ⇐558

Money expended by dog racing corporation to persuade a majority of voters to vote in the affirmative on a question put before them as to whether a pari-mutuel system of betting on licensed dog races should be permitted in their county was not deductible from gross income as an "ordinary and necessary expense" paid or incurred in carrying on a trade or business. 26 U.S.C.A. (I.R.C.1939) § 23(a) (1) (A); G.L. (Ter.Ed.) Mass. c. 128A, § 14 as added by St.1934, c. 374, § 3 and amended by St.1947, c. 138, § 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Ordinary and Necessary Expense".

3. Internal Revenue ⇐558

Expenses incurred in campaigning for an opportunity to engage in a business for an additional term are not expenses of doing business within statute authorizing a deduction from gross income for ordinary and necessary expenses incurred in carrying on a trade or business. 26 U.S.C.A. (I.R.C.1939) § 23(a) (1) (A); G.L.(Ter.Ed.) Mass c. 128A, § 14 as added by St.1934, c. 374, § 3 and amended by St.1947, c. 138, § 2.

4. Internal Revenue ⇐558

Expenditures by dog racing corporation to persuade a majority of voters to vote in the affirmative on a question put before them as to whether the pari-mutuel system of betting on licensed dog races should be permitted in their county were denied deductibility by treasury regulation preventing deductions from gross income for sums of money expended for lobbying purposes, promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses. 26 U.S.C.A. (I.R.C.1939) § 23(a) (1) (A); G.L.(Ter.Ed.) Mass. c. 128A, § 14 as added by St.1934, c. 374, § 3 and amended by St.1947, c. 138, § 2.

Louis L. Lobel, Boston, Mass., with whom James N. Gabriel, Boston, Mass., was on the brief, for appellant.

David O. Walter, Atty., Dept. of Justice, Washington, D. C., with whom Charles K. Rice, Acting Asst. Atty. Gen., Lee A. Jackson and I. Henry Kutz, Attys., Department of Justice, Washington, D.

C., and Anthony Julian, U. S. Atty., and Arthur I. Weinberg, Asst. U. S. Atty., Boston, Mass., were on the brief, for appellee.

Before MAGRUDER, Chief Judge, and WOODBURY and HARTIGAN, Circuit Judges.

HARTIGAN, Circuit Judge.

This case presents the question: Whether the taxpayer may recover an alleged overpayment of income taxes for the fiscal year ending April 30, 1951, wherein the taxpayer was denied a deduction of certain expenditures under § 23(a) (1) (A)[1] of the Internal Revenue Code of 1939, 26 U.S.C.A., said expenditures having been made to persuade a majority of voters to vote in the affirmative on the question: "Shall the pari-mutuel system of betting on licensed dog races be permitted in this County?"

The district court ruled that the deductions claimed here were not ordinary and necessary expenses of doing business, and on November 15, 1955, entered a judgment dismissing the action. The plaintiff on the same date filed its notice of appeal.

The lower court's findings were based on a stipulation of facts which may be summarized as follows: The appellant is a Massachusetts corporation and conducts and operates a greyhound race track, under license granted by the Massachusetts State Racing Commission, in the City of Revere, Suffolk County, Massachusetts. The appellee was the duly authorized and incumbent United States District Director of Internal Revenue for the District of Massachusetts. The appellant duly filed its federal income tax return for the fiscal year ending April 30, 1951, wherein it included a deduction from its gross income of $23,148.51 for certain promotional advertising, public relations and legal fees. On or about May 7, 1953, an examination was completed by a duly qualified Revenue Agent of the appellant's Federal Income Tax Return for the fiscal year ending April 30, 1951, as a result of which said District Director determined inter alia, that the said amount was not an allowable deduction from the appellant's gross income under Section 29.23(q).1, United States Treasury Regulations 111. The appellant paid the assessed deficiency, plus interest, under protest, in the total amount of $15,101.19 and then duly filed a claim for refund and subsequently brought suit in the United States District Court after the rejection of its claim for refund by the said District Director. The amount of the claim for refund is $10,241.12 (or such greater amount as is legally refundable).

The pari-mutuel system of betting on licensed dog races in the Commonwealth of Massachusetts was authorized by the Acts of 1934, Chapter 374, § 3, by creating General Laws (Ter.Ed.) Chapter 128A. This act, besides legalizing licensed dog racing, further provides by Section 14 thereof, that the question, "Shall the pari-mutuel system of betting on licensed dog races be permitted in this county?" shall be placed before the voters of each county at the biennial State election for the year 1934 and shall not be submitted under this section to the voters of any county oftener than once in four years. A majority vote in answer to said question in the affirmative in any county was taken to authorize the granting of a license by the State Racing Commission, provided the applicant otherwise qualifies for such license.

Chapter 138 § 2, of the Massachusetts Acts of 1947, amended Massachusetts General Laws (Ter.Ed.), Chapter 128A, § 14, by providing that the question, "Shall the pari-mutuel system of betting

1. Title 26, Internal Revenue Code
"§ 23. *Deductions from gross income.*
"In computing net income there shall be allowed as deductions:
"(a) *Expenses*
"(1) *Trade or business expenses.*
"(A) *In general.*
"All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *."

on licensed dog races be permitted in this county?" shall be placed before the voters of the several counties at the biennial State election in the year 1950 and in every fourth year thereafter and that an affirmative vote of a majority of voters in said counties shall be taken to have authorized the licensing of dog races in that county. This law was in effect in the years 1950–1951.

The question concerning licensed dog racing appeared on the official ballot in every city and town in every county in Massachusetts at intervals of four years starting in 1934 and whether the counties voted in the affirmative or negative, the question reappeared the following fourth year and will appear on the official ballot to be used every succeeding fourth year.

The appellant expended the sum of $23,148.51 to help aid and persuade a majority of the voters in Suffolk County to vote in the affirmative on the previously stated question which appeared as "6B" on the official ballot used in the cities and towns at the biennial state election in the year 1950.

The following questions are presented on this appeal:

1. Whether the payment of $23,148.-51 is deductible as an ordinary and necessary business expense under Section 23(a) (1) (A) of the Internal Revenue Code (1939) in computing the appellant's net income for said fiscal year.

2. Whether the payment of $23,148.-51 is barred as a deduction from the appellant's gross income for said fiscal year by the provisions of Section 29.23(q).1, Treasury Regulations 111.

[1–3] "Whether an expenditure is directly related to a business and whether it is ordinary and necessary are doubtless pure questions of fact in most instances." Commissioner of Internal Revenue v. Heininger, 1943, 320 U.S. 467, at page 475, 64 S.Ct. 249, at page 254, 88 L.Ed. 171. Accordingly we have no disposition to disturb the decision of the court below unless it was demonstrably based upon errors of law. Putting to one side, for the moment, the effect of the Treasury Regulations, we believe the trial court was correct in its view that these expenditures did not represent ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. Plaintiff contends at some length that these expenditures are "ordinary" under the circumstances, and could scarcely be more "necessary" since "without the expense, there could have been no business." Even if we agree, it does not follow that the decision below was erroneous since plaintiff has not met—and in our opinion cannot meet—the rule established by the Supreme Court in McDonald v. Commissioner, 1944, 323 U.S. 57, 65 S.Ct. 96, 97, 89 L.Ed. 68, wherein a distinction was drawn between ordinary and necessary expenses "incurred in being a judge" and similar expenses incurred "in trying to be a judge for the next ten years." The trial court seems to have had this distinction in mind when it said [137 F.Supp. 294]: "These expenses were not the expenses of doing business in any sense of the word, but were to put the voters in a frame of mind that would give them a possible opportunity to do business later."

Plaintiff attempts to distinguish the McDonald case on the ground that public policy forbade the deduction of campaign expenses. If this is true, then we believe the deductions sought by plaintiff should likewise be denied. We can conceive of no public policy which, while denying to judicial officers the right to deduct expenses incurred in campaigning for an opportunity to do business for an additional term, would nevertheless permit a corporation engaged in dog racing to deduct expenses incurred in campaigning for an opportunity to engage in that business for an additional term. Accordingly we believe the McDonald decision controls the instant case.

[4] We likewise agree with the court below that the deductibility of these expenditures is denied by § 29.23(q).1 of the Treasury Regulations which reads in part: "* * * Sums of money ex-

pended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses are not deductible from gross income. * * *" The court said in its opinion: "In this case, the lobbying of course was not before a legislature, but nevertheless it was for the purpose of seeking the favor of the voters for dog track racing." Although the taxpayer's expenditures were made to influence voters rather than members of the legislature, in our opinion they come within the prohibition of the regulation. Textile Mills Securities Corp. v. Commissioner, 1941, 314 U.S. 326, 62 S.Ct. 272, 86 L.Ed. 249.

The judgment of the district court is affirmed.

Exhibit 138: Articles 39.23(o)-1 and 39.23(q)-1 of Treasury Regulations 118

TREASURY REGULATIONS 118

§ 39.23 (o)-1 *Contributions or gifts by individuals.* (a) A deduction is allowable under section 23 (o) only with respect to contributions or gifts which are actually paid during the taxable year, regardless of when pledged and regardless of the method of accounting employed by the taxpayer in keeping his books and records. A contribution or gift to an organization described in section 23 (o) is deductible even though some portion of the funds of such organization is or may be used in foreign countries for charitable and educational purposes. This section does not apply to contributions or gifts by estates and trusts (see section 162). For disallowance of certain charitable deductions otherwise allowable under section 23 (o) (2), see sections 3813 and 162 (g) (2) and the regulations promulgated pursuant thereto.

(b) A contribution or gift to the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, or any possession of the United States, exclusively for public purposes, is deductible.

(c) No deduction is allowed in computing the net income of a common trust fund or a partnership for contributions or gifts made to organizations described in section 23 (o). See sections 169 and 183. However, a partner's proportionate share of contributions or gifts actually paid by a partnership during its taxable year to such organizations may be allowed as a deduction in his individual personal return for his taxable year with or within which the taxable year of the partnership ends, to an amount which, when added to the amount of contributions made by the partner individually and claimed as a deduction, is not in excess of 20 percent of his adjusted gross income. In the case of a nonresident alien individual or a citizen of the United States entitled to the benefits of section 251, see sections 213 (c), 220, and 251.

For contributions or gifts by corporations, see § 39.23 (q)-1.

(d) In the case of husband and wife making a joint return, the deduction for contributions or gifts is the aggregate of such contributions or gifts made by the spouses, and is limited to 20 percent of the aggregate adjusted gross income of the spouses.

(e) A donation made by an individual to an organization other than one referred to in section 23 (o) which bears a direct relationship to his business and is made with a reasonable expectation of a financial return commensurate with the amount of the donation may constitute an allowable deduction as business expense.

(f) Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

(g) If the contribution or gift is other than money, the basis for calculation of the amount thereof shall be the fair market value of the property at the time of the contribution or gift.

(h) In connecion with claims for deduction under section 23 (o), there shall be stated in returns of income the name and address of each organization to which a contribution or gift was made and the amount and the approximate date of the actual payment of the contribution or gift in each case. Claims for deductions under section 23 (o) must be substantiated, when required by the Commissioner, by a statement from the organization to which the contribution or gift was made showing whether the organization is a domestic organization, the name and address of the contributor or donor, the amount of the contribution or gift and the date of the actual payment thereof, and by such other information as the Commissioner may deem necessary.

(i) For unlimited deduction if contributions or gifts and taxes in the taxable year and in each of the 10 preceding taxable years exceed 90 percent of the taxpayer's net income, see section 120.

§ 39.23 (q)–1 *Contributions or gifts by corporations.* (a) A corporation may, subject to the limitations provided by section 23 (q), deduct from its gross income contributions or gifts to organizations described in section 23 (q). Except as otherwise provided in paragraph (c) of this section, such deduction shall, to the extent provided by section 23 (q), be allowed only for the taxable year in which such contributions or gifts are actually paid, regardless of when pledged and regardless of the method of accounting employed by the corporation in keeping its books and records. As to charitable contributions by corporations not deductible under section 23 (a), see § 39.23 (a)–13. Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses are not deductible from gross income. For disallowance of certain charitable, etc., deductions otherwise allowable under section 23 (q) (2), see sections 3813 and 162 (g) (2) and the regulations promulgated pursuant thereto.

(b) The provisions of § 39.23 (o)–1, relating to (1) the statement in returns of the name and address of each organization to which a contribution or gift was made and the amount and the approximate date of the actual payment of the contribution or gift, (2) the substantiation of the claims for deductions when required by the Commissioner, and (3) the basis for calculation of the amount of a contribution or gift which is other than money, are equally applicable to claims for deductions of contributions or gifts by corporations under section 23 (q).

(c) A corporation reporting its net income on the accrual basis may elect to have considered as paid during the taxable year any contribution or gift to organizations described in section 23 (q), with the exceptions hereinbefore described, payment of which contribution or gift is made after the close of the taxable year and on or before the fifteenth day of the third month following the close of such year if, during such year, the board of directors authorized such contribution or gift. Such election shall be made only at the time of the filing of the return for the taxable year and shall be signified by reporting such contribution or gift on the return. There shall be attached to such return a written declaration that the resolution authorizing the contribution or gift was adopted by the board of directors during the taxable year, and such declaration shall be verified by a statement signed by the president or other principal officer of the corporation that it is made under the penalties of perjury. With respect to contributions or gifts authorized on or after January 1, 1953, there shall be attached to the return, in addition to the written declaration referred to in the preceding sentence, a copy of the resolution of the board of directors authorizing such contribution or gift.

Exhibit 139: House Report 83-1337 (Internal Revenue Code of 1954)

83d Congress, 2d Session House Report No. 1337

INTERNAL REVENUE CODE OF 1954

REPORT

OF THE

COMMITTEE ON WAYS AND MEANS

HOUSE OF REPRESENTATIVES

TO ACCOMPANY

H. R. 8300

A BILL TO REVISE THE INTERNAL REVENUE LAWS OF THE UNITED STATES

MARCH 9, 1954.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

UNITED STATES
GOVERNMENT PRINTING OFFICE
44140° WASHINGTON : 1954

83D CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
No. 1337

INTERNAL REVENUE CODE OF 1954

MARCH 9, 1954.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. REED of New York, from the Committee on Ways and Means, submitted the following

REPORT

[To accompany H. R. 8300]

The Committee on Ways and Means, to whom was referred the bill (H. R. 8300) to revise the internal revenue laws of the United States, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

I. GENERAL STATEMENT

Your committee has undertaken the first comprehensive revision of the internal-revenue laws since before the turn of the century and the enactment of the income tax. This revision includes a rearrangement of the provisions to place them in more logical sequence, the deletion of obsolete material, and an attempt to express the internal-revenue laws in a more understandable manner. Cross-reference tables between the new and old section numbers appear as an appendix to the bill itself.

In addition to the rearrangement, however, your committee has made many substantive changes in the code. In general, the purpose of these changes has been to remove inequities, to end harassment of the taxpayer and to reduce tax barriers to future expansion of production and employment.

The restrictive effects of the present tax law on economic growth have been obscured and somewhat offset during the past decade by the inflationary pressures of the war and postwar periods. It is now apparent that prompt adoption of this new tax law is especially timely in order to create an environment in which normal incentives can operate to maintain normal economic growth.

This bill is a long overdue reform measure which is vitally necessary regardless of the momentary economic conditions and should not be confused with other measures which may be, or might become, ap-

propriate in the light of a particular short-run situation. The bill has been developed through extensive and lengthy study of ways and means of removing tax inequities and tax restraints. Its passage will lead to increased employment and a higher standard of living.

It should be pointed out that slightly over half of the revenue loss in the fiscal year 1955, which is expected to result from the provisions of this bill, represents amounts which will be available to individuals and not corporations. Section II indicates that $778 million out of a total revenue loss of $1.4 billion will go to individuals. This is without taking into consideration the fact that this bill continues the present level of the corporate rate for 1 more year. This continuation of the present corporate rate is expected to produce approximately $1.2 billion in revenue for the Government in the fiscal year 1955. This almost offsets the entire revenue loss otherwise resulting from this bill.

It should also be recognized that this bill is only one feature of your committee's tax program for 1954. The Congress has already allowed an individual income tax reduction of approximately 10 percent to go into effect as of the first of this year. This represents a saving to individuals of over $3 billion a year which will largely be available for consumption expenditures. Your committee has also reported out a bill reducing excise taxes by approximately $1 billion on a full-year basis. This also in large measure represents additional funds available for consumer spending.

The bill contains many provisions which are important to the growth and survival of small business. These include more adequate depreciation, a more realistic policy with respect to retained earnings, more liberal provision for research and development expenditures, a stimulus to equity financing through dividend relief, recognition of business practices for tax accounting purposes, and simplified procedures for partnerships and corporate reorganizations.

IX. Itemized Deductions for Individuals and Corporations

A. Business expenses not to include charitable gifts above limitation (sec. 162)

At the present time corporations are allowed a deduction for charitable contributions up to a limit of 5 percent of their income otherwise subject to tax. In addition, they are allowed to take as business-expense deductions contributions to charitable and other organizations where the institution is to render a service commensurate to the contribution. However, where no service is rendered, a business-expense deduction may not be taken for amounts not allowable as charitable contributions only because they are in excess of the 5 percent limitation. However, in the case of individuals, there has been some question as to whether or not a business-expense deduction can be claimed for gifts (for which no service is to be rendered) which are in excess of the percentage limitation applicable to individuals.

Your committee's bill makes it clear that the rule presently applicable to corporations is also to be applicable in the case of individuals.

DETAILED DISCUSSION OF THE TECHNICAL PROVISIONS OF THE BILL

PART VI—ITEMIZED DEDUCTIONS FOR INDIVIDUALS AND CORPORATIONS

Section 161. Allowance of deductions

This section states the general rule that in computing taxable income there shall be allowed the deductions specifically provided in the other sections of part VI relating to itemized deductions for individuals and corporations.

Section 162. Trade or business expenses

The first sentence of subsection (a) corresponds to the first sentence of section 23 (a) (1) (A) of the 1939 Code. The second sentence of subsection (a) is derived from the Legislative-Judiciary Appropriations Act, 1954. Subsection (b) corresponds to section 23 (a) (1) (B). No substantive change is made in these provisions.

Subsection (b) is derived from section 23 (a) (1) (B) of the 1939 code. This section provides that no business deduction is available for any contribution which would be deductible as a charitable gift, were it not for the percentage limitation on such gifts. This was the rule for corporations under section 23 (a) (1) (B) of the 1939 Code and this section now extends the rule to individuals. No substantive change is made in the application of this rule. As under present law, it applies only to gifts, i. e., those contributions which are made with no expectation of a financial return commensurate with the amount of the gift. For example, the limitation would not apply to a payment by an individual to a hospital in consideration of a binding obligation to provide medical treatment for the individual's employees. It would apply only if there were no expectation of any quid pro quo from the hospital.

Exhibit 140: Senate Report 83–1622 (Internal Revenue Code of 1954)

Union Calendar No. 1635

83D CONGRESS *2d Session*	SENATE	REPORT No. 1622

INTERNAL REVENUE CODE OF 1954

REPORT

OF THE

COMMITTEE ON FINANCE

UNITED STATES SENATE

TO ACCOMPANY

H. R. 8300

A BILL TO REVISE THE INTERNAL REVENUE LAWS OF THE UNITED STATES



JUNE 18, 1954.—Ordered to be printed

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1954

45599°

Calendar No. 1635

83D CONGRESS
2d Session

SENATE

REPORT
No. 1622

INTERNAL REVENUE CODE OF 1954

JUNE 18, 1954.—Ordered to be printed

Mr. MILLIKIN, from the Committee on Finance, submitted the following

REPORT

[To accompany H. R. 8300]

The Committee on Finance, to whom was referred the bill (H. R. 8300) to revise the internal revenue laws of the United States, having considered the same, report thereon with amendments and recommend that the bill as amended do pass.

I. GENERAL STATEMENT

Your committee has joined with the House Committee on Ways and Means in undertaking the first comprehensive revision of the internal revenue laws since before the turn of the century and the enactment of the income tax. This revision includes a rearrangement of the provisions to place them in a more logical sequence, the deletion of obsolete material, and an attempt to express the internal revenue laws in a more understandable manner.

In addition to the rearrangement, however, H. R. 8300, both as passed by the House and as amended by your committee, contains many substantive changes in the code. In general, the purpose of these changes have been to remove inequities, to end harassment of the taxpayer, and to reduce tax barriers to future expansion of production and employment.

The restrictive effects of the present tax law on economic growth have been obscured and somewhat offset during the past decade by the inflationary pressures of the war and postwar periods. It is now apparent that prompt adoption of this new tax law is especially timely in order to create an environment in which normal incentives can operate to maintain normal economic growth.

This bill is a long overdue reform measure which is vitally necessary regardless of the momentary economic conditions and should not be

confused with other measures which may be, or might become, appropriate in the light of a particular short-run situation. The bill has been developed through extensive and lengthy study of ways and means of removing tax inequities and tax restraints. Its passage will lead to increased employment and a higher standard of living.

Slightly over half of the revenue loss in the fiscal year 1955, which is expected to result from the provisions of this bill, represents amounts which will be available to individuals. Section II indicates that about $850 million out of a total revenue loss of approximately $1.5 billion will go to individuals. This is without taking into consideration the fact that this bill continues the present level of the corporate rate for 1 more year. This continuation of the present corporate rate is expected to produce approximately $1.2 billion in revenue for the Government in the fiscal year 1955. With this taken into account the revenue loss under this bill is about $277 million.

This bill is only 1 of 4 steps taken with respect to taxes so far in 1954. Congress has already allowed the excess-profits tax to expire as of December 31, 1953, and permitted an individual income tax reduction of approximately 10 percent to go into effect as of the same time. For the fiscal year 1955 the former represents a saving to businesses of approximately $1.6 billion, and the latter a saving to individuals of $3 billion. Moreover, Congress has already enacted an excise tax reduction bill which will reduce excise tax collections in the fiscal year 1955 by approximately $1 billion. These measures which have been enacted, or allowed to become effective, represent tax reductions of approximately $5.6 billion. Of this, approximately $3.8 billion has gone to individuals and in large measure represents additional funds available for consumer spending. This bill as amended by your committee will increase the savings to individuals by approximately $850 million and to corporations by about $630 million. As a result, individuals after the passage of this bill will have received reductions under the 4 tax measures of $4.7 billion and corporations will have received a reduction in their tax burden of $2.4 billion. This represents an over-all reduction for the fiscal year 1955 of $7.1 billion. These figures do not take into account extensions of present rates since these merely continue existing tax levels.

The bill contains many provisions which are important to the growth and survival of small business. These include more adequate depreciation, a more realistic policy with respect to retained earnings, more liberal provision for research and development expenditures, a stimulus to equity financing through dividend relief, recognition of business practices for tax accounting purposes, and simplified procedures for partnerships and corporate reorganizations.

IX. Itemized Deductions for Individuals and Corporations

A. Trade or Business Expenses (sec. 162)

(1) House changes accepted by committee

At the present time corporations are allowed a deduction for charitable contributions up to a limit of 5 percent of their income otherwise subject to tax. In addition, they are allowed to take as business-expense deductions contributions to charitable and other organizations where the institution is to render a service commensurate to the contribution. However, where no service is rendered, a business-expense deduction may not be taken for amounts not allowable as charitable contributions only because they are in excess of the 5 percent limitation. However, in the case of individuals, there has been some question as to whether or not a business-expense deduction can be claimed for gifts (for which no service is to be rendered) which are in excess of the percentage limitation applicable to individuals.

The House and your committee's bill make it clear that the rule presently applicable to corporations is also to be applicable in the case of individuals.

(2) Changes made by committee

Your committee made no changes in the House provision.

DETAILED DISCUSSION OF THE TECHNICAL PROVISIONS OF THE BILL

PART VI—ITEMIZED DEDUCTIONS FOR INDIVIDUALS AND CORPORATIONS

Section 161. Allowance of deductions

This section is identical with section 161 of the bill as it passed the House. It states the general rule that in computing taxable income there shall be allowed the deductions specifically provided in the other sections of part VI relating to itemized deductions for individuals and corporations.

Section 162. Trade or business expenses

This section, except for deletion of a cross reference, is identical with section 162 of the bill as it passed the House.

The first sentence of subsection (a) corresponds to the first sentence of section 23 (a) (1) (A) of the 1939 Code. The second sentence of subsection (a) is derived from the Legislative-Judiciary Appropriations Act, 1954. No substantive change is made in these provisions.

Subsection (b) is derived from section 23 (a) (1) (B) of the 1939 code. This section provides that no business deduction is available for any contribution which would be deductible as a charitable gift, were it not for the percentage limitation on such gifts. This was the rule for corporations under section 23 (a) (1) (B) of the 1939 Code and this section now extends the rule to individuals. No substantive change is made in the application of this rule. As under present law, it applies only to gifts, i. e., those contributions which are made with no expectation of a financial return commensurate with the amount of the gift. For example, the limitation would not apply to a payment by an individual to a hospital in consideration of a binding obligation to provide medical treatment for the individual's employees. It would apply only if there were no expectation of any quid pro quo from the hospital.

Exhibit 141: Excerpts From Internal Revenue Code of 1954

PUBLIC LAW 591 - CHAPTER 736

APPROVED AUGUST 16, 1954, 9:45 a. m., E. D. T.

H. R. 8300

Internal Revenue Code of 1954

ENACTED DURING THE

SECOND SESSION OF THE EIGHTY-THIRD CONGRESS

OF THE UNITED STATES OF AMERICA

Begun and held at the City of Washington on Wednesday, January 6, 1954.

An Act

To revise the internal revenue laws of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) CITATION.—

(1) The provisions of this Act set forth under the heading "Internal Revenue Title" may be cited as the "Internal Revenue Code of 1954".

(2) The Internal Revenue Code enacted on February 10, 1939, as amended, may be cited as the "Internal Revenue Code of 1939".

PART VI—ITEMIZED DEDUCTIONS FOR INDIVIDUALS AND CORPORATIONS

Sec. 161. Allowance of deductions.
Sec. 162. Trade or business expenses.
Sec. 163. Interest.
Sec. 164. Taxes.
Sec. 165. Losses.
Sec. 166. Bad debts.
Sec. 167. Depreciation.
Sec. 168. Amortization of emergency facilities.
Sec. 169. Amortization of grain-storage facilities.
Sec. 170. Charitable, etc., contributions and gifts.
Sec. 171. Amortizable bond premium.
Sec. 172. Net operating loss deduction.
Sec. 173. Circulation expenditures.
Sec. 174. Research and experimental expenditures.
Sec. 175. Soil and water conservation expenditures.

SEC. 161. ALLOWANCE OF DEDUCTIONS.

In computing taxable income under section 63 (a), there shall be allowed as deductions the items specified in this part, subject to the exceptions provided in part IX (sec. 261 and following, relating to items not deductible).

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) IN GENERAL.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, Territory, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000.

(b) CHARITABLE CONTRIBUTIONS AND GIFTS EXCEPTED.—No deduction shall be allowed under subsection (a) for any contribution or gift which would be allowable as a deduction under section 170 were it not for the percentage limitations, or the requirements as to the time of payment, set forth in such section.

Exhibit 142: IRS Proposed Regulations on Lobbying Expenditures, July 10, 1956

THE NATIONAL ARCHIVES
LITTERA SCRIPTA MANET
FEDERAL REGISTER
1934
OF THE UNITED STATES
VOLUME 21 NUMBER 132
Washington, Tuesday, July 10, 1956

PROPOSED RULE MAKING

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[26 CFR (1954) Part 1]

INCOME TAX; TAXABLE YEARS BEGINNING AFTER DEC. 31, 1953

ITEMIZED DEDUCTIONS FOR INDIVIDUALS AND CORPORATIONS

Notice is hereby given, pursuant to the Administrative Procedure Act, approved June 11, 1946, that the regulations set forth below in tentative form are proposed to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury or his delegate. Prior to the final adoption of such regulations, consideration will be given to any data, views, or arguments pertaining thereto which are submitted in writing, in duplicate, to the Commissioner of Internal Revenue, Attention T: P, Washington 25, D. C., within the period of 30 days from the date of publication of this notice in the FEDERAL REGISTER. The proposed regulations are to be issued under the authority contained in section 7805 of the Internal Revenue Code of 1954 (68A Stat. 917; 26 U. S. C. 7805).

[SEAL] RUSSELL C. HARRINGTON,
Commissioner of Internal Revenue.

The following regulations are hereby prescribed under sections 161, 162, 168, and 169 of the Internal Revenue Code of 1954:

ITEMIZED DEDUCTIONS FOR INDIVIDUALS AND CORPORATIONS

§ 1.161 *Statutory provisions; allowance of deductions.*

SEC. 161. *Allowance of deductions.* In computing taxable income under section 63 (a), there shall be allowed as deductions the items specified in this part, subject to the exceptions provided in part IX (sec. 261 and following, relating to items not deductible).

§ 1.161–1 *Allowance of deductions.* Section 161 provides for the allowance as deductions, in computing taxable income under section 63 (a) of the items specified in Part VI of subchapter B of chapter 1 (sections 161–175), subject to the exceptions provided in part IX (sections 261–273, relating to items not deductible). Double deductions are not permitted. Amounts deducted under one provision of the Internal Revenue Code of 1954 cannot again be deducted under any other provision thereof. See also section 7852 (c), relating to the taking into account, both in computing a tax under subtitle A and a tax under chapter 1 or 2 of the Internal Revenue Code of 1939, of the same item of deduction.

§ 1.162 *Statutory provisions; trade or business expenses.*

SEC. 162. *Trade or business expenses.*—(a) *In general.* There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

(1) A reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) Traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and

(3) Rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, Territory, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000.

(b) *Charitable contributions and gifts excepted.* No deduction shall be allowed under subsection (a) for any contribution or gift which would be allowable as a deduction under section 170 were it not for the percentage limitations, or the requirements as

to the time of payment, set forth in such section.

(c) *Cross reference.* For special rule relating to expenses in connection with subdividing real property for sale, see section 1237.

§ 1.162–1 *Business expenses.* (a) Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except items which are used as the basis for a deduction or a credit under provisions of law other than section 162. The cost of goods purchased for resale, with proper adjustment for opening and closing inventories, is deducted from gross sales in computing gross income. See § 1.61 (a)–5. Among the items included in business expenses are management expenses, commissions (but see section 263 and the regulations thereunder), labor, supplies, incidental repairs, operating expenses of automobiles used in the trade or business, traveling expenses while away from home solely in the pursuit of a trade or business (see § 1.162–2), advertising and other selling expenses, together with insurance premiums against fire, storm, theft, accident, or other similar losses in the case of a business, and rental for the use of business property. No such item shall be included in business expenses, however, to the extent that it is used by the taxpayer in computing the cost of property included in its inventory or used in determining the gain or loss basis of its plant, equipment, or other property. Penalty payments with respect to Federal taxes, whether on account of negligence, delinquency, or fraud, are not deductible from gross income. The full amount of the allowable deduction for ordinary and necessary expenses in carrying on a business is nevertheless deductible, even though such expenses exceed the gross income derived during the taxable year from such business. In the case of any sports program to which section 114 (relating to sports programs conducted for the American National Red Cross) applies, expenses described in section 114 (a) (2) shall be allowable as deductions under section 162 (a) only to the extent that such expenses exceed the amount excluded from gross income under section 114 (a).

§ 1.162–14 *Expenditures for advertising or promotion of good will.* A corporation which has, for the purpose of computing its excess profits tax credit under subchapter E of chapter 2, or subchapter D of chapter 1, of the Internal Revenue Code of 1939, elected under section 733 or section 451 (applicable to the excess profits tax imposed by subchapter E of chapter 2, and subchapter D of chapter 1, respectively) to charge to capital account for taxable years in its base period expenditures for advertising or the promotion of good will which may be regarded as capital investments, may not deduct similar expenditures for the taxable year. See section 263 (b). Such a taxpayer has the burden of proving that expenditures for advertising or the promotion of good will which it seeks to deduct in the taxable year may not be regarded as capital investments under the provisions of the regulations prescribed under section 733 or section 451 of the 1939 Code. See § 35.733–2 of Regulations 112 (26 CFR (1939) Part 35) and § 40.451–2 of Regulations 130 (26 CFR (1939) Part 40).

§ 1.162–15 *Excepted contributions.* (a) No deduction is allowable under section 162 (a) for a contribution or gift by an individual or a corporation if any part thereof is deductible under section 170. For example, if a taxpayer makes a contribution of $5,000 and only $4,000 of this amount is deductible under section 170 (a) (whether because of the percentage limitation under either section 170 (b) (1) or (2), the requirement as to time of payment, or both), no deduction is allowable under section 162 (a) for the remaining $1,000.

(b) The limitations provided in section 162 (b) and this section apply only to payments which are in fact contributions or gifts to organizations described in section 170. For example, payments by a street railway company to a local hospital (which is a charitable organization within the meaning of section 170) in consideration of a binding obligation on the part of the hospital to provide hospital services and facilities for the company's employees are not contributions or gifts within the meaning of section 170 and may be deductible under section 162 (a) if the requirements of section 162 (a) are otherwise satisfied. Donations to organizations other than those described in section 170 which bear a direct relationship to the taxpayer's business and are made with a reasonable expectation of a financial return commensurate with the amount of the donation may constitute allowable deductions as business expenses. For example, a street railway company may donate a sum of money to an organization (of a class not referred to in section 170) intending to hold a convention in the city in which it operates, with a reasonable expectation that the holding of such convention will augment its income through a greater number of people using its cars.

(c) Expenditures for lobbying purposes, for the promotion or defeat of legislation, for political purposes, or for the development or exploitation of propaganda (including advertising other than trade advertising) relating to any of the foregoing purposes, are not deductible from gross income. No payment made, either directly or through any organization, for the specific purpose of attempting to promote or defeat legislation shall be deductible. Other payments, not so made and otherwise meeting the requirements of the regulations under section 162, when made as dues or contributions to a trade or business organization, may be deductible under some circumstances, even though influencing, or attempting to influence, legislation is incidentally involved in the use by such organization of such payments. Thus, the payment of such amounts made as dues or contributions to—

(1) A labor, agricultural, or horticultural organization, exempt under section 501 (c) (5), or

(2) A business league, chamber of commerce, real-estate board, or board of trade, exempt under section 501 (c) (6), for the furtherance of the general purposes and program of such an organization in promoting the common economic interests represented, shall be deductible in full if the activities of such organiza-

tion which consist of lawfully attempting to promote or defeat legislation are incidental to the organization's general purposes and program.

§ 1.162–16 *Cross reference.* For special rules relating to expenses in connection with subdividing real property for sale, see section 1237 and the regulations thereunder.

Exhibit 143: IRS Withdrawal of Proposed Regulations on Lobbying Expenditures and Substitution of New Proposed Regulation, September 19, 1959

THE NATIONAL ARCHIVES
LITTERA SCRIPTA MANET
FEDERAL REGISTER
1934
OF THE UNITED STATES
VOLUME 24 NUMBER 184
Washington, Saturday, September 19, 1959

7781

PROPOSED RULE MAKING

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[26 (1954) CFR Part 1]

INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Lobbying Expenditures

Pursuant to the Administrative Procedure Act, approved June 11, 1946, proposed regulations under section 162 of the Internal Revenue Code of 1954, relating to lobbying expenditures, were published in tentative form with a notice of proposed rule making in the FEDERAL REGISTER for July 10, 1956 (21 F.R. 5091). Notice is hereby given that proposed § 1.162-15(c) is withdrawn.

Further, notice is hereby given, pursuant to the Administrative Procedure Act, that the regulations set forth in tentative form below are proposed to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury or his delegate, in substitution for the proposed regulations hereinbefore withdrawn. Prior to the final adoption of such regulations, consideration will be given to any comments or suggestions pertaining thereto which are submitted in writing in duplicate, to the Commissioner of Internal Revenue, Attention: T:P, Washington 25, D.C., within the period of 30 days from the date of publication of this notice in the FEDERAL REGISTER. Any person submitting written comments or suggestions who desires an opportunity to comment orally at a public hearing on these proposed regulations should submit his request, in writing, to the Commissioner within the 30-day period. In such a case, a public hearing will be held, and notice of the time, place, and date will be published in a subsequent issue of the FEDERAL REGISTER. The proposed regulations are to be issued under the authority contained in section 7805 of the Internal Revenue Code of 1954 (68A Stat. 917; 26 U.S.C. 7805).

[SEAL] DANA LATHAM,
Commissioner of Internal Revenue.

The Income Tax Regulations (26 CFR Part 1) are hereby amended to prescribe regulations under section 162 of the Internal Revenue Code of 1954, relating to lobbying expenditures. Such amendments are effective for taxable years beginning after December 31, 1953, and ending after August 16, 1954.

There is inserted immediately after § 1.162-15(b) the following new paragraph:

§ 1.162-15 Excepted contributions.

* * * * *

(c) (1) Expenditures for lobbying purposes, for the promotion or defeat of legislation, for political campaign purposes (including the support of or opposition to any candidate for public office), or for carrying on propaganda (including advertising) related to any of the foregoing purposes are not deductible from gross income. For example, the cost of advertising to promote or defeat legislation or to influence the public with respect to the desirability or undesirability of proposed legislation is not deductible as a business expense, even though the legislation may directly affect the taxpayer's business. On the other hand, expenditures for institutional or "good will" advertising which keeps the taxpayer's name before the public are generally deductible as ordinary and necessary business expenses provided the expenditures are related to the patronage the taxpayer might reasonably expect in the future. For example, a deduction will ordinarily be allowed for the cost of advertising which keeps the taxpayer's name before the public in connection with encouraging contributions to such organizations as the Red Cross, the purchase of United States Savings Bonds, or participation in similar causes. In like fashion, expenditures for advertising which present views on economic, financial, social, or other subjects of a general nature but which do not involve any of the activities specified in the first sentence of this subparagraph are deductible if they otherwise meet the requirements of the regulations under section 162.

(2) Dues and other payments to an organization, such as a labor union or a trade association, which otherwise meet the requirements of the regulations under section 162, are deductible in full unless a substantial part of the organization's activities consists of one or more of those specified in the first sentence of subparagraph (1) of this paragraph. If a substantial part of the activities of the

organization consists of one or more of those so specified, deduction will be allowed only for such portion of such dues and other payments as the taxpayer can clearly establish is attributable to activities other than those so specified. The determination as to whether such specified activities constitute a substantial part of an organization's activities shall be based on all the facts and circumstances. In no event shall special assessments or similar payments (including an increase in dues) made to any organization for any of such specified purposes be deductible.

(3) Expenditures for the promotion or the defeat of legislation include, but shall not be limited to, expenditures for the purpose of attempting to—

(i) Influence members of a legislative body directly or indirectly, by urging or encouraging the public to contact such members for the purpose of proposing, supporting, or opposing legislation, or

(ii) Influence the public to approve or reject a measure in a referendum, initiative, vote on a constitutional amendment, or similar procedure.

[F.R. Doc. 59-7833. Filed, Sept. 18, 1959; 8:47 a.m.]

Exhibit 144: IRS Notice of Hearings on Proposed Regulation on Lobbying Expenditures, October 28, 1959

THE NATIONAL ARCHIVES
LITTERA SCRIPTA MANET
FEDERAL REGISTER
1934
OF THE UNITED STATES
VOLUME 24 NUMBER 211

Washington, Wednesday, October 28, 1959

8721

[26 CFR (1954) Part 1]

INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Notice of Hearing on Proposed Regulations

Proposed regulations under section 162 of the Internal Revenue Code of 1954, relating to expenditures for lobbying purposes, were published in the FEDERAL REGISTER for Saturday, September 19, 1959 (24 F.R. 7584).

A public hearing on the proposed regulations will be held on Thursday and Friday, November 12 and 13, 1959, at 9:30 a.m., e.s.t., in Room 3313, Internal Revenue Building, 12th and Constitution Avenue NW., Washington, D.C. Persons who plan to attend the hearing are requested to so notify the Commissioner of Internal Revenue, Attention: T:P, Washington 25, D.C., by November 6, 1959.

[SEAL] MAURICE LEWIS,
Director, Technical Planning Division, Internal Revenue Service.

[F.R. Doc. 59-9150; Filed, Oct. 27, 1959; 8:51 a.m.]

Exhibit 145: IRS Final Regulation on Lobbying Expenditures, December 29, 1959

Title 26—INTERNAL REVENUE, 1954

Chapter I—Internal Revenue Service, Department of the Treasury

SUBCHAPTER A—INCOME TAX

[T.D. 6435]

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Lobbying Expenditures

On September 19, 1959, notice of proposed rule making regarding an amendment of the regulations for taxable years beginning after December 31, 1953, and ending after August 16, 1954, under section 162 of the Internal Revenue Code of 1954, relating to lobbying expenditures, was published in the FEDERAL REGISTER (24 F.R. 7584). After consideration of all such relevant matter as was presented by interested persons regarding the rules proposed, the regulations as so published are hereby adopted.

[SEAL] DANA LATHAM,
Commissioner of Internal Revenue.

Approved: December 23, 1959.

FRED C. SCRIBNER, JR.,
Acting Secretary of the Treasury.

The amendment of the Income Tax Regulations (26 CFR Part 1) under section 162 of the Internal Revenue Code of 1954, relating to lobbying expenditures, reads as follows:

§ 1.162-15 Excepted contributions.

* * * * * * *

(c) (1) Expenditures for lobbying purposes, for the promotion or defeat of legislation, for political campaign purposes (including the support of or opposition to any candidate for public office), or for carrying on propaganda (including advertising) related to any of the foregoing purposes are not deductible from gross income. For example, the cost of advertising to promote or defeat legislation or to influence the public with respect to the desirability or undesirability of proposed legislation is not deductible as a business expense, even though the legislation may directly affect the taxpayer's business. On the other hand, expenditures for institutional or "good will" advertising which keeps the taxpayer's name before the public are generally deductible as ordinary and necessary business expenses provided the expenditures are related to the patronage the taxpayer might reasonably expect in the future. For example, a deduction will ordinarily be allowed for the cost of advertising which keeps the taxpayer's name before the public in connection with encouraging contributions to such organizations as the Red Cross, the purchase of United States Savings Bonds, or participation in similar causes. In like fashion, expenditures for advertising which present views on economic, financial, social, or other subjects of a general nature but which do not involve any of the activities specified in the first sentence of this subparagraph are deductible if they otherwise meet the requirements of the regulations under section 162.

(2) Dues and other payments to an organization, such as a labor union or a trade association, which otherwise meet the requirements of the regulations under section 162, are deductible in full unless a substantial part of the organization's activities consists of one or more of those specified in the first sentence of subparagraph (1) of this paragraph. If a substantial part of the activities of the organization consists of one or more of those so specified, deduction will be allowed only for such portion of such dues and other payments as the taxpayer can clearly establish is attributable to activ-

ities other than those so specified. The determination as to whether such specified activities constitute a substantial part of an organization's activities shall be based on all the facts and circumstances. In no event shall special assessments or similar payments (including an increase in dues) made to any organization for any of such specified purposes be deductible.

(3) Expenditures for the promotion or the defeat of legislation include, but shall not be limited to, expenditures for the purpose of attempting to—

(i) Influence members of a legislative body directly or indirectly, by urging or encouraging the public to contact such members for the purpose of proposing, supporting, or opposing legislation, or

(ii) Influence the public to approve or reject a measure in a referendum, initiative, vote on a constitutional amendment, or similar procedure.

(Sec. 7805 of the Internal Revenue Code of 1954, 68A Stat. 917; 26 U.S.C. 7805)

[F.R. Doc. 59-11061; Filed, Dec. 28, 1959; 8:50 a.m.]

Exhibit 146: *Cammarano* v. *United States*, 358 U.S. 498 (1959)

CAMMARANO ET UX. *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 29. Argued November 19, 1958.—Decided February 24, 1959.*

1. In computing federal income taxes, sums paid by a taxpayer to an organization which expended them in extensive publicity programs designed to persuade voters to cast their ballots against proposed state initiative legislation which would have seriously affected or wholly destroyed the taxpayer's business may not be deducted from gross income as "ordinary and necessary" business expenses under § 23 (a) (1) (A) of the Internal Revenue Code of 1939, as interpreted by §§ 29.23 (o)–1 and 29.23 (q)–1 of Treasury Regulations 111, which forbid the deduction of sums expended for "the promotion or defeat of legislation." Pp. 499–507.

   (a) The Regulations apply to expenditures made in connection with efforts to promote or defeat legislation by persuasion of the general public as well as efforts to influence legislative bodies directly through "lobbying." Pp. 504–505.

   (b) They apply to expenses incurred in furthering or combatting proposed initiative measures as well as bills pending before legislatures. Pp. 505–507.

2. As so interpreted, the Regulations are not in conflict with § 23 (a) (1) (A) and are a valid exercise of the Commissioner's rule-making power. Pp. 507–512.

3. As thus construed and applied, the Regulations do not present a substantial constitutional question under the First Amendment. *Speiser* v. *Randall*, 357 U. S. 513, distinguished. Pp. 512–513.

246 F. 2d 751 and 251 F. 2d 724, affirmed.

Frederick Bernays Wiener argued the cause for petitioners in No. 29. With him on the brief was *Clinton M. Hester.*

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*Together with No. 50, *F. Strauss & Son, Inc., of Arkansas* v. *Commissioner of Internal Revenue*, on certiorari to the United States Court of Appeals for the Eighth Circuit.

E. Chas. Eichenbaum argued the cause for petitioner in No. 50. With him on the brief were *Leonard L. Scott* and *W. S. Miller, Jr.*

Oscar H. Davis argued the causes for respondents. On the brief were *Solicitor General Rankin, Assistant Attorney General Rice, Joseph F. Goetten* and *Myron C. Baum.*

Hart H. Spiegel filed a brief for the Bay Cities Transportation Co., as *amicus curiae.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

These cases, coming to us from two different Circuits, present identical issues, and may appropriately be dealt with together in one opinion. The issues involve the interpretation and validity of Treas. Reg. 111, § 29.23 (o)–1 and § 29.23 (q)–1 as applied by the courts below to deny deduction as "ordinary and necessary" business expenses under § 23 (a)(1)(A) of the Internal Revenue Code of 1939 [1] to sums expended by the respective taxpayer petitioners in furtherance of publicity programs designed to help secure the defeat of initiative measures then pending before the voters of the States of Washington and Arkansas.

The Treasury Regulations in question each provides in pertinent part that no deduction shall be allowed to "sums of money expended for lobbying purposes, the promotion

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[1] That section (26 U. S. C. § 23 (a)(1)(A)) provides in pertinent part:

"§ 23. Deductions from gross income. In computing net income there shall be allowed as deductions:

"(a) Expenses.

"(1) Trade or Business Expenses.

"(A) In General. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ."

or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising . . . ." [2] Both Courts of Appeals held that these provisions render nondeductible sums paid by petitioners to organizations which expended them in extensive publicity programs designed to persuade the voters to cast their ballots against state initiative measures, even though the passage of those measures would have seriously affected, or indeed wholly destroyed, the taxpayers' businesses—and that so interpreted the Regulations are a valid exercise of the Commissioner's rule-making power. We granted certiorari because of the recurring nature of the question, and because of its importance to the proper administration of the Internal Revenue laws. 355 U. S. 952; 356 U. S. 966.

A brief review of the facts in the two cases is necessary to an understanding of the issues.

No. 29: In 1948 petitioners William and Louise Cammarano, husband and wife, jointly owned a one-fourth interest in a partnership engaged in the distribution of beer at wholesale in the State of Washington. The partnership was a member of the Washington Beer Wholesalers Association. In December 1947 the Association had established a trust fund as a repository for assessments collected from its members to help finance a statewide publicity program urging the defeat of "Initiative to the Legislature No. 13," a measure to be submitted to the electorate at the general election of November 2, 1948, which would have placed the retail sale of wine and beer in Washington exclusively in the hands of the State.

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[2] Only § 29.23 (o)–1, which reads on individuals, is involved as to petitioners Cammarano, and only § 29.23 (q)–1, reading on corporations, as to petitioner F. Strauss & Son, Inc. Because the language and effect of the two Regulations are in all relevant respects identical they will be discussed throughout this opinion as if they were one.

During 1948 petitioners' partnership paid to the trust fund $3,545.15, of which petitioners' pro rata share was $886.29. The trust fund collected a total of $53,500, which was turned over to an Industry Advisory Committee organized by wholesale and retail wine and beer dealers, which in turn expended it as part of contributions totaling $231,257.10 for various kinds of advertising directed to the public, none of which referred to petitioners' wares as such and all of which urged defeat of Initiative No. 13.[3] The initiative was defeated.

In preparing their joint income tax return for 1948, petitioners deducted as a business expense the $886.29 paid to the Association's trust fund as their share of the partnership assessment. The deduction was disallowed by the Commissioner, and petitioners paid under protest the additional sum thus due and sued in the District Court for refund. That court ruled that the payments made to the trust fund were "expended for . . . the . . . defeat of legislation" within the meaning of Treas. Reg. 111, § 29.23 (o)–1 and were therefore not deductible as ordinary and necessary business expenses under § 23 (a)(1)(A) of the Internal Revenue Code of 1939. The Court of Appeals affirmed, holding the Regulation applicable and valid as applied. 246 F. 2d 751.[4]

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[3] A typical advertisement paid for by the Industry Advisory Committee, signed by "Men & Women Against Prohibition," begins "We intend to Vote Against Initiative 13—because it would mean a return to the speakeasy, the bootlegger, the gangster—and, finally, state-wide PROHIBITION! We urge our friends and neighbors to do likewise."

[4] The Court of Appeals alternatively held that judgment in favor of the Commissioner was required by a trial court finding that petitioners Cammarano had failed to show that passage of the initiative would have impaired their partnership's business as a beer distributor. 246 F. 2d, at 754. This ground of decision is not strongly defended by the Government in this Court, and on our view of the principles which control it need not be considered.

No. 50: Petitioner F. Strauss & Son, Inc., is a corporation engaged in the wholesale liquor business in Arkansas. In 1950 an initiative calling for an election on statewide prohibition was placed on the ballot to be voted on in the state general election on November 7, 1950. In May of that year Strauss, together with eight other Arkansas liquor wholesalers, organized Arkansas Legal Control Associates, Inc., as a means of coordinating their efforts to persuade the voters of Arkansas to vote against the proposed prohibition measure. Between May 30 and November 30, 1950, Arkansas Legal Control Associates collected a total of $126,265.84, which was disbursed for various forms of publicity concerning the proposed Act.[5] Strauss' contribution amounted to $9,252.67.

The initiative measure was defeated in the November election. On its 1950 income tax return Strauss deducted the $9,252.67 as a business expense. The Commissioner disallowed the deduction and Strauss filed a timely petition in the Tax Court seeking a redetermination of the deficiency asserted. That court upheld the action of the Commissioner in disallowing the claimed deduction, and the Court of Appeals unanimously affirmed. 251 F. 2d 724.

Since 1918 regulations promulgated by the Commissioner under the Internal Revenue Code have continuously provided that expenditures for the "promotion or defeat of legislation . . . ," or for any of the other purposes specified in the "corporate" Regulation now before us, are not deductible from gross corporate income; and

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[5] A typical advertisement, which ran in all Arkansas daily and weekly newspapers, and which shows as its sponsor "Arkansas Against Prohibition," begins:
"What Does 'One Quart' Prohibition REALLY MEAN? There's nothing like it anywhere . . . it's novel . . . it's unique. But it's sinister . . it's a plan to destroy the strictly-regulated alcohol beverage business and to turn that business over to the bootlegger."

since 1938 regulations containing identical language have forbidden such deductions from individual income.[6] During this period of more than 40 years these regulatory provisions have been before this Court on only one occasion. In *Textile Mills Securities Corp.* v. *Commissioner*, 314 U. S. 326, it was held that the Commissioner properly disallowed the deduction of sums paid by a corporation to a publicist and two legal experts employed to help secure the passage of legislation designed to secure the return of certain properties in this country seized during World War I under the provisions of the Trading With the Enemy Act. This holding was squarely based on the regulatory provisions now embodied in Treas. Reg. 111, § 29.23 (q)–1, which were found valid and applicable to the facts involved in that case, although the very busi-

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[6] Article 143 of Treas. Reg. 33 (1918 ed.) denied deductibility as ordinary and necessary business expenses to corporate expenditures for "lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda . . . ." The prohibition against corporate deduction of such expenditures first appears in its present form in Art. 562 of Treas. Reg. 45 (1919 ed.), promulgated under the Revenue Act of 1918. Thereafter it so appears continuously without change. See Art. 562 of Treas. Reg. 45 (1920 ed.), 62, 65, and 69, promulgated under the Revenue Acts of 1918, 1921, 1924, and 1926, Art. 262 of Treas. Reg. 74 and 77, promulgated under the Revenue Acts of 1928 and 1932, Art. 23 (o)–2 of Treas. Reg. 86, promulgated under the Revenue Act of 1934, Art. 23 (q)–1 of Treas. Reg. 94 and 101, promulgated under the Revenue Acts of 1936 and 1938, §§ 19.23 (q)–1, 29.23 (q)–1, and 39.23 (q)–1 of Treas. Reg. 103, 111, and 118, respectively, promulgated under the Internal Revenue Code of 1939.

The prohibition against individual deductibility of such expenditures first appears in Art. 23 (o)–1 of Treas. Reg. 101, promulgated under the Revenue Act of 1938, and thereafter in §§ 19.23 (o)–1, 29.23 (o)–1, and 39.23 (o)–1 of Treas. Reg. 103, 111, and 118, respectively, promulgated under the Internal Revenue Code of 1939.

In the proposed Income Tax Regulations under the 1954 Code the prohibitions are consolidated in § 1.162–15.

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ness of the taxpayer seeking the deduction was the direction of the publicity program in the course of which the expenditures were made.

Petitioners suggest that *Textile Mills* is not dispositive of the present cases, either as to the applicability of the Regulations upon the facts disclosed by these records or as to the validity of those Regulations under the statute if they are found to be applicable. Essentially, petitioners' contentions are (1) that the Regulations cannot properly be construed as applicable to expenditures made in connection with efforts to promote or defeat the passage of legislation by persuasion of the general public as opposed to direct influence on legislative bodies, that is "lobbying"; (2) that in any case the Regulations are inapplicable to expenditures made in connection with initiative measures; and (3) that if construed as applicable to the facts here presented the Regulations are invalid as contrary to the plain terms of § 23 (a)(1)(A) of the 1939 Code and possibly as unconstitutional under the First Amendment.

We need not be long detained by the question of the applicability of the Regulations to petitioners' expenditures. First, we see no justification for reading into these regulatory provisions the implied exceptions which petitioners would have us there find. We cannot accept petitioners' argument that *Textile Mills* should be read as limiting such provisions to direct dealings with legislators, insidious or otherwise. The deductions whose propriety was before the Court in that case were for expenditures, characterized by the Court of Appeals as being for "matters of publicity, 'including the making of arrangements for speeches, contacting the press, in respect of editorial comments, and news items,' " and for the preparation of "brochures" involving "a comprehensive study of the history of the treatment of persons and property in war," 117 F. 2d 62, 65, 63, all designed to influence

the opinions of the general public.[7] Apart from *Textile Mills*, the Courts of Appeals have uniformly applied these Regulations to expenditures for publicity directed to the general public on legislative matters. See, *e. g.*, *Revere Racing Assn.* v. *Scanlon*, 232 F. 2d 816 (C. A. 1st Cir.); *American Hardware & Eq. Co.* v. *Commissioner*, 202 F. 2d 126 (C. A. 4th Cir.); *Roberts Dairy Co.* v. *Commissioner*, 195 F. 2d 948 (C. A. 8th Cir.); *Sunset Scavenger Co.* v. *Commissioner*, 84 F. 2d 453 (C. A. 9th Cir.). Petitioners' reading of these Regulations would make all but the reference to "lobbying" pure surplusage. We think that the Regulations must be construed to mean what they say—that not only lobbying expenses, but also sums spent for "the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising" are nondeductible.[8]

Likewise unpersuasive is petitioners' suggested distinction between expenses incurred in attempting to promote or defeat legislation pending before legislatures and those incurred in furthering or combatting an initiative measure. We think that initiatives are plainly "legislation" within the meaning of these Regulations. Had the

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[7] Petitioners Cammarano suggest that in fact "lobbying" was involved in *Textile Mills* because of the activities of one Mondell whose services had also been engaged by the petitioner there. But the opinion of the Court of Appeals shows that none of the payments made to Mondell were involved in the litigation (see 117 F. 2d, at 64), and the opinion of this Court makes no reference to any of Mondell's activities.

[8] Petitioners point to *United States* v. *Rumely*, 345 U. S. 41, and *United States* v. *Harriss*, 347 U. S. 612, where this Court interpreted the term "lobbying" in a congressional resolution and in the Federal Regulation of Lobbying Act, 2 U. S. C. §§ 261–270, to mean only representations and communications made directly to Congress and its members concerning pending or proposed legislation. These cases do not advance petitioners' cause, since the regulatory provisions here explicitly embrace more than "lobbying." Cf. *United States* v. *Rumely*, *supra*, at 47.

measures involved in these cases been passed by the people of Washington and Arkansas they would have had the effect and status of ordinary laws in every respect. The Constitutions of the States of Washington and Arkansas both explicitly recognize that in providing for initiatives they are vesting legislative power in the people.[9] Every court which has considered the question has found these provisions to be fully as applicable to initiatives and referendums as to any other kind of legislation. See *Revere Racing Assn.* v. *Scanlon, supra; Old Mission Portland Cement Co.* v. *Commissioner,* 69 F. 2d 676, affirmed on other issues, 293 U. S. 289; *Mosby Hotel Co.* v. *Commissioner,* decided October 22, 1954, P–H 1954 TC Mem. Dec. ¶ 54,288; *McClintock-Trunkey Co.* v. *Commissioner,* 19 T. C. 297, reversed on other issues, 217 F. 2d 329 (involving payments, like those of petitioners Cammarano, made to the Washington Beer Wholesalers Association in connection with "Initiative to the Legislature No. 13").

A contrary reading of the Regulations would, indeed, be anomalous, for it would mean that expenses of publicity campaigns directed to the public to influence it in turn to persuade its legislative representatives to vote for or against pending bills would be encompassed by the Regulations and denied deductibility, whereas a less-

[9] Amendment 7 of the Constitution of the State of Washington provides in pertinent part:

"Art. 2, Sec. 1. *Legislative Powers, Where Vested*—The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the State of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature . . . ."

Amendment 7 of the Arkansas Constitution contains a virtually identical provision.

diluted form of persuasion and influence, directed to the voters as legislators, would be left at large so far as the Regulations are concerned. We see no reason to give so artificial and strained a construction to the pertinent language.[10]

The cornerstone of petitioners' argument is that Treas. Reg. 111, § 29.23 (o)–1 and § 29.23 (q)–1 are invalid if interpreted to apply to the expenditures here at issue. It is contended that sums expended by a taxpayer to preserve his business from destruction are deductible as ordinary and necessary business expenses under the Code as a matter of law, and that therefore a regulation purporting to deny deductibility to such expenditures is plainly contrary to the statute and *ipso facto* invalid. Petitioners rely upon *Commissioner* v. *Heininger,* 320

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[10] Petitioners place heavy reliance on the Commissioner's acquiescence until 1958 in a 1944 decision of the Tax Court allowing deduction to expenditures—found otherwise to qualify under § 23 (a) (1) (A) of the 1939 Code—incurred by a taxpayer in connection with a self-operative amendment to the Missouri Constitution, on the ground that "no legislation was needed or involved." *Smith* v. *Commissioner,* 3 T. C. 696. Whether or not under the Regulations here at issue a distinction can rationally be drawn between a popularly enacted constitutional amendment and an initiative, we do not see how the fact that the Tax Court and the Commissioner for a period made such a distinction, compare *Smith* v. *Commissioner, supra,* with *McClintock-Trunkey Co.* v. *Commissioner,* 19 T. C. 297, reversed on other issues, 217 F. 2d 329, helps petitioners' case, as the Commissioner and the Tax Court have been entirely consistent in their position that expenditures connected with initiatives—as in the present cases—are not deductible.

The Tax Court appears to have modified its view since the *Smith* case even as to expenditures made in connection with constitutional amendments. See *Mosby Hotel Co.* v. *Commissioner,* decided October 22, 1954, P–H 1954 TC Mem. Dec. ¶ 54,288. And the Commissioner has recently withdrawn his acquiescence in the *Smith* decision. See Rev. Rul. 58–255, 1958–1 Cum. Bull. 91.

U. S. 467, where this Court held that attorney's fees incurred by a mail-order dentist in resisting a postal fraud charge which would have ended his business were deductible as an ordinary and necessary business expense.

We do not think that *Heininger* governs the present cases, nor that it establishes as broad a rule of law as petitioners suggest. In *Heininger* this Court held no more than that expenditures without which a business enterprise would inevitably suffer adverse effects, and the granting of deductibility to which would frustrate no "sharply defined national or state policies," 320 U. S., at 473 (see also *Commissioner* v. *Sullivan*, 356 U. S. 27), were deductible as ordinary and necessary business expenses under the statute.[11] Here the deductions sought are prohibited by Regulations which themselves constitute an expression of a sharply defined national policy, further demonstration of which may be found in other sections of the Internal Revenue Code.[12]

As was said in *Textile Mills*, "the words 'ordinary and necessary' are not so clear and unambiguous in their meaning and application as to leave no room for an interpretative regulation. The numerous cases which have come to this Court on that issue bear witness to that." 314 U. S., at 338. In the present cases there is before us regulatory language of more than 40 years' continuous duration expressly providing that sums expended for the activities here involved shall not be considered an ordinary and necessary business expense under the statute. The provisions of the Internal Revenue Code which underlie the Regulations have been repeatedly re-enacted by the Congress without the slightest suggestion that the

[11] The Court noted that in judging the issues before it "we do not have the benefit of an interpretative departmental regulation defining the application of the words 'ordinary and necessary' to the particular expenses here involved." 320 U. S., at 470.

[12] See p. 512, *post*.

policy expressed in these regulatory measures does other than precisely conform to its intent.[13]

In 1934 the Court of Appeals for the Ninth Circuit denied deduction to expenses incurred in connection with a referendum which would, if passed, have increased the taxpayer's business. *Old Mission Portland Cement Co.* v. *Commissioner, supra.*[14] And in 1936 the same court in *Sunset Scavenger Co.* v. *Commissioner, supra,* reversed the Board of Tax Appeals to hold that the regulatory language now before us, through repeated re-enactment by Congress of the underlying legislation, already had acquired the force of law, and applied it to deny deductibility to expenditures made by an incorporated association of garbage collectors for a publicity program directed to the general public urging the defeat of legislation which would have injured the business of the Association's membership. The court recognized that the Board of Tax Appeals had twice previously held similar expenditures deductible so long as not made for an illegal purpose,[15] but pointed out that in both of those cases the effect of the Regulation had been entirely disregarded, and that

[13] See Note 6, *supra.*

[14] The suggestion of petitioners Cammarano that the decision in that case turned on factors of the kind involved in *McDonald* v. *Commissioner,* 323 U. S. 57, is contradicted by the statement of the Court of Appeals concerning *Old Mission* in *Sunset Scavenger Co.* v. *Commissioner,* 84 F. 2d, at 457.

[15] *G. T. Wofford* v. *Commissioner,* 15 B. T. A. 1225; *Los Angeles & Salt Lake R. Co.* v. *Commissioner,* 18 B. T. A. 168. Cf. *Lucas* v. *Wofford,* 49 F. 2d 1027, where a petition by the Commissioner for review of the decision in *G. T. Wofford, supra,* was denied upon a finding that the expenditures involved were not made "to secure the passage or defeat of any legislation." 49 F. 2d, at 1028.

After this Court's decision in *Textile Mills* the Board of Tax Appeals recognized that the Regulation was applicable to expenditures incurred in a "proper and legal attempt to prevent [business] injury" by endeavoring to secure the defeat of legislation. *Bellingrath* v. *Commissioner,* 46 B. T. A. 89, 92.

they were therefore not sound authority. Three years later the Congress, in the face of these decisions, again re-enacted without change in the 1939 Code the "ordinary and necessary" business expense section.

It is also noteworthy that Congress, in its 1954 re-enactment of the Internal Revenue Code, again adopted the "ordinary and necessary" provision without substantive change,[16] following consistent rulings by the courts subsequent to the 1939 re-enactment holding these Regulations applicable to sums spent in efforts to persuade the general public of the desirability or undesirability of proposed legislation affecting the taxpayer's business. See *Textile Mills; American Hardware & Eq. Co.* v. *Commissioner, supra; Roberts Dairy Co.* v. *Commissioner, supra; McClintock-Trunkey Co.* v. *Commissioner, supra.* Although the tax years involved in the cases before us are 1948 and 1950, and a 1954 re-enactment of course cannot conclusively demonstrate the propriety of an administrative and judicial interpretation and application as made to transactions occurring before the re-enactment, the 1954 action of Congress is significant as indicating satisfaction with the interpretation consistently given the statute by the Regulations here at issue and in demonstrating its prior intent. Cf. *United States* v. *Stafoff,* 260 U. S. 477, 480.

Under these circumstances we think that the Regulations have acquired the force of law. This is not a case where the Government seeks to cloak an interpretative regulation with immunity from judicial examination as to conformity with the statute on which it is based simply because Congress has for some period failed affirmatively to act to change the interpretation which the regulation gives to an otherwise unambiguous statute. Cf. *Jones* v. *Liberty Glass Co.,* 332 U. S. 524. Nor is it a case where

[16] Internal Revenue Code of 1954, 26 U. S. C. (Supp. V) § 162.

no reliable inference as to Congress' intent can be drawn from re-enactment of a statute because of a conflict between administrative and judicial interpretation of the statute at the time of its re-enactment. Cf. *Commissioner* v. *Glenshaw Glass Co.*, 348 U. S. 426, 431. Here we have unambiguous regulatory language, adopted by the Commissioner in the early days of federal income tax legislation, in continuous existence since that time, and consistently construed and applied by the courts on many occasions to deny deduction of sums expended in efforts to persuade the electorate,[17] even when a clear business motive for the expenditure has been demonstrated.

In these circumstances we consider that what was said in *Massachusetts Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269, 273, applies here:

> "This action [of Congress in re-enacting a statute] was taken with knowledge of the construction placed upon the section by the official charged with its administration. If the legislative body had considered the Treasury interpretation erroneous it would have amended the section. Its failure so to do requires the conclusion that the regulation was not inconsistent with the intent of the statute [citations] unless, perhaps, the language of the act is unambiguous and the regulation clearly inconsistent with it. [citation]." [18]

This Court has heretofore recognized that the "ordinary and necessary" language of the Code is hardly unambiguous, see *Textile Mills Securities Corp.* v. *Commissioner*,

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[17] *Smith* v. *Commissioner*, *supra*, can hardly be regarded as a break in the uniform chain of decisions. See Note 10, *supra*.

[18] See also *Helvering* v. *Winmill*, 305 U. S. 79, 83: "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reënacted statutes, are deemed to have received congressional approval and have the effect of law."

supra, and we cannot say that these Regulations are clearly, or even apparently, inconsistent with it. Cf. *Trust of Bingham* v. *Commissioner,* 325 U. S. 365.

The statutory policy is further evidenced by the treatment given by Congress to the tax status of organizations, otherwise qualified for exemption as organized exclusively for "religious, charitable, scientific, literary, or educational purposes," which engage in activities designed to promote or defeat legislation. As early as 1934 Congress amended the Code expressly to provide that no tax exemption should be given to organizations, otherwise qualifying, a substantial part of the activities of which "is carrying on propaganda, or otherwise attempting, to influence legislation," and that deductibility should be denied to contributions by individuals to such organizations. Revenue Act of 1934, §§ 101 (6), 23 (o)(2), 48 Stat. 700, 690. And a year thereafter, when the Code was for the first time amended to permit corporations to deduct certain contributions not qualifying as "ordinary and necessary" business expenses, an identical limitation was imposed. Revenue Act of 1935, § 102 (c), 49 Stat. 1016. These limitations, carried over into the 1939 and 1954 Codes,[19] made explicit the conclusion derived by Judge Learned Hand in 1930 that "political agitation as such is outside the statute, however innocent the aim . . . . Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them." *Slee* v. *Commissioner,* 42 F. 2d 184, 185. The Regulations here contested appear to us to be but a further expression of the same sharply defined policy.

Petitioners suggest that if the Regulations are construed to deny them deduction, a substantial constitutional issue under the First Amendment is presented.

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[19] Internal Revenue Code of 1939, 26 U. S. C. §§ 23 (o)(2), (q) (2), 101 (6); Internal Revenue Code of 1954, 26 U. S. C. (Supp. V) §§ 170 (c)(2)(D); 501 (c)(3).

They rely upon *Speiser* v. *Randall,* 357 U. S. 513, where a California statute requiring the taking of a loyalty oath as a condition of property tax exemption was struck down on grounds of procedural due process. This contention, made by neither petitioner below, is without merit. *Speiser* has no relevance to the cases before us. Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code. Nondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not " 'aimed at the suppression of dangerous ideas.' " 357 U. S., at 519. Rather, it appears to us to express a determination by Congress that since purchased publicity can influence the fate of legislation which will affect, directly or indirectly, all in the community, everyone in the community should stand on the same footing as regards its purchase so far as the Treasury of the United States is concerned.

Affirmed.

MR. JUSTICE DOUGLAS, concurring.

Valentine v. *Chrestensen,* 316 U. S. 52, 54, held that business advertisements and commercial matters* did not enjoy the protection of the First Amendment, made

*Two decisions prior to the *Valentine* case approved broad regulation of commercial advertising. *Fifth Avenue Coach Co.* v. *New York,* 221 U. S. 467, was decided long before *Stromberg* v. *California,* 283 U. S. 359, extended the application of the First Amendment to the States. In *Packer Corp.* v. *Utah,* 285 U. S. 105, the First Amendment problem was not raised. The extent to which such advertising could be regulated consistently with the First Amendment (cf. *Cantwell* v. *Connecticut,* 310 U. S. 296; *Martin* v. *Struthers,* 319 U. S. 141; *Breard* v. *Alexandria,* 341 U. S. 622; *Roth* v. *United States,* 354 U. S. 476) has therefore never been authoritatively determined.

applicable to the States by the Fourteenth. The ruling was casual, almost offhand. And it has not survived reflection. That "freedom of speech or of the press," directly guaranteed against encroachment by the Federal Government and safeguarded against state action by the Due Process Clause of the Fourteenth Amendment, is not in terms or by implication confined to discourse of a particular kind and nature. It has often been stressed as essential to the exposition and exchange of political ideas, to the expression of philosophical attitudes, to the flowering of the letters. Important as the First Amendment is to all those cultural ends, it has not been restricted to them. Individual or group protests against action which results in monetary injuries are certainly not beyond the reach of the First Amendment, as *Thornhill* v. *Alabama*, 310 U. S. 88, which placed picketing within the ambit of the First Amendment, teaches. And see *Newell* v. *Local Union*, 181 Kan. 898, 182 Kan. 205, 317 P. 2d 817; 319 P. 2d 171, reversed, 356 U. S. 341. A protest against government action that affects a business occupies as high a place. The profit motive should make no difference, for that is an element inherent in the very conception of a press under our system of free enterprise. Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive. We held as much in *Follett* v. *McCormick*, 321 U. S. 573. And I find it difficult to draw a line between that group and those who in other lines of endeavor advertise their wares by different means. Chief Justice Hughes speaking for the Court in *Lovell* v. *Griffin*, 303 U. S. 444, 452, defined the First Amendment right with which we now deal in the broadest terms, "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." And see *Jamison* v. *Texas*, 318 U. S. 413, 416; *Martin* v. *Struthers*,

319 U. S. 141, 143; *Burstyn* v. *Wilson,* 343 U. S. 495, 501–502.

In spite of the overtones of *Valentine* v. *Chrestensen, supra,* I find it impossible to say that the owners of the present business who were fighting for their lives in opposing these initiative measures were not exercising First Amendment rights. If Congress had gone so far as to deny all deductions for "ordinary and necessary business expenses" if a taxpayer spent money to promote or oppose initiative measures, then it would be placing a penalty on the exercise of First Amendment rights. That was in substance what a State did in *Speiser* v. *Randall,* 357 U. S. 513. "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech." *Id.,* at 518. Congress, however, has taken no such action here. It has not undertaken to penalize taxpayers for certain types of advocacy; it has merely allowed some, not all, expenses as deductions. Deductions are a matter of grace, not of right. *Commissioner* v. *Sullivan,* 356 U. S. 27. To hold that this item of expense must be allowed as a deduction would be to give impetus to the view favored in some quarters that First Amendment rights must be protected by tax exemptions. But that proposition savors of the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State. Such a notion runs counter to our decisions (*Grosjean* v. *American Press Co.,* 297 U. S. 233, 250; *Murdock* v. *Pennsylvania,* 319 U. S. 105, 112; *Follett* v. *McCormick, supra,* at 578), and may indeed conflict with the underlying premise that a complete hands-off policy on the part of government is at times the only course consistent with First Amendment rights. See *McCollum* v. *Board of Education,* 333 U. S. 203.

With this addendum, I concur in the opinion of the Court.

Exhibit 147: *Southwestern Electric Power Co.* v. *United States*, 312 F.2d 437 (Ct. Cl. 1963)

SOUTHWESTERN ELECTRIC POWER COMPANY (Formerly Southwestern Gas and Electric Company)

v.

The UNITED STATES.

No. 45–58.

United States Court of Claims.

Jan. 11, 1963.

Action to recover amounts of income tax deficiencies and interest thereon which private electric power company had been required to pay. The Court of Claims, Laramore, Judge, held that under income tax regulation denying deductibility of expenditures for exploitation of propaganda, including advertising, other than trade advertising, and for promotion or defeat of legislation, expenditures for advertising to discourage congressional appropriation for government power project in company's trade area were not deductible from gross income, but expenses in connection with appearance of company's officers and general counsel before appropriate congressional committees were not expenses to promote or defeat legislation and were deductible from gross income as ordinary and necessary business expenses.

Judgment accordingly.

Davis, J., dissented in part.

1. Constitutional Law ⇐82

Income tax regulation prohibiting deductions from gross income of taxpayer's expenditures for lobbying purposes, for promotion or defeat of legislation, for exploitation of propaganda, including advertising, other than trade advertising and for campaign expenses does not violate the First Amendment. U.S.C.A.Const. Amend. 1; 26 U.S.C.A. (I.R.C.1939) § 23(a) (1) (A).

2. Internal Revenue ⇐568.2

Expenditures by private electric power company for advertisements to discourage the appropriations by Congress to be used by government agency for development of power facilities in

area served by electric company were not deductible as ordinary and necessary expenses of company, since expenditures were within income tax regulation denying deduction of expenses for exploitation of propaganda, including advertising other than trade advertising. 26 U.S.C.A. (I.R.C.1939) § 23(a) (1) (A).

3. Internal Revenue ⇐568.2

Threat of business injury does not authorize deduction from gross income of taxpayer's expenditures for exploitation of propaganda, including advertising other than trade advertising, contrary to income tax regulation. 26 U.S.C.A. (I.R.C.1939) § 23(a) (1) (A).

4. Internal Revenue ⇐566.1

For advertising expenditures to be deductible from gross income under statute authorizing deduction of ordinary and necessary expenses paid or incurred in carrying on trade or business, taxpayer's advertising must be within the normal scope of advertising; that is, promoting sale of goods. 26 U.S.C.A. (I.R.C.1939) § 23(a) (1) (A).

5. Internal Revenue ⇐568.2

Mere appearance before legislative committee cannot be construed as "lobbying" under statute authorizing deduction of ordinary and necessary expenses in trade or business and regulation prohibiting deduction of expenditures for lobbying. 26 U.S.C.A. (I.R.C.1939) § 23 (a) (1) (A); Federal Regulation of Lobbying Act, § 301 et seq., 2 U.S.C.A. § 261 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

6. Internal Revenue ⇐568.2

Appearances by officers and general counsel of private electric power company before congressional committees to discourage appropriation for government power project in area serviced by company were not "lobbying," and expenditures in connection therewith were deductible from company's gross income as ordinary and necessary expenditures in carrying on business of company. 26 U.S.C.A. (I.R.C.1939) § 23(a) (1) (A); Federal Regulation of Lobbying Act, § 301 et seq., 2 U.S.C.A. § 261 et seq.

Richard L. Arnold, Texarkana, Ark., for plaintiff; John M. Madison, Shreveport, La., and Stevenson, Dendtler & McCabe, Chicago, Ill., on the briefs.

Robert Livingston, Washington, D. C., with whom was Asst. Atty. Gen., Louis F. Oberdorfer, for defendant; Edward S. Smith and Philip R. Miller, Washington, D. C., on the brief.

LARAMORE, Judge.

This is an action to recover the amounts of income tax deficiencies and interest thereon, totaling $15,847.39, which the plaintiff was required by the Internal Revenue Service to pay for the calendar years 1947, 1948, 1949, and for the period January 1–October 20, 1950.

The legal question involved in this action is whether certain advertising expenses and certain legal and traveling expenses of the plaintiff during the respective periods constituted "ordinary and necessary expenses paid or incurred * * * in carrying on * * * [the plaintiff's] business," within the meaning of that phrase as used in section 23 (a) (1) (A) of the Internal Revenue Code of 1939, as amended 26 U.S.C. § 23 (a) (1) (A) (1952 Ed.).[1]

A corollary question is whether by virtue of section 29.23(q)–1 of U.S. Treasury Department, Income Tax Regulations 111 (26 CFR § 29.23(q)–1 (1949 Ed.)), said advertising, legal and traveling expenses, or any of them were nondeductible from gross income under section 23(a) (1) (A), supra.

1. Section 23(a) (1) (A), supra, provides in pertinent part:

"(A) *In general.* All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *."

The Treasury Regulation in question provides in pertinent part that sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses are not deductible from gross income.

The facts briefly summarized are as follows: The plaintiff, a Delaware corporation, had its principal business office, during the years involved, in the City of Shreveport, Louisiana. It was engaged in the generation, transmission, distribution and sale of electric power and energy in an area covering northeastern Texas, northwestern Louisiana, and a portion of southern and western Arkansas. In that area plaintiff, during the pertinent periods, furnished electric utility service at retail in approximately 154 cities, towns and unincorporated communities and in rural areas adjacent thereto. It also sold electric power to 3 municipalities and 13 rural electric cooperatives for resale. Plaintiff owned and operated various steam electric generating stations, electric distributing systems, and a transmission system.

Background for the present controversy was provided when the Congress of the United States, during the period between June 28, 1938, and March 2, 1945, authorized or approved the construction and operation by the Corps of Engineers, United States Army, under the control of the War Department, of 13 reservoir projects and hydroelectric power facilities located in the area that includes the States of Arkansas and Louisiana, those parts of the States of Kansas and Missouri lying south of the Missouri River basin and east of the 98th meridian, and those parts of the States of Texas and Oklahoma lying east of the 99th meridian and north of the San Antonio River basin. In addition, Congress during the same period authorized the Corps of Engineers to survey and report on the feasibility of 16 additional proposed reservoir projects and hydroelectric facilities in such area.

The territory served by the plaintiff (see finding 7(a)) is within the area described in finding 9. The authorized and proposed hydroelectric power projects referred to in finding 9 were all located or to be located in, or within transmission distance of, the territory served by the plaintiff. The aggregate hydroelectric generating capacity proposed to be installed in such Federal projects was about 2,000,000 kilowatts.

During the period in question, on the basis of the reports of the Army Engineers, plaintiff believed that the power generated at the Federal projects in the area would be sold to existing electric systems. However, under section 5 of the Act of December 22, 1944 (the Flood Control Act of 1944), 58 Stat. 887, the Secretary of the Interior was authorized to sell such power in wholesale quantities at rates to be approved by the Federal Power Commission, and to construct or acquire, from funds appropriated by Congress, transmission lines and related necessary facilities. The Southwestern Power Administration was designated as the marketing agent under section 5 of the Act of December 22, 1944, supra.[2]

In November of 1945 the Southwestern Power Administration issued a "Report on Comprehensive Plan of Power Distribution and Sales from Hydro-Electric Projects, as Authorized by Flood Control Act, December 1944 (H.R. 4485) in the Southwestern Region." This was a proposal for possible future action with respect to the construction and operation of a comprehensive electric system within a substantial portion of the southwestern area of the country. The Plan proposed the sale in wholesale quantities of firm power to public bodies, rural electric cooperatives, and privately owned companies.

The comprehensive plan was brought to the attention of plaintiff on or about February 2, 1946, and it was apparent

2. The Southwestern Power Administration is a bureau or agency of the Department of the Interior. It was created by Order No. 1865, which the Secretary of the Interior issued on August 31, 1943.

partment of Agriculture requests for funds to be used by the Rural Electrification Administration in making loans to certain rural electric cooperatives for construction of steam electric generating stations and transmission lines. The attempt to dissuade the appropriations committees was based largely upon the legality of proposed appropriations.

Plaintiff, in addition to advertising expenses and travel expenses, incurred and paid legal fees to its general counsel, Richard L. Arnold, as compensation for his services in preparing and submitting legal opinions to subcommittees and expenses incident to his attending committee hearings for the purpose of giving testimony.

Plaintiff timely filed its corporation income tax returns for the calendar years 1947, 1948, 1949, and for a part of 1950, and paid the taxes shown to be due. After examination, the Internal Revenue Service made certain adjustments, not here involved, and assessed a deficiency.

In determining the deficiency, the Internal Revenue Service disallowed as deductions from plaintiff's gross income the advertising expenses, legal and travel expenses, which are referred to herein.

Plaintiff paid the assessed deficiencies and timely filed claims for refund which were denied. This suit results.

Since two types of deductions are claimed here, we will treat each separately.

[1] The first claimed deduction is for the cost of advertising. As stated earlier, the law does not allow a deduction from gross income for expenditures incurred for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising and contributions for campaign expenses. The nondeductibility of these items stems from section 29.23(q)–1 of Treasury Regulations 111, supra, the legality of which was upheld most recently by the Supreme Court in the case of Cammarano v. United States, 358 U.S. 498, 79 S.Ct. 524, 3 L.Ed.2d 462. In that case, the issue was the deductibility of expenses incurred by Cammarano in an effort to persuade voters to cast their ballots against proposed state initiative legislation which would have seriously affected or wholly destroyed the taxpayer's business. Therein the Supreme Court held that not only lobbying expenses, but also sums spent for "* * * the promotion or defeat of legislation, *the exploitation of propaganda*, including advertising other than trade advertising" are non-deductible [italic supplied]. In addition to upholding the legality of the regulations, the Supreme Court in the Cammarano case rejected as without merit the contention that the first amendment to the Constitution of the United States was violated by the denial of expenditures to purchase publicity which could influence the fate of legislation.

Plaintiff contends with respect to the constitutional question that the Supreme Court's holding was made without the extended consideration usually afforded to constitutional questions. We need only to point out that while the majority opinion in Cammarano respecting violation of the first amendment was contained in one paragraph, it was not treated in a cavalier fashion. Mr. Justice Douglas, in a concurring opinion, very exhaustingly dealt with the constitutional question and approved and upheld the constitutionality of the regulation.

True, plaintiff makes a different, intelligent and persuasive argument on this point. Yet, however meritorious the argument, we feel that the Cammarano opinion leaves no room for doubt in this field.

Referring back to the application of the Cammarano case to the facts of this case—legislation had already been passed, so we cannot categorically say that the advertisements were primarily aimed at promoting or defeating legislation.[3]

3. Nothing is contained in the evidence or briefs, but the possibility exists that repeal of legislation already enacted might reasonably result from such advertising.

that if the facilities embraced therein were constructed and operated, it would constitute a competitive system with that of plaintiff. The plaintiff was concerned that the cities and towns would decide to go into the power business and either build distribution systems or acquire those owned by plaintiff. The plaintiff considered this to be a serious threat to its business.

The plaintiff's concern was increased by reports it received to the effect that representatives of the Southwestern Power Administration had approached certain municipal authorities and had tried to interest them in public power and in substituting electric service from the Southwestern Power Administration for the electric service rendered by the plaintiff. In fact, during the periods involved in this case, the Southwestern Power Administration began furnishing electric service to three rural electric cooperatives which were located in plaintiff's service area and which had previously obtained power from the plaintiff.

In an attempt to develop a spirit of opposition toward the implementation of the Southwestern Power Administration's comprehensive plan, plaintiff began a series of advertisements in newspapers and magazines which circulated primarily in such service area. In their totality, these advertisements endeavored to make the following principal points:

> "The Government, through the Southwestern Power Administration, was planning to spend $200,000,000 of the taxpayers' money to build a power system that would duplicate the lines of electric light companies already serving more than 800,000 houses in Missouri, Kansas, Oklahoma, Arkansas, Louisiana, and Texas.
>
> "The plaintiff was building to serve every future need of electric power in its territory. There was no need, and there never would be a need, for the Southwestern Power Administration to waste the taxpayers' money for service already supplied by the plaintiff, a taxpaying business.
>
> "The plaintiff and other electric power companies operating in the areas where Federal flood-control dams were located or to be located should be permitted to purchase and distribute any power generated at those projects, because such companies already had the lines and other distribution facilities.
>
> "It is unfair for the Government to compete with electric power companies in the generation and distribution of electric power, because electric power companies are required to pay a fair return to their investors, to pay taxes, and to pay adequate interest on loans, whereas the Government does not meet such requirements.
>
> "The Government shifts its losses to the taxpayers. In the power business, it can pretend to sell cheap power and cover up its losses.
>
> "When the Government takes over enough things, socialism comes automatically. Socializing electric light and power is one of the first goals of people who want to push America down the hill to socialism.
>
> "Government ownership of electric power companies is contrary to the American system of free business enterprise."

These advertising expenses are the same, and in part, are the subject of this litigation.

During the periods here involved, representatives of plaintiff, plaintiff's president, vice president, and general counsel, in cooperation with other electric power companies, also appeared before subcommittees of the Appropriations Committees of the House of Representatives and Senate of the United States. In these appearances an attempt was made to persuade said committees not to grant requests for funds to be used by the Southwestern Power Administration for purposes of the agency's comprehensive plan. In addition, an attempt was made to persuade committees not to grant De-

[2] What then remains in the regulation which could deny deductibility? We think the important language is this: "* * * the exploitation of propaganda, including advertising other than trade advertising * * *."

The principal points which the advertisements were designed to make are: (1) The Government, through the Southwestern Power Administration, was planning to unnecessarily waste $200,000,000 of the taxpayers' money to build a duplicating power system; (2) there was no need for such; (3) the plaintiff should be permitted to purchase and distribute any power generated at the proposed projects; (4) it is unfair for the Government to compete with private companies; (5) the Government shifts its losses to the taxpayers and can pretend to sell cheap power and cover up its losses; (6) socialism would be the result; (7) Government ownership of electric power companies is contrary to the American system of free business enterprise.

Even though we may be heart and soul in sympathy with and in agreement with the objectives of the advertisements, nevertheless said advertisements clearly are in the nature of the exploitation of propaganda and cannot be considered as "trade advertisements". Except for plaintiff's name at the bottom of each ad, nothing is contained in any one that would induce a prospective customer to purchase plaintiff's product. For instance, picking at random, the advertisement of January 1947 is entitled, "Here's Where Your Money Goes." This ad is pointing to waste of tax money proposed to be spent by Southwestern Power Administration. The advertisement of May 5, 1947, is entitled, "Is This Waste Really Necessary?" This ad points out unfair competition by the Government. The November 1948 ad is entitled, "The way it actually works." This ad is datelined "London" and points out the danger of socialism. Thus, it can readily be seen that exploitation of propaganda is the primary objective of most, if not all, of the advertisements when viewed either individually or as a whole. They were designed to create a climate of public opinion against the proposed project, the expense deductibility of which is in direct violation of the pertinent regulations and not in conformity with the expression of the Supreme Court in Cammarano v. United States, supra.

While it may be argued that the insertion of Plaintiff's name at the bottom of each advertisement in some measure attains the form of direct customer advertising, the tenor of the advertisements, taken in their entirety, completely outweighs any determination other than that their purpose was purely the exploitation of propaganda.

[3] Nor can the threat of business injury justify advertising such as here. Los Angeles & Salt Lake Railroad Co. v. Commissioner, 18 B.T.A. 168.

[4] Consequently, in the light of the Supreme Court's decision upholding the validity of the regulation in question, and in the light of many decisions to the effect that deductions for advertising under section 23(a) (1) (A), supra, must be within the normal concept of advertising; i. e., promoting the sale of goods,[4] plaintiff must fail on this item of its claim.

The remainder of plaintiff's claim is based upon the deductibility or non-deductibility of certain legal and travel expenses of the plaintiff. Plaintiff's claim is based upon a contention that said expenses constitute "ordinary and necessary expenses paid or incurred * * * in carrying on * * * business," within the meaning of that phrase as is used in section 23(a) (1) (A) of the Internal Revenue Code of 1939, supra.

Defendant, of course, contends that the legal and travel expenses were incurred in an effort to defeat legislation; i. e., to defeat an appropriation bill for the im-

4. Stover Co. v. Commissioner, 27 T.C. 434; Revere Racing Association v. Scanlon, 1 Cir., 232 F.2d 816.

plementation of the Southwestern Power Administration's comprehensive plan.

While the problem of whether or not "appropriation" is "legislation" is surrounded by an aura of confusion and doubt with little or no light shed on the subject by the Federal courts, we think the resolution of that question is unnecessary to a complete disposition of this phase of the case.

The facts respecting this portion of plaintiff's claim are briefly: Plaintiff incurred legal and travel expenses in attempting, along with other electric power companies, to persuade the appropriations committees of the U. S. Senate and House of Representatives not to grant requests of the Interior Department for funds to be used by the Southwestern Power Administration for the purposes of the agency's comprehensive plan, and not to grant a request by the Department of Agriculture for funds to be used by the Rural Electrification Administration in carrying out a plan whereby the Rural Electrification Administration would make loans to certain rural electric cooperatives for construction of steam electric generating stations and transmission systems within the area of plaintiff's operations.

The plaintiff's reason for the above action was based upon its general counsel's advice that in his opinion the steam electric generating plants and the network of 14,000 miles of transmission lines proposed to be constructed by Southwestern Power Administration were not authorized by section 5 of the Act of December 22, 1944, supra.[5]

In attempting to prevent favorable action on the requests for funds, the president, vice president, and general counsel of the plaintiff engaged in travel, at the expense of plaintiff, for the purpose of appearing at hearings before a subcommittee of the respective appropriations committee, stating to said subcommittee factual and legal reasons why, in the opinion of plaintiff, the requests for funds should not be granted.

While it is true plaintiff's representatives made certain factual representations regarding the plan, we think those statements were necessary to place the situation in a climate whereby the legal problems could be approached.

In connection with these activities, plaintiff paid legal fees to its general counsel, as compensation for his service in preparing and submitting legal opinions to plaintiff and said subcommittee and in attending hearings before such subcommittee for the purpose of giving testimony himself and advising other representatives of plaintiff with respect to the formulation of statements to be submitted by them to said subcommittee, and in coordinating legal material for inclusion in said statements and in performing legal research incident to these matters.

The total legal and travel expenses amounted to $14,459.58. Of this amount, $9,500 represented fees paid plaintiff's general counsel for his legal services, $3,949.48 represented reimbursement to plaintiff's general counsel for travel expenses and $1,010.10 represented reimbursement to other representatives of the plaintiff for travel expenses.[6]

These expenses were not disallowed by the Commissioner of Internal Revenue on the ground that the expenses were not "ordinary and necessary expenses" under section 23(a) (1) (A), supra, but on the ground that they were not deductible from gross income under the provisions of section 29.23(q)–1, supra, of the regulations and, therefore, did not constitute allowable, ordinary and necessary expenses under section 23(a) (1) (A).

Thus, we must again look to the above regulation for a determination as to the application thereof. At the outset, we can cast aside certain portions of the regulation; i. .e, it was not the exploitation of propaganda, including advertising of any sort, nor was it a campaign contribution. Therefore, to come within the regulation the expenses must have been

5. This statute is frequently referred to as the Flood Control Act of 1944.

6. No question is raised as to the reasonableness of the above amounts.

either for lobbying or the promotion or defeat of legislation.

[5, 6] We cannot conceive in this situation that the Government strongly urges that the above recited appearances constituted lobbying on the part of the plaintiff. A mere appearance before a legislative committee cannot be construed to be "lobbying" under the statute. As a matter of fact, a mere appearance before a committee of Congress is expressly excepted from the Act. 60 Stat. 839, 842. Therefore, we hold that the appearances and statements by plaintiff's president, vice president, and general counsel in fact are not embraced by the term "lobbying".

We then must consider whether these sums were expended for the promotion or defeat of legislation, and in so doing we attempt to refrain from any expression as to whether "appropriation" is "legislation" within the meaning of the regulation in question.

We simply do not think plaintiff's representatives were paid to promote or defeat legislation. The legislation had been passed by Congress. Indeed, as a result thereof, plaintiff was fighting for its very existence. If, as thought by plaintiff, the Southwestern Power Administration's lines could effectively destroy plaintiff's business and there was some taint of illegality in an appropriation of funds to supplement the plan, it was the duty of plaintiff's president and officers to seek legal advice in order to protect its stockholders.[7]

In furtherance of this goal, it was also the duty of plaintiff's officers to so inform the appropriations committees of Congress. In this connection, there is no evidence to the contrary and we assume neither plaintiff's president nor its vice president were lawyers, and hence it was necessary that they turn to some other person for legal advice. This they did and we can see no reason why the obligation incurred thereby should not be treated as an ordinary and necessary expense in carrying on its business under the terms of section 23(a) (1) (A), supra.

Therefore, when it became necessary to impart this legal information to the appropriations committee, it was imperative that they have in attendance their attorney, not only to advise the president and vice president in their testimony before the committee, but to testify and advise said committee on the legal intricacies involved.

The regulation was not designed to protect an illegal act of an appropriations committee but only the legitimate acts of Congress. In this respect, whether plaintiff was right or wrong is of no importance. The important fact is plaintiff believed the appropriation to be illegal and thus was impelled to make its contention known. This is the right of each citizen, company, or corporation, and is in conformity with sound business principles. Viewed in this light, deduction of the attendant expense could not violate the regulation in question.

Their appearance was not to deceive, not to influence, but merely to state their case in an effort to preserve the business the company had built, and in this respect denial of the right of deductibility for expenses attributable to an attempt to enlighten a committee of Congress as to the legality of proposed action would be manifestly unfair. Indeed, Southwestern Power Administration was unquestionably represented by legal counsel and had also its representatives in attendance. Why then should plaintiff not be given the same consideration with right to deduct the attendant expense? We can only answer this question by holding that the expenses enumerated earlier do not fall within the prohibition of the regulation, but are ordinary and

7. The advice obtained from plaintiff's general counsel made attendance before the subcommittee more imperative, in that plaintiff was advised that court action would not solve the problem and that appearance before the appropriations committees offered the only solution. The opinion of plaintiff's general counsel has been confirmed by the court's opinion in Kansas City Power & Light Company v. McKay, 96 U.S.App.D.C. 273, 225 F.2d 924.

necessary business expenses within the meaning of section 23(a) (1) (A), supra.

Furthermore, there was another and important reason for their appearance before the appropriations committee. Plaintiff was naturally desirous at all times to keep itself informed as to the Southwestern Power Administration's plans, inasmuch as it conceivably could be put out of business as a result thereof, and plaintiff might conceivably remain in business by the purchase of electricity under the terms of the Act of December 22, 1944, supra. Thus plaintiff's appearances were not only geared to the legality of the appropriations but directly connected with its business.

Consequently, we hold that plaintiff is not entitled to deduct as ordinary and necessary business expense the amounts expended for advertising as earlier outlined. Plaintiff is, however, entitled to deduct the travel and legal expenses as referred to heretofore, and judgment is entered to that effect. The exact amount of recovery will be determined pursuant to Rule 38(c) of the Rules of this court.

DURFEE and WHITAKER, Judges, concur.

JONES, Chief Judge (concurring in part in the result).

I have no doubt that the plaintiff or any business concern would be entitled to a deduction for trade or goodwill advertising simply in the interest of securing public understanding. So long as such advertising is not propaganda directly or indirectly influencing legislation, such advertising is an avenue of good public relationship in the normal course of regular business operations.

In modern times every successful business in the United States finds it necessary to advertise regularly in the ordinary conduct of its operations, not only for business purposes but as a basis of fair and honorable operations. Emerson is reputed to have said many years ago that if a man can write a better book, preach a better sermon, or build a better mousetrap than his neighbor, even though he builds his house in the woods, the world will make a beaten path to his door. That was probably at least measurably true in the circumstances that existed at that time. But in the grueling competition of today the man would probably starve to death before the public found out that he was in the woods. In the tremendous competition of today he would be more like the bashful boy who threw his sweetheart a kiss in the dark. He knew what he was doing but nobody else did.

In the current period, if a business concern should try to operate in the dark it would die on the vine, go broke and be forgotten, or, if operating in a restricted field, would probably bring down upon itself the wrath of the public even though due to a misunderstanding. By its silence it would thus sow the seed of its own destruction either by public revolt or by misunderstanding, or by competition that is wise enough to cultivate an understanding public through the medium of judicious advertising. If that man in the woods, however, would do a little intelligent advertising some enterprising concern would probably make newsreels of him and have an interview in which he and his wife would be asked to tell just how it was all done, including some stress stories of long and persistent struggles and heartbreaks on the way to final success.

No doubt the plaintiff, with all other business concerns, knows the value of and probably engages in appropriate goodwill advertising.

The question naturally arises: Is the advertising in question this type or is it intended primarily for the purpose of influencing legislation or action by the Congress, the exploitation of propaganda, or advertising other than trade advertising?

We have read each of the ads that have been submitted in the record and we can reach no other reasonable conclusion than that they were definitely all of the primary propaganda type intended to stir

up such a movement as would directly or indirectly affect action to be taken by the Congress.

Plaintiff makes a distinction between what is known as a legislative bill which is usually in the form of a permanent statute, or an appropriation bill, which has for its purpose simply the carrying out—usually for just one year—all or a part of the enacted legislation. There is a distinction, especially in the House, between the manner in which the two kinds of congressional actions are considered and classified. But this is merely a matter of rules and convenience of procedure. The substance remains the same. Most legislation is inanimate and lifeless without the energizing appropriation. Withholding appropriations in this type of legislation renders such legislation useless, thus destroying its whole purpose. Reducing the essential appropriation partially cripples its effectiveness.

Where, as here, legislation is dependent on affirmative action to become effective, the legislative act is not complete until the appropriation is made. No action of any kind can be taken until funds are available. So any effort to induce the Congress to withhold or substantially reduce the appropriation which is essential to the life and effectiveness of the legislative authorizing act becomes an effort to defeat legislation. However, any such distinction becomes relatively unimportant in the instant case in view of the broad terms of the Treasury Regulation which forbids deductions for expenses incurred in propaganda and "advertising other than trade advertising."

Also bearing on the subject is a provision enacted by the Congress entitled "Title III—Regulation of Lobbying Act," Chapter 753, 60 Stat. 839, 840. Section 302(e) contains the following language:

> "The term 'legislation' means bills, resolutions, amendments, nominations, and other matters pending or proposed in either House of Congress, and includes any other matter which may be the subject of action by either House."

Thus, clearly the purpose of this provision was to include under the ban efforts to influence any action taken by the Congress which, of course, would include a legislative measure or an appropriation bill enacted pursuant to legislative authorization.

In the light of the wording of the advertising and especially in view of this declaration of the Congress, I do not think the plaintiff is entitled to a deduction for the type of advertising shown by the record.

The question remains of the allowance of a deduction for attorneys' fees. I think that this matter comes in a different category.

In the complication of laws and reports under which modern business must be operated, there is a vital need for counsel. The Commissioner has found that the work of the counsel, Mr. Arnold, was limited to the legal questions involved and that his advice and appearance were on that basis. He so stated in the oral argument and the statement was not questioned by defendant's counsel.

It appears from the record that the operation and planning of the Southwestern Power Administration in this particular area was done under an executive order issued pursuant to the authorizing act and that the Southwestern Electric Power Company made its plans in accordance therewith. Of course such plans would necessarily be limited to the framework of the act under which the operations were being pursued. Certainly, the business concern was entitled to have counsel advise whether the planners stayed within the limits of the act. Even though it may have stayed within its terms it would be altogether advisable and proper, almost necessary, to have legal advice on whether it had done so.

One of the most highly prized rights of the Anglo-Saxon tradition is to have a day in court and the right to be represented by counsel. I have always thought that one of the chief glories of the Constitution is that the Nation cannot take the shirt from the back of the street

ragamuffin without either securing the lad's consent or paying him for the requisitioned rags. A man is entitled to counsel both in civil and criminal matters. In the light of this record, I think plaintiff is entitled to have a deduction for the legal fees and expenses incurred in connection with the services of Mr. Arnold as described by the trial commissioner. The record rather clearly indicates that the other counsel and officials were engaged largely in connection with proposed legislation or action by the Congress, or at least the record is not clear that this is not true.

Our attention has been called to the provisions of section 3 of the Revenue Act of 1962, which permit deductions for expenses incurred in connection with appearances before, or submission of statements to, congressional committees or individual members of the Congress. But this section, especially when read in connection with the House and Senate Reports, would indicate that the law was otherwise prior to the 1962 enactment. At least the wording does not seem to indicate that the amendment was merely a clarifying declaration of what the intention of the Congress had been in the earlier enactment.

Hence, I concur with the majority that the advertising expenses are nondeductible. I would limit plaintiff's recovery to the fees and traveling expenses of the chief counsel, Mr. Arnold.

DAVIS, Judge (concurring in part and dissenting in part).

I concur in the court's judgment against the deductibility of the advertising expenses, but I dissent from the ruling upholding the deduction of the travel and legal expenses. Under the Treasury Regulation (Treas.Reg. 111, Sec. 29.23(q)–1), the latter amounts were, I believe, non-deductible as "sums of money expended for lobbying purposes" and also for "the promotion or defeat of legislation."

Ever since the prototype of this regulation was issued in 1915 (T.D. 2137), it has forbidden the deduction of "lobbying" expenses. The Supreme Court has said that "lobbying in its commonly accepted sense" means "representations made directly to the Congress, its members, or its committees." United States v. Rumely, 345 U.S. 41, 47, 73 S.Ct. 543, 97 L.Ed. 770 (1953); United States v. Harriss, 347 U.S. 612, 620, 74 S.Ct. 808, 98 L.Ed. 989 (1954). The term has not been limited to improper or clandestine activities. In appearing before committees of the Congress, plaintiff's officers and counsel had "direct communication with members of Congress on pending or proposed federal legislation" (United States v. Harriss, supra), communications which were within "lobbying in its commonly accepted sense." It is true that the Regulation of Lobbying Act, enacted in 1946, excepts from its coverage "any person who merely appears before a committee of the Congress of the United States in support of or in opposition to legislation" (60 Stat. 839, 842, 2 U.S.C. § 267), but this was a special exception for that registration statute which did not affect the usual, broader, meaning of the term "lobbying" as it has been employed in the Treasury Regulations since 1915.[1]

The travel and legal expenses plaintiff seeks to deduct were also spent for "the promotion or defeat of legislation." That phrase in the Regulation has a long reach. It has been applied to attempts to influence Congress to pass statutes (Textile Mills Securities Corp. v. Commissioner, 314 U.S. 326, 62 S.Ct. 272, 86 L.Ed. 249 (1941)); to efforts to induce the electorate of a state to defeat or approve an initiative or referendum (Cammarano v. United States, 358 U.S. 498, 79 S.Ct. 524, 3 L.Ed.2d 462 (1959));

1. Section 3 of the Revenue Act of 1962, 87th Cong., 2d Sess., P.L. 87-834, enacted October 16, 1962, makes new provisions for deduction of the expenses of appearing before Congressional committees, but these amendments apply only to taxable years beginning after December 31, 1962.

to expenditures for appearances before state legislators (Bellingrath v. Commissioner, 46 B.T.A. 89 (1942)); and to programs designed to influence the voters of a city against a proposed ordinance (Sunset Scavenger Co. v. Commissioner, 84 F.2d 453 (C.A.9, 1936)). To me, this sweeping phrase—designed to cover the entire range of law-making by "legislative" bodies of all types—clearly applies to an attempt to persuade an Appropriation Committee of the Congress not to implement a pre-existing statute by including the necessary money in an appropriation bill. This is just as much an effort to defeat Congressional "legislation" as it would be if the appearances were related to a substantive bill. Authority to enact appropriation measures is among the "legislative powers" granted to Congress by Article I, Section 1, of the Constitution; an appropriation bill, once enacted, is a statute and law of the United States like any other, as the Constitution itself expressly recognizes (Art. I, Sec. 9) by declaring that "no Money shall be drawn from the Treasury, but in Consequence of Appropriations made *by Law*" (emphasis added); indeed, Congress can amend substantive legislation through an appropriation bill, if it chooses to disregard its own internal rule against doing so (United States v. Dickerson, 310 U.S. 554–555, 60 S.Ct. 1034, 84 L.Ed. 1356 (1940); Eisenberg v. Corning, 86 U.S. App.D.C. 21, 179 F.2d 275–276 (C.A.D.C. 1949)). Nor does it matter, for this comprehensive Regulation, that the plaintiff's presentation to the Committees was primarily legal or that it acted in all good faith to show Congress that the proposed appropriations would not be validly authorized by the prior substantive statute. As the decisions show, the Regulation is neutral and all-inclusive; it has no concern with weighing the merit or scope of a taxpayer's arguments why certain legislation should be passed or defeated; it precludes deductions of expenditures made with the purest of motives as well as those with the basest; and it applies to those petitioners with the most compelling of arguments as well as those with the most frivolous. Similarly, it is irrelevant that plaintiff thought that it was fighting for its business life; the Supreme Court, the Courts of Appeals, and the Tax Court have applied the Regulation to comparable cases in which an enterprise considered that the legislation it was opposing or promoting would destroy or save it (Cammarano v. United States, 358 U.S. 498, 79 S.Ct. 524, 3 L.Ed.2d 462 (1959), affirming 246 F.2d 751 (C.A.9, 1957) and 251 F.2d 724 (C.A.8, 1958); Sunset Scavenger Co. v. Commissioner, 84 F.2d 453, 456 (C.A.9, 1936); Revere Racing Assn. v. Scanlon, 232 F.2d 816 (C.A.1, 1956); Davis v. Commissioner, 26 T.C. 49, 58–60 (1956)).

These conclusions stem not only from the terms and history of the Regulation but also from its underlying policy—and that of the Congress at the time of plaintiff's expenditures. This policy was against any "public subvention" by the federal fisc of efforts to change or maintain legislation. Neither side to such controversies was to be aided by tax deductions; both were to pay for their legislative activities "entirely out of their own pockets." So far as the revenue was concerned there was to be tax equilibrium, with no weight to be thrown on either scale. Business and trade interests were not to be given a tax advantage over opposing non-business interests (individual and organizational) which ordinarily must bear their expenses of this character without compensating deduction. See Cammarano v. United States, supra, 358 U.S. at 512, 513, 79 S.Ct. at 532, 533, 3 L.Ed.2d 462 (1959); Slee v. Commissioner, 42 F.2d 184–185, 72 A.L.R. 400 (C.A.2, 1930). The basic theory was that everyone should participate in the electoral and legislative process purely as an unsubsidized citizen, not some few with the added help of financial backing by the federal treasury. Plaintiff seeks this semi-subsidized status which the law at that time deliberately chose not to accord it.

Exhibit 148: *Pickrick* v. *United States*, 16 AFTR 2d 5277 (1965)

[¶ 65-5082]

The PICKRICK, INC., Plaintiff,
v.
U.S., Defendant.

Cite as 16 AFTR 2d 5277

U.S. District Court, N. Dist. of Ga., Atlanta Div., No. 8753, June 11, 1965.

Year 1960. Decision for Govt.

1. BUSINESS EXPENSES—Expenditures for advertising—political advertising.

Business expense deduction denied restaurant for advertising expenses. Although they were ordinary and necessary expenses of the business, and not personal costs of the principal stockholder, they were intended to promote or defeat legislation, and to promote, endorse, or defeat, political parties or candidates. Jury verdict. *Reference:* 1965 P-H Fed. ¶ 11,084.

Herbert Cheek, Whitehead Bldg., Atlanta, Ga., Atty. for Plaintiff.

Arthur Biggens, Atty., Dept. of Justice, Wash., D.C., for Defendant.

HOOPER, District Judge:

The Court: Ladies and gentlemen of the jury, in this case the plaintiff, The Pickrick, Incorporated, has brought this action against the United States of America seeking at your hands to obtain a refund of part of the income taxes assessed against the plaintiff for the fiscal year and the calendar year 1960. The defendant received the tax returns filed by the plaintiff taxpayer and disallowed a portion of the exemptions which were claimed by the taxpayer arising out of expenditures allegedly made by the taxpayer for newspaper advertisements as shown to you in the evidence in this case.

The amount expended for the advertisements in question is approximately the sum of nine thousand dollars. Of that amount, the United States has disallowed some three thousand dollars of that amount, and it is for a return of this three thousand dollars that the plaintiff sues.

The Internal Revenue and its officers have the right when they claim certain taxes against the taxpayer in the forms provided by law to levy an assessment. That was done in this case. Assessment issued against The Pickrick, Incorporated, for approximately three thousand dollars. That assessment under the law is prima facie considered as being correct. And where such an assessment has issued, as in this case, the burden of proof is upon the taxpayer, in this case, The Pickrick, Incorporated, to show by a legal preponderance of evidence in the case that the assessment is not correct. That is the issue which is to be tried in this case and your verdict in the case will decide that issue, whether or not the assessment as made is or is not correct, the burden of proof being upon The Pickrick, Incorporated, to show that it is not correct.

* * * * * * * * *

It so happens in this case that there is only one witness who has taken the stand, and that is Mr. Maddox. I think he was the president, I'm sure the evidence shows that he was the sole stockholder in The Pickrick, Incorporated. The corporation, however, is a party to this case. Mr. Maddox is an interested witness. You may consider his interest in the case because of his connection with The Pickrick, Incorporated, but you are not to disregard his testimony because he has a financial interest in the case. You should, however, as I have cautioned you, consider the interest which any witness has in the case.

In addition to the testimony of Mr. Maddox, there is a considerable amount of documentary evidence in the case. The advertisements in question are in evidence in this case.

* * * * * * * * *

The first question, ladies and gentlemen, which you will consider in this case, is whether the plaintiff has established by the legal preponderance of the evidence that the entire cost of all these advertisements in question should have been allowed as ordinary and necessary expenses. The two crucial words which appear in this question, namely, "ordinary and necessary" have no hidden or complicated legal meaning. When Congress used these words in the income tax law, which must be applied here, it intended that these words should be used in their natural and common meaning. You will—or you may have no trouble therefore in applying the law to your answer to this first question. Just consider your own meaning of the words as you use them in your everyday life because that is exactly the meaning which Congress intended.

The grounds given by the commissioner for disallowing a part of the total cost of these advertisements were that portions of some of the advertisements represented the owner's personal preferences and recommendations concern-

ing various public problems which were the subjects of pending legislation by the Federal, state or local governments, and represented, the government contends, the owner's personal preferences and recommendations concerning certain political parties, platforms or candidates.

Even though certain expenses may have been incurred in connection with a business and have some incidental business advantage, this does not mean that all such expenditures are deductible for income tax purposes. First, some expenses may have been incurred in whole or in part primarily for personal purposes as opposed to business. Personal expenses are not deductible for income tax purposes. Second, even though some expenditures may in fact be both ordinary and necessary for the operation of a given business, the deduction of some such expenditures is prohibited by law. Included among expenses which Congress has provided cannot be deducted for income tax purposes are expenses which are incurred for the promotion or defeat of legislation at any level of government or for the endorsement, promotion or defeat of any political party platform or candidate in any election. For this reason, if you should decide that the entire content of all these advertisements is both ordinary and necessary for the operation of a restaurant business in this community, you must then consider and decide whether any part of the costs of these advertisements was incurred for any of these prohibited purposes.

The law which you must consider and apply in answering these questions is perhaps a little bit complicated. However, the parties agree that the law which should be applied has been properly stated in a Treasury Regulation which reads as follows, and I quote:

"Expenditures for lobbying purposes, for the promotion or defeat of legislation, for political campaign purposes including the support of or opposition to any candidate for public office or for carrying on propaganda, including advertisement related to any of the foregoing purposes, are not deductible from gross income. For example, the cost of advertising to promote or defeat legislation or to influence the public with respect to the desirability or undesirability of proposed legislation is not deductible as a business expense even though the legislation may directly affect the taxpayer's business. On the other hand, expenditures for institutional or goodwill advertising which keeps the taxpayer's name before the public are generally deductible as ordinary and necessary business expenses provided the expenditures are related to the patronage the taxpayer might reasonably expect in the future. For example, a deduction will ordinarily be allowed for the cost of advertising which keeps the taxpayer's name before the public in connection with encouraging contributions to such organizations as the Red Cross; the purchase of United States Savings Bonds; or participation in similar causes. In like fashion, expenditures for advertising which present views on economic matters, financial, social or other subjects of a general nature but which do not involve any of the activities specified in the first sentence of this subparagraph, are deductible if they otherwise meet the requirements of the regulations."

The expenditures last referred to appear in the first part of this regulation consisting of those matters for which a deduction cannot be made and I will repeat the first portion there so you may get the context. That refers to expenditures for lobbying purposes, for the promotion or defeat of legislation, for political campaign purposes or for carrying on propaganda. So, you have there in that regulation which I have read to you these two general classes of purposes, one concerning politics, lobbying, et cetera; the other concerning economic, financial, social or other subjects of a general nature.

Now ladies and gentlemen, there are involved in this case, necessarily involved in this case, a number of matters which have been of great public interest in this community, matters of a purely political nature. Other matters of a nature as to which the minds of people differ very much. Sometimes very bitterly. There are matters referred to in this case concerning which people have very strong feelings on one side or the other. But I wish to caution you very earnestly that if you have in regard to any of these issues any strong feelings, whether of conviction or whether of prejudice, and it's frequently difficult to separate the two, that you will put entirely aside any such feelings and seek

to decide this case as I am sure you will entirely on the facts in the case, the rules of law that I have given you as to weighing the testimony, and seek to find what is the truth in the case, bearing in mind that the burden is on the plaintiff to prove the plaintiff's contentions by the greater weight of evidence or testimony in the case, not beyond a reasonable doubt, not beyond any doubt, but by a greater or superior weight of evidence which would cause a fair and impartial mind to decide for one side or the other.

When I referred in these instructions to the ordinary and necessary expenses, that does not mean of course that an advertisement itself has to be ordinary or mediocre, uninteresting or anything of that sort. I have defined what "ordinary and necessary expense" mean. It does not mean that the taxpayer would not have the right to put in his advertisements matter that might attract the reader and cause the reader to read the advertisements when otherwise they would not.

The Court has not meant by these instructions to intimate any opinion upon the part of the Court as to which party should prevail or as to any controverted question in the case. And if the Court has done so, I charge you that you are not bound by any opinion which the Court might express or even appear to express on any controverted issue in this case.

You will have out with you the form of verdict which will have four questions, question number 1 as follows:

"Has the plaintiff established by the preponderance of evidence that the publication of the opinions and comments included as a part of the advertisements in evidence was both ordinary and necessary for advertising the operation of a restaurant business in this community?"

Now that first question relates to the first portion of my charge, that is to say, that the plaintiff has the burden of proving that these expenditures were ordinary and necessary. If you should answer that question in favor of the plaintiff, you would write in there the word "Yes." If you should find for the defendant on that question, you would write under there the word "No." If you should write in there the word "No," you would not have to go any further. You would not consider Questions 2, 3 and 4. You would stop there and you would return your verdict as written with the word "No" and that would be the end of the case.

If, however, you answer question number 1 in the affirmative, that would mean that the advertisements were ordinary and necessary but you would then have to go further and ascertain whether or not such advertisements, even though ordinary and necessary, violated any one of the prohibitions placed by Congress as a requisite for deductions, to which I have referred.

Question number 2 is one of those and

"Were any of the opinions or comments included as part of the advertisements in evidence published by plaintiff primarily for the personal purposes of its sole owner, Lester Maddox."

If you find from the evidence that that question should be answered in the affirmative, you would write in there the word "Yes." If you do not find it should be answered in the affirmative, you would write in there the word "No."

Question number 3:

"Were any of the opinions or comments included as part of the advertisements in the evidence published for the purpose of promoting or defeating any legislation, Federal, state or local, pending or prospective, referendum or Constitutional Amendment?"

There again you would write the question "Yes" or "No" as you should find.

Number 4:

"Were any of the opinions or comments included as parts of the advertisements in evidence published for the purpose of endorsing, promoting or defeating any Federal, state or local political party platform or candidate?"

There again, you would write the word "Yes" or "No" as you find the evidence to indicate under the instructions which I have given to you.

You may retire at this time to the jury room, but do not begin your deliberation of the case until the form of verdict and the documents have been brought to you by the marshal of this Court.

You may retire.

* * * * * * * * *

The Court: Ladies and gentlemen, there's one portion of my instructions which I made in error. I referred to the matter of three thousand dollars assessment being at issue in this case. I overlooked the fact that only fifteen hundred dollars of that assessment affects this matter of advertisement. The other fifteen hundred dollars arose from another item which was withdrawn from this case before it was tried. Therefore, and this will not affect your verdict one way or the other—therefore, we have involved here the matter of fifteen hundred dollars assessment. That doesn't mean fifteen hundred dollars in taxes because as you well know, when you have the assessment you have to apply to that the proper rates for taxes in order to arrive at the amount of actual taxes. And while this will not, this will not directly affect your verdict one way or the other, and should not affect it, I did want to explain to you that we have involved an assessment to the extent of fifteen hundred dollars and with that correction, you may retire to your room.

Verdict of the Jury

1. Has the plaintiff established by the preponderance of the evidence that the publication of the opinions and comments included as a part of the advertisements in evidence was both ordinary and necessary for advertising the operation of a restaurant business in this community? Answer (Yes) or (No). Yes

(If your answer to this first question is "no", you should return with your verdict without answering any of the additional questions listed below. If your answer to this first question is "yes", however, you must consider and answer *all* three of the following additional questions.)

2. Were any of the opinions or comments included as part of the advertisements in evidence published by plaintiff primarily for the personal purposes of its sole owner, Lester Maddox? Answer (Yes) or (No). No

[1] 3. Were any of the opinions or comments included as part of the advertisements in evidence published for the purpose of promoting or defeating any legislation (federal, state, or local; pending or prospective), referendum, or constitutional amendment? Answer (Yes) or (No). Yes

4. Were any of the opinions or comments included as part of the advertisments in evidence published for the purpose of endorsing, promoting, or defeating any federal, state, or local political party, platform, or candidate? Answer (Yes) or (No). Yes

Exhibit 149: Revenue Rule 62–156

Rev. Rul. 62–156

Expenditures made by a taxpayer engaged in a trade or business, other than as an employee, for advertising designed to encourage the public to register and vote in Federal, state and local elections and to contribute to the campaign funds of the candidate or party of their choice are deductible by the taxpayer under section 162(a) of the Internal Revenue Code of 1954, provided such advertising was intended to be, and was, in fact, politically impartial in character, was reasonably related to future public patronage expected by the taxpayer and, provided also, that such expenditures otherwise meet the requirements of that section of the Code.

Amounts expended by such a taxpayer in sponsoring the politically impartial presentation of a debate among the candidates for a particular political office are also deductible under section 162(a) of the Code, provided, they are reasonably related to the taxpayer's expected future public patronage, and otherwise meet the requirements of that section of the Code.

Where such a taxpayer makes expenditures and incurs costs to encourage its employees to register and vote in Federal, state and local elections by granting them time off with pay for such purposes, and to contribute to the campaign funds of the party or candidate of their choice by maintaining a completely voluntary payroll deduction plan for those wishing to make such contributions, the costs of handling these items are deductible by the taxpayer under section 162(a) of the Code, provided such encouragement of employee political activity is politically impartial in character and such expenditures are reasonably related to the maintenance or improvement of employee morale and otherwise meet the requirements of section 162(a) of the Code.

Advice has been requested whether expenses paid or incurred by the taxpayer, in connection with Federal, state and local elections, for the purposes of: (1) advertising designed to encourage the public to register and vote and to contribute to the political party or campaign fund of a candidate of their choice, (2) sponsoring a political debate among candidates for a particular political office, (3) granting employees time off with pay for registration and voting, and (4) maintaining a payroll deduction plan for employees wishing to make political contributions, are deductible under section 162(a) of the Internal Revenue Code of 1954.

The taxpayer is engaged in a trade or business other than as an employee. It manufactures products which are sold under its own name.

During the taxable year, the taxpayer made several substantial expenditures and incurred a number of costs, in connection with Federal, state and local elections. The extent to which, if at all, each expenditure is deductible by the taxpayer under section 162(a) of the Code is the question presented in the instant case.

In support of a campaign to maximize the number of those voting in Federal, state and local elections, the taxpayer purchased a full page of advertising space in newspapers urging the public to register and vote for the party or candidate of their choice. People were also urged, wherever possible, to contribute money and work for whatever candidate, party, or cause they preferred. The advertisements contained a statement that they were paid for in the interest of encouraging all eligible persons to vote as a demonstration of good citizenship without regard to the specific political choices or preferences expressed at the polls. The advertisements designated the taxpayer as their sponsor.

The taxpayer mailed a similar message to each of its employees encouraging them to register and vote in the elections and to work for, and contribute to, the candidate or party of their choice. As a means of inducing employees to vote, the taxpayer offered, and later gave, each employee who wished to vote two hours time off, with pay, on election day. It also instituted an entirely voluntary plan under which employees could authorize the taxpayer to deduct political contributions from their pay and forward them to whatever political candidate, cause, or party the employee chose to designate.

The taxpayer also sponsored the production and presentation of a debate among the candidates for a particular political office. The program was arranged in a manner intended to give each candidate an equal opportunity to present himself and his views to the public and the "ground rules" for the program were agreed upon in advance by the candidates. At the beginning and end of the program it was announced that the program was paid for by the taxpayer in the hope that it would increase the interest and knowledge of the public regarding the candidates and programs at issue in the elections. The taxpayer expected that sponsorship of the debate would increase its future public patronage by keeping its name before the public.

Section 162(a) of the Code provides, in part, that, in general, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

Section 1.162–15(c)(1) of the Income Tax Regulations promulgated under section 162 of the Code provides as follows:

> Expenditures for lobbying purposes, for the promotion or defeat of legislation, for political campaign purposes (including the support of or opposition to any candidate for public office), or for carrying on propaganda (including advertising) related to any of the foregoing purposes are not deductible from gross income. For example, the cost of advertising to promote or defeat legislation or to influence the public with respect to the desirability or undesirability of proposed legislation is not deductible as a business expense, even though the legislation may directly affect the taxpayer's business. On the other hand, expenditures for institutional or "good will" advertising which keeps the taxpayer's name before the public are generally deductible as ordinary and necessary business expenses provided the expenditures are related to the patronage the taxpayer might reasonably expect in the future. For example, a deduction will ordinarily be allowed for the cost of advertising which keeps the taxpayer's name before the public in connection with encouraging contributions to such organizations as the Red Cross, the purchase of United States Savings Bonds, or participation in similar causes. In like fashion, expenditures for advertising which present views on economic, financial, social, or other subjects of a general nature but which do not involve any of the activities specified in the first sentence of this subparagraph are deductible if they otherwise meet the requirements of the regulations under section 162.

Whether the expenses paid or incurred by the taxpayer in connection with an election are deductible is a question of fact, the resolution of which requires a consideration of all the facts and circumstances surrounding each expenditure made or cost incurred.

The deductibility of the taxpayer's expenditures for newspaper advertising urging the public to participate in elections depends, in large measure, upon whether such expenditures are in the nature of good will advertising intended to keep the taxpayer's name before the

public in connection with an organization or cause similar to those described in the regulations, or whether they are made for a purpose for which deduction is prohibited by the regulations.

Amounts spent by a taxpayer for politically impartial advertising encouraging eligible persons in the community to register and vote in elections are expended in the advancement of a cause similar to encouraging the purchase of United States Savings Bonds, as described in section 1.162–15(c)(1) of the regulations. However, expenditures for such activity will be deductible under section 162 of the Code only insofar as they are politically impartial in nature and are reasonably related to future public patronage expected by the taxpayer. For example, if a message is directed to an audience the response of which would reasonably be expected to redound to the benefit of one polit cal group or faction, such a message would not be politically impartial and the expenses incurred with respect thereto would constitute an expenditure for political campaign purposes, which as provided in the above-quoted section of the regulations would not be deductible from gross income.

Although expenses paid or incurred by a taxpayer in encouraging its own employees, like the general public, to register and vote in elections, in granting them time off with pay to register and vote, and in deducting and forwarding employee political contributions, may not be *directly* connected with the anticipated future patronage of the taxpayer by the public, it would not be unreasonable for the taxpayer to expect that such expenditures would improve employee morale and ultimately improve its business. It could also be reasonably anticipated that a reputation for encouraging employees to vote and otherwise exercise their rights and duties as citizens would benefit its business. In the absence of evidence that such expenditures were not politically impartial, or were unreasonable in amount, such expenses come within the meaning of the term "ordinary and necessary" as used in section 162 of the Code.

Amounts expended by the taxpayer for the sponsorship of a debate under the circumstances described above are similar to the taxpayer's expenditures for newspaper advertisements, in that, in each case, the publicity expected by the taxpayer as sponsor of the debate, was reasonably related to future public patronage expected by the taxpayer.

Although section 1.162–15(c) of the regulations contemplates the deduction of expenses paid or incurred in connection with political affairs, provided they manifest political impartiality, that is not to say that total political balance must always be assured to result from such expenditures. For example, all the available evidence in the instant case indicates that the taxpayer's intention in sponsoring the debate was to present a forum in which each candidate would appear and present his views. Genuine attempts were made to present each of the candidates under circumstances as nearly equal as possible, and each of the candidates agreed, in advance, to the format of the program and to the rules for the conduct of the debate. Whatever the outcome of the program from the standpoint of a particular candidate, the results of the program are most reasonably attributable to the candidates themselves, and responsibility for the result is not that of the taxpayer, which merely provided the arena in which those results may have been achieved.

Accordingly, it is held that expenses of the nature described above incurred by the taxpayer to encourage the public and its own employees to register and vote in elections and to work for and contribute to the campaign funds of the candidate or party of their choice, and for the sponsorship of a debate among the candidates for a particular political office, are deductible under section 162(a) of the Code as ordinary and necessary expenses of doing business, provided such encouragement and sponsorship were intended to be, and were, in fact, politically impartial in character, and that such expenditures were reasonably related to the taxpayer's expected future public patronage and otherwise satisfy the requirements of the Code.

Exhibit 150: H.R. 7123 (86th Congress)

Union Calendar No. 919

86TH CONGRESS
2D SESSION

H. R. 7123

[Report No. 2077]

IN THE HOUSE OF REPRESENTATIVES

MAY 14, 1959

Mr. BOGGS introduced the following bill; which was referred to the Committee on Ways and Means

JULY 1, 1960

Reported with amendments, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To amend the Internal Revenue Code of 1954 so as to provide that lawful expenditures for legislative purposes shall be allowed as deductions from gross income.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, ~~That subsection (a) of section 162 of the Internal Revenue Code of 1954 is amended by striking out the word "and" following the semicolon at the end of paragraph (2); by striking out the period and adding a semicolon followed by the word "and" at the end of paragraph (3); and by adding the following new paragraph:~~

~~"(4) expenses lawfully incurred in supporting or opposing or otherwise influencing legislation in the Con-~~

~~gress or in a State legislature or in the legislative body of a county or other local governmental agency or in any submission of proposed legislation to the voters."~~

~~SEC. 2. The amendment made by the first section of this Act shall apply to taxable years ending after the date of enactment of this Act.~~

That section 162 of the Internal Revenue Code of 1954 (relating to trade or business expenses) is amended by redesignating subsection (d) as subsection (e), and by inserting after subsection (c) the following new subsection:

"(d) CERTAIN EXPENSES TO INFLUENCE ACTION WITH RESPECT TO LEGISLATIVE PROPOSALS, ETC.—

"(1) GENERAL RULE.—No expense which otherwise qualifies as a deduction under subsection (a) (including, but not limited to, dues and other amounts paid to any organization) shall be disallowed as a deduction merely because paid or incurred to support or oppose or otherwise influence action by the Congress or by any legislative body of a State, a possession of the United States, the District of Columbia, or any political subdivision of the foregoing, with respect to any legislative or constitutional proposal, or to support or oppose or otherwise influence action of the voters with respect to any legislative or constitutional proposal submitted or pro-

posed to be submitted to the voters by initiative, referendum, or similar proceeding.

"(2) EXCEPTION.—The provisions of paragraph (1) shall not be construed as allowing the deduction of any amount paid or incurred (whether by way of contribution, gift, or otherwise) for participation or intervention in any political campaign on behalf of, or in opposition to, any candidate for public office."

SEC. 2. The amendment made by the first section of this Act shall apply to taxable years ending after the date of the enactment of this Act.

Amend the title so as to read: "A bill to amend section 162 of the Internal Revenue Code of 1954 with respect to the deduction of certain expenses to influence action with respect to legislative proposals."

Exhibit 151: House Report 86-2077 (on H.R. 7123)

86TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 2077

DEDUCTION OF CERTAIN EXPENSES WITH RESPECT TO LEGISLATIVE PROPOSALS

JULY 1, 1960.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BOGGS, from the Committee on Ways and Means, submitted the following

REPORT

[To accompany H.R. 7123]

The Committee on Ways and Means, to whom was referred the bill (H.R. 7123) to amend the Internal Revenue Code of 1954 so as to provide that lawful expenditures for legislative purposes shall be allowed as deductions from gross income, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Strike out all after the enacting clause and insert:

That section 162 of the Internal Revenue Code of 1954 (relating to trade or business expenses) is amended by redesignating subsection (d) as subsection (e), and by inserting after subsection (c) the following new subsection:

"(d) CERTAIN EXPENSES TO INFLUENCE ACTION WITH RESPECT TO LEGISLATIVE PROPOSALS, ETC.—

"(1) GENERAL RULE.—No expense which otherwise qualifies as a deduction under subsection (a) (including, but not limited to, dues and other amounts paid to any organization) shall be disallowed as a deduction merely because paid or incurred to support or oppose or otherwise influence action by the Congress or by any legislative body of a State, a possession of the United States, the District of Columbia, or any political subdivision of the foregoing, with respect to any legislative or constitutional proposal, or to support or oppose or otherwise influence action of the voters with respect to any legislative or constitutional proposal submitted or proposed to be submitted to the voters by initiative, referendum, or similar proceeding.

"(2) EXCEPTION.—The provisions of paragraph (1) shall not be construed as allowing the deduction of any amount paid or incurred (whether by way of contribution, gift, or otherwise) for participation or intervention in any political campaign on behalf of, or in opposition to, any candidate for public office."

SEC. 2. The amendment made by the first section of this Act shall apply to taxable years ending after the date of the enactment of this Act.

Amend the title so as to read:

A bill to amend section 162 of the Internal Revenue Code of 1954 with respect to the deduction of certain expenses to influence action with respect to legislative proposals.

I. Summary of the Bill

H.R. 7123, as amended by your committee, would provide that an expense which otherwise qualifies as an ordinary and necessary trade or business expense will not be disallowed as a deduction for income tax purposes because it is expended or incurred to influence action by the Congress or by other legislative bodies with respect to legislative or constitutional proposals. Amounts expended or incurred to influence action of voters with respect to legislative or constitutional proposals in initiative, referendum, or similar proceedings will also be deductible if they otherwise qualify as ordinary and necessary business expense. No deduction will be allowed, however, for any amount paid or incurred for participation or intervention in a political campaign on behalf of, or in opposition to, any candidate for public office.

The amendments made by the bill apply to taxable years ending after the date of its enactment.

The Treasury Department has informed your committee that it has no objection to the bill as amended.

II. Reasons for the Bill

A. Present Law and Regulations

Under present law, section 162 of the Internal Revenue Code allows deductions for income tax purposes for ordinary and necessary expenses paid or incurred in carrying on a trade or business. The code itself has never contained any provision prohibiting the deduction of an expense because it is incurred "for lobbying purposes" or "for the promotion or defeat of legislation." Treasury regulations in effect prior to enactment of the 1954 Code, while not being very explicit, had for some time disallowed deductions for expenditures for such purposes (regulations 118, secs. 39.23(o)–1(f) and 39.23(q)–1(a)), but as the Treasury Department has itself indicated, as a matter of actual administrative practice the rule was not enforced uniformly and, as a result, deductions for such expenditures were in many cases not disallowed.

In 1959, the Supreme Court rendered decisions in two companion cases which involved the question of the validity of these regulations, *Cammarano* v. *U.S.* and *F. Straus & Sons, Inc.* v. *U.S.* (358 U.S. 498 (1959)). In these cases, the Government sought to apply the provisions of the regulation to disallow the deduction for amounts paid by taxpayers to business organizations for the purpose of defeating proposals submitted to the voters by referendum. Although the Court found that the amounts expended were "ordinary and necessary"—in fact essential to the very survival of the taxpayer's business—and that they otherwise met all the requirements for deductibility as a business expense, it held that the provisions of the regulations were valid and that they barred deduction of the particular expenses involved. The Court recognized that the code contained no provisions such as those of the regulations, but stated that the regulations had acquired the force of law by reason of congressional reenactment of the underlying statute and indicated that it felt bound to follow the regulations in the absence of legislative action by the Congress.

Following the decision of the Supreme Court in the *Cammarano* case, the Treasury Department promulgated new regulations under section 162 of the 1954 Code, relating to deduction of expenditures for these purposes. These regulations, while following the rule of the earlier regulations, state specifically, for the first time, that several different classes of expenditures are to be disallowed as deductions. Thus, the new regulations require disallowance of a deduction for that portion of dues and other payments to any organization, a "substantial part" of the activities of which consist of lobbying, to the extent that such amounts are "attributable to" its lobbying activities even though such dues and payments would otherwise qualify for deduction under section 162. Similarly, the regulations now state that expenditures for the promotion or defeat of legislation include expenditures for the purpose of attempting to influence members of a legislative body, directly or indirectly, by urging or encouraging the public to contact such members. Further, the regulations now state specifically that such expenditures include expenses incurred for the purpose of attempting to influence the public to approve or reject a measure in a referendum, initiative, a vote on a constitutional amendment, or similar procedure. The new regulations also indicate for the first time that expenses may be considered as expenses for the promotion or defeat of legislation whether they are incurred to influence the legislators directly or to influence them indirectly by means of "grassroots" campaigns aimed at the voters. See regulations, section 1.162–15(c).

B. PROBLEMS UNDER PRESENT LAW

The regulations issued by the Treasury in 1959 brought to the forefront many administrative and enforcement problems and uncertainties which have plagued both the Government and taxpayers over the years in this area. H.R. 7123 is designed to eliminate many of these problems and uncertainties as well as to provide a more appropriate treatment for an important class of business expenses.

(1) Problems of administration and compliance

The administrative problems of a rule disallowing deduction for expenses incurred to influence legislation are such as to make very difficult administration on a uniform and nondiscriminatory basis. In a letter of February 26, 1960, to the chairman of your committee commenting on legislative proposals on this subject, the Treasury Department stated in part as follows:

> Legislative reappraisal of the present law and the proposed legislation will necessarily take account both of the practical administrative problems which now exist in this area as well as those which might develop under the proposed modification. Present law, particularly as it relates to the dues paid to trade associations, institutional advertising, and the grassroots type of lobbying expenditure, is difficult for the Internal Revenue Service to administer. It is difficult, *if not impossible*, for the Internal Revenue Service, with its present manpower, to "censor" or "monitor" lobbying of the advertising or grassroots variety. Indeed, it has been the general position of the Internal Revenue Service that it is

not only impracticable but undesirable to attempt to substitute the judgment of the tax collector for that of the businessman in determining the character of the advertising appropriate for the business as long as it may reasonably be expected to increase the patronage of the business.

It is only realistic to recognize that many of the expenditures in these areas which have passed the permissible borderline under the existing regulations have doubtless escaped detection in the audit of tax returns. Unless the Internal Revenue Service were to devote disproportionate manpower from its basic collection function to policing this difficult and controversial area, *it would seem that uniform enforcement would be an unattainable goal.* If there were to be a modification or relaxation of the existing rules, therefore, it would appear to be a desirable objective that it should help reduce, rather than aggravate, the practical administrative problems which are inherent in this area, and at the same time reduce to a minimum whatever inequalities among some taxpayers result from unavoidable imperfections in the administration of the law.

* * * * *

The present rules have created problems of enforcement since it is difficult to "police" advertising campaigns and expenditures by unions or trade associations in an effort to identify degrees of attempts to influence legislation and, with respect to taxpayers generally, it is difficult to make certain that expenditures definitely in the lobbying area are not in fact deducted in the guise of legal expenses, advertising, or the like. [Italic supplied.]

The nature of these difficulties may be seen in perhaps their clearest form in the case of the rule which requires the disallowance of a deduction for dues paid to organizations to the extent that they are "attributable to" lobbying activities. In order for the taxpayer to prepare his return or for an internal revenue agent to audit the return in such a situation, numerous complex determinations must be made. First, a determination must be made as to which particular activities conducted by the organization, to which the taxpayer made the payment of dues or other amounts, constitutee fforts to influence legislation, etc. Since the meaning of the word "lobbying" is by its nature indefinite, the particular activities of an organization which may be considered lobbying are also indefinite. Once the particular activities regarded as "lobbying" are identified, it is necessary to determine whether such activities constitute a "substantial" part of the organization's activities. If it is determined that "lobbying" is a "substantial" part of the organization's activities, a determination must be made as to what portion of all the activities of the organization consists of "lobbying." Although the regulations do not specify the method to be followed in making this determination, it presumably would be made every year by reference to the expenditures of the organization. To ascertain such expenditures with any degree of accuracy, it would be necessary for the organization to employ a new method of accounting, viz, one which classifies all its expenditures for compensation, advertising, and other

items into "lobbying" and "nonlobbying" expenses. Assuming that it were possible to make all the determinations described, such determinations would have to be made each year and the results thereof communicated to the taxpayer who made the payment to the organization before his return for the year was due. Your committee believes that it is unreasonable to force either the Internal Revenue Service or the taxpayers to bear burdens of administration and compliance such as those produced by the rule of the regulations, and also believes that administrative problems of such magnitude can only lead to a situation in which the rule, if enforced at all, would be enforced only partially and unevenly.

(2) *Policy considerations*

Still more important issues are involved, however, in the policy question involved in the deduction of business expenses that are incurred to influence legislation.

In commenting on the policy considerations involved in this area, the Treasury Department letter states:

> With the growing impact of government at all levels upon individuals and upon all segments of our society, businessmen and organizations representing their interests, farm groups, labor organizations, and the like have often found it necessary or desirable to make large expenditures for the purpose of influencing legislation. The proper treatment of such expenditures is important to the equity and fairness of the income tax. Their tax treatment in turn is relevant to sound governmental policy in a modern democracy.
>
> * * * * *
>
> The proposed legislation and the broader question to which it is addressed merit consideration by your committee. Existing law as developed has frozen concepts relating to expenditures in the area of legislative process which are quite distinct from generally accepted attitudes in regard to expenditures related to fields of administrative and judicial processes. It appears to many anomalous that no expenditures involving legislation, without regard to their character, are deductible, while similar activities before administrative and judicial bodies are clearly deductible if they otherwise constitute ordinary and necessary business expenses.

It was these considerations which prompted your committee in ordering this bill reported. It seemed to your committee that if an expenditure is ordinary and necessary to the conduct of a taxpayer's trade or business and is lawful, it is unfair for the deduction to be disallowed just because the expense is incurred to influence legislation. Many have pointed out, for example, that expenditures to influence legislation or the outcome of a referendum may be necessary for the very survival of the taxpayer's business. This might be the case, for example, where a measure before the voters in a referendum would outlaw the taxpayer's business, as was the situation in the *Cammarano* case. It also has been urged that the Congress should encourage efforts by the interested public to advise and assist the representatives in formulating legislation. This would also apply in the case of other legislative bodies.

Similarly, it has been urged that expenses incurred to present legal, economic, and other arguments to a legislative body do not differ materially from expenses incurred to present such arguments to courts and administrative agencies. The latter type of expenses, if they are otherwise ordinary and necessary in carrying on the taxpayer's business, are now deductible. In many cases the subject matter with respect to which expenses are incurred in presenting views to a court or administrative agency may be the very subject matter with respect to which expenses are incurred in presenting views to a legislative body. Yet the expenses for presenting arguments to the courts and administrative agencies are allowed as a deduction whereas those for presenting arguments to the legislative body are not allowed as a deduction.

III. Explanation of the Bill

The first section of the bill, as reported, amends section 162 by redesignating the present subsection (d) as subsection (e) and by adding a new subsection (d) consisting of two paragraphs. Paragraph (1) provides that no expense which otherwise qualifies as a deduction under section 162(a) (including, but not limited to, dues and other amounts paid to any organization) shall be disallowed as a deduction merely because paid or incurred to support or oppose or otherwise influence action by the Congress or by any legislative body of a State, a possession of the United States, the District of Columbia, or any political subdivision of the foregoing, with respect to any legislative or consitutional proposal, or to support or oppose or otherwise influence action of the voters with respect to any legislative or consitutional proposal submitted or proposed to be submitted to the voters by initiative, referendum, or similar proceeding. Paragraph (2) provides that the provisions of paragraph (1) shall not be construed as allowing the deduction of any amount paid or incurred (whether by way of contribution, gift, or otherwise) for participation or intervention in any political campaign on behalf of, or in opposition to, any candidate for public office. Section 2 of the bill makes the provisions of the first section effective as to taxable years ending after the date of enactment.

Your committee's bill is intended to reverse the rule stated in regulations section 1.162–15(c) (except, of course, to the extent that the rule of the regulations may operate to prevent deduction of political capaign expenditures referred to in the new par. (2) of subsec. (d) added by sec. 1 of the bill). Thus the fact that expenses are "for lobbying purposes" or for the "promotion or defeat of legislation," within the meaning of those terms as they are used in the regulations, will not prevent the deduction of any amount which would be deductible under section 162 (but for the rule stated in regulations).

The provisions of the bill relate only to those expenses which meet all the requirements for deductibility under section 162 (relating to ordinary and necessary business expenses other than the requirements stated in regulations sec. 1.162–15(c), "lobbying"). Thus, an expense may not be deductible under the provisions of the bill unless it is "ordinary and necessary in carrying on a trade or business," within

the meaning of that phrase as it is used in the statute and as it has been interpreted by the courts and administrative construction. Moreover, an expenditure will not be deductible by reason of the provisions of the bill if it is an expenditure the deduction of which is prohibited by some other section of the code, such as section 262 (relating to personal expenditures), or section 263 (relating to capital expenditures). The determination of whether the deduction of an expenditure for a purpose to which the bill relates is to be disallowed on the grounds, for example, that it is a capital expenditure, is to be made, of course, under standards no more or less rigid than those which would apply in the case of a similar expenditure made for any other purpose. Thus, if legal fees for presenting an issue before an executive agency or court were not required to be capitalized, legal fees in seeking to influence legislation as to a similar issue would likewise not be required to be capitalized.

IV. Changes in Existing Law Made by Introduced Bill

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as introduced, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

Section 162(a) of the Internal Revenue Code of 1954

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) In General.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; [and]

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity[.]; *and*

(4) expenses lawfully incurred in supporting or opposing or otherwise influencing legislation in the Congress or in a State legislature or in the legislative body of a county or other local governmental agency or in any submission of proposed legislation to the voters.

For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, Territory, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000.

V. Changes in Existing Law Made by the Bill, as Reported

For the information of the Members of the House, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman).

Section 162 of the Internal Revenue Code of 1954

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) In General.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, Territory, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000.

(b) Charitable Contributions and Gifts Excepted.—No deduction shall be allowed under subsection (a) for any contribution or gift which would be allowable as a deduction under section 170 were it not for the percentage limitations, or the requirements as to the time of payment, set forth in such section.

(c) Improper Payments to Officials or Employees of Foreign Countries.—No deduction shall be allowed under subsection (a) for any expenses paid or incurred if the payment thereof is made, directly or indirectly, to an official or employee of a foreign country, and if the making of the payment would be unlawful under the laws of the United States if such laws were applicable to such payment and to such official or employee.

(d) Certain Expenses to Influence Action With Respect to Legislative Proposals, Etc.—

(1) General rule.—No expense which otherwise qualifies as a deduction under subsection (a) (including, but not limited to, dues and other amounts paid to any organization) shall be disallowed as a deduction merely because paid or incurred to support or oppose or otherwise influence action by the Congress or by any legislative body of a State, a possession of the United States, the District of Columbia, or any political subdivision of the foregoing, with respect to any legislative or constitutional proposal, or to support or oppose or otherwise influence action of the voters with respect to any legislative or constitutional proposal submitted or proposed to be submitted to the voters by initiative, referendum, or similar proceeding.

(2) EXCEPTION.—The provisions of paragraph (1) shall not be construed as allowing the deduction of any amount paid or incurred (whether by way of contribution, gift, or otherwise) for participation or intervention in any political campaign on behalf of, or in opposition to, any candidate for public office.

[(d)] *(e)* CROSS REFERENCE.—

For special rule relating to expenses in connection with subdividing real property for sale, see section 1237.

Exhibit 152: H.R. 640 (87th Congress)

87TH CONGRESS
1ST SESSION

H. R. 640

IN THE HOUSE OF REPRESENTATIVES

JANUARY 3, 1961

Mr. BOGGS introduced the following bill; which was referred to the Committee on Ways and Means

A BILL

To amend section 162 of the Internal Revenue Code of 1954 with respect to legislative proposals.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 162 of the Internal Revenue Code of 1954 (relating to trade or business expenses) is amended by redesignating subsection (d) as subsection (e), and by inserting after subsection (c) the following new subsection:

"(d) CERTAIN EXPENSES TO INFLUENCE ACTION WITH RESPECT TO LEGISLATIVE PROPOSALS, ETC.—

"(1) GENERAL RULE.—No expense which otherwise qualifies as a deduction under subsection (a) (including, but not limited to, dues and other amounts paid

to any organization) shall be disallowed as a deduction merely because paid or incurred to support or oppose or otherwise influence action by the Congress or by any legislative body of a State, a possession of the United States, the District of Columbia, or any political subdivision of the foregoing, with respect to any legislative or constitutional proposal, or to support or oppose or otherwise influence action of the voters with respect to any legislative or constitutional proposal submitted or proposed to be submitted to the voters by initiative, referendum, or similar proceeding.

"(2) EXCEPTION.—The provisions of paragraph (1) shall not be construed as allowing the deduction of any amount paid or incurred (whether by way of contribution, gift, or otherwise) for participation or intervention in any political campaign on behalf of, or in opposition to, any candidate for public office."

SEC. 2. The amendment made by the first section of this Act shall apply to taxable years ending after the date of the enactment of this Act.

Exhibit 153: H.R. 925 (87th Congress)

87TH CONGRESS
1ST SESSION

H. R. 925

IN THE HOUSE OF REPRESENTATIVES

JANUARY 3, 1961

Mr. BYRNES of Wisconsin introduced the following bill; which was referred to the Committee on Ways and Means

A BILL

To amend the Internal Revenue Code of 1954 so as to provide that lawful expenditures for legislative purposes shall be allowed as deductions from gross income.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (a) of section 162 of the Internal Revenue Code of 1954 is amended by striking out the word "and" following the semicolon at the end of paragraph (2); by striking out the period and adding a semicolon followed by the word "and" at the end of paragraph (3); and by adding the following new paragraph:

"(4) expenses lawfully incurred, including dues paid to labor, agricultural, or horticultural organizations

or to business leagues, chambers of commerce, real estate boards, or boards of trade, in supporting, opposing, or otherwise influencing Federal, State, or local government legislative action or in any submission of proposed legislation to the voters."

SEC. 2. The amendment made by the first section of this Act shall apply to taxable years ending after the date of enactment of this Act.

Exhibit 154: S. 467 (87th Congress)

87TH CONGRESS
1ST SESSION

S. 467

IN THE SENATE OF THE UNITED STATES

JANUARY 17, 1961

Mr. HARTKE introduced the following bill; which was read twice and referred to the Committee on Finance

A BILL

To amend the Internal Revenue Code of 1954 so as to provide that lawful expenditures for legislative purposes shall be allowed as deductions from gross income.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (a) of section 162 of the Internal Revenue Code of 1954 is amended by striking out the word "and" following the semicolon at the end of paragraph (2); by striking out the period and adding a semicolon followed by the word "and" at the end of paragraph (3); and by adding the following new paragraph:

"(4) expenses lawfully incurred in supporting or opposing or otherwise influencing legislation in the Con-

gress or in a State legislature or in the legislative body of a county or other local governmental agency or in any submission of proposed legislation to the voters."

SEC. 2. The amendment made by the first section of this Act shall apply to taxable years ending after the date of enactment of this Act.

Exhibit 155: Excerpts From H.R. 10650 (Revenue Act of 1962) as Introduced, March 12, 1962

87TH CONGRESS
2D SESSION

H. R. 10650

IN THE HOUSE OF REPRESENTATIVES

MARCH 12, 1962

Mr. MILLS introduced the following bill; which was referred to the Committee on Ways and Means

A BILL

To amend the Internal Revenue Code of 1954 to provide a credit for investment in certain depreciable property, to eliminate certain defects and inequities, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE, ETC.

(a) SHORT TITLE.—This Act may be cited as the "Revenue Act of 1962".

SEC. 3. APPEARANCES, ETC., WITH RESPECT TO LEGISLATION.

(a) IN GENERAL.—Section 162 (relating to trade or business expenses) is amended by redesignating subsection (e) as subsection (f) and by inserting after subsection (d) the following new subsection:

"(e) APPEARANCES, ETC., WITH RESPECT TO LEGISLATION.—

"(1) IN GENERAL.—The deduction allowed by subsection (a) shall include all the ordinary and necessary expenses (including, but not limited to, traveling expenses described in subsection (a) (2) and the cost

of preparing testimony) paid or incurred during the taxable year in carrying on any trade or business—

"(A) in direct connection with appearances before, submission of statements to, or sending communications to, the committees, or individual members, of Congress or of any legislative body of a State, a possession of the United States, or a political subdivision of any of the foregoing with respect to legislation or proposed legislation of direct interest to the taxpayer, or

"(B) in direct connection with communication of information between the taxpayer and an organization of which he is a member with respect to legislation or proposed legislation of direct interest to the taxpayer and to such organization,

and that portion of the dues so paid or incurred with respect to any organization of which the taxpayer is a member which is attributable to the expenses of the activities described in subparagraphs (A) and (B) carried on by such organization.

"(2) LIMITATION.—The provisions of paragraph (1) shall not be construed as allowing the deduction of any amount paid or incurred (whether by way of contribution, gift, or otherwise)—

"(A) for participation in, or intervention in,

any political campaign on behalf of any candidate for public office, or

"(B) in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums."

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 1962.

Exhibit 156: Excerpts From House Report 87–1447 (Revenue Act of 1962)

87th Congress, 2d Session - - - - - House Report No. 1447

REVENUE ACT OF 1962

REPORT

OF THE

COMMITTEE ON WAYS AND MEANS

HOUSE OF REPRESENTATIVES

TO ACCOMPANY

H.R. 10650

A BILL TO AMEND THE INTERNAL REVENUE CODE OF 1954 TO PROVIDE A CREDIT FOR INVESTMENT IN CERTAIN DEPRECIABLE PROPERTY, TO ELIMINATE CERTAIN DEFECTS AND INEQUITIES, AND FOR OTHER PURPOSES



MARCH 16, 1962.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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U.S. GOVERNMENT PRINTING OFFICE

80931 WASHINGTON : 1962

87TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 1447

REVENUE ACT OF 1962

MARCH 16, 1962.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. MILLS, from the Committee on Ways and Means, submitted the following

REPORT

[To accompany H.R. 10650]

The Committee on Ways and Means, to whom was referred the bill (H.R. 10650) to amend the Internal Revenue Code of 1954 to provide a credit for investment in certain depreciable property, to eliminate certain defects and inequities, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

IV. APPEARANCES, ETC., WITH RESPECT TO LEGISLATION

(Sec. 3 of the bill—sec. 162(e) of the code)

A. Reasons for provision

Present law allows deductions for income tax purposes for ordinary and necessary expenses paid or incurred in carrying on a trade or business. No mention, however, is made in the statute of expenses incurred in making appearances, submitting material, or communicating with respect to legislative matters. However, Treasury regulations in effect prior to the enactment of the 1954 Code disallowed deductions for expenditures for such purposes (regulations 118, secs. 39.23(o)–1(f) and 39.23(q)–1(a)).

In 1959, the Supreme Court handed down two companion decisions upholding the validity of these regulations, *Cammarano* v. *U.S.* and *F. Straus & Sons, Inc.* v. *U.S.* (358 U.S. 498 (1959)). The Court held that although the amounts expended for legislative matters were "ordinary and necessary"—in fact essential to the very survival of the taxpayer's business—nevertheless they were not deductible because the regulations barred the deduction of this particular type of expense. The court recognized that the statute contained no provisions specifically supporting the regulations, but stated that they had acquired the force of law by reason of congressional reenactment of the underlying statute.

Following the *Cammarano* decision, the Treasury Department promulgated new regulations relating to deductions incurred with respect to legislative matters. These regulations, while following the general rules set forth in the earlier regulations for the first time stated specifically that several different classes of expenditures are to be disallowed as deductions. For example, the new regulations require

the disallowance of a deduction for the portion of dues and other payments to any organization, a "substantial part" of the activities of which consist of lobbying to the extent that such amounts are "attributable to" these activities. Similarly, the regulations now state that expenditures for the promotion or defeat of legislation include expenditures for the purpose of attempting to influence members of a legislative body directly or indirectly, by urging or encouraging the public to contact the members.

The regulations issued by the Treasury Department in 1959 brought to a head many administrative and enforcement problems and uncertainties which have plagued both the Government and taxpayers. The difficulty in allowing trade or business expenses generally, but isolating expenses relating to legislative matters and denying deductions for them, stems in part from the difficulty in segregating and classifying such expenses. This is a form of detailed recordkeeping to which taxpayers are not accustomed. Moreover, in the case of many expenses which may primarily be incurred to inform the business itself as to the application of certain proposed legislation, when such information is also made available to legislators it is difficult to determine how an allocation of the expense should be made between legislation and mere planning of the company. Moreover, in the case of an organization, a determination must also be made as to whether the expenses of this type are substantial—a term which involves a difficult determination.

More important than the administrative and enforcement problems, however, are the policy considerations involved in denying expenses with respect to legislative matters. It appears anomalous, for example, that expenses incurred in appearing before legislative bodies or before legislators are not deductible while appearances before executive or administrative officials with respect to administrative matters, or before the courts with respect to judicial matters, are deductible where the expenses otherwise qualify as trade or business expenses. Your committee believes that the present bar on deductions with respect to legislative matters must be modified to place presentations to the legislative branch of government on substantially the same footing in this respect as that with the other two coordinate branches of government.

It also is desirable that taxpayers who have information bearing on the impact of present laws, or proposed legislation, on their trades or businesses not be discouraged in making this information available to the Members of Congress or legislators at other levels of government. The presentation of such information to the legislators is necessary to a proper evaluation on their part of the impact of present or proposed legislation. The deduction of such expenditures on the part of business also is necessary to arrive at a true reflection of their real income for tax purposes. In many cases making sure that legislators are aware of the effect of proposed legislation may be essential to the very existence of a business. The deduction of legislative expenses for those who incur them for personal reasons is not proposed here, since such expenses are not deductible with respect to administrative or judicial presentations and have no bearing on the determination of true taxable income of a business.

B. General explanation of provision

The bill adds a new subsection (sec. 162(e)) to the provision of present law relating to the deduction of trade or business expenses. It provides that certain types of expenses incurred with respect to legislative matters are to be deductible if in all other respects they qualify as trade or business expenses.

The expenses which may be deducted are divided into two categories. The first category relates to expenses in direct connection with appearances, submission of statements or sending of communications. These appearances, statements or communications may be presented either to committees or individual Members of Congress or to committees or individual members of State or local governmental legislatures. The second category of expenses which may be deducted are those in direct connection with the communication of information between the taxpayer and an organization of which he is a member. This communication of information may be either from the organization to the taxpayer or vice versa. In the case of both categories of expenses referred to above, in order for the expense item to be deductible, it must be concerned with legislation or proposed legislation of direct interest to the taxpayer (and to the organization in the latter case). Thus, the expenses may not be in connection with legislative matters such as nominations, etc., but rather must be in connection with specific legislation or proposals for legislation.

The bill also provides that where a taxpayer is a member of an organization and the organization pays or incurs the expenses of the types referred to above on behalf of its members, the dues which the taxpayer pays to the organization in carrying on his trade or business are to be deductible to the extent they are used for such purposes. The remainder of the dues is likely already to be deductible as ordinary and necessary business expenses. Of course, the dues to an organization may be deductible although not all of the organization's legislative activity is connected with each specific member's trade or business. It is sufficient if all of the organization's legislative activity is related to the trade or business of a significant number of the members.

The bill provides two limitations on the deduction of the above-specified expenses for the specified types of legislative activity. It is not intended by your committee that any deduction be allowed for an amount paid or incurred for participation or intervention in any political campaign for any candidate. Of course, this includes participation or intervention in political campaigns in opposition to a candidate as well. Your committee's bill further provides that no expense deduction is to be allowed for expenditures to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums. Thus, no deduction is intended to be allowed for expenses incurred in connection with what is usually called "grassroot" campaigns intended to develop a point of view among the public generally which in turn is directed toward the legislators.

Nothing in this provision is intended to permit the deduction of entertainment expenses. Such amounts, if deductible at all, must meet the tests set forth in the section of the bill explained below, without regard to this provision.

This provision is to be effective with respect to taxable years beginning after December 31, 1962.

SECTION 3. APPEARANCES, ETC., WITH RESPECT TO LEGISLATION

(*a*) *In general.*—Subsection (a) of section 3 of the bill amends section 162 (relating to trade or business expenses) by redesignating subsection (e) as subsection (f) and by inserting after subsection (d) a new subsection (e) relating to appearances, etc., with respect to legislation.

Paragraph (1) of the new subsection (e) provides that the deduction allowed by subsection (a) of section 162 is to include all of the following ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business: (1) expenses in direct connection with appearances before, submission of statements to, or sending communications to, the committees, or individual members, of Federal, State, or local legislative bodies with respect to legislation or proposed legislation of direct interest to the taxpayer, (2) expenses in direct connection with communication of information between the taxpayer and an organization of which he is a member with respect to legislation or proposed legislation of direct interest to the taxpayer and to such organization, and (3) that portion of dues

with respect to any organization of which the taxpayer is a member which is attributable to the expenses of the activities above described in this paragraph which are carried on by such organization. Paragraph (1) also provides that the expenses referred to therein are to include, but not be limited to, the cost of preparing testimony and traveling expenses described in subsection (a)(2) of section 162.

Paragraph (2) of the new subsection (e) provides that the provisions of paragraph (1) are not to be construed as allowing the deduction of any amount paid or incurred (whether by way of contribution, gift, or otherwise)—

(1) for participation in, or intervention in, any political campaign on behalf of any candidate for public office, or

(2) in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums.

(*b*) *Effective date.*—Subsection (b) of section 3 of the bill provides that the amendments made by subsection (a) are to apply to taxable years beginning after December 31, 1962.

Exhibit 157: Excerpts From H.R. 10650 (Revenue Act of 1962) as Adopted by House

87TH CONGRESS
2D SESSION

H. R. 10650

IN THE SENATE OF THE UNITED STATES

APRIL 2, 1962

Read twice and referred to the Committee on Finance

AN ACT

To amend the Internal Revenue Code of 1954 to provide a credit for investment in certain depreciable property, to eliminate certain defects and inequities, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE, ETC.

(a) SHORT TITLE.—This Act may be cited as the "Revenue Act of 1962".

SEC. 3. APPEARANCES, ETC., WITH RESPECT TO LEGISLATION.

(a) IN GENERAL.—Section 162 (relating to trade or business expenses) is amended by redesignating subsection (e) as subsection (f) and by inserting after subsection (d) the following new subsection:

"(e) APPEARANCES, ETC., WITH RESPECT TO LEGISLATION.—

"(1) IN GENERAL.—The deduction allowed by subsection (a) shall include all the ordinary and necessary expenses (including, but not limited to, traveling expenses described in subsection (a) (2) and the cost

of preparing testimony) paid or incurred during the taxable year in carrying on any trade or business—

"(A) in direct connection with appearances before, submission of statements to, or sending communications to, the committees, or individual members, of Congress or of any legislative body of a State, a possession of the United States, or a political subdivision of any of the foregoing with respect to legislation or proposed legislation of direct interest to the taxpayer, or

"(B) in direct connection with communication of information between the taxpayer and an organization of which he is a member with respect to legislation or proposed legislation of direct interest to the taxpayer and to such organization,

and that portion of the dues so paid or incurred with respect to any organization of which the taxpayer is a member which is attributable to the expenses of the activities described in subparagraphs (A) and (B) carried on by such organization.

"(2) LIMITATION.—The provisions of paragraph (1) shall not be construed as allowing the deduction of any amount paid or incurred (whether by way of contribution, gift, or otherwise)—

"(A) for participation in, or intervention in,

any political campaign on behalf of any candidate for public office, or

"(B) in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums."

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 1962.

Exhibit 158: Excerpts From Senate Finance Committee Hearings H.R. 10650 (Revenue Act of 1962)

Copy 1

REVENUE ACT OF 1962

1498—

HEARINGS

BEFORE THE

COMMITTEE ON FINANCE

UNITED STATES SENATE

EIGHTY-SEVENTH CONGRESS

SECOND SESSION

ON

H.R. 10650

AN ACT TO AMEND THE REVENUE ACT OF 1954 TO PROVIDE A CREDIT FOR INVESTMENT IN CERTAIN DEPRECIABLE PROPERTY, TO ELIMINATE CERTAIN DEFECTS AND INEQUITIES, AND FOR OTHER PURPOSES

APRIL 3, 4, AND 5, 1962

PART 2

Printed for the use of the Committee on Finance

U.S. GOVERNMENT PRINTING OFFICE

82190 WASHINGTON : 1962

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington 25, D.C. - Price $1.00

REVENUE ACT OF 1962

TUESDAY, APRIL 3, 1962

U.S. SENATE,
COMMITTEE ON FINANCE,
Washington, D.C.

The committee met, pursuant to recess, at 10:15 o'clock a.m., in room 2110, New Senate Office Building, Senator Harry F. Byrd (chairman) presiding.

Present: Senators Byrd, Kerr, Douglas, Gore, Hartke, McCarthy, Williams, Carlson, Curtis, and Morton.

Also present: Elizabeth B. Springer, committee clerk; and Colin F. Stam and L. M. Woodworth, of the Joint Committee on Internal Revenue Taxation.

The CHAIRMAN. The committee will come to order.

The first witness is Mr. Walter A. Slowinski of the Chamber of Commerce of the United States.

Take a seat, sir, and proceed.

STATEMENT OF WALTER A. SLOWINSKI, APPEARING ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

Mr. SLOWINSKI. Mr. Chairman and members of the committee, I am Walter A. Slowinski of the law firm of Baker, McKenzie & Hightower of Chicago, Ill., and Washington, D.C., appearing on behalf of the Chamber of Commerce of the United States as a member of its committee on taxation.

I am an adjunct professor of comparative tax law at the Georgetown Graduate Law School in Washington, D.C., and a lecturer in domestic and foreign tax law at the University of Virginia Law School in Charlottesville.

The chamber's board of directors and committee on taxation have met regularly during the current year on the changing tax proposals to be certain all points of view have been given an opportunity for full expression.

We request permission, Mr. Chairman, to file another more detailed statement later in these hearings.

We are anxious to give all our members an opportunity to comment on H.R. 10650. For this reason our detailed statement will not be completed until April 27. We request permission to have it inserted at the end of the record for that day's testimony.

The CHAIRMAN. Without objection that will be done.

Mr. SLOWINSKI. The chamber's position on major sections of H.R. 10650 is as follows:

SECTION 3—DEDUCTIONS FOR LEGISLATIVE ACTIVITY SHOULD BE IMPROVED

The chamber believes that section 3, as presently contained in H.R. 10650 is neither an adequate nor a proper solution to the problem of legislative activity deductions.

In lieu of section 3 of H.R. 10650, it recommends the substitution of S. 467 introduced by Senator Hartke. A similar bill was reported favorably and unanimously by the Ways and Means Committee of the 86th Congress.

The chamber proposes a general legislative rule which would state that:

> No expense which otherwise qualifies as a deduction relating to trade or business expenses (including, but not limited to, dues and other amounts paid to any organization) shall be disallowed as a deduction merely because paid or incurred to support or oppose or otherwise influence action by the Congress by any legislative body of a State, a possession of the United States, the District of Columbia, or any political subdivision of the foregoing, with respect to any legislative or constitutional proposal, or to support or oppose or otherwise influence action of the voters with respect to any legislative or constitutional proposal submitted or proposed to be submitted to the voters by initiative, referendum, or similar proceeding.

The general rule would not be construed as allowing the deduction of any amount paid or incurred (whether by way of contribution, gift, or otherwise) for participation or intervention in any political campaign on behalf of, or in opposition to, any candidate for public office.

The CHAIRMAN. Senator Douglas.

Senator DOUGLAS. Mr. Slowinski, I invite your attention to the statement where you speak of deductions for legislative activities or lobbying and I would like to ask you this question:

Under section 3 of the bill as it is now before us, if I am president of a racing corporation which wants to establish a racetrack in a given State, and in order to do so must obtain legislative permission, can I lobby for the passage of this bill before a legislative committee or administrative authorities and deduct those expenses as tax exempt under the bill as it now reads.

Mr. SLOWINSKI. Senator, I think so.

On page 26 of the bill, at the section at line 11 that says,

In direct connection with communication of information between the taxpayer and an organization of which he is a member with respect to legislation or proposed legislation of direct interest to the taxpayer and of such organization.

Senator DOUGLAS. Well, that would be communications which I might address to the stockholders in my corporation.

But section (a) above is even more explicit, is it not? It—

permits deductions in direct connection with appearances before and submission of statements to or sending communications to the committees or individual Members of Congress or of any legislative body of a State.

Mr. SLOWINSKI. Yes, that is right.

Senator DOUGLAS. This would be tax deductible.

Now, let me raise a question. Suppose you, Mr. Slowinski, are a minister and representing a point of view at the racetrack is not his trade or business in a State in which I want to establish a racetrack and you feel that the establishment of this racetrack would be injurious to the public welfare in that it would encourage gambling and concentrate people's attention upon chance rather than upon effort as a means of getting ahead in life and you feel that you should appear before the State legislature to lobby against my bill to establish a racetrack.

Could you as a minister of the Gospel deduct your expenses in connection with appearing before the legislature as tax deductible?

Mr. SLOWINSKI. Senator, if this is of direct interest to the minister, and I assume it is——

Senator DOUGLAS. Well, it is not of direct economic interest, it is only of moral interest.

Mr. SLOWINSKI. That is right.

Mr. and Mrs. Cammarano wanted to save their wholesale beer distributing business in Seattle, and they were told that spending money to go to the legislature to try to save their beer business was not deductible.

Senator DOUGLAS. The minister is not in the beer business. He is a minister of the Gospel.

Mr. SLOWINSKI. That is right.

Senator DOUGLAS. And my question is if trying to protect the morals of the community as he sees them, he goes before a State legislature, and incurs expenses, and, let us say, eats a meal costing 75 cents, and has a hotel room that costs $6, can he deduct that from his taxable income?

Mr. SLOWINSKI. I would be hopeful he could, Senator.

Senator DOUGLAS. Well, you would be hopeful that he could; but is there anything in the law which would permit him to do so?

Mr. SLOWINSKI. Not presently; no, sir.

Senator DOUGLAS. Not presently?

Mr. SLOWINSKI. That is right.

Senator DOUGLAS. Then the law as it is at present would permit the president of a racetrack corporation to deduct his expenses, directly lobbying outlays for the racetrack but would not permit the minister of the Gospel from making a deduction of his lobbying expenses against it.

In other words, if you want to get something through which will benefit you financially, you can deduct this, and if you are a corporation, say, you can have 52 percent of the bill met by the public; isn't that true?

So the minister would be taxed, as a matter of fact, taxed more heavily than the representative of the racetrack who appears; is that true?

Mr. SLOWINSKI. Senator, the Congressional Record has contained some articles called "Censorship by taxation," which refer to just that question.

The right to petition Congress should be granted everyone in terms of his direct interest in the legislation.

Senator DOUGLAS. Would you say you were in favor of broadening this act so that any expenditure by an individual either for or against the bill would be tax deductible?

Mr. SLOWINSKI. No, sir; I would think——

Senator DOUGLAS. You would or would not?

Mr. SLOWINSKI. No; I would be in favor of classifying the term "direct interest" to have a more general application that would include your minister.

Senator DOUGLAS. How would you define it?

Mr. SLOWINSKI. The revenue agent defines it every day in terms of——

Senator DOUGLAS. Thus far they have defined it so that the minister would not be able to deduct his lobbying expenses, but the company would, the racetrack company would.

Mr. SLOWINSKI. Section 4 of the bill is going to define direct interest in terms of when you take someone to lunch, whether or not this is a direct interest or business connection.

I would be hopeful we could move some of that into section 3.

Senator DOUGLAS. This is very interesting.

Senator KERR. Senator, would you yield for just an observation?

Senator DOUGLAS. I will yield, if you are my ally on this.

If, on the other hand, you are not my ally I will not yield.

[Laughter.]

Senator GORE. Declare your position, sir.

Senator KERR. I was going to speak from an objective neutral position.

Senator DOUGLAS. You always add to the gaiety of a session, Robert.

Senator KERR. I appreciate that.

I was just thinking about the minister and I want to say that I think the Senator has a valid point, but in view of the fact that the minister would be sent there by, I presume, his congregation, whose income is tax free they could pay his expenses but if he found a place here where he could get a meal for 75 cents and a room for $6 a day, he could establish a travel bureau and make that a very profitable business.

Senator DOUGLAS. Now, suppose the minister came not in obedience to any resolution by his congregation but according to the mandates of his conscience which should be the most powerful mandate of all.

Mr. SLOWINSKI. Senator, that very question under the present law troubles crime commissions and you know about crime commissions in your own jurisdiction. Crime commissions cannot spend money to appear before legislative bodies under threat of losing their income tax exemptions.

Senator DOUGLAS. Yes.

Mr. SLOWINSKI. And we now feel if section 3 is broadened, that both the minister and the crime commission can participate.

Senator DOUGLAS. Would a minister be entitled to deduct his travel expenses in appearing before——

Mr. SLOWINSKI. We would like to see it that way.

Senator DOUGLAS. You would?

Mr. SLOWINSKI. Yes, sir.

Senator DOUGLAS. Ministers are not the only people in the country authorized to have consciences.

[Laughter.]

Senator DOUGLAS. Suppose a private citizen feels a conscientious objection to a racetrack. Should he be permitted to deduct his expenses?

Mr. SLOWINSKI. Yes, sir.

Senator DOUGLAS. What?

Mr. SLOWINSKI. Yes, sir.

Senator DOUGLAS. Yes, the answer is "Yes"?

Mr. SLOWINSKI. Yes.

Senator DOUGLAS. All right.

You want to broaden this exemption still further to include not only the cost of direct appearances, but advertising and other propaganda in connection with the measure?

Mr. SLOWINSKI. We want to exclude anything which has to do with a political campaign.

Senator DOUGLAS. I understand.

But full-page ads in newspapers on a given matter for a racetrack, for instance, would still be deductible.

Look at your own language.

Mr. SLOWINSKI. Yes, sir.

Senator DOUGLAS. It would be deductible, would it not?

Mr. SLOWINSKI. Yes, sir.

Senator DOUGLAS. Now, suppose a group of private citizens wants to place an ad in opposed to the racetrack, should that be deductible?

Mr. SLOWINSKI. Yes.

Senator DOUGLAS. Suppose the president of an oil company wants to carry on extensive advertising campaign to protect the depletion allowance and to get higher gas rates should that be deductible?

Senator KERR. Oh, yes. [Laughter.]

I hope I speak as an ally. [Laughter.]

Senator DOUGLAS. I am afraid you don't Bob.

Mr. SLOWINSKI. Would you like the record to show my saying yes or the Senator saying yes?

Senator DOUGLAS. I would like to have the record show your position.

Mr. SLOWINSKI. Yes.

Senator DOUGLAS. That means in effect, does it not, that the taxpayers would finance 52 percent of the expenditure?

Mr. SLOWINSKI. Yes.

Senator DOUGLAS. Yes.

Mr. SLOWINSKI. Yes, sir.

Senator DOUGLAS. Would you favor private individuals having this same right to deduct contributions?

Suppose Senator Gore and I pass the hat and get money for ads against the 27½ percent depletion allowance, should we be permitted to deduct that from our income and make it nontaxable?

Mr. SLOWINSKI. Should the people who give you the money in the hat be allowed to deduct it?

Senator DOUGLAS. Yes, and such contributions as we may make, should that be deductible?

Mr. SLOWINSKI. Yes.

Senator DOUGLAS. You haven't answered. You have nodded your head.

Mr. SLOWINSKI. Yes, sir.

To do otherwise, Senator, would be to say we do have censorship by taxation.

Senator DOUGLAS. Not censorship but unfair advantage.

Mr. SLOWINSKI. Yes; namely, a wealthy man can come before the Congress because he can spend money and he doesn't need a deduction. A poor person who needs the deduction loses his right to come before this Congress because he can't afford it without a deduction.

Senator GORE. The poor man is not involved in this. Let's leave them out.

Mr. SLOWINSKI. Senator, Mr. and Mrs. Cammarano were not wealthy people.

Senator DOUGLAS. This is very interesting. I didn't think you would have the consumers taking advantage of this opportunity which you have so generously accorded to the same degree that you would have a corporation with public relations experts and with access to advertising firms and with ample funds which they could use in this fashion——

Mr. SLOWINSKI. It boils down to the question——

Senator DOUGLAS. You know the famous quotation of Anatole France in which he said the majestic equality of the law forbids the rich as well as the poor from sleeping under bridges and begging in the streets for bread. [Laughter.]

Mr. SLOWINSKI. Yes, sir.

Senator HARTKE. I didn't know I was going to get such a cooperative witness.

Let me come back to another question, that is all I have on that matter, and I want no assumption for the Senator from Tennessee.

In regard to the matter of the question of deduction for attempts to influence legislation, the so-called lobbying aspects, I want to thank my distinguished witness for referring to my bill.

Let me ask you as a matter of practical application, isn't there a very difficult interpretative question involved so far as the law written in the House is concerned?

have a detrimental effect upon you as well as a positive effect upon the chamber?

Mr. SLOWINSKI. We think groups such as this should have the right to inform the public on legislation or on referendums.

Senator HARTKE. Under the present bill this is not possible, isn't that true?

Mr. SLOWINSKI. Yes, sir.

Senator HARTKE. Let's take in the case of bond issues in local communities.

What would be the effect of this type of legislation in regard to a bond issue for public improvement?

Mr. SLOWINSKI. If one were not a corporation, which was about to pay a portion of the expense of the bond issue, or one were not an individual who was about to pay a portion of the expenses of the bond issue, one probably couldn't participate under the provisions of the House bill because he didn't have a direct interest.

Senator HARTKE. And the net result would be that these advertising campaigns which frequently are required in order to stir up public opinion to take positive action to do things which frequently the bond issue seeks to do, would probably fail.

Mr. SLOWINSKI. Or that the wealthier groups which were not worried about tax deductibility would have the privilege of participating while the other groups would not.

Senator HARTKE. That is all I have, sir.

The CHAIRMAN. Thank you very much, Mr. Slowinski.

All the committee may not agree with what you have said but I want to say this, you have shown to my mind, a very remarkable knowledge of the tax laws. I note with some interest that you are a lecturer at the University of Virginia Law School.

Mr. SLOWINSKI. Yes, Mr. Chairman.

The CHAIRMAN. So the committee will now recess until 2:30 p.m.

Whereupon, at 12:20 p.m., the committee was recessed to reconvene at 2:30 p.m., the same day.)

AFTERNOON SESSION

The CHAIRMAN. The committee will come to order.

We have sent for some of the other Senators, and I hope they will respond.

The first witness is Mr. Harold H. Scaff, National Association of Manufacturers. Take a seat, sir. I am sorry we have not got more Senators here, but I think they will come in very shortly.

STATEMENT OF HAROLD H. SCAFF, CHAIRMAN, TAX COMMITTEE, NATIONAL ASSOCIATION OF MANUFACTURERS; ACCOMPANIED BY JOHN C. DAVIDSON, VICE PRESIDENT IN CHARGE OF GOVERNMENT FINANCE DIVISION, NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. SCAFF. My name is Harold H. Scaff. I am vice president of Ebasco Services, Inc., New York, N.Y. My presentation is in behalf of the National Association of Manufacturers as chairman of its taxation committee.

SECTION 3—EXPENSES, ET CETERA, WITH RESPECT TO LEGISLATION

This section deals with the deduction of expenses in connection with the expression of business viewpoints on legislative matters, at all legislative levels. Such expressions are necessary to assure that laws do not impede or restrain the effective functioning of our private enterprise system. Consistently, expenses in connection with such expressions are "ordinary and necessary," and there is no statutory prohibition to the contrary. The present situation has been created by an interplay of administrative regulations, and court decisions, resulting from a failure of explicit statutory language on the subject.

The section as drafted, however, would draw a line through such expenses. It would permit generally the deduction of those which involve expressions directly communicated to legislative bodies, or members thereof. But it would deny deductions where expressions are designed to influence the general public, or segments thereof, in regard to legislative matters.

We appreciate the recognition which the Ways and Means Committee, on two occasions, and now the full House of Representatives, has given to this problem, but the provisions in H.R. 10650 do not come to grips with the full scope of the problem. To achieve an adequate resolution of the issue we urge consideration by this committee of the bill, S. 467, jointly sponsored by Senators Kerr and Hartke.

This bill would provide a comprehensive and equitable remedy by permitting the deductibility of legislative expenditures to the extent they would qualify as "ordinary and necessary" business expenses related to the business of the taxpayer and reasonable in amount. Clearly, the limitations indicated, as well as the discretionary authority left to the Internal Revenue Service, would provide adequate safeguards against possible abuse.

In light of the seriousness with which we view this problem, we propose to file a more extended statement of our views for inclusion in the record of these hearings.

STATEMENT OF LESLIE MILLS, CHAIRMAN, COMMITTEE OF FEDERAL TAXATION, AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

Mr. MILLS. Mr. Chairman, my name is Leslie Mills. I am chairman of the Committee on Federal Taxation of the American Institute of Certified Public Accountants.

The American Institute of CPA's is the national professional organization of practicing CPA's in this country. It has over 43,000 members, and the committee on Federal taxation, of which I am chairman, is a large committee with representatives from all over the country, rendering professional services to all kinds of American business, large and small. Because of the limited time we have had for study of the Revenue Act of 1962, I would like permission to submit within a few days a detailed analysis of the major sections of the bill. We shall expand on my comments today and make observations.

(The supplemental statement referred to appears at the end of Mr. Mills' oral presentation.)

(The supplemental statement follows:)

SUPPLEMENTAL STATEMENT OF COMMITTEE ON FEDERAL TAXATION OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

SECTION 3.—APPEARANCES, ETC., WITH RESPECT TO LEGISLATION

1. SECTION 3—PROPOSED SECTION 162(e)

Payments to influence legislation

Expenses incurred to defeat or promote legislation should be deductible if the purposes therefor and the methods used do not violate Federal or State laws and the expenses are otherwise deductible. This should include payments to influence public opinion.

We call your attention to recommendation No. 6, page 5, of our booklet of Recommendations for Amendments to the Internal Revenue Code which was submitted to the Congress on February 28, 1961. With respect to code sections 162 and 212, it was recommended that:

"Expenses incurred to defeat or promote legislation should be deductible if the purpose therefor and the methods used do not violate Federal or State laws and the expenses are otherwise deductible.

"The regulations bar the deduction of expenditures incurred for the promotion or defeat of legislation without making any distinction between proper and improper expenditures and regardless of whether the expenditures are otherwise ordinary and necessary under the circumstances. The law itself does not seem to prohibit the deduction of such expenditures, but regulations prohibiting it have been in effect so long that the courts hold that they have the effect of law.

"In recent cases, the U.S. Supreme Court has upheld the disallowance of expenses incurred to defeat legislation which, if adopted, would have completely eliminated the taxpayer's trade or business. The expenses were not illegal or immoral and were clearly necessary to preserve the very existence of the taxpayer's trade or business.

"The Congress and other legislative bodies frequently invite testimony of professional and business leaders when they are considering legislation. We believe the taxpayers not only have the right but have an obligation to express their informed opinions and share their experiences with legislators and the public generally. When such activities bear a close relationship to the taxpayer's trade or business or to other activities engaged in for the production of income and the methods employed are legal and moral, the expenses thereof should be deductible for income tax purposes."

Proposed section 162(e) seems unduly restrictive since it prohibits expenditures for the promotion or defeat of legislation which attempts to encourage the public to take a position with regard to a matter. While informing legislative bodies is important and in the public interest, it is equally desirable that administrative agencies and the public be informed as to legislative or constitutional matters. It should be made clear that expenses related thereto are deductible if ordinary and necessary under the circumstances.

Whether our recommendation is or is not adopted we believe that the wording of the bill should be changed to eliminate the requirement that the expenditure be of "direct" interest to the taxpayer. The requirement of a "direct" connection with the taxpayer's business may give rise to unnecessary disputes with the Internal Revenue Service. It should be sufficient if the expenditure meets the normal "ordinary and necessary" test applicable to other business expenses.

STATEMENT OF RAYMOND A. HOFFMAN, ILLINOIS STATE CHAMBER OF COMMERCE

Mr. HOFFMAN. My name is Raymond A. Hoffman. I am a partner in Price Waterhouse & Co., a firm of certified public accountants.

SECTION 3—APPEARANCES, ETC., WITH RESPECT TO LEGISLATION

Recommendation: In lieu of enacting section 3 of H.R. 10650, adopt the principles of H.R. 640 introduced January 3, 1961, by Mr. Boggs.

Explanation: In a statement addressed to the Commissioner of Internal Revenue November 12, 1959, in relation to then-proposed regulations, the Illinois State Chamber of Commerce described its activities in supplying information to the business concerns comprising its membership. Such information relates to complex legislative issues of direct concern to business. The chamber's statement also pointed out that it seemed inconsistent to require a chamber of commerce exempt from income taxes under the provisions of the code to evaluate its detailed activities in an attempt to segregate certain lobbying expenditures. H.R. 640 seems to eliminate the difficulties. That bill prohibits tax reduction for political contributions or for costs of participating in any political campaign. These provisions offer adequate safeguards.

By contrast H.R. 10650 appears further to complicate, rather than clarify, the present situation. Among other things, this bill raises doubts about the tax treatment of expenditures incurred for disseminating information to the public. Also, in the case of dues to membership organizations, this bill imposes the virtually impossible task of ascertaining what portion of the organization's activities are on account of appearances and communications to legislative bodies.

REVENUE ACT OF 1962

WEDNESDAY, APRIL 4, 1962

U.S. SENATE,
COMMITTEE ON FINANCE,
Washington, D.C.

The committee met, pursuant to recess, at 10 a.m., in room 2221, New Senate Office Building, Senator Harry F. Byrd (the chairman) presiding.

Present: Senators Byrd (chairman), Kerr, Smathers, Douglas, Gore, Williams, Carlson, Bennett, Curtis, and Morton.

Also present: Elizabeth B. Springer, committee clerk; and Colin F. Stam and L. M. Woodworth, of the Joint Committee on Internal Revenue Taxation.

The CHAIRMAN. The committee will come to order. The first witness this morning is Mr. Stanley Ruttenberg of the AFL–CIO, accompanied by Andrew J. Biemiller.

Take a seat, gentlemen.

Proceed, sir.

STATEMENT OF STANLEY H. RUTTENBERG, DIRECTOR OF RESEARCH, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, ACCOMPANIED BY ANDREW J. BIEMILLER

Mr. RUTTENBERG. Thank you very much, Mr. Chairman.

Senator DOUGLAS. May I ask a question on section 3 on lobbying?

Mr. RUTTENBERG. Yes, we suggest in our statement that this provision be removed both for substantive and procedural reasons, and I explained a little of this in my statement toward the end, I think when you were out of the room, Senator.

Senator DOUGLAS. May I ask this: If a group of citizens are opposed to a bill which a group of corporations favor, under this language the corporations could deduct the direct expenses connected with appearances or communications?

Could the citizens make similar deductions under our law? Could they be said to have a material interest which would permit them to deduct expenses, travel expenses coming to Washington, preparation of briefs, and so forth?

Mr. RUTTENBERG. As I understand the bill as it is now written, and I would defer to the experts on this, it would apply only to the business expenses of corporations and not to the expense of individuals, private individuals who are coming to testify.

Senator DOUGLAS. I wonder if Mr. Stam and the staff would clarify this point?

Mr. STAM. I did not hear you.

Senator DOUGLAS. The question is whether the deductions allowed in connection with legislation under section 3 apply only to those carrying on a trade or business which has a material interest in connection with legislation or whether they are also permitted for citizens having only an indirect interest as consumers or as taxpayers or having only a moral interest in the matter.

Mr. STAM. I think the purpose of the amendment was that you had to have in mind a specific matter that affected you personally, your business, I mean.

Senator DOUGLAS. Has affected you economically?

Mr. STAM. That is right.

But you could deduct it, that is the idea.

Senator DOUGLAS. Would a taxpayer be considered, an ordinary taxpayer be considered, to have a material interest in the tax bill?

Mr. STAM. Well, it would have to be a direct interest that affected his particular problem. In other words——

Senator DOUGLAS. In effect what you are saying is that lobbying expenditures for the general interest are not tax deductible, but lobbying expenses for special interests are deductible, is that right?

Mr. STAM. Well, I mean, for example, if you went to see a Member of Congress and you wanted to talk about a specific tax proposal that affected you personally, then that would be considered to be a business expense, and allowed.

Senator DOUGLAS. Yes, such as corporations doing business abroad.

But suppose you are just a citizen interested in this matter, and you feel that if this privilege, to which the Senator from Tennessee has referred, is granted to corporations abroad, it would have a generally adverse effect upon the country.

Would your expenses under those conditions be deductible?

Mr. STAM. I would think no, Senator Douglas, the connection is too remote.

Senator DOUGLAS. That was my feeling.

Senator BENNETT. Would the Senator yield so I can cite him another example?

Suppose you were the president of the League of Women Voters of Salt Lake City and you wanted to come to Washington to testify before any committee of Congress on any pending legislation, could your expenses be deducted?

Mr. STAM. I think you would have to show some direct interest in that legislation that would have some specific effect upon you in connection with your business.

Mr. RUTTENBERG. There is a provision here, I was just looking at the report, I am not sure I understand it but it says the deduction of legislative expenses for those who incur them for personal reasons is not proposed here since such expenses are not deductible.

Senator BENNETT. I didn't indicate somebody who was doing it for personal reasons. I indicated an example of a person who was a member of a national organization, nonprofit, who comes representing the organization to an appearance before a legislative committee.

Senator DOUGLAS. What was Mr. Stam's answer?

Mr. STAM. Well, all of those questions will have to be interpreted but I mean you are supposed to have some direct interest in the particular legislation.

Senator DOUGLAS. What is your definition of "direct"?

Mr. STAM. Now, if this particular person was hired by an organization to come before the Congress and make a statement affecting the proposed legislation, I would think it would be deductible.

Senator SMATHERS. In this summary right here, I just saw this, Mr. Chairman, it says here if the expenses are otherwise a deduction allowed for the portion of dues paid to an organization which are used for similar legislative expenses to the extent they are related to the business of its members. It goes on to say in addition the expense

of communication of information between the taxpayer and the organization with respect to legislation is deductible.

So the illustration which the Senator from Utah gave according to this summary would be deductible.

That is what it says.

Stam says, "Yes" and the other man says, "No," so I don't know.

Mr. RUTTENBERG. The best thing to do is just remove the whole provision from the bill which we strongly urge you to do.

Senator DOUGLAS. Did you hear testimony from the U.S. Chamber of Commerce yesterday that the language still be further broadened to include expenses to inform not only legislators but also the general public?

Mr. RUTTENBERG. This was a proposal which the Ways and Means Committee was considering back, I think, in 1959 and 1960, and rejected out of hand and this proposal specifically does say in the report on it by the Ways and Means Committee that such expenses obviously are not covered by this proposal but I do know the Chamber and a good many other organizations are interested in expanding it out which would be a very serious problem indeed.

(The prepared statement of Mr. Ruttenberg follows:)

STATEMENT OF STANLEY H. RUTTENBERG, DIRECTOR OF RESEARCH, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

On behalf of the AFL–CIO, I wish to express appreciation to the chairman and members of the Senate Finance Committee for this opportunity to present our views on the proposed Revenue Act of 1962. Your committee is confronted with vastly complex tax issues which vitally affect the welfare of this Nation.

Deducting lobbying expenses

The proposal on this matter in the bill before you (sec. 3) is in the nature of loophole opening rather than closing. We oppose it for both substantive and procedural reasons.

The bill would add a new subsection (sec. 162(c)) to the provision of present law which would make deductible as a legitimate business expense certain types of outlays for lobbing activity—Federal, State, and local.

While it is presumed that this deduction would apply only to legislative activities directly related to the conduct of a specific business, the bill would surely open wide the floodgates.

Every corporation in the country, for example, could well seek to have the public underwrite its lobbying efforts to lower its income taxes, on the ground that tax rates affect specific businesses. It could be argued, as well, that the costs of lobbying for lower Federal expenditures should be deductible, on the theory that this would mean lower taxes. Quite plainly, under this proposal, automobile manufacturers could make a case for the deduction of their expenses for lobbying for increased tariffs on foreign cars, on increased highway building programs, or against measures to curtain noxious exhaust gases, etc. While there is no lack of corporate lobbying at present, lobbying outlays can be expected to increase enormously, if they could be openly deducted.

Moreover, in a letter dated February 26, 1960, from the Treasury to the House Ways and Means Committee, it is suggested that many lobbying expenses are already being deducted under the guise of advertising, promotion, legal, and like expenditures. The committee report on H.R. 10650 concedes "the difficulty in segregating and classifying such expenses."

Presumably, the way to resolve this segregation problem, according to the bill before you, is to open wide the floodgates by simply making deduction of lobbying expenses legal.

What is more, in proposing that the public now underwrite business lobbying expenditures by changing the Revenue Code, it is noteworthy that no proposal is currently being made to allow a similar tax-deduction privilege to individuals seeking to influence legislative decisions. If the issue of freedom of speech is, indeed, at stake, surely lobbying engaged in out of altruistic motives should be

treated as favorably as business enterprises seeking to promote their own self-interest.

It should be noted also that the Treasury letter already referred to further states that, "General reversal of policy relating to the deductibility of legislative activities can result in considerable decrease in revenues. * * *" If only because of the still loose provisions covering business expense deductions contained in the present bill—particularly for entertainment to encourage good will—we are certain that the revenue loss will, indeed, be substantial.

Quite apart from its content, it is also noteworthy that the issue covered by section 3 was not included in the President's tax message of April 1961, nor was public testimony on it invited by the Ways and Means Committee during its hearings.

During the course of House debate last week, the view was logically expressed by an important member of the committee majority that this subject matter has no proper place in this bill.

We are compelled to concur with this view.

STATEMENT OF R. J. LANDOLT, COMMITTEE ON FEDERAL TAXATION, CONTROLLERS INSTITUTE OF AMERICA; ACCOMPANIED BY EDWARD H. BENGTSON

Mr. LANDOLT. Mr. Chairman, I am R. J. Landolt of the Controllers Institute of America, Committee on Federal Taxation, and this is my associate on the committee, Mr. Edward Bengtson.

SECTION 3.—APPEARANCE, ET CETERA, WITH RESPECT TO LEGISLATION

We recommend in lieu thereof, in lieu of this H.R. 10650, the language of H.R. 7123 of the 86th Congress. The language of this section—and I am referring again now to the current bill—is so restrictive as to possibly deny proper communication with stockholders, because the language of the bill says "any important segment of the public." Well, you might consider 15 million stockholders an important segment of the public. Companies may want to communicate a message to their stockholders. It could conceivably be disallowed, the expense attributable to such communication, under the language of this proposed bill.

It should not deny business the right to be heard on legislative matters of great import to it. Unions operate freely in this field and business should have an equal right. Reference is made here to the restrictions imposed under section (2)(b).

STATEMENT OF LINCOLN ARNOLD, CHAIRMAN, TAX COMMITTEE, AMERICAN MINING CONGRESS

Mr. ARNOLD. Mr. Chairman, my name is Lincoln Arnold. I practice law here in Washington as a member of the law firm of Alvord & Alvord, but I am presenting this statement as chairman of the Tax Committee of the American Mining Congress. The American Mining Congress has in its membership producers accounting for the major part of the production by the various branches of the mining industry, including coal, ferrous and nonferrous metals, and industrial minerals.

The Mining Congress wishes to express the position of the industry with respect to several provisions of H.R. 10650.

SECTION 3—EXPENDITURES WITH RESPECT TO LEGISLATION

We endorse the provisions of section 3 of the bill, as far as they go. This section allows the deduction of ordinary and necessary business expenses in connection with proposed legislation of direct interest to the taxpayer, but it excepts from this allowance expenditures in connection with any attempt to influence the general public. It is our position that this section should be broadened to include all lawful expenditures with respect to legislation which are ordinary and necessary business expenses, and we hope you will amend this section of the bill to make it as broad as H.R. 640, introduced by Congressman Boggs, and H.R. 925, introduced by Congressman Byrnes.

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REVENUE ACT OF 1962

1498

HEARINGS

BEFORE THE

COMMITTEE ON FINANCE

UNITED STATES SENATE

EIGHTY-SEVENTH CONGRESS

SECOND SESSION

ON

H.R. 10650

AN ACT TO AMEND THE REVENUE ACT OF 1954 TO PROVIDE A CREDIT FOR INVESTMENT IN CERTAIN DEPRECIABLE PROPERTY, TO ELIMINATE CERTAIN DEFECTS AND INEQUITIES, AND FOR OTHER PURPOSES

APRIL 6, 9, AND 10, 1962

PART 3

Printed for the use of the Committee on Finance

U.S. GOVERNMENT PRINTING OFFICE
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For sale by the Superintendent of Documents, U.S. Government Printing Office
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REVENUE ACT OF 1962

FRIDAY, APRIL 6, 1962

U.S. SENATE,
COMMITTEE ON FINANCE,
Washington, D.C.

The committee met, pursuant to recess, at 10 a.m., in room 2221, New Senate Office Building, Senator Harry F. Byrd (chairman) presiding.

Present: Senators Byrd, Kerr, Douglas, Gore, Williams, Carlson, and Curtis.

Also present: Elizabeth B. Springer, committee clerk; Colin F. Stam, and Laurence N. Woodworth, Joint Committee on Internal Revenue Taxation.

The CHAIRMAN. The committee will come to order.

Our first witness will be Senator William Proxmire, a very distinguished Senator, and we are very happy to have you.

STATEMENT OF HON. WILLIAM PROXMIRE, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator PROXMIRE. Thank you, Mr. Chairman and members of the committee.

I would like to discuss two parts of the tax bill H.R. 10650, the House-passed bill.

These are: Section 2, dealing with a proposed credit for investment in certain depreciable property; and section 3, dealing with appearances and other costs with respect to legislation.

LOBBYING ACTIVITIES

I oppose the tax deduction for lobbying expenses because it would give a thoroughly unjustified tax advantage to special business interests over the public interest.

Contributions to lobbying organizations that fight for their ideals—be they left, right, or center—are not tax deductible. Contributions to groups like the American Civil Liberties Union, the Americans for Constitutional Action, and the League of Women Voters are prohibited by law from tax exemption.

But if this provision is enacted, special interest business groups, whose financial interests may run counter to the public interest, will get a juicy tax break.

This proposed new tax deduction is the one part of the bill that is flatly opposed by the Treasury.

This is one of the very few significant changes made in the law in years on which the House Ways and Means Committee conducted no hearings.

Section 3 of the bill would allow businesses and trade associations, but not the ordinary citizen nor the individual specialist, to deduct costs incurred in connection with promoting or opposing particular legislation. The bill as presently written would allow deductions for not only the expenses of appearances before congressional committees, but also expenses involved in personal contacts with individual Members of the Congress, personal contacts with State and local officials, and all expenses incurred by trade associations in propagandizing a particular point of view with their individual members.

I consider this provision of the bill wholly indefensible on several different grounds. First, as I have mentioned, from a legislative standpoint, the Ways and Means Committee has held no hearings on this particular measure. Certainly there should be an opportunity for the general public to be heard by the Ways and Means Committee on this subject before the legislation is enacted.

Second, from a legal standpoint, section 3 of the bill represents a change in a long-standing principle which has been supported on several occasions by Federal courts, including the Supreme Court.

The Internal Revenue Code provides for deductions only for "ordinary and necessary" expenses. It is far outside the "ordinary and necessary" income-producing procedures of business to attempt to influence legislative decisions. While the Treasury Department has apparently not attempted to enforce fully its present regulations, dereliction of duty should not be a justification for legislative change.

Third, the proposed change can be criticized on equity grounds. It clearly and explicitly discriminates in favor of business lobbying and against lobbying by private citizens or individual specialists.

Thus the provision serves to rig the odds against legislation for the general well-being, and in favor of specialized legislation for the few. It is difficult enough at present for the individual legislator

to obtain information on both sides of the questions upon which we must legislate.

In effect the new provision means that some tax funds now coming to Uncle Sam will be returned to businesses and trade associations in order that they can present their case more effectively, while at the same time discouraging individuals, who presumably have less capacity to meet lobbying costs, from incurring those costs. Thus the flow of information to legislators is diverted so that it comes more freely from certain sources and is less available from other sources.

Fourth, the proposed section can be criticized on economic grounds. The Federal Government, through this measure, will be subsidizing the diversion of resources away from productive output for the benefit of the national economy into specialized propagandizing purposes designed solely to benefit the few. These proposed deductions are not equivalent to deductions for advertising. Advertising is intended to disseminate knowledge to the many about products which are available in the market. The proposed deductions are for expenses designed to influence the few for the special benefit of a few.

The proposed provision on lobbying expenses will not only discriminate against certain nonprofit lobbying organizations, such as the League of Women Voters.

These organizations, like industry trade associations, are usually nonprofit and are generally not subject to tax on their own activities.

However, contributions to these organizations, like contributions to industry trade associations, are only deductible by the contributors to the extent that the contributions are not used by the associations to support lobbying activities.

Section 3 of H.R. 10650 would permit contributions to trade associations to be deductible even though the contributions were used by the trade associations for lobbying purposes.

This change would be made on the grounds that the contributions were "ordinary and necessary" business expenses. However, contributions to organizations such as the League of Women Voters would not be deductible to the extent that the league engaged in lobbying activities because the contributions in that case—under the proposed bill—would not be considered as "ordinary and necessary" business expenses.

Therefore, the bill tends to discriminate in favor of lobbying activities by industry trade associations and against lobbying activities by certain other groups which have been of great assistance to legislators in the past.

Mr. Chairman, I stated at the beginning of this statement that I believed there were two sections of the bill before you which were inimical to the best interests of the general public. I believe the case against both these provisions is clear cut and overwhelming.

That completes my statement, Mr. Chairman.

STATEMENT OF ALLAN P. LUCHT, TREASURER, FEDERATED DEPARTMENT STORES, INC.

Mr. LUCHT. Senator Kerr, my name is Allan P. Lucht. I am treasurer of Federated Department Stores, Inc. with offices in Cincinnati, Ohio. I appear here on behalf of the members of the American Retail Federation with offices at 1616 H Street, NW., Washington, D.C.

SUPPLEMENTAL STATEMENT OF THE AMERICAN RETAIL FEDERATION, APRIL 19, 1962

This statement is submitted in order to amplify and expand the necessarily brief statement presented on behalf of the American Retail Federation to the committee on April 9. That statement dealt solely with the investment tax credit provision and only in general terms. It did not deal with other provisions of the bill before you on which the federation wishes to make its views known.

APPEARANCES WITH RESPECT TO LEGISLATION

The American Retail Federation endorses section 3 of the bill which would permit deduction of ordinary and necessary expenses incurred by taxpayers in connection with appearances before legislative bodies and communications with such bodies and the members thereof.

Expenses incurred in appearances before executive or administrative agencies and tribunals, and appearances before the courts are now deductible when they otherwise qualify as ordinary and necessary business expenses. The enactment of section 3 of the bill will simply place all such expenses of the taxpayer on an equal basis.

In the present extremely complex state of the economy it is vitally important that all legislative bodies obtain as complete information as may be available as to the potential effects of any law or ordinances which they may be considering, particularly when this effect may be vital to the very existence of business. No artificial barrier, in the form of unfair tax treatment, should be raised to prevent a legislative body from obtaining the views of individuals who are interested in or will be affected by pending legislation.

1959

REVENUE ACT OF 1962

1498

HEARINGS

BEFORE THE

COMMITTEE ON FINANCE

UNITED STATES SENATE

EIGHTY-SEVENTH CONGRESS

SECOND SESSION

ON

H.R. 10650

AN ACT TO AMEND THE REVENUE ACT OF 1954 TO PROVIDE A CREDIT FOR INVESTMENT IN CERTAIN DEPRECIABLE PROPERTY, TO ELIMINATE CERTAIN DEFECTS AND INEQUITIES, AND FOR OTHER PURPOSES

APRIL 11, 12, AND 13, 1962

PART 4

Printed for the use of the Committee on Finance



U.S. GOVERNMENT PRINTING OFFICE

82190 WASHINGTON : 1962

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington 25, D.C. - Price $1.25

REVENUE ACT OF 1962

WEDNESDAY, APRIL 11, 1962

U.S. SENATE,
COMMITTEE ON FINANCE,
Washington, D.C.

The committee met, pursuant to recess, at 10:15 a.m., in room 2221, New Senate Office Building, Senator Harry F. Byrd (chairman) presiding.

Present: Senators Byrd, Kerr, Long, Anderson, Douglas, Gore, Hartke, Williams, Bennett, Curtis, and Morton.

Also present: Elizabeth B. Springer, committee clerk; and Colin F. Stam and L. M. Woodworth, of the Joint Committee on Internal Revenue Taxation.

The CHAIRMAN. The committee will come to order.

The first witness is Joseph Welman, of the American Bankers Association. Come around and take a seat.

STATEMENT OF JOSEPH C. WELMAN, PRESIDENT, BANK OF KENNETT, KENNETT, MO., APPEARING ON BEHALF OF THE AMERICAN BANKERS ASSOCIATION; ACCOMPANIED BY CHARLES WALKER, EXECUTIVE VICE PRESIDENT OF THE AMERICAN BANKERS ASSOCIATION; AND CHARLES McNEILL, DIRECTOR OF THE WASHINGTON OFFICE OF THE AMERICAN BANKERS ASSOCIATION

Mr. WELMAN. Mr. Chairman and gentlemen of the committee, thank you very much for the privilege of appearing before you today.

My name is Joseph C. Welman. I am president of the Bank of Kennett, Kennett, Mo., and I am a past president of the American Bankers Association.

Mr. WELMAN. Section 3 of H.R. 10650 amends section 162 of the Internal Revenue Code——

Senator BENNETT. Mr. Chairman, can we identify the location in the statement?

Senator ANDERSON. The very last part, the very last two pages.

Mr. WELMAN. The very last part of the supplementary material.

Senator BENNETT. Oh, yes, thank you.

Mr. WELMAN. Section 3 of H.R. 10650 amends section 162 of the Internal Revenue Code to make it clear that ordinary and necessary expenses incurred in making appearances, submitting material, or communicating with respect to legislative matters at the National, State or local level will be allowed as deductions for Federal income tax purposes and that the portion of dues paid or incurred with respect to any organization of which a taxpayer is a member which is attributable to the expenses of such activities will likewise be deductible by the taxpayer.

Current regulations of the Treasury Department relating to expenses incurred with respect to legislative matters require the disallowance of a deduction for the portion of dues and other payments to any organization, a "substantial part" of the activities of which consist of lobbying to the extent that such amounts are "attributable to" these activities.

The determination as to whether activities of this type are a substantial part of the overall activities of a multipurpose organization is most difficult, as the term "substantial" is a term of uncertain application.

Also, segregating and classifying expenses incurred in connection with such activities present serious difficulties.

The report of the Committee on Ways and Means point out that:

It is also desirable that taxpayers who have information bearing on the impact of present laws or proposed legislation, on their trades or businesses, not be discouraged in making information available to the Members of Congress or legislators at other levels of government.

The report further states that:

In many cases making sure that legislators are aware of the effect of proposed legislation may be essential to the very existence of a business.

Therefore, it is the view of the American Bankers Association that this is desirable and needed legislation and is in the public interest.

Senator ANDERSON. Mr. Chairman, if we are going to get into this question, I only want to point out I want you to comment on lobbying.

You think this lobbying is a good thing and ought to be permitted, particularly this communicating with respect to legislative matters? We have a taxpayers association in my State of New Mexico. When I was a newspaper reporter 40-some years ago up at the State capital, I think the taxpayers association was solely supported by the Santa Fe Railroad and the Southern Pacific Railroad.

Now, they broadened the base, they take in all the banks and a lot of other individuals in it. They are conducting a steady campaign of lobbying on bills that are now pending in the Congress.

If you think that it is a good thing that they stay in their own field, perhaps they should.

Why did you get into the lobbying field; why do you think that is so good?

Mr. WELMAN. We, of course, are not affected by this bill because we have been checked regularly and only a minor portion of our expenses are for lobbying.

Senator ANDERSON. That is exactly what Senator Kerr said, you should attend to your own business. Now you get off into somebody else's business. Why are you off in that?

Mr. WELMAN. We felt this represented the public interest by making it clear that expense for presentation of testimony and gathering of data and furnishing it to the Congress in an effort to clarify various items of legislation is a deductible item.

Senator ANDERSON. Did you ever check how many hotel suites in this town are regularly reserved by certain groups?

Mr. WELMAN. No, sir; I haven't.

Senator ANDERSON. Well, do you think they all have to have people here all the time entertaining Members of the Congress?

Mr. WELMAN. I wouldn't think so.

Senator ANDERSON. That is why I don't understand why you think this lobbying provision is such a good provision?

Mr. WELMAN. Our desire was that it be clarified and perhaps it is too broad in the sense we stated it. As I say we are not affected directly. We thought the problems would be clarified, and we think we should have proper regulations to keep it within bounds and it should be within bounds.

1963

REVENUE ACT OF 1962

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HEARINGS

BEFORE THE

COMMITTEE ON FINANCE

UNITED STATES SENATE

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SECOND SESSION

ON

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AN ACT TO AMEND THE REVENUE ACT OF 1954 TO PROVIDE A CREDIT FOR INVESTMENT IN CERTAIN DEPRECIABLE PROPERTY, TO ELIMINATE CERTAIN DEFECTS AND INEQUITIES, AND FOR OTHER PURPOSES

APRIL 16, 17, 18, AND 19, 1962

PART 5

Printed for the use of the Committee on Finance



U.S. GOVERNMENT PRINTING OFFICE

82190 WASHINGTON : 1962

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington 25, D.C. - Price $1.75

STATEMENT OF M. W. ARMISTEAD III, AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

Mr. ARMISTEAD. Thank you very much, Senator.

My name is M. W. Armistead III. I did not come here bearing gifts, I am sorry to say, but I do want to talk a little bit about advertising.

I am the publisher of the Roanoke Times and the Roanoke World-News. I am chairman of the Federal Laws Committee of the American Newspaper Publishers Association and I appear before your committee to urge revision of section 3 of the tax reform bill, H.R. 10650.

In its present form, this section would prohibit tax-deductibility of expenditures for institutional advertising but permit and recognize the cost of lobbying.

The ANPA is a trade association incorporated under the laws of the State of New York. Its membership comprises more than 850 daily newspapers, ranging from circulations of less than 5,000 to more than 1 million per day.

Our members have more than 90 percent of total daily newspaper circulation in the United States.

Each of these members has a very real and direct interest in the consideration being given by your committee to income tax reform. This is especially so with respect to the proposed discriminatory treatment of advertising costs by administrative agencies in their determination as to whether or not those costs should be treated as an ordinary and necessary business expense.

Section 162 of the 1954 Internal Revenue Code, in referring to trade or business expenses which are deductible, does not specifically mention advertising, but states that all the "ordinary and necessary expenses" of a business may be deducted. Similar language was in the 1939 Internal Revenue Code and the previous codes.

Under the present state of law, as interpreted by the U.S. Supreme Court, Federal authorities have set themselves up as censors of information disseminated in the form of advertising and as judges of what messages to the public constitute necessary advertising related to the taxpayer's business.

And now section 3 of bill H.R. 10650 passed by the House proposes to put a congressional stamp of approval on censorship by taxation. The bill would allow businesses to treat expenses in connection with lobbying activities as a tax-deductible item, but it would forbid the tax-deductibility of advertising expenditures for the promotion or defeat of legislation—even if the business life of a firm is at stake.

Should this bill become a law as it now stands, the net effect would be to sanction lobbying costs and expenses of direct contact with legislators, but it would disallow expenses of taking the same message to the public through advertising. Involved here is the encroachment of the Government on the people's right to information affecting the public interest.

A business firm wishing to back a local school bond drive through advertising or letters to its employees, for example, could not deduct the expense involved.

A company which feels that its back is to the wall with respect to proposed legislation could not take its fight to the public and show those activities as legitimate expenses for tax purposes. But individual lobbying, by the company, including pay to lawyers to appear and other costs, would be considered tax deductible.

It is plainly apparent what is involved here. Institutional advertising is, essentially, directed at the American public and only indirectly at the individual Members of Congress. Lobbying activities go generally in the reverse direction: to influence individual legislators.

The net effect of the present proposal would be to segregate the public—which should be best informed at all times—from the issues that come before Congress and which have much influence on the everyday lives of the American people.

The concern with this basic issue is clearly shown by the numerous editorials in many newspapers of all sizes in all sections of the country. We are supplying copies of a selection of these editorials for your record of this hearing.

Newspapers are not alone concerned with this proposal. The advertising business generally is disturbed over what seems to be a lack of knowledge in some Government circles either of the tremendous force of advertising upon our economic welfare or the harmful effect of regulations by Federal agencies upon that tremendous economic force.

Those high in Government for many years have urged the use of advertising to counteract recessions, to fight inflation, to sell U.S. savings bonds, to save our forests, to mention but a few. They want the aid of the Advertising Council but some of them are cool about the lifeblood that permits the council to exist.

There is an ironic note to all of this. Recently, President Kennedy, addressing the Advertising Council, complimented members of the council on their fine public service advertising and urged them not only to continue it, but to produce advertising in behalf of his international trade program. No one present asked the President if such advertising would be tax deductible. It is a pertinent question. If this bill passes, the chances are good that it would not be recognized as a tax deductible business expense even though such advertising would contribute to public understanding of this important matter.

From the standpoint of our national welfare, the right to free speech and to have a free press becomes of paramount importance when related to issues that are or may become the subject of legislation, because it is precisely these issues in which the public interest is vested.

One of the basic cornerstones of our system of government is an informed electorate. This in turn is dependent not only upon the right to acquire knowledge but to impart it, whether the issue be the merits of the free enterprise system as against those of the communistic system, the merits of privately owned as against State owned business, whatever the nature of the business may be, or the merits of any other question of vital public interest.

It is a matter of serious concern, therefore, that it is precisely here in the area of public policy, the most vital of all areas pertaining to our life as a nation, that the taxing power is used to exact a penalty on the exercise of one of our most cherished rights by those most competent to speak and inform the public.

The management and the board of directors of any American business know what is justifiable as an "ordinary and necessary" expense of the business.

Substitution of judgment by a Government administrative agency for the judgment of responsible business is incompatible with our basic American freedom.

So long as Congress permits the taxing authorities to censor advertising by determining what kinds of advertising are ordinary and necessary to a business, it is assisting the Government in curtailing the opportunity for the acquisition of knowledge by the people in respect of the conduct of their Government's affairs.

Accordingly, we respectfully urge that your committee reject the language in section 3 of H.R. 10650, and instead recommend language which will clearly permit a business to choose its own way to tell its story to the legislative branch of Government and to the public, free from tax penalty on the method it chooses.

The remedy is at hand. Bill S. 467 by Senator Hartke of Indiana, now in your committee, or similar language, would accomplish exactly that. Cosponsor of that bill is the senior Senator from Oklahoma, Senator Kerr.

We thank you for the opportunity to present the views of our association.

The CHAIRMAN. Thank you, Mr. Armistead.

Are there any questions?

Senator DOUGLAS. Mr. Chairman, I would like to ask Mr. Armistead, what is the present practice as regards institutional advertising which has a political implication? Can it be deducted from taxable income?

Mr. ARMISTEAD. If it is designed or, in the opinion of the Internal Revenue Service, is to influence or affect legislation or perhaps regulation by Government, I believe it is not, Senator Douglas, by a decision of the Supreme Court.

Senator DOUGLAS. But ordinary institutional advertising, devoid of a political content, is regarded as a business expense, and hence is not subject to taxation, is that correct?

Mr. ARMISTEAD. Yes, sir. I think that is correct, so long as it comes within the purview of ordinary and necessary. Of course, that is subject to interpretation.

Senator DOUGLAS. So the problem is for the courts to draw the line as to where the influence upon legislation or elections begins, is that true?

Mr. ARMISTEAD. I believe, sir, that the decision is made initially by the Internal Revenue Service. When somebody objects to that, of course, it does go before the courts for examination.

Senator DOUGLAS. Frequently in elections, some will emphasize the importance of a balanced budget which a certain political party tries to appropriate as its own. Under those conditions, what have been the decisions of the Internal Revenue Bureau? Have they held that that had a political overtone or undertone, or have they said this is merely a contribution to economic stability which it is proper for business to promote?

Mr. ARMISTEAD. Senator Douglas, I am not aware of any decisions on that specific point. If I can find any, I shall be glad to send them to you, sir, for the record.

Senator DOUGLAS. I would like to find out about that, because we find those ads very frequently occurring close to election time. I have always felt they were not totally dissociated from politics.

Do you know of any cases where institutional advertising of this nature has been rejected as not being tax deductible or income deductible?

Mr. ARMISTEAD. I believe, sir, there have been some cases involving some electric power companies, and also I believe a case involving a liquor company.

Senator DOUGLAS. On a fixed price, you mean, or resale price maintenance?

Mr. ARMISTEAD. No, sir; in the liquor case I believe it was a question of their taking a position in a referendum which would have dried up the area which they served, as I recall.

Senator DOUGLAS. Was that a tax case, or what? Was the question whether it should be included in the costs to be met out of rates? Can you remember?

Mr. ARMISTEAD. I do not remember.

The CHAIRMAN. Any further questions?

Senator CARLSON. Mr. Chairman, I was trying to find but have been unable to locate at the present a very excellent statement on institutional advertising. The witness, I believe, was Professor Haring from Indiana last week, and I appreciate your comments, Mr. Armistead, because I think they confirm what he stated before this committee.

Mr. ARMISTEAD. Thank you.

Senator BENNETT. Mr. Chairman, just for the record, when one political party abandons a good economic concept, I am sure there is no reason why the other political party could not adopt it.

Do you remember the words on the masthead of the Denver Post?

Senator DOUGLAS. Will the Senator yield?

Senator BENNETT. May I finish this?

Senator DOUGLAS. Certainly.

Senator BENNETT. Do you remember the words on the masthead of the Denver Post?

Mr. ARMISTEAD. No, sir; that is a little far removed from Roanoke, Va.

Senator BENNETT. I wish I could remember them exactly, but it said something like this, sir:

"Oh, Truth, when deserted by everybody else, make this thy dwelling place."

Mr. ARMISTEAD. Yes, I do remember that.

Senator BENNETT. I think that goes for the balanced budget.

Senator DOUGLAS. It is always a matter of marvel to me how our Republican friends try to embrace all the virtues in the world and try to identify them with the Grand Old Party, and ascribe to the Democrats by implication all of the vices.

Senator BENNETT. We have been well taught by our Democratic friends.

Senator DOUGLAS. I will say that the Denver Post made itself into an extremely good paper. But in the days when Bonfils and Tammen ran the Denver Post, it kept justice holed up within its walls.

Mr. ARMISTEAD. I would like to say that the American Newspaper Publishers Association, Mr. Chairman, is nonpartisan.

The CHAIRMAN. Thank you very much, sir. The reproductions of the 13 newspaper editorials attached to your prepared statement will be inserted in the record.

(The editorials referred to follow:)

[From editorial page, the Press-Chronicle, Johnson City, Tenn., Mar. 1, 1962]

STILL COUNTENANCING CENSORSHIP BY TAXATION

For some years there has been much controversy over a "censorship by taxation" ruling imposed by the Internal Revenue Service. It holds that a businessman, in making out his tax returns, cannot deduct as a business expense the money he spent trying to influence legislation.

Now, a House committee has tentatively decided to take steps to guarantee the right to speak without incurring heavy tax penalities. And the danger is that people may come to believe that the committee recommendations properly and adequately take care of this manifest injustice.

They do not. They go only a part of the way—and a small part. Specifically, they would allow the deduction only of expenses incurred in connection with "legislative appearances"—that is, in giving formal testimony before legislative bodies. Such appearances, obviously, are a relatively minor means of reaching the public with one's views pro or con on legislation. Still nondeductible, for example, would be newspaper advertisements a businessman might use to discuss such matters as zoning ordinances and taxes, or letters and pamphlets mailed to employees and stockholders about some issues with legislative overtones.

One bill—the Boggs bill—would revoke the IRS ruling and truly assure freedom of speech and petition. Until such a bill is passed, we will continue to have "censorship by taxation."

[From the Daily Times-Call, Longmont, Colo., Mar. 12, 1962]

EDITORIAL: WORKING ON A WASHINGTON-DESIGNED BLINDFOLD

One of these days, the "ivory tower thinkers" and the overfed philosophers of the we-know-what-is-best-for-you school are going to be amazed at the reaction of the general public.

Right now, in the House Ways and Means Committee, there is strong indication that careful preparation is being made to assure that a new nail is being driven in the coffin of the people's right to know. This is one of those perpetual problems to certain of our elected representatives, who are happiest when the people know less and less.

It is both very simple and very clever. The key to the entire philosophy was voiced in 1819 by Chief Justice John Marshall: "The power to tax involves the power to destroy."

By very carefully planning a provision to disallow any tax deduction for institutional advertising about pending legislation, the sponsors can be sure that a major step is being taken to keep the public in the dark.

If a business organization is deeply concerned about some proposed legislation, why should it not be permitted to advertise its position to the public?

The proposed bill will permit deductions for the cost of travel, preparing testimony, appearing at legislative hearings, or communicating with legislators. In plain, simple language, that merely means that you can lobby the representative, but you cannot tell the general public about the issues involved.

This all began in 1959, when the Internal Revenue Service refused to allow the expenditures of two concerns that sought to prevent the enactment of State laws which would have put them out of business. One of the key points of the battle was that advertising to tell their side of the story was not considered tax exempt.

We believe that despite our friends with the ever-ready cloak of secrecy, the American people have a right to know. If they are sufficiently concerned about legislation, they will make their voices heard.

If we have to make something nondeductible, let's disallow the lobbying cost and allow necessary expenses to tell the story to the American people.

If you agree, write to your Congressman.

[From Duluth (Minn.) Herald, Mar. 13, 1962]

BILL TO END BUSINESS DEDUCTIONS: AD TAX BENEFIT THREATENED

(By William Sumner of the Herald Washington Bureau)

Washington.—The administration's tax revision bill contains, among other controversial provisions, a clear-cut and ruthless curtailment of freedom of speech.

In this so-called tax reform bill, deductions for the expense of appealing to the public in regard to legislation—local, State or National—will not be allowed for tax purposes.

Opponents of this particular clause refer to it as censorship by taxation, and that doesn't seem to be an exaggeration.

It was included in the bill at the behest of the Treasury Department. Legislative appearances, or lobbying, for or against legislation would be considered deductible expenses. But appealing to the public through advertising, newsletters or other means can not be considered a business expense. This would be true even though the business involved is directly affected by the legislation.

A firm wishing to back a local school bond drive through advertising or letters to its employees, for example, could not deduct the expense involved.

A company which feels that its back is to the wall in regard to proposed legislation can't take its fight to the public and consider its activities legitimate expenses.

A company which wished to take a public stand in favor of free enterprise or against backdoor spending would find itself with an unhappy ruling by the Internal Revenue Service.

The history of this bit of tax reform began 3 years ago in the State of Washington. A liquor dealer there fought a pending local option measure by means of newspaper advertising. IRS agents ruled that this was not a deductible expense. Though there was nothing in the IRS Code to back this up, the Supreme Court ruled against the liquor dealer.

Then there were some battles between public and private utilities being waged in all forms of communication media. Internal Revenue began moving in on the private utilities with the backing of the court decision, and the process of stifling an opposition voice set in.

The tax reform bill puts in black and white an even less ambiguous admonition. And in the case of public vs. private utilities the tone may have been set this past week with a two-page advertising spread in a national magazine in behalf of the Rural Electrification Administration. This was financed, of course, by tax money. An answer will not be deductible.

One of the strangest roles in these proceedings has been played by Representative Hale Boggs, Democrat of Louisiana, the majority whip and a member of the House Ways and Means Committee. He had sponsored legislation which would have allowed such deductions and declared that this was the American way.

"To deny such speech," he said at the time, "is to deny the very essence of the democratic process."

Boggs, however, has fallen into line. The vote on the subject in Ways and Means was by strict party division. An amendment by Representative James Utt, Republican of California, which would have permitted such deductions was killed by Boggs and the rest of the Democrats.

Utt describes it as another move in the direction of the Big Brother state. Boggs is disinclined to discuss his change from that of flag-waving champion of free speech.

There was an ironic note to all this during the past week. President Kennedy, addressing an advertising group, complimented them on their fine public service advertising and urged them to not only continue it but to produce advertising in behalf of his trade program.

No one asked him if such advertising would be deductible, for there are few in the business who know what is about to hit them. It would not, of course, be deductible as a business expense, but perhaps the administration wants these men to put up a kitty, out of their salaries or company earnings, out of patriotic impulse.

[From editorial page, the Oregonian, Portland, Oreg., Mar. 14, 1962]

"SLEEPER" TAX BILL

The administration's new comprehensive tax bill, now in gestation in the House of Representatives, should have minute examination.

Take, for example, two provisions that may appear relatively minor. One would specifically authorize the deduction as business expense of the cost of lobbying on legislative issues directly related to a firm's interest. But another part of the law would outlaw such tax deduction of expenses incurred in seeking to influence legislation through advertising.

In short, it would be a legitimate business expense to carry your's firm's views on legislation to Congress or to the legislature, but not so to carry them to the public through advertising in newspapers and magazines.

The question of deduction of expenses of lobbying and advertising on public issues was first raised by the Internal Revenue Service a few years ago when it refused to allow deductions of expenditures by two liquor firms in the interest of defeating legislation that would have put them out of business. The U.S. Supreme Court in 1959 upheld IRS in both cases, and the IRS has spelled out the position in its regulations.

The House bill would remove this restriction on a firm's freedom of self defense only in the particular of direct lobbying. It would make a distinction between talking to your Congressman and talking to the public, to the disadvantage of the latter approach. Such distinction has no support in reason.

This is a sample of the issues of consequence that may be found in great number in this omnibus package.

[From editorial page, the Californian, Bakersfield, Calif., Mar. 14, 1962]

A DISCRIMINATORY AND DANGEROUS BILL

A piece of legislation is now before Congress which involves such drastic and discriminatory provisions inimical to the right of the people to be informed that its defeat should be the primary order of business. We refer to the provisions of the so-called tax reform bill which relate to the deductions that may be made for expenses related to supporting or criticizing legislation.

The manner in which these provisions are written would in effect prevent an open and forthright effort one way or the other, but would exempt lobbying from the taxing formula. The net result would be, as one critic observed, to force the taxpayers to pay for lobbying while dening a business or industry the right to deduct advertising expenditures for the promotion or defeat of legislation.

A deeper principle involved here does not readily lend itself to immediate perception but it is present and this matter may set a precedent that would be vastly injurious to the freedom of choice now offered by newspapers and other media to advertising. The encroachment of the legislature on the people's right to information is also involved.

As one informed observer has noted, these provisions would sanction lobbying costs and expenses of direct contacts with legislators, while denying the right to keep the public itself informed regarding the issues involved. This is a point that every citizen, interested in his own freedom and the right to be heard on legislation introduced in legislatures, should mark well and he should not delay in informing the Members of Congress of the unfairness and danger of this proposal.

He way well observe that if Congress passes a law preventing a business from taking its case to the public in an effort to survive the threat of injurious legislation, Congress will be permitted in the future, on the basis of this precedent, to apply the same restrictions to the individual, with obvious effect on his freedom and security.

[From editorial page, the Daily World, Tulsa, Okla., Mar. 14, 1962]

PENALIZE INITIATIVE, SUBSIDIZE LOBBIES

When it comes to enacting reforms in Uncle Sam's almost indecipherable income tax statutes, Congress invariably approaches remedies in round-about ways.

Under consideration before the House Ways and Means Committee is a tax "reform" measure specifically precluding deductions from income taxes of funds

spent on institutional advertising seeking to influence the course of legislation before the Congress.

However, in taking this slap at industries, associations and trade groups, the committee wants to permit tax deduction for expenses involved in maintaining active lobbying forces in congressional halls.

It is readily apparent what is involved here. Institutional advertising is, essentially, directed at the American public and only indirectly at the individual Members of Congress. Lobbying activities are generally in the reverse direction: to influence individual legislators on legislation.

A prime example of what is involved can be found in the case of the private power companies, in association, who for some years have been investing in institutional advertising expounding the actual and real problems resulting from the encroachment of public power production and distribution. The Internal Revenue Service has forbidden the utilities to assume these expenses as business deductions in reporting income. The legislation before the Ways and Means Committee would extend this administrative decision into law. Congress seeks to give a tax break to the lobbyists.

What Congress seems to be doing, whether it realizes it or not, is segregate the public—which should be advised at all times—from the issues that come before Congress and which have much influence on the everyday lives of the American people.

Encouraging the investment of private funds in sometimes dubious lobbying activities—and offering to subsidize such expenditures—is a less healthy policy. Some of the worst scandals of the past in Washington have evolved from nefarious lobbying activities; some people call it influence peddling.

But far more basic, as we see it, is the attempt to invoke tax policies that seek to deter the enlightenment of the public through advertising and, instead, place a penalty upon such activities. Tulsa newspapers, incidentally, carry little advertising of this type, which usually is directed at a mass audience through nationally circulated publications.

Far better it would be, in our opinion, to permit tax relief on institutional advertising directed to public enlightenment than to encourage the increase of raucous and sometimes predatory lobbying in the Nation's Capital—where the general public is innocent of what takes place.

There can't be many "black bags" showing up on the printed page.

[Editorial in Westerly (R.I.) Sun, Mar. 14, 1962]

TAX REFORM BILL TO PROMOTE LOBBYING

Advertising expenditures for the promotion or defeat of pending legislation—regardless of whether a firm's business life is at stake—would not be tax-deductible as a business expense under provisions of a tax reform proposal completed by the House Ways and Means Committee in Washington last February 27.

However, dues or other expenses paid by a taxpayer to an organization and used by such an organization "with respect to legislation of direct interest to the taxpayer and to such organization" would be tax deductible. This would include cost of travel, preparing testimony as well as expenses incurred in actually appearing at legislative hearings, or communicating with legislators.

Under present Internal Revenue Service regulations, lobbying expenses are not deductible. The net effect of this nex tax-reform proposal would be to sanction lobbying costs and expenses of direct contacts with legislators, but it would disallow expenses of taking the same message to the general public through institutional advertising such as newspapers, radio, and television.

Chairman Mills of Arkansas expects to present the bill to the House of Representatives this week or next week. No amendments can be made in the House, which can either vote to accept the measure or return it to committee.

The net result of this proposed action is to make it impossible for a reputable businessman to make his feelings known to his customers or business associates and claim the cost as a business expense.

At the same time, it promotes the use of lobbyists or pressure groups in direct contact with the legislators.

Apparently Congress isn't at all interested in the private individual speaking his mind in public. Congressmen seem to be adopting the slogan, "See me, but don't talk to anyone else."

It is tough enough for a businessman to make a legitimate profit—either before or after taxes—these days. Why should Congress try, through tax reforms, to further stifle the process of free enterprise and freedom of speech?

We plan to write to our Congressman, Representative John E. Fogarty, and ask him to vote against this tax-reform proposal. Will you do the same?

[From the Times-Union, Albany, N.Y., Mar. 16, 1962]

INCONSISTENT THINKING

A tax reform bill soon to be introduced in the House of Representatives contains a provision which should concern every business and industrial executive in the area. The measure provides that while lobbying expenses in making direct contacts with legislators are deductible, the costs of the same message, taken to the public in the form of institutional advertising, is not.

It need not be pointed out (except, apparently, to tax law writers) that there is more than one kind of lobbying. Legitimate efforts to present a point of view directly to legislators and press for this or that legislation beneficial to this or that industry or organization have long been accepted in this country. But also accepted have been efforts to enlist public support on some occasions—particularly where the public interest is involved or it is believed that public concern should be expressed.

We fail to see the distinction implied in this hair-splitting interpretation of lobbying which does not include an advertising message to the public. Interested persons who agree should urge their Congressmen to take appropriate action.

[From editorial page, the Times Herald, Norristown, Pa., Mar. 16, 1962]

A MUZZLE FOR MAIN STREET

A tax reform bill soon to be introduced in Congress has a provision that would prohibit income tax deduction of any money a company spends to advertise its position, pro or con, regarding pending legislation.

Thus if one of Norristown's major industries wanted to explain to our people how a law might undermine our economic security, or enhance it as the case may be, the money spent to drive home the point would not be tax free.

The same "reform" bill, however, would consider lobbying a deductible expense. The net effect of such an enactment would be to discourage legislative enlightenment at the grassroots level, while encouraging cubbyhole conferences between the legislators, on one hand, and the old prolobbyists who aren't exactly emptyhanded when they arrive in Washington, their devious duties to do.

It would appear that the bill is intended deliberately to throttle discussion of legislation through the medium of the local press, while subsidizing the oft-discredited practice of deciding the destiny of a bill over cocktails and cavair.

Unfortunate though it may be, the average citizen has neither the time nor the patience to become an avid student of contemplated legislation. Its phaseology is rarely outstanding for its clarity and it takes an astute lawyer, and sometimes the U.S. Supreme Court, to interpret what the law writer was trying to say in the first place.

Conversely, each grassroots area has its conscientious watchdogs who are practiced in peering into legislative loopholes, and in exposing insidiously hidden details that could destroy a business, a segment of workers or the economy of an entire community.

Robbing Peter to pay Paul is a common rather than uncommon legislative process these days.

When skulduggery of this sort looms over the legislative horizon, these community watchdogs use the best media within their means to alert an unsuspecting public. They have found that nothing equals the local newspaper as the means of bringing the truth to the local people who stand to be affected, favorably or disastrously, by any given law.

Hometown folks usually open an eye and bend an ear when a knowledgeable neighbor begins to give out with facts. Furthermore, it is academic that the local newspaper, catering to families in all stations in life, of all creeds and political philosophies, depends on a diet of truth for its survival. It is read, and generally believed.

Perhaps that is why some in high office want to use the tax gag as a way to stifle such open and honest discussion, at the local level, of a law's merits and demerits. They can't muzzle the watchdogs but they can make their warning barks expensive. It amounts to a dollars-and-cents drugging of free speech and free thought on the homefront.

Meanwhile, lobbyism in the corridors and clubs of the capital would be blessed with tax exemption. The voices speaking for a few, silvered in tone and subsidy, would be heard * * * sometimes in profitable murmurs and often in a high crescendo of demand and menace.

The idea seems to be to keep Joe Doaks back home totally in the dark about what's happening in the District of Columbia. The provision is just another detail in the trend away from local dominion, toward an unhealthy and hazardous concentration of power at the Federal bureau level.

It was excusable some years ago when the income tax gimmick was first used as a way to smash organized crime. But extension of that technique in so many ways, during recent years, to smash human initiative, free enterprise, and basic liberties is unforgivable. The trend is treacherous and ultimately could be fatal to freedom.

[From Congressional Record, Apr. 9, 1962]

BLOCKING FREE PRESS

Extension of remarks of Hon. Peter H. Dominick, of Colorado, in the House of Representatives, Monday, April 9, 1962

Mr. DOMINICK. Mr. Speaker, the tax bill which recently passed the House had a number of provisions to which many of us objected but, because of the closed rule, no amendments to change the bill could be offered unless the committee itself proposed them. One of these objectionable features involves the right of American citizens to take the public messages advertising their position on important legislative matters or positions concerning fundamental political principles. Under the recent bill as passed such advertising may no longer be deducted as a business expense. One of the best explanations of the effect of this discriminatory provision appeared in an editorial of March 16, 1962, in the Daily Sentinel, which serves the western slope of Colorado. It reads as follows:

"BLOCKING FREE PRESS

"Advertising expenditures for promotion or defeat of legislation—regardless of whether a firm's business life is at stake—would not be tax deductible as a business expense under provisions of a tax reform proposal completed by the House Ways and Means Committee recently.

"Dues or other expenses paid by a taxpayer to an organization and used 'with respect to legislation of direct interest to the taxpayer and to such organization' would be tax deductible. This would include cost of travel and preparation of testimony as well as expense incurred in appearance at legislative hearings or communicating with legislators. (One assumes from this that entertaining legislators to influence their votes might also be deducted?)

"Under present Internal Revenue Service regulations lobbying expenses are not tax-deductible. The net effect of the new proposal is to sanction lobbying costs and expenses of direct contacts with legislators and disallow expenses of taking the same message directly to the people through advertising.

"The unfairness of such legislation is obvious. It interferes with the right of the individual or organization to go to the public. Lobbying efforts which can be and usually are personal are hidden from the public. These are sanctioned. The right to use the press, TV or radio to make a point for or against legislation is not. Lawmaking and the lobbying which influences it will thus become more and more isolated from the people who are vitally concerned.

"This is obviously an effort of Government to find one more way to collect taxes from the people. But it is far more than that, it is a deliberate attempt of Government to shut itself off, protect itself if you will, from the results of the use of a free press to express views with which the Government may not agree.

"As such it involves far more than the free press. It involves the rights of all free people and should be protested just as loudly by them as by the press itself."

[From editorial page, the Times, Roanoke, Va., Mar. 18, 1962]

CENSORSHIP BY TAXATION

The House Ways and Means Committee's tax reform bill contains at least one provision which doesn't make sense. The bill would allow businesses to deduct from their taxes expenses in connection with lobbying activities but would forbid deduction of advertising expenditures for the promotion or defeat of legislation.

Enactment would mean that money spent for personal contact with legislators would be tax exempt while funds for calling public attention to public issues and matters of public policy would not be tax exempt. In fact, a businessman would, in effect, be penalized even for stating his views in an advertisement about legislation which might put him out of business.

We fail to follow the House committee's reasoning. Under present Internal Revenue Service regulations, lobbying expenses are not tax deductible. We have no deep-seated feeling about the committee's decision that such expenses should be put in the deductible class. But we do contest the committee's obvious inconsistency in this matter.

In an arbitrary administrative order, the IRS in 1959 issued a regulation under which expenditures for lobbying purposes at Federal, State, or local levels for the promotion or defeat of legislation, for political campaign purposes or for carrying on propaganda (including advertising) would be non-tax-deductible. A bill to overturn a Supreme Court decision upholding the IRS stand has been introduced in the House but apparently is to be ignored.

On the surface at least, it appears the House committee has attempted to deal with a controversial matter by compromise but its effort is unrealistic.

If the committee's bill passes Congress, it will mean that business will continue to be taxed on exercising freedom of speech. There is in this case an abridgment of the right to petition and the right to speak freely on matters affecting the public. It is nothing less than censorship by taxation. It is an utterly foolish regulation.

No amendments can be made to the bill in the House, which must either accept the measure as is or send it back to committee. If it passes the House, it is to be hoped that the Senate, which will not be so shackled, will right the wrong which now exists.

[From editorial page, the Advocate, Stamford, Conn., Mar. 20, 1962]

DISTURBING PROPOSAL

A two-part provision in the administration's tax bill, which is due to come before the House any day now, has us considerably disturbed inasmuch as it would, in effect, penalize business and industry for taking the public into its confidence about laws it is proposing or supporting.

The first part of the two-part provision is most desirable—it would make deductible from taxation, any lobbying expenses incurred in attempts to inform Congress or other legislative bodies on the position of a business or industry on pending or needed legislation.

It is the second part of the provision that is particularly onerous. This is the part that would exclude from deduction any expenses incurred in persuading the public to a business or industry's point of view on legislation that is pending or considered to be needed.

There can be no question that legislation which affects any business or industry also affects the employees, stockholders, customers and, as a result, the public at large.

In addition, this provision would even prevent business from telling its stories on matters coming up in public referendum. This could be particularly harmful in Stamford or other Connecticut communities where changes in the city charter are determined by referendum.

Experience in referenda in Stamford in the past has shown that, in the absence of a concerted effort against a proposed change in the charter, passage is almost automatic.

It is conceivable that a charter change could be proposed that might be particularly damaging to business—such as a basic change in zoning policy or a change in the relationship between the master plan and the zoning map.

In cases such as this, it is not only desirable, but imperative that business or industry inform the public on the consequences of such legislation.

We can think of many other cases where it is imperative that the public be fully informed on the position of business or industry with respect to pending legislation.

There are occasions where legislators look to the public for direction. The public must be fully informed in order to give their legislators the proper direction. It must be informed in order to determine whether their legislators are acting in the best interests of the community, State or country as a whole.

Any attempt to stifle the flow of information to the public, whether it be through the advertising media or through any other media is a step toward ignorance or lack of interest.

[From editorial page, the News-Argus, Goldsboro, N.C., Mar. 20, 1962]

LOBBYISTS ARE FAVORED

Congress is now studying a proposal on tax loophole filling that is an out-and-out special favor for the lobbyist. The latter, as you know, is the paid agent who pleads the cause and works for the benefit of a special bloc, industry, program, or organization or individual.

It has been accepted policy for years that advertising done by firms which falls under the designation of institutional advertising could be tax deductible. The proposal now up in Washington would end this long-accepted practice.

But money spent for lobbying and lobbyists would continue to be tax deductible. It doesn't take a Solomon to see that there is no fairness in such a proposal. We don't expect to see such a one-sided proposal passed by Congress.

The CHAIRMAN. The next witness is Mr. George D. Webster, of the District of Columbia Bar Association.

STATEMENT OF GEORGE D. WEBSTER, BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

Mr. WEBSTER. Mr. Chairman, gentlemen of the committee: my name is George D. Webster. I am attorney in the District of Columbia and am appearing here on behalf of the Bar Association of the District of Columbia. We take this opportunity to appear before the committee to make known the position of the association on section 3 of H.R. 10650.

As you know, section 3 provides for the deductibility under section 162 of the Internal Revenue Code of 1954 of certain expenses incurred with respect to legislative matters, if in all other respects such expenses qualify as ordinary and necessary trade or business expenses.

While we are mainly concerned in our statement with the deduction of the lawyers' fees and expenses, we generally favor the language contained in H.R. 7123, 86th Congress, 2d session, reported by the Ways and Means Committee of the House on July 1, 1960, as a substitute for the language now contained in section 3 of H.R. 10650. (For provisions of H.R. 7123, see appendix attached.)

The association shares the view that the legislators' ability to legislate may be severely hampered by the lack of intelligent presentation by the supporters and opponents of specific legislation. We are also concerned that free speech or the free expression of views may be effectively or arbitrarily limited through the exercise of the taxing power. The principle was pointed out in *Speiser* v. *Randall*, 357 U.S. 513 (1958), wherein the U.S. Supreme Court stated:

It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech * * *. It is settled that speech can be effectively limited by the exercise of the taxing power. *Grosjean* v.

American Press Co., 297 U.S. 233. To deny an exemption to claimants who engage in certain forms of speech is, in effect, to penalize them for such speech.

And, as Mr. Justice Black phrased it in his concurring opinion in this case:

> • • • I am convinced that this whole business of penalizing people because of their views and expressions concerning government is hopelessly repugnant to the principles of freedom upon which this Nation was founded and which have helped to make it the greatest in the world.

PRESENT LAW

As you know, the present Treasury Department regulations deny a deduction for efforts to influence legislation, even when a clear business motive for the expenditure has been demonstrated. Specifically, these regulations provide in relevant part as follows:

> Expenditures for lobbying purposes, for the promotion or defeat of legislation, for political campaign purposes (including the support of or opposition to any candidate for public office), or for carrying on propaganda (including advertising) related to any of the foregoing purposes are not deductible from gross income.

The revenue statutes themselves have never contained any provision precluding the deduction of an expense because it is incurred for "lobbying purposes" or "for the promotion or defeat of legislation."

Basically, the position of the association is that these current Treasury regulations permit a tax which (1) operates as a burden on the citizen's basic right of petition, and (2) discriminates against the legal profession in the ordinary and usual practice of law. The association starts out, of course, with the basic premise that lobbying is not a reprehensible occupation but is just a shorthand word for what, in legal parlance, would be called advocacy. The association also accepts the premise that lobbying in the ordinary and accepted sense is helpful to legislators and legislative bodies. It permits the proponents as well as the opponents as to any particular legislative question to bring all of the pertinent facts and arguments to the attention of those who must ultimately make a decision on the merits.

Legislation is the preparation and enactment of laws; and the giving of advice as to interpretation, scope and application of laws is a lawyer's stock in trade, not only in the area of Federal legislation but also in the area of representation before State and local government legislative bodies. The lawyer is frequently consulted and retained to advise with, and advance the cause of his client. Under the present Treasury regulation, the expenditure of a lawyer's client, including expenditures for the lawyer's own fee in this area, may be disallowed, as well as the expenses incurred by the lawyer in the course of carrying out his representative function.

It appears anomalous to the association that expenses incurred for the appearance of a lawyer before legislative bodies or contacts with individual legislators may not be deductible while appearances of a lawyer before executive or administrative officials with respect to administrative matters, or before the courts with respect to judicial matters, are deductible when the expenses otherwise qualify as trade or business expenses. The association believes that presentations to the legislative branch of the Government should not be discriminated against in this respect and should be placed on the same footing and

given equal tax treatment as presentations before administrative agencies and the courts. In this connection, reference should be made to the fact that canon 26 of the "Canons of Professional Ethics of the American Bar Association" recognizes that a lawyer may render professional services before legislative or other bodies, whether by individual contact or as a committee witness.

PREVENTION OF UNEQUAL TREATMENT

This deduction is necessary to prevent unequal treatment. At present, the largest lobbyist is the Government itself, at all levels. If the Government using taxpayers' money advocates legislative changes harmful to a particular business, equity requires that business funds which are used in advocating an opposing position be deductible, or otherwise the departments are given an unfair advantage over the citizen.

PRESERVATION OF BUSINESS

It may be extremely important to the preservation of a business that presentation of its position be made before the Congress, or that individual Members or their staffs be contacted. For example, probably in June of this year this committee will consider the sugar bill with its quota provisions. These quota provisions may affect the very existence of certain domestic enterprises (both beet sugar and sugarcane producers) and yet, under the present law, the presentation of a lawyer before the committee, or a Member, or the staff of either, on a matter involving the life of the business will not be deductible. Presentations made on the same matter before the U.S. Department of Agriculture would be deductible under present law.

To the association, this distinction in the present law seems completely insupportable.

To take the example one step further, under present law, a sugar producer could deduct a lawyer's fee for an appearance in court to resist a $100 action arising in contract, the loss of which would not materially affect its business. And yet, as stated, the same producer could not deduct the cost of the apearance of a lawyer before this committee to protect its sugar quota which might affect the very survival of the business itself.

Our position is consistent with the position that the U.S. Treasury Department took in a letter dated February 26, 1960, which stated in part as follows:

> With the growing impact of government at all levels upon individuals and upon all segments of our society, businessmen and organizations representing their interests, farm groups, labor organizations, and the like have often found it necessary to make large expenditures for the purpose of influencing legislation. The proper treatment of such expenditures is important to the equity and fairness of the income tax. Their tax treatment in turn is relevant to sound governmental policy in a modern democracy.
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> * * * * * * *
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> The proposed legislation and the broader question to which it is addressed merit consideration by your committee. Existing law as developed has frozen concepts relating to expenditures in the area of legislative process which are quite distinct from generally accepted attitudes in regard to expenditures related to fields of administrative and judicial processes. It appears to many anomalous that no expenditures involving legislation, without regard to their character,

are deductible, while similar activities before administrative and judicial bodies are clearly deductible if they otherwise constitute ordinary and necessary business expenses.

Reference should be made to the contrast between the status of honest and legitimate expenditures incurred in the exercising of constitutional rights with the treatment accorded persons engaged in admittedly illegal activities.

This contrast was emphasized by the Supreme Court decision in *Commissioner* v. *Sullivan*, 356 U.S. 27 (1958), involving expenditures for wages and rent incurred in connection with a Chicago gambling enterprise found to be illegal under Illinois law, and as to which the acts performed by employees as well as payment of rent were also illegal under that law. The Supreme Court held their expenses to be deductible.

It is a strange anomaly, indeed, when our tax law denies to a business concern a tax deduction for legitimate expenses incurred in making known its views—to Congress or the public—on issues of vital concern to it, while a person conducting an admittedly illegal enterprise and whose employees are likewise violating the law, is entitled to a deduction for unlawful expenditures.

UNIFORM ENFORCEMENT IMPOSSIBLE

In addition to these policy considerations, there are other reasons why the association supports section 3 of H.R. 10650.

In the first place, the prohibitions of the Treasury regulations have never been uniformly enforced. "Lobbying" expenses have been allowed by the Internal Revenue Service in many instances, whereas in the same circumstances as to the other taxpayers such expenses have been disallowed. This result may be inherent in the problem, and uniform enforcement in this area may be impossible. As stated by the report of the House Ways and Means Committee on this provision, the difficulty in part stems from the difficulty in segregating and isolating expenses relating to legislative matters. To segregate such expenses constitutes a most difficult problem of allocation.

The problems of uniform enforcement have also been made difficult by the inability of the Service through 47 years (the first Treasury regulation was issued in 1915 [1]) to define "lobbying." In an audit today, after 47 years of the Treasury position, we don't know what the Department considers to be properly classified as lobbying. We can argue with the examining revenue agent for months over a single problem because he has been supplied no firm dividing lines.

As stated by the Treasury Department:

> It is only realistic to recognize that many of the expenditures in these areas which have passed the permissible borderline under the existing regulations have doubtless escaped detection in the audit of tax returns. Unless the Internal Revenue Service were to devote disproportionate manpower from its basic collection function to policing this difficult and controversial area, it would seem that uniform enforcement would be an unattainable goal. If there were to be a modification or relaxation of the existing rules, therefore, it would appear to be a desirable objective that it should help reduce rather than aggravate the practical administrative problems which are inherent in this area, and at the same time reduce to a minimum whatever inequalities among some taxpayers result from unavoidable imperfections in the administration of the law.

[1] T.D. 2137, 17 Treas. Dec., Int. Rev., pp. 48, 57–58.

Consider the case, for example, where a client requests a legal opinion on the applicability of the Tariff Act to a certain set of facts. Later the client, openly relying on the opinion, becomes interested in and expresses himself pro or con as to an amendment of the escape clause provision. Is the law firm lobbying nunc pro tunc, or would its expenses be disallowed? Or suppose the law firm knew at the outset that the opinion was to be used as the basis for a decision as to whether or not an amendment of the escape clause should be sought. Would it then be lobbying? Or suppose further that the law firm is hired to prepare statements, letters, briefs, etc., which the client expects to use in supporting or opposing the proposed amendment. Quite aside from whether use of this material might be "carrying on propaganda," is the preparation of it a lobbying activity?

Or suppose the client is invited to testify, for example, on small business and defense subcontractors and turns to his law firm to prepare and present the testimony. Is the law firm lobbying? Or suppose the client is invited or subpenaed to testify in a conflict-of-interest investigation and hires the law firm to advise him as to his rights in connection with answering questions which he may be asked, is the law firm lobbying? The "ergo" of these suppositions might then logically be: Is not the law firm also lobbying when the client is cited for contempt and the law firm defends him in court?

When does the practice of law stop and lobbying begin? The present Treasury regulation applies to the practice of law whenever the lawyer's work product is used to aid in the promotion or defeat of legislation or in connection with any legislative function. And if the latter is the intent and purpose of the present regulation, does it make any difference if the lawyer's work product is given to the client without any knowledge that it will or might be used for lobbying purposes?

The difficulty of drawing proper lines of demarcation does not deter a lawyer. But it has prevented the Service for 47 years from uniformly enforcing the law and giving equal treatment to taxpayers.

DEDUCTIBILITY UNDER OTHER TAX SYSTEMS

In the English case of *Tate and Lyle, Ltd.* ((1953) 2 All E.R. 162 (C.A.)), expenditures by a sugar company to defeat proposed nationalization were held deductible. This represents the rule in England where expenses in connection with legislative matters are deductible if they constitute ordinary or necessary expenses.

CONCLUSION

In conclusion, it is clear that lobbying and other activities seeking to promote or defeat legislation on the Federal, State and local levels have become ordinary, necessary, and governmentally encouraged modes of representation. This factor, together with the Commissioner's inability to administer the present law upon a uniform basis, makes this provision a proper one to be added to the Internal Revenue Code of 1954.

(The appendix referred to follows:)

APPENDIX

H.R. 7123

(As reported by Committee on Ways and Means, July 1, 1960)

"That section 162 of the Internal Revenue Code of 1954 (relating to trade or business expenses) is amended by redesignating subsection (d) as subsection (e), and by inserting after subsection (c) the following new subsection:

"'(d) CERTAIN EXPENSES TO INFLUENCE ACTION WITH RESPECT TO LEGISLATIVE PROPOSALS, ETC.—

"'(1) GENERAL RULE.—No expense which otherwise qualifies as a deduction under subsection (a) (including, but not limited to, dues and other amounts paid to any organization) shall be disallowed as a deduction merely because paid or incurred to support or oppose or otherwise influence action by the Congress or by any legislative body of a State, a possession of the United States, the District of Columbia, or any political subdivision of the foregoing, with respect to any legislative or constitutional proposal, or to support or oppose or otherwise influence action of the voters with respect to any legislative or constitutional proposal submitted or proposed to be submitted to the voters by initiative, referendum, or similar proceeding.

"'(2) EXCEPTION.—The provisions of paragraph (1) shall not be construed as allowing the deduction of any amount paid or incurred (whether by way of contribution, gift, or otherwise) for participation or intervention in any political campaign on behalf of, or in opposition to, any candidate for public office.'"

The CHAIRMAN. Thank you very much.

Any questions?

Senator DOUGLAS. I have here the Internal Revenue Code, and I am reading from section 501(c), which lays down the criteria for organizations which are exempt from taxation. It says:

Organizations for religious, charitable, scientific, or other literary or educational purposes are exempt, provided that no substantial part of the activities it is carrying on is propaganda or otherwise attempting to influence legislation.

As I understand it, the courts have held that the League of Women Voters, which does advocate legislation, is therefore denied the opportunity of being tax exempt, and that as a consequence of this ruling, contributions to the League of Women Voters are not tax exempt. And I believe the General Federation of Women's Clubs is tax exempt, but this is because it does not carry substantial activities in connection with influencing legislation.

Now, you are arguing that a sugar producer should be permitted to deduct lobbying expenses so that the present 2-percent differential above the world price, which domestic and foreign sugar producers now enjoy, could be deductible, and a previous gentleman argued that newspaper advertising to preserve this 2-percent differential should be deductible. But if the League of Women Voters were to try to lobby against it or if the General Federation of Women's Clubs were to try to lobby against this proposal, they would lose their tax-exempt status.

What I am asking is, and the general question I would like to pose, is this: With the exemptions in the bill as it comes to us from the House, and still more to broaden these exemptions as proposed by many others, are you not giving a privilege to the direct producing interests of the country which is not accorded to the consuming interests of the country, since the consuming interest is diffused and the general citizenship interest of the country is diffused, and are you

therefore not arming the comparatively strong bodies, while continuing to disarm the weaker bodies?

Mr. WEBSTER. Senator, I think the answer to that is contained in the distinction that the Internal Revenue Code makes, itself. Section 501(c)(3), which you read from on charitable and educational—the section we are talking about here is section 162 which has to do with ordinary and necessary business expenses.

Senator DOUGLAS. I understand, but it is not regarded as part of the business of an organization to defend the public interest.

Mr. WEBSTER. But their income is not——

Senator DOUGLAS. But individual contributions to these organizations cannot be tax deductible.

Mr. WEBSTER. That is exactly right, because there is no income involved as far as those organizations are concerned.

Senator DOUGLAS. In other words, only if income is involved can an expenditure for lobbying be tax deductible. The expenditure of money to protect the general interest, or the consuming interest, which in a particular case affects a consumer only to a moderate degree, that is not tax deductible?

Mr. WEBSTER. Senator, that is true of a trip to Chicago. If I want to go to Chicago on personal business, it cannot be deducted. But if I go to Chicago on behalf of a client, it can be deducted.

Senator DOUGLAS. I want to say you are giving a very one-sided interpretation of what the law should be. Take these very important matters of legislation, these tax measures. What you are saying is that the appearance of lawyers in connection with this legislation should be tax deductible, and newspaper advertising, to get added loopholes, for example, should be tax deductible. But if a person in pursuit of the general interest wants to tighten the loopholes, he cannot deduct his expense. As I say, what I think this does is to further strengthen the groups which have special interests and weaken those which have general interest.

One of the great weaknesses in political democracy, as I see it, is this disparity in power. This would further accentuate it.

Mr. WEBSTER. Well, this is an income tax and that is what is taxed.

Senator DOUGLAS. I understand. But you would lose the income tax to still further strengthen the special interests that would want to have the laws fashioned in their image.

Does not that strike you as unfair?

Mr. WEBSTER. No, sir, because I do not think that is the result here. If I want to sponsor a law because I have a personal interest in it, I cannot deduct those expenses as a citizen. But if I have a business which is about to lose its quota to produce sugar, I should be entitled to deduct those expenses, because otherwise, I should be out of business.

Senator DOUGLAS. You would be justified, then, in deducting an advertising campaign in the New York Times, the Washington Post, the Denver Post, the Deseret News, the Chicago Tribune, the Louisville Courier-Journal, and so forth?

Mr. WEBSTER. Section 3 does not go that far, because as you know, it does not have advertising expenses in it.

Senator DOUGLAS. No, but I mean the proposal that the representative of the ANPA——

Mr. WEBSTER. This section does not go that far. Advertising is a more difficult area to control.

Senator DOUGLAS. Suppose it is said to be a necessary lobbying expense to give a cocktail party at the Mayflower Hotel and invite Senators and Congressmen to lubricate the legislation. Do you think that should be deducted?

Mr. WEBSTER. Senator, we have discussed that very carefully in our group in the association, and I think you will find in the committee report—that entertainment expenses go back over to the entertainment provisions of the bill.

Senator DOUGLAS. Well, the entertainment provisions of the bill are quite weak. Could not they be held to be necessary and proper, the inevitable concomitant being to try to get favorable action?

Mr. WEBSTER. It could be, but the way I understand the bill, when you get into entertainment, you would leave the lobbying provisions entirely and the entertainment provisions would be applicable.

Senator DOUGLAS. What do you understand those provisions to be?

Mr. WEBSTER. The entertainment provisions?

Senator DOUGLAS. Yes.

Mr. WEBSTER. They are very involved and detailed, as you know.

Seantor DOUGLAS. There is no limit as of today, is there?

Mr. WEBSTER. No, there is not.

Senator DOUGLAS. So a cocktail party could be held to be a very legitimate business interest?

Mr. WEBSTER. Under the entertainment provisions of the bill.

Senator DOUGLAS. Now, nightclub bills, they might be tax deductible, might they not? Dinners in night clubs?

Mr. WEBSTER. As the present bill as it came from the House?

Senator DOUGLAS. Yes, so that the lobbyists could invite highly priced Senators and Congressmen to go to the Casino Royal. Is that true? Or perhaps some of the Egyptian night clubs which have sprung up like mushrooms, I am told, in the city.

Mr. WEBSTER. But, as you recall, in the language of the committee report, it has to be a place that is conducive to business discussions.

Senator DOUGLAS. But these are conducive to business. You might get votes very well in a night club, perhaps more effectively than in Child's Restaurant. And you might have tickets to the theater, is that not true? Is that not a good way to make friends and influence people?

Mr. WEBSTER. That is true.

Senator DOUGLAS. Do you not think there are real dangers here that should be guarded against? Do you not want to protect the virtue of your Senators and Congressmen, as well as the virtue of the lawyers so that they can practice law and not be panderers?

Mr. WEBSTER. I think the Senators can take care of themselves.

Senator DOUGLAS. But not the lawyers.

Mr. WEBSTER. The lawyers can take care of themselves, also. I might point out, that most of these expenses are being deducted today, as I am sure the Congress is well aware of.

Senator DOUGLAS. Unfortunately; unfortunately.

Mr. WEBSTER. I do not know how you are going to get at this unless you have some kind of a reasonable restriction. That is what we want, a reasonable restriction.

Senator DOUGLAS. What about $32 a day for room and board? Would that not be a reasonable restriction? That is twice what a Government official is allowed.

Mr. WEBSTER. That depends on where you go. I think in New York, that might not be enough. I think in Atlanta or Peoria, that might be too much.

Senator DOUGLAS. Well, you have opened up a very interesting line of thought, but I think as a citizen, you want to be careful how far you go.

The CHAIRMAN. Thank you very much, Mr. Webster.

The next witness is Mr. Louis A. Kohn, the Committee for Modern Courts.

The CHAIRMAN. The next witness is Mr. John J. Ryan, of the Advertising Federation of America.

STATEMENT OF JOHN J. RYAN, ADVERTISING FEDERATION OF AMERICA

Mr. RYAN. Mr. Chairman and gentlemen, my name is John Ryan and I am general counsel for the Advertising Federation of America. This is an organization whose membership centers around 138 advertising clubs located in leading cities from the Atlantic seaboard as far west as Denver, with 20 national associations of advertisers, media, and advertising agencies represented on our board of directors.

We have nearly 1,000 individual corporation members which are also representative of advertisers, agencies, and media.

In addition to all this, the Advertising Federation of America maintains close liaison with the Advertising Association of the West, an organization of 44 advertising clubs operating in the area between the West coast and Denver.

The Advertising Federation of America is not a trade association; it represents too many divergent interests to be that. But it is the organization which has carried on the fight for truth in advertising for over a half a century, which was the No. 1 sponsor of the Federal Trade Commission back in 1913, and was the father of the better business bureaus in this country a few years later. We have played a role of both critic and defender of this industry which is the catalyst that has triggered the union of American mass production and mass consumption to produce the greatest economy the world has ever known.

I should like to address myself to one and only one aspect of the bill before us; that is, its flat prohibition against the deduction of expenses lawfully incurred in publicly supporting or opposing or otherwise commenting to the general public on legislative matters or referendums even where it can be clearly demonstrated that such expenditures are an ordinary and necessary expense of a business.

The famous *Cammarano* case is the very prototype of the problem which this legislation fails to correct. In that case, you will remember, a beer distributor in the State of Washington made a contribution to a fund to defeat a statewide referendum that would have made beer distribution in Washington a State monopoly.

He deducted this expenditure as a business expense on the theory that if the referendum had prevailed, he would have been put out of business. Although the Supreme Court of the United States found that the amounts expended were "ordinary and necessary," in fact, essential to the very survival of the taxpayer's business, and that they otherwise met all the requirements for deductibility as a business expense, it held that the regulation of the Internal Revenue Service which prohibited the deduction of such an expense was valid and until legislation was introduced which would countermand that regulation, it went along with the regulation.

Since that time, approximately 20 Members of the National Legislature have introduced bills to correct this clearly inequitable situation and no less a personage than the Honorable Hale Boggs of Louisiana has introduced such legislation for the past two sessions. In 1960, the House Ways and Means Committee, by unanimous vote, approved the Boggs bill but unfortunately the session ended before the bill could be called up for a vote.

The report of the House Ways and Means Committee, which was prepared after a public hearing on the subject and a great deal of study and research into the history and the complications involved, set forth the reasons why the committee recommended this amendment to the tax law.

No small part of the report is devoted to a consideration of the difficulties involved in the fair administration of the existing law. On page 3 the report says:

> The administrative problems of a rule disallowing deduction for expenses incurred to influence legislation are such as to make very difficult administration on a uniform and nondiscriminatory basis.

As authority for this conclusion, the committee cites a letter received by it from the Treasury Department dated February 26, 1960, which reads in part as follows:

> Present law, particularly as it relates to the dues paid to trade associations, institutional advertising, and the grassroots type of lobbying expenditure, is difficult for the Internal Revenue Service to administer * * *.
>
> Unless the Internal Revenue Service were to devote disproportionate manpower from its basic collection function to policing this difficult and controversial area, it would seem that uniform enforcement would be an unattainable goal.

In summing up, the report had this to say:

> It seemed to your committee that if an expenditure is ordinary and necessary to the conduct of a taxpayer's trade or business and is lawful, it is unfair for the deduction to be disallowed just because the expense is incurred to influence legislation.

This seems to be about as fair a test for allowable deductions as could be devised and it is submitted that it is the only valid test that should be employed in determining whether an expenditure is or should be a deductible expense of a business.

Suppose the tax regulation read, "All ordinary and necessary expenses of a business may be deducted except moneys expended for payment of rent." I am sure no one would attempt to justify such a law and yet the bill before us employs just as arbitrary a test. The point is that if it would be unfair to prohibit a taxpayer from deducting money spent to protect his business from the weather, it is just as unfair to prohibit him from deducting money spent to protect his business from legislative dangers.

Commenting to the House committee on the test that should be employed to determine deductibility, the Department of Commerce made the following statement to the House Ways and Means Committee:

> It is our view that lawful expenditures by business enterprise to support or oppose legislation at all levels of government, when involving the interests of their particular businesses, should be deductible as ordinary and necessary expenses * * *.
>
> We feel that the sound policy would be to permit full deduction for all lawful expenditures that are related to the business of the taxpayer.

The time-honored test of deductibility has always been, "Is the expense ordinary and necessary in the business of the taxpayer?" And it needs no savant of the law to inform us that when an expenditure is made to prevent legislation that threatens economic life or the very existence of a taxpayer, it is, in fact, an ordinary and necessary expense.

We were very hopeful that the omnibus bill would contain a provision adopting this sound standard, but unfortunately it does not. We are informed that there were many Members of the House who wished to amend this section of the bill on the floor but were unable to do so because the House was operating under a "closed rule" and the Representatives could only vote for or against the bill as a whole. But we would like you gentlemen to know that we feel very strongly that there are principles involved in this measure which far transcend the amount of money involved and we are hopeful that this committee will amend this bill to insure the basic rights of citizens shall not be violated.

The basic rights I refer to, of course, are the constitutional rights of freedom of speech and the right of petition.

When the Founding Fathers spoke of the right of freedom of speech, they were concerned mostly with the right of a citizen to stand up in the Town Square and speak his mind to every citizen in the community, for generally by doing that he could reach every citizen in the community. Basically what he was guaranteed by the Constitution was the right to use the most effective means available to get across his message and, in doing so, he was free to attack his Government's policies, laws and leaders with impunity and immunity.

Today both the electorate and the elected have become so large and so diffuse that such limited personal appeals would have small impact.

Today only by employing the most far-reaching media, can the citizen's rights be expounded adequately and brought to the attention of even a limited segment of this great Nation of ours. To deny the citizens that right to employ the public press, radio, and television to express his grievance to his fellow countrymen, except at prohibitive cost, is to deny him both the right of freedom of speech and the right to petition effectively for a redress of grievances.

And when you tell a corporate person whose income tax rate is 52 percent of net earnings that he may not deduct the cost of such expression except out of whatever profits are left after the payment of taxes, you are imposing a fearful price on the exercise of these freedoms.

Freedom of the press can be attacked in two ways: either by outright censorship, or by the more devious method of taxation.

Of the two, the latter is unquestionably the greater danger because it is more difficult to recognize for what it is. The present Internal Revenue Service regulation which will become law by the passage of the bill before us is an example of this type of censorship by taxation.

The proponents of this legislation would disarm us by arguing that no direct tax is being levied here, that all this bill does is to disallow institutional advertising as a business expense.

This may not be absolute censorship but it takes no mathematician to realize that it is more than 50 percent censorship. And it may not be direct taxation in the accepted sense, but it is painfully evident that the taxpayer who tells the public that he can produce a better and cheaper product than his rival, the U.S. Government, is going to have a much bigger tax to pay at the end of the year if that rival happens to be the U.S. Government instead of the XYZ Corp. down the block.

Let us bear in mind that the first amendment does not guarantee that the citizen shall have the right to say one-half of what is on his mind without fear or favor. Freedom of speech is an absolute guarantee of the Constitution. There are no degrees of freedom of speech spoken of in the Constitution. You either have it or you don't have it. Under this bill we will have it at a price and, if only those who can afford it can enjoy it, then we as a nation haven't got it at all.

Hard cases make hard laws, we are told. And perhaps hard times make for hard taxes. But, however great the need for tax money, it should never be procured at the cost of the sacrifice of the liberties of any of our citizens.

The CHAIRMAN. Thank you very much, Mr. Ryan.

Any questions?

Senator BENNETT. No questions.

The CHAIRMAN. Thank you, sir.

(Mr. Ryan's prepared statement follows:)

STATEMENT BY HON. JOHN J. RYAN, GENERAL COUNSEL FOR THE ADVERTISING FEDERATION OF AMERICA

My name is John J. Ryan and I am general counsel for the Advertising Federation of America. I am appearing here as the representative of an organization whose membership centers around 138 advertising clubs located in leading cities from the Atlantic seaboard as far west as Denver, with 20 national associations of advertisers, media and advertising agencies represented on our board of directors, and nearly 1,000 individual corporation members which are also representative of advertisers, agencies, and media. Thus we combine under one roof all facets and phases of advertising—the advertiser, the agency, and media. In addition to all this, AFA maintains close liaison with the Advertising Association of the West, an organization of 44 advertising clubs operating in the area between the west coast and Denver.

AFA is not a trade association; it represents too many divergent interests to be that. But it is the organization which has carried the fight for truth in advertising for over half a century, which was the No. 1 sponsor of the Federal Trade Commission back in 1913 and was the father of the better business bureaus in this country a few years later. So we have been both critic and defender of this industry which is the catalyst that has triggered the union of American mass production and mass consumption to produce the greatest economy the world has ever known.

I should like to address myself to one and only one aspect of the bill before us; and that is, its flat prohibition against the deduction of expenses lawfully incurred in publicly supporting or opposing or otherwise commenting to the general public on legislation matters or referendums even where it can be clearly demonstrated that such expenditures are an ordinary and necessary expense of a business.

The bill as drawn forbids such deductions for this most open and above board type of lobbying wherein the taxpayer proclaims his point of view openly and publicly, to all of his fellow citizens and asks their support, but at the same time it authorizes the deduction of what might be described as "private" lobbying expenses, the kind more susceptible to the secret practices which in the past have given people the impression that there is something evil per se about lobbying and lobbyists. This is a strange and unrealistic approach to this problem which has vexed the Internal Revenue Service for many years.

The famous *Cammarano* case is the very prototype of the problem which this legislation fails to correct. In that case, you will remember, a beer distributor in the State of Washington made a contribution to a fund to defeat a statewide referendum that would have made beer distribution in Washington a State monopoly. He deducated this expenditure as a business expense on the theory that if the referendum had prevailed, he would have been put out of business. Although the Supreme Court of the United States found that the amounts expended were "ordinary and necessary," in fact essential, to the very survival of the taxpayer's business, and that they otherwise met all the requirements for deductibility as a business expense, it held that the regulation of the Internal Revenue Service which prohibited the deduction of such an expense was valid and it felt bound to enforce it in the absence of legislative enactment to the contrary.

Since that time over a dozen legislators have introduced bills to correct this clearly inequitable situation and no less a personage than the Honorable Hale Boggs of Louisiana has introduced such legislation for the past 2 years. In 1960 the House Ways and Means Committee, by unanimous vote, approved the Boggs bill but unfortunately the session ended before the bill could be called up for a vote.

The report of the House Ways and Means Committee, which was prepared after a public hearing on the subject and a great deal of study and research into the history and the complications involved, set forth the reasons why the committee recommended this amendment to the tax law.

No small part of the report is devoted to a consideration of the difficulties involved in the fair administration of the existing law. On page 3 the report says:

"The administrative problems of a rule disallowing deduction for expenses incurred to influence legislation are such as to make very difficult administration on a uniform and nondiscriminatory basis."

As authority for this conclusion, the committee cites a letter received by it from the Treasury Department dated February 26, 1960, which reads in part as follows:

"Present law, particularly as it relates to the dues paid to trade associations, institutional advertising, and the grassroots type of lobbying expenditure, is difficult for the Internal Revenue Service to administer. It is difficult, if not impossible, for the Internal Revenue Service, with its present manpower, to 'censor' or 'monitor' lobbying of the advertising or grassroots variety. Indeed, it has been the general position of the Internal Revenue Service that it is not only impracticable but undesirable to attempt to substitute the judgment of the tax collector for that of the businessman in determining the character of the advertising appropriate for the business * * *

"Unless the Internal Revenue Service were to devote disproportionate manpower from its basic collection function to policing this difficult and controversial area, it would seem that uniform enforcement would be an unattainable goal."

The Treasury Department then concludes,

"The Treasury recommends early consideration by the Congress of the various proposals designed to modify the ban to deduct the bar to deductibility of expenditures in connection with the legislative process."

The balance of the report is devoted to the question of policy involved. With regard to that, the report states:

"It seemed to your committee that if an expenditure is ordinary and necessary to the conduct of a taxpayer's trade or business and is lawful, it is unfair for the deduction to be disallowed just because the expense is incurred to influence legislation. Many have pointed out, for example, that expenditures to influence legislation or the outcome of a referendum may be necessary for the very survival of the taxpayer's business. This might be the case, for example, where a measure before the voters in a referendum would outlaw the taxpayer's business, as was the situation in the *Cammarano* case."

This seems to be about as fair a test for allowable deductions as could be devised and it is submitted that it is the only valid test that should be employed in determining whether an expenditure is or should be a deductible expense of a business.

Why should the Internal Revenue Service penalize a taxpayer for engaging in an activity which no other statute on the books condemns, particularly where said activity is plainly for the advancement of his own business? Gambling is illegal and so it is fair for the Internal Revenue Service to impose such penalties as it may desire on gambling profits. So too with income which is the result of unlawful activities. But here no unlawful activity is involved. Please note that the regulation does not specify that the lobbying must be unlawful or even unethical in nature.

Suppose the tax regulation read, "All ordinary and necessary expenses of a business may be deducted except moneys expended for the payment of rent." I am sure no one would attempt to justify such a law and yet the bill before us employs just as arbitrary a test. The point is that if it would be unfair to prohibit a taxpayer from deducting money spent to protect his business from the weather, it is just as unfair to prohibit him from deducting money spent to protect his business from legislative dangers, which might well be far more destructive to it than the weather.

Commenting to the House committee on the test that should be employed to determine deductibility, the Department of Commerce made the following statement:

"It is our view that lawful expenditures by business enterprise to support or oppose legislation at all levels of government, when involving the interests of their particular businesses, should be deductible as ordinary and necessary expenses. The impact of government has become so pervasive that businessmen and the organizations which represent their interests often find it necessary to convey to legislative bodies and to the public their views regarding existing or proposed legislation. Freedom of expression is an essential element of a free economy.

"It appears that a realistic solution to the problem will be found only in appropriate legislation changes. We feel that the sound policy would be to permit full deduction for all lawful expenditures that are related to the business of the taxpayer."

The time-honored test of deductibility has always been, "Is the expense ordinary and necessary in the business of the taxpayer?" And it needs no savant of

the law to inform us that when an expenditure is made to prevent legislation that threatens economic life or the very existence of a taxpayer, it is an ordinary and necessary expense. It is surely necessary and it is certainly ordinary for the Supreme Court has defined the term "ordinary" to mean that which is the accepted and common defense against attack. And, gentlemen, speaking out against legislation that is injurious to it is the only means of defense business has against such attacks.

We were very hopeful that the omnibus bill would contain a provision adopting this sound standard, but unfortunately it does not. We are informed that there were many Members of the House who wished to amend this section of the bill on the floor but were unable to do so because the House was operating under a "closed rule" and the Representatives could only vote for or against the bill as a whole. But we would like you gentlemen to know that we feel very strongly that there are principles involved in this measure which far transcend the amount of money involved and we are hopeful that this committee will come to understand how fundamental are the principles herein involved and, understanding them, amend this bill to insure that the basic rights of citizens shall not be violated.

The basic rights I refer to are the constitutional rights of freedom of speech and the right of petition.

When the Founding Fathers spoke of the right of freedom of speech they were concerned mostly with the right of a citizen to stand up in the town square and speak his mind to every citizen in the community, for generally by doing that he could reach every citizen in the community. Basically what he was guaranteed by the Constitution was the right to use the most effective means available to get across his message and, in doing so, he was free to attack his Government's policies, laws and leaders with impunity and immunity.

Today both the electorate and the elected have become so large and diffuse that such limited personal appeals would have small impact. Today only through paid advertising and publicity, employing the most far-reaching media, can the citizen's rights be expounded adequately and brought to the attention of even a limited segment of the community, local or national. To deny the citizen the right to employ the public press, radio and television to express his grievances to his fellow countrymen, except at prohibitive cost, is to deny him both the right of freedom of speech and the right to effectively petition for a redress of grievances.

And when you tell a corporate person whose income tax rate is 52 percent of net earnings that he may not deduct the cost of such expression except out of whatever profits are left after the payment of taxes, you are imposing a fearful price on the exercise of these freedoms.

The language of section 3(e) of the proposed legislation is quite specific. The taxpayer has no remedy even though the legislation or referendum he wishes to complain about directly affects his business and what it doesn't say but what is implicit in its bald language is that he has no recourse even though the very legislation he would protest against will destroy him. Here indeed is the fulfillment of the prophesy inherent in the warning, "The power to tax is the power to destroy."

Freedom of the press can be attacked in two ways; either by outright censorship or by the more devious method of taxation. Of the two, the latter is unquestionably the greater danger because it is more difficult to recognize for what it is. The present Internal Revenue Service regulation which will become law by the passage of the bill before us is an example of this type of censorship by taxation.

The proponents of this legislation would disarm us by arguing that no direct tax is being levied here, that all this bill does is to disallow institutional advertising as a business expense.

This may not be absolute censorship but it takes no mathematician to realize that is is more than 50-percent censorship. And it may not be direct taxation in the accepted sense but it is painfully evident that the taxpayer who tells the public that he can produce a better and cheaper product than his rival, the U.S. Government, is going to have a much bigger tax to pay at the end of the year than if he confined himself to telling the public that he offers a better deal than his rival, the XYZ Corp. Let us bear in mind that the first amendment does not guarantee that the citizen shall have the right to say one-half of what is on his mind without fear or favor. Freedom of speech is an absolute guarantee of the Constitution. There are no degrees of freedom of speech spoken of in

the Constitution. You either have it or you don't have it. Under this bill we will have it at a price and, if only those who can afford it can enjoy it, then we as a nation haven't got it at all.

Gentlemen, we all know that our democratic system of government is based on the premise that given a free forum for all opinion, truth will inevitably prevail over error, but we know too that for this system to work, there must be complete freedom to speak for all. If we limit this freedom by either absolute prohibition or by the placing of obstacles in its path in the form of burdensome taxation or restrictive licensing, we will destroy this system of democracy.

Hard cases make hard laws, we are told. And perhaps hard times make for hard taxes. But, however great the need for tax money, it should never be procured at the cost of the sacrifice of the liberties of any of our citizens.

The CHAIRMAN. The next witness is Mr. Paul Manns, the Press Committee To Eliminate Censorship by Taxation.

STATEMENT OF PAUL MANNS, PRESS COMMITTEE TO ELIMINATE CENSORSHIP BY TAXATION

Mr. MANNS. Mr. Chairman, Senator Bennett, my name is Paul Manns. I live in Bowling Green, Va. I am editor and publisher of weekly newspapers in three adjoining counties in Virginia about midway between Washington, D.C., and Richmond. My three newspapers are: The Caroline Progress of Bowling Green, the King George News, of King George; and the Westmoreland News of Montross. A few years ago I was president of the Virginia Press Association.

The Press Committee to Eliminate Censorship by Taxation, for whom I am appearing here today, was organized just over a year ago in the spring of 1961. It is a very informal organization with 205 editors and publishers from 42 States who signed up as members. With the chairman's permission, I will furnish a list of the names of the newspapermen who signified their desire to serve on this Committee.

(The list referred to follows:)

PRESS COMMITTEE TO ELIMINATE CENSORSHIP BY TAXATION

Alabama: Dick Smith, publisher, Sumter County Journal, York, Ala.

Alaska:

George C. Anderson, publisher, the Alaska Spotlight, Box 116, Anchorage, Alaska.

Theodore O. Schmidtke, the Frontiersman, Box D, Palmer, Alaska.

Arizona:

James A. Hamra, publisher, Peoria Times and Valley Farm News, Peoria, Ariz.

Warren E. Morrell, publisher, the Glendale News, Glendale, Ariz.

Arkansas:

R. W. Chowning, editor, Banner-News, 537 East Main, Magnolia, Ark.

W. M. Courtney, editor, Wynne Progress, Post Office Box 310, Wynne, Ark.

H. H. Harris, editor, Courier-News, Box 380, Blytheville, Ark.

Perrin Jones, publisher, Searcy (Ark.) Daily Citizen, Searcy, Ark.

Ray Kimball, publisher, De Queen Daily Citizen, DeQueen, Ark.

Calvin Mannen, editor, the Daily Leader, Stuttgart, Ark.

John R. Newman, editor, Harrison Daily Times, Harrison, Ark.

Laud Payne, editor and publisher, the Piggott Banner, 123 South Second, Piggott, Ark.

Ellis W. Ramsey, publisher, Beebe News, 207 North Main, Beebe, Ark.

Van A. Tyson, publisher, the Atkins Chronicle, Atkins, Ark.

Fred A. Wulfekuhler, editor and publisher, Paragould Daily Press, Paragould, Ark.

California:
Herbert L. Beierle, editor-publisher, the Newark Sun, 54 Lewis Center, Newark, Calif.
Mark H. Edwards, editor-publisher, Santa Paula News, Post Office Box 390, Santa Paula, Calif.
Mark H. Edwards, editor-publisher, Santa Barbara Star, Ventura County News, Galeta Valley Times, Oxnard News, Post Office Box 390, Santa Paula, Calif.
R. Robert Evans, publisher, Shafter Press, Post Office Box A, Shafter, Calif.
Norman B. Foster, Barnes Chase Co., San Diego, Calif.
Max Goodwin, publisher, Lemon Grove Review, 7834 Lester Street, Lemon Grove, Calif.
Francis E. Howard, publisher-printer, Inter Mountain News, Post Office Box 295, Fall River, Mills, Calif.
John Hudson, publisher, Lucerne Valley Leader, Post Office Box X, Lucerne Valley, Calif.
Hal W. Hunt, editor-publisher, Shasta County Chronicle, Box 677, Burney, Calif.
Carlyle Reed, Union-Tribune Publishing Co., 919 Second Avenue, San Diego, Calif.
Hamilton V. B. Riggs, publisher, Fillmore Herald, Post Office Box 727, Fillmore, Calif.
Frank H. Wisner, editor and publisher, Tri-Valley Newspapers, Inc., 99 Glenn Drive, Camarillo, Calif.

Colorado:
Milton H. Booth, Arkansas Valley Journal, La Junta, Colo.
Frank S. Hoag, Jr., publisher, Star-Journal Chieftain, Pueblo, Colo.
John Jameson, publisher, Englewood Herald, Box 89, Englewood, Colo.
Walt McKinstry, Jr., publisher, Grit-Advocate, Julesburg, Colo.
Bus Tarbox, Golden Transcript, Golden, Colo.
Preston Walker, publisher, Sentinel Publishing Co., Grand Junction, Colo.

Connecticut:
Myles Standish, Norwich Morning Bulletin, 66 Franklin Street, Norwich, Conn.
Luis J. A. Villalon, editor, the Town Crier, Box 30, Westport, Conn.

Delaware:
Ralph Grapperhaus, Delmarva News, Selbyville, Del.
W. Wright Robinson, Leader-News, Post Office Drawer 771, Seaford, Del.
Jack Smyth, editor-publisher, Delaware State News, 10 North Street, Dover, Del.

Florida:
Jack W. Gore, Fort Lauderdale News, Fort Lauderdale, Fla.
Sam D. Melson, publisher, Chronicle, Chronicle Building, Box 4607, Jacksonville, Fla.

Georgia:
M. R. Ashworth, publisher, Ledger-Enquirer, Columbus, Ga.
DuPree Jordan, Jr., president and chairman, Jordan Enterprises Weekly Newspapers, Atlanta, Ga.
E. W. Mathews, publisher, Cordele Dispatch, Cordele, Ga.
Homer M. Rankin, publisher, Daily Tifton Gazette, Tifton, Ga.

Idaho:
Everett A. Colley, publisher, Owyhee Chronicle, 20 East Idaho Avenue, Homedale, Idaho.
Adam J. Kalb, publisher, Free Press, Post Office Box 111, Nampa, Idaho.
Harry N. Nelson, editor and publisher, American, Weiser, Idaho.
L. E. Pietsch, copublisher, Sandpoint News-Bulletin, Sandpoint, Idaho.

Illinois:
Martin Brown, manager, Cairo Evening Citizen, Cairo, Ill.
John Kilpatrick, publisher, Industrial News, 3304 West 63d Street, Chicago, Ill.
Donovan M. Kramer, publisher, Fairbury Blade, Fairbury, Ill.
Frank R. Mills, editor, Chronicle-Herald, Hoopeston, Ill.
Roy R. Rucker, editor-publisher, Leader, Bridgeport, Ill.
Robert E. Shaw, co-publisher Dixon Evening Telegraph, Dixon, Ill.
Edward A. Taylor, publisher, the Pulaski Enterprise, Mounds, Ill.
Joseph G. Velna, editor, Community Reporter Newspapers, 4072 West 26th Street, Chicago, Ill.

Indiana:
John Backes, managing editor, the Washington Daily Times, Washington, Ind.
Claude Billings, publisher, the Akron News, Akron, Ind.
George L. Carey, publisher, the Daily Clintonian, 422 South Main, Clinton, Ind.
Chester W. Cleveland, publisher, Indiana Business and Industry, Culver, Ind.
Artley D. Cullum, publisher, Mentone News, Mentone, Ind.
Robert G. Huneke, editor, the Herald-Tribune, Post Office Drawer 89, Batesville, Ind.
Eugene N. Marten, president, LaGrange Standard-LaGrange News, Box 148, LaGrange, Ind.
James T. Neal, editor, Noblesville Daily Ledger, Noblesville, Ind.
W. A. Vance, publisher, Journal-Review, Crawfordsville, Ind.
Everett White, publisher, the Richland Press, 813 East Summit, Attica, Ind.

Iowa:
John D. Baldridge, publisher, Chariton Leader, 815 Braden Avenue, Charlton, Iowa.
J. R. Gallagher, editor and copublisher, Belmond Independent, Belmond, Iowa.
Henry B. Hook, publisher, the Morning Democrat, Davenport, Iowa.
M. P. Kruse, editor, Cedar Valley Daily Times, Vinton, Iowa.
J. W. McCutcheon, editor, Hawkeye-Record, Mt. Vernon, Iowa.

Kansas:
Frank D. Boyd, publisher, the Citizen, Overbrook, Kans.
Jess Denious, Jr., publisher, Daily Globe, Dodge City, Kans.
Dwight Payton, publisher, Ellsworth Messenger, Ellsworth, Kans.
Sam Shade, editor and publisher, Sedan Times-Star, Box F, 117 North Chautauqua, Sedan, Kans.
Park Wilcox, publisher, the Democrat, 101 West Central, Wichita, Kans.

Kentucky:
W. T. Davis, editor-publisher, Lyon County Herald, Eddyville, Ky.
Douglas Galbraith, publisher, the Paintsville Herald, Inc., Paintsville, Ky.
Alfred Jones, editor, News-Democrat, Main Street, Carrollton, Ky.
Percy H. Landrum, publisher, the Ohio County News, Box 45, Hartford, Ky.

Louisiana:
Marcel M. Bienvenu, publisher, Tache News, Post Office Box 31, St. Martinville, La.
Nathan Bolton, publisher, Bastrop Daily Enterprise, Bastrop, La.
Robert D. Miller, publisher, the Jennings Daily News, Post Office Box 910, Jennings, La.
John R. Thistlethwaite, editor-publisher, Daily World, Opelousas, La.

Maryland: Dr. John R. Steelman, publisher, Suburban Record, Silver Spring, Md. (Cochairman of press committee.)

Massachusetts:
William G. Coulter, Clinton Daily Item, Clinton, Mass.
Leonard D. Wood, Arlington Advocate, Arlington, Mass.

Michigan:
Jackson C. Gorlsby, publisher, Antrim County News, Bellaire, Mich.
Walt Rummel, publisher, Blade-Crescent, Sebewaing, Mich.

Minnesota:
W. S. Adams, editor, the Roseau Times-Region, Roseau, Minn.
Elmer V. Engberg, manager, the Progress-Register, 417 Hennepin Avenue, Minneapolis, Minn.
Lem Kaercher, publisher, Ortonville Independent, Ortonville, Minn.
Mrs. Frieda J. Monger, editor and publisher, Duluth Publicity, 409 Lyceum, Duluth, Minn.
Claude N. Swanson, Box 422, Fairmont, Minn.

Mississippi:
Powell Glass, Jr., editor, Sea Coast Echo, Box 230, Bay Saint Louis, Miss.
Charles R. Jacobs, publisher, Leader-Times, Post Office Box 551, Brookhaven, Miss.

Missouri:
C. L. Blanton, 205 South New Madrid, Sikeston, Mo.
Frank W. Farmer, publisher, the Sweet Springs Herald, 205 Lexington Avenue, Sweet Springs, Mo.
Frank H. Hollmann, editor and manager, the Warrenton Banner, Warrenton, Mo.
Phil Shade, publisher, Advertiser-News, Lexington, Mo.
T. Ballard Watters, editor and publisher, the Marshfield Mail, Marshfield, Mo.
Stanley E. White, manager, Lamar Democrat, Lamar, Mo.

Montana:
K. A. Eggensperger, publisher, Sanders County Ledger, Thompson Falls, Mont.
Sam Gilluly, publisher-manager, Montana Citizen, Helena, Mont.
Chet F. Kavanagh, publisher, Independent-Observer, Conrad, Mont.
R. E. Poe, editor, Yellowstone News, Billings, Mont.
Frank A. Whetstone, Cut Bank Pioneer Press, Cut Bank, Mont.

Nebraska:
Jerry Huse, publisher, the Norfolk Daily News, Norfolk, Nebr.
Mrs. E. C. Leggett, publisher, Ord Quiz, Ord, Nebr.
W. H. Plourd, publisher, Nance County Journal, Fullerton, Nebr.
J. Hilton Rhoades, editor and publisher, Enterprise, Blair, Nebr.
Richard J. Sheehan, editor, Bellevue Press-Sarpy County Gazette, 2217 Franklin Street, Bellevue, Nebr.
W. A. Stauffer, editor, News-Times, York, Nebr.
Floyd C. Wisner, Daily Star-Herald, Scottsbluff, Nebr.
Warren C. Wood, publisher, Gering Courier, Gering, Nebr.

New Hampshire:
Edward S. Seavey, Jr., editor, Hampton Union, 575 Lafayette Road, Hampton, N.H.
Harry B. Thayer, Jr., Exeter News Letters, Exeter, N.H.

New Jersey:
Chris M. Parson, editor and publisher, the Observer, 44 West Church Street, Blackwood, N.J.
Don Robinson, editor and publisher, American Press, Stanton, N.J.

New Mexico:
Orville E. Priestley, editor, the Sun-News, Las Cruces, N. Mex.
Edwin M. Stanton, News Chieftain, Albuquerque, N. Mex.
The Torrance County News, Mountainair, N. Mex.
The Catron County Reporter, Reserve, N. Mex.
The Sandoval County Journal, Bernalillo, N. Mex.
Robert L. Summers, publisher, Hobbs Daily News-Sun, Hobbs, N. Mex.

New York:
Frank C. Forbes, president, Weekly Newspaper Representatives, Inc., 404 Fifth Avenue, New York, N.Y.
Mrs. Denny S. Griswold, editor and publisher, Public Relations News, 815 Park Avenue, New York, N.Y.
Robert Hall, publisher, Warrensburg News, Warrensburg, N.Y.
Edward M. Herrschaft, publisher, Kings County Chronicle-Queens County Post, 175 Shepherd Avenue, Brooklyn, N.Y.
Howard E. Silberstein, editor and publisher, Catskill Daily Mail, Catskill, N.Y.
A. J. Smitherman, editor and publisher, the Empire Star, 234 Broadway, Buffalo, N.Y.

North Carolina:
David E. Gillespie, editor, Shelby Daily Star, Shelby, N.C.
L. Barron Mills, Jr., editor and publisher, the Randolph Guide, Post Office Box 511, Asheboro, N.C.
Spencer Murphy, editor, the Post, Salisbury, N.C.
J. Mayon Parker, editor, the Herald, Ahoskie, N.C.

North Dakota:
Grant M. Helgeson, publisher, Hankinson News, Hankinson, N. Dak.
Harry E. Polk, editor and publisher, Williston Herald, Williston, N. Dak.

Ohio:
Clarence J. Brown, Jr., publisher, Urbana Daily Citizen, 225 South Main Street, Urbana, Ohio.
M. M. Ferguson, editor-publisher the Sentinel Herald, 5716 Summit Street, Sylvania, Ohio.
Frank W. Spencer, editor and publisher, The Advocate, Newark, Ohio.
Robert B. Wallace, editor, The Tribune, Coshocton, Ohio.

Oklahoma:
Brooks H. Bicknell, editor and publisher, The Alva Review-Courier, Box 331, Alva, Okla.
Ed Burchfiel, Daily Democrat, Pauls Valley, Okla.
Bruce Carnett, publisher, Sand Springs Leader, Box 397, Sand Springs, Okla.
Billy W. Denson, publisher, Ellis County Capital, Arnett, Okla.
Wayne S. Jefferies, owner and publisher, Dewey Herald-Record, Box 339, Dewey, Okla.
J. L. Jennings, editor, Examiner-Enterprise, Bartlesville, Okla.
W. D. Little, editor, The Ada (Okla.) Evening News, Ada, Okla.
Ed Livermore, editor, Sapulpa Daily Herald, Sapulpa, Okla.
Perry E. White, publisher, the Big Pasture News, Box 328, Grandfield, Okla.
David L. Wire, news editor, Northwest News, Box 186W, Oklahoma City, Okla.

Oregon:
Philip N. Bladine, publisher, the News-Register, Post Office Box 510 McMinnville, Oreg.
Morgan Coe, publisher, Astorian-Budget, Post Office Box 210, Astoria, Oreg.
Elmer R. Price, Lincoln County Leader, Post Office Box 816, Toledo, Oreg.
Tom Straub, publisher, the Lane Reporter, Fall Creek, Oreg.
L. T. Ward, publisher, Benton County Review, Post Office Box 518, Philomath, Oreg.

Pennsylvania:
John A. DeRenzo, editor-publisher, Altoona American, Post Office Box 47, Altoona, Pa.
S. Victor Freeston, editor, Easton Road Guide, 128 South Keswick Avenue, Glenside, Pa.
W. M. Likins, editor, Coraopolis Record, 1000 State Avenue, Coraopolis, Pa.
Mrs. W. D. Lillich, publisher, City and Suburban Life, 647 California Avenue, Avalon, Pittsburgh, Pa.
Guy W. Paul, editor and publisher, the Courier, 605 Main Street, Bentleyville, Pa.
James B. Werner, publisher, Somerset Democrat, Post Office Box 187, Somerset, Pa.
A. S. Wilder, editor, Daily News, Lebanon, Pa.

South Carolina:
Thomas P. Davis, editor and publisher, the Georgetown Times, Georgetown, S.C.
J. L. Wiggins, editor and publisher, the Hartsville Messenger, Hartsville, S.C.

South Dakota: Donald Johannsen, publisher, Winner Advocate, 125 West Third, Winner, S. Dak.

Tennessee:
John W. Finney, editor, the Daily Herald, Columbia, Tenn.
W. T. Franklin, Jr., publisher, the Lexington Progress, 211 Broad Street, Lexington, Tenn.
John Helms III, Daily Gazette-Mail, Morristown, Tenn.

Texas:
LeRoy M. Anderson, Sr., editor, Denison Press, 926 West Sears, Denison, Tex.
J. L. C. Beaman, publisher, the Duval County Facts, Gonzalez Building, San Diego, Tex.
W. E. Berger, publisher, Hondo Anvil Herald, Box 218, Hondo, Tex.
Joe R. Compton, publisher, Mount Enterprise Progress, Mount Enterprise Tex.
James R. Dennis, publisher, Jacksboro Gazette-News, Box 578, Jacksboro, Tex.

Texas—Continued
Gabe Garrett, publisher, Voice-Chronicle-Nueces Co. News, Flour Bluff Reporter, 1115 Kinney Avenue, Corpus Christi, Tex.
Jack Howerton, publisher, Daily Record, Cuero, Tex.
W. W. Kittley, editor, the Kerens Tribune, Post Office Box 188, Kerens, Tex.
Fred C. Latcham, Jr., publisher, Beeville, Bee-Picayune, Beeville, Tex.
J. O. Mahaffey, Texarkana Gazette and News, Texarkana, Tex.
B. J. Morgan, Advertising, Manager, the Orange Grove Observer, Schmidt Building, Orange Grove, Tex.

Utah:
C. W. Claybaugh, publisher, News & Journal, Brigham City, Utah.
George E. Jones, publisher, San Juan Record, Box 428, Monticello, Utah.

Virginia:
Richard F. Beirne, the Virginian, 311 Monroe Street, Covington, Va.
Charles M. Keen, Jr., publisher and editor, News-Journal, Chester, Va.
Paul W. Manns, editor and publisher, the Caroline Progress of Bowling Green, the King George News of King George, the Westmoreland News of Montross, Bowling Green, Va.
E. Walton Opie, publisher, the Staunton Leader and Sunday News-Leader, Staunton, Va.
A. Robbins, Jr., publisher, the Hopewell News, Hopewell, Va.
Louis Spillman, editor and publisher, News-Virginian, Waynesboro, Va.
W. L. Willis, Jr., editor, Henrico Herald, Box 340, Richmond, Va.

Washington:
Ashley E. Holden, Sr., publisher, Tonasket Tribune, Post Office Box 518, Tonasket, Wash.
J. Clifford Kaynor, publisher emeritus, Ellensburg Daily Record, 1003 Fourth Avenue, East Ellensburg, Wash.
Bill Wilmot, Colfax Gazette, Colfax, Wash.
Walt Woodward, publisher, the Bainbridge Review, the North Kitsap News, Post Office Box 147, Bainbridge Island, Wash.

West Virginia:
Samuel D. Mason, editor and publisher, the Sentinel, Post Office Box 448, White Sulphur Springs, W. Va.
Thomas W. Russell, the Daily Sentinel, Grafton, W. Va.

Wisconsin:
William E. Branen, editor, Standard-Press, Burlington, Wis.
Paul J. Creviere, general manager, De Pere Journal-Democrat, 126 South Broadway, De Pere, Wis.
W. B. Chilsen, publisher, Daily Herald, Merrill, Wis.
Walter E. Gleason, publisher, Clintonville Tribune-Gazette, 13 11th Street, Clintonville, Wis.
Elmer S. Haumant, editor, Inter-County Leader, Oak Street and First Avenue, Frederic, Wis.
Fritz Rathmann, publisher, Milwaukee County News, 4124 South Austin Street, Milwaukee 7, Wis.
Francis F. Schweinler, editor and publisher, Times, Mosinee, Wis.
John J. Shinners, editor and publisher, Times-Press, 730 Center Street, Hartford, Wis.
Arnott Widstrand, Jr., editor and publisher, La Farge Enterprise, La Farge, Wis.

Wyoming:
Lee R. Call, editor and publisher, Star Valley Independent, Afton, Wyo.
Jack W. Perry, Casper Tribune Herald & Star, Casper, Wyo.

Mr. MANNS. The co-chairmen are Alex H. Washburn, editor of the Hope Star of Hope, Ark. and Dr. John R. Steelman, publisher of the Suburban Record of Silver Spring, Md. I was aked to testify because I am an editor and publisher who has been honored for many years by being privileged to serve in the Virginia House of Delegates. This experience has given me the opportunity of observing the problem we are considering from two different viewpoints. It is on this basis that I hope the testimony I shall give today will be helpful to the chairman and the members of the Senate Committee on Finance.

My appearance here is the result, in part, of professional interest in the subject I am prepared to discuss, but it is also inspired by strong personal convictions as a Jeffersonian Democrat. With such convictions it becomes a matter of duty to fight in defense of liberty, free speech, and the right of petition wherever these rights are endangered.

Section 3 of H.R. 10650 is certainly one of the least publicized portions of the 240-page bill now before you. Yet, the issue which it raises—the matter of a price tag on the right to petition—is as fundamental to the future of our country as any of the economic provisions of this legislation.

As it is now, the language of section 3 of the bill concerns itself with only one phase of the problem. It deals with the tax deductibility of expenses incurred for appearances in connection with the promotion or defeat of legislation. It does not establish deductibility for what the Internal Revenue Service chooses to call—

carrying on propaganda (including advertising) to influence the public with respect to the desirability of proposed legislation.

Section 3 authorizes deductions for all ordinary and necessary expenses in direct connection with appearances before, submissions of statements to, or sending communications to committees or individual members of any legislative body with respect to legislation of direct interest to the taxpayer.

It further allows a similar deduction for expenses in direct connection with communication of information between the taxpayer and an organization of which he is a member with respect to legislation of direct interest to the taxpayer and such organization. Deductibility also is provided for that portion of the dues paid to any organization of which the taxpayer is a member and which is attributable to the activities I have just described.

The passage of section 3 by the House of Representatives marks a step forward. It authorizes the tax deduction of all the ordinary and necessary expenses involved in bringing to the legislators information relative to legislation of direct interest to the taxpayer. Incidentally, the House quite properly prohibits the deduction of any amount paid or incurred for participation in any political campaign. Unfortunately section 3 goes on to prohibit, also, the deduction of any amount paid or incurred in connection with any attempt to influence the general public or segments thereof with respect to legislative matters or referendums. In other words, informing legislators is deductible but informing the general public or, more importantly, correcting misinformation to which the general public has been exposed is not deductible.

I am here today to support the idea behind section 3 of H.R. 10650 except for the very last limitation contained in subparagraph (B) which I have just discussed with you and to ask you to consider expanding on that idea. I urge that the provisions of this section be amended to include the provisions of the bill, S. 467, introduced jointly by two distinguished members of this great Senate Committee on Finance: Senator Hartke of Indiana and Senator Kerr of Oklahoma.

The Hartke-Kerr bill is essentially the same as H.R. 7123, originally introduced in the House during the 86th Congress by Representative Hale Boggs of Louisiana. You will remember that this legislation

was amended by the House Committee on Ways and Means and reported unanimously on July 1, 1960. Unfortunately it was too close to adjournment for further action and the bill never reached the floor of the House.

In the 87th Congress, legislation similar to the Boggs bill or the Ways and Means Committee bill has been introduced in the Senate by Senator Hartke and Senator Kerr and by Senator Capehart of Indiana. In the House, eight Members have recently introduced legislation to accomplish this same purpose. They are: Representative Teague, Democrat, of Texas, Boggs, Democrat, of Louisiana, Byrnes, Republican, of Wisconsin, Miller, Republican, of New York, Wilson, Republican, of California, Dooley, Republican, of New York, Pelley, Republican, of Washington, and the late Overton Brooks, Democrat, of Louisiana.

The need for legislation in this area is emphasized by the fact that there is at present no duly enacted law on the books to guide the taxpayer, the courts, or the Internal Revenue Service. Congress has never adopted any measure to lay down exact limits as to the deductibility of expenditures made to influence the passage or defeat of legislation.

All Congress has said—and the latest version appears as section 162(a) of the Internal Revenue Code of 1954—is:

> There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred * * * in carrying on any trade or business * * *

To the layman it might seem logical that a businessman who spends his business's money to oppose passage of legislation which would damage or destroy his business would be allowed to deduct as an expense the cost of fighting this battle for survival. This might even seem to be the intent of Congress.

But for many years, the Internal Revenue Service has disallowed deductions of gross income for expenses made for the purpose of influencing legislation even when the legislation affected the income and the continued existence of the business itself. Through stepped up enforcement and a succession of Treasury Department rulings culminating in an IRS regulation in December 1959, the Federal Government has imposed what amounts to censorship by taxation a price tag on the right to petition.

In the *Cammarano* and *Strauss* cases, decided jointly by the U.S. Supreme Court in 1959, the Treasury Department won a test of its regulations. Cammarano, a wholesale beer distributor in the State of Washington, contributed to defeat a referendum on the 1948 ballot which would have created a State monopoly, driving private businessmen completely out of the beer and liquor business. Strauss, a liquor wholesaler in the State of Arkansas, participated in organizing an association to oppose a statewide prohibition law which was voted on in the 1950 election. The Internal Revenue Service disallowed any deduction in either case and the Supreme Court upheld the IRS. There was no question in either case that the proposed legislation would have eliminated the business of the firms fighting the legislation. The Supreme Court decision did not dispute that point. Rather, it ruled against both taxpayers on the grounds that the failure of Congress to enact legislation correcting the succession of in-

terpretations given the law by the IRS was tantamount to congressional approval.

Actually, this could have happened to any business facing adverse legislation. I understand, for example, that the Italian Government has just banned all tobacco advertising. Could it happen here?

At a public hearing in November 1959, held at the request of some 50 organizations, representatives of newspaper associations, labor unions, business groups, legal organizations and medical groups opposed the proposed regulations. The rules were adopted as proposed without change despite virtually unanimous opposition during the hearings.

This, the current Internal Revenue Service regulation on the subject, 1.162–15(c), issued in December 1959, provides that—and I quote:

> Expenditures for lobbying purposes, for the promotion or defeat of legislation, or for carrying on propaganda (including advertising) related to any of the foregoing purposes are not deductible from gross income, even though the legislation may directly affect the taxpayer's business.

Mr. Chairman, it is not fair to deny a businessman deductibility on expenses he must incur to save his very business. When the Supreme Court goes so far as to authorize a mail-order dentist to deduct as ordinary and necessary business expenses the legal costs of defending himself against a charge of postal fraud why shouldn't a businessman have a right to defend his business against unfavorable legislation which might ruin him. Are we to believe that if you defraud the public your defense costs are tax free but if you inform the public on a legislative issue you must pay a tax on your expenditure?

These tax penalties against freedom of expression and the right to petition were never enacted by Congress. Incidentally, I feel strongly that the right to enjoy a free press is the right of all the people, including advertisers. It should certainly not be subject to a tax penalty when exercised by others than editors, publishers and newsmen.

In the few minutes left to me I shall point out, first, why Congress should act by including the provisions of the Hartke-Kerr bill in the tax legislation now before you. Second, I shall try to answer, briefly, critics of this legislation who have developed two or three standard arguments which they usually advance to justify Congress in remaining mute on this subject.

Early in 1960 I was especially impressed with the plight of a fellow newspaperman, Alex H. Washburn, editor of the Hope Star, of Hope, Ark., and cochairman of the Press Committee To Eliminate Censorship by Taxation for whom I speak today. Alex Washburn started a vigorous crusade against an amendment to the State sales tax law which extended its provisions to apply to livestock and poultry feed. His campaign was motivated by a desire to protect his community and his own newspaper against possible loss of income resulting from the extension of the sales tax to a point where business would be driven across State lines to escape taxation. His expense for promoting a petition campaign for a popular referendum, about $6,000, was disallowed as ordinary business expense by the Internal Revenue Service. The Tax Court and the Eighth Circuit Court of Appeals both ruled against him and the Supreme Court, which has been acclaimed by some as a champion of individual liberty in other cases, refused to hear Alex Washburn's appeal.

The committee is undoubtedly familiar with the difficulties of the Timken Roller Bearing Co. which was informed by the Internal Revenue Service that it could not deduct as a business expense more than $1 million spent for institutional advertising. The advertising in question contained copy dealing with public issues, in some cases, but not with specific legislation. The series dealt with such matters as inflation, the menace of communism, and governmental spending.

Essentially the company used these ideas to attract attention to the advertisments, to build good will and to secure favorable notice. Yet, the IRS ruled that such public relations copy could not be published as a reasonable and necessary business expense. Had they used pictures of attractive girls to secure attention for their advertising everything would have been all right. But ideas—they were ruled nondeductible. Doesn't this suggest that if Congress fails to take affirmative action now, the Internal Revenue Service will feel constrained to act as a censor of advertising as well as a collector of taxes?

The Public Relations Journal, the monthly magazine of the Public Relations Society of America, carried an effective editorial in the August 1961 issue titled "Censorship by Taxation" which discusses in some detail the *Timken Roller Bearing Co.* case. The editorial concludes—and I quote:

> The Public Relations Journal sympathizes with the budget problems of the Treasury Department and its need to develop new and ever larger sources of revenue. But we believe Congress must make certain, by adequate legislation, that in the IRS zeal no inequities are created and no regulations interpreted in such a manner as to stifle freedom of expression.

Mr. Chairman, I shall not take the valuable time of the committee to read this entire editorial but I would appreciate it if you would have it printed in full in the record of these hearings since it does represent the thinking of the major professional organization in the field of public relations.

The CHAIRMAN. Without objection.

(The document referred to follows:)

CENSORSHIP BY TAXATION

Of vital interest to all corporate advertisers, media advertising personnel and public relations practitioners is the suit recently filed by the Timken Roller Bearing Co. against the U.S. Government.

This suit is an attempt to recover $1,283,000 in taxes paid under protest as the result of the disallowance by the Internal Revenue Service of certain plant city advertisements as deductible business expense.

In the main these ads dealt with economic and political subjects which affect the welfare of the company, its employees and their communities. They did not advocate special legislation. They were disallowed under IRS regulations adopted less than 2 years ago after brief hearings at which virtually every witness testified against them.

The *Timken* case seems to confirm the doubts expressed at that time by C. James Proud, president and general manager, Advertising Federation of America, who described the proposed regulations as "loosely and ambiguously worded." Mr. Proud was especially farsighted when he observed, "almost every [institutional] advertisement could be considered as politically controversial if it happens to deal with any subject under the sun on which any member of government or a politician outside of government has uttered a single word."

IRS regulations presently in force and the rulings which stem from them may be interpreted to prohibit the deduction of any advertising expenditure which directly or indirectly tends to influence legislation.

Those who disagree with these regulations believe that Congress should pass definitive legislation to spell out clearly what sort of advertising or other activity is considered as directly influencing legislation and what is institutional or "good will" advertising and therefore a deductible expense.

For the public relations profession, the *Timken* case is an important signpost, for the decision—and implications flowing from the decision—may have far-reaching effects upon activities other than advertising. Alarm has been expressed in some quarters that the IRS rulings as presently constituted might conceivably be applied to render the total cost of a public relations program nondeductible as a business expense.

While the Public Relations Society of America has been keeping its membership informed on this matter for over 3 years, other groups, including the Advertising Federation of America, American Association of Advertising Agencies, American Newspaper Publishers Association and the Chamber of Commerce of the United States have been equally interested in the 2 bills on this subject before the Senate and the 10 before the House, the best known of which is the Boggs bill, H.R. 640.

One group doing especially effective work in this field of securing legislation to offset the IRS rulings is the Press Committee To Eliminate Censorship by Taxation. It is composed principally of 250 grassroots newspaper editors and publishers. Its cochairmen are Alex H. Washburn, editor and publisher of the Hope (Ark.) Star, and Dr. John R. Steelman, publisher and owner, Suburban Record, Silver Spring, Md.

Some advocates of definitive legislation believe that the action of IRS amounts to censorship, since the disallowance of advertising for income tax purposes is an effective way of preventing it from being run. True, such ads may be run, entirely at the company's own expense. But in the opinion of many this puts a premium or penalty on free expression. Still others think there is an even larger question involved. They say that a business should have the right to speak out for or against proposed legislation, directly affecting that business, and have the action considered a legitimate and necessary cost of doing business.

At any rate, it seems evident that the present regulations lack clear-cut guidelines. This and the *Timken* case have made business extremely cautious about exercising a prerogative to speak on public issues.

G. D. Crain, Jr., president and publisher, Advertising Publications, Inc., writing in Industrial Marketing, pointed out that, "Until recently, political ads were defined to mean those which opposed or favored pending legislation, or opposed or favored candidates running for office. * * *

"To say that advertising which expresses an opinion on a subject of importance from an economic, social, or political standpoint is not a proper use of company funds in an arbitrary decision, but unfortunately, opposition to it requires long and expensive litigation.

"For that reason Congress should approve legislation, now pending, which OK's for income tax purposes, the use of advertising dealing with public affairs."

The Public Relations Journal sympathizes with the budget problems of the Treasury Department and its need to develop new and ever-larger sources of revenue. But we believe Congress must make certain, by adequate legislation, that in the IRS zeal no inequities are created and no regulations interpreted in such a manner as to stifle freedom of expression.

Mr. MANNS. Our committee is concerned primarily with the principles of individual liberty, free speech, freedom of the press, and the constitutional right to petition which are involved in this controversy. These principles are much more important than the impact of the economic penalties imposed on any business which tries to preserve its existence against crippling legislation. They far transcend the dollars-and-cents effect of such a regulation on the revenues of small newspapers, magazines, and trade associations.

In his great defense of Thomas Paine, Thomas Erskine pointed up these real issues when he warned:

> The liberty of opinion keeps governments themselves in due subjection to their duties.

What is the ultimate danger if this regulation is carried to its logical end? It can become, as Fortune magazine called it, "a tax on criticism."

This taxing power can be used to prevent citizens from using mass media to inform their neighbors about governmental actions which threaten their very economic existence. This regulation actually gives to the Government the power to censor political views, or any views which the bureaucracy may construe as being political.

Institutional advertising will then deteriorate to the point where it dares only to be against sin and it had better be a nameless sin at that. As a witness pointed out at the Internal Revenue Service hearings, anti-inflation ads could be interpreted as being against new public works legislation; advertising on racial tolerance could be construed as being in favor of the passage of civil rights legislation.

Editor & Publisher sums up the danger well in their editorial of January 9, 1960:

> The free press guarantee of the Bill of Rights was designed to give everyone equal opportunity to write as they pleased and to use a printing press to disseminate those opinions about public affairs, legislation, etc. The guarantee no longer is operative if the Government can rule that the expression of certain opinions is taxable and the utterance of others is nontaxable. Once the precedent is established there will be nothing to prevent an extension of the ruling to enlarge the "taxable opinions"—those opinions about public affairs, governmental procedure, and legislation which may not be uttered without penalty of taxation by the Government.

Mr. Chairman, would it be possible to have that editorial from Editor & Publisher and its sequel on January 16, together with their editorial of March 19, 1960, entitled "Where There's Hope"—based on the decision in the *Alex Washburn* case—included in the record of this hearing?

The CHAIRMAN. Without objection.

(The documents referred to follow:)

[From Editor & Publisher, Jan. 9, 1960]

CENSORSHIP BY TAXATION

As predicted by the Advertising Federation of America (Editor & Publisher, Dec. 19, p. 68) the Internal Revenue Service has adopted a rule making expenditures for lobbying, political campaigns, and other "propaganda" advertising nondeductible as business expenses for income tax purposes. This has been done arbitrarily by IRS without waiting for the requests of congressional hearings on the subject or the fate of several bills pending before Congress.

In our opinion this ruling is un-American if not unconstitutional. Because of our severe income tax laws it gives the Government the power to censor political views by taxation. Only the wealthy will be able to express views on pending legislation through mass media even if the proposed statute means financial disaster to them.

The free press guarantee of the Bill of Rights was designed to give everyone equal opportunity to write as they pleased and to use a printing press to disseminate those opinions about public affairs, legislation, etc. The guarantee no longer is operative if the Government can rule that the expression of certain opinions is taxable and the utterance of others is nontaxable. Once the precedent is established there will be nothing to prevent an extension of the ruling to enlarge the "taxable opinions"—those opinions about public affairs, governmental procedure, and legislation which may not be uttered without penalty of taxation by the Government.

[From Editor & Publisher, Jan. 16, 1960]

CENSORSHIP BY TAXATION

The Internal Revenue Service ruling prohibiting as deductible business expenses any advertising expenditures for the promotion or defeat of legislation or other "propaganda" purposes is clearly censorship by taxation.

IRS says "sure, you can spend your money for such advertising but you can't deduct it as a business expense even if the Government action or the legislation discussed in the advertising threatens to put you out of business."

We would like to propose a test case. Let's get some fearless Congressman to introduce a constitutional amendment to change the Bill of Rights. Every publication in the country, in fact all media, would hop on this and oppose it editorially and probably in display space. This opposition to legislation would cost money for publishers and broadcasters. It is the same as if an advertiser bought time or space to oppose legislation affecting his business. Would this opposition of media to legislation be considered "propaganda" by IRS?

[From Editor & Publisher, Mar. 19, 1960]

EDITORIAL: WHERE THERE'S HOPE

In all of the discussion on the Internal Revenue Service rulings which result in curbing business expenditures for opinion advertising, nothing has hit home with such impact as the Tax Court's decision against A. H. Washburn of the Hope (Ark.) Star.

Mr. Washburn crusaded to obtain a vote by the people on a question of a State sales tax—only to find that he must write off the expense (about $6,000) as a bread-and-butter item. He can't charge it up to "ordinary business expenses" and claim it as a deduction in figuring his income tax.

The editor's campaign was prompted by a desire to protect himself and the newspaper against possible loss of income if a higher sales tax were imposed to make up for what he considered an unjustifiable exemption on a certain group of producers. He was right, too; the tax was hiked. The court record does not show any evidence of harm to the Star, up to this point, but that's immaterial now. In the opinion of the judge, the editor's fears of depreciation or hopes of an enhancement in income were too remote to be considered.

Since the Supreme Court had spoken on such matters in the *Cammarano* case, the Tax Court relied on the precedent which grew out of a claim by liquor dealers for deductibility of expenses in seeking a referendum on legislation affecting their business. This is the same authority cited by IRS in defending its regulations which declare that advertising expenditures of public utility firms, for example, when they oppose public ownership plans, are not ordinary and necessary business expenses.

The entire question of tax allowance for "lobbying" expenses, including advertising costs, is on the agenda of the House Ways and Means Committee which has already held hearings. The American Newspaper Publishers Association argued that nondeductibility amounted to censorship of ideas.

Our advices from Washington this week were that a floodtide of grassroots pressure will be needed to get any of the corrective bills—six in the House and one in the Senate—out onto the floor before adjournment of this session. Representative Hale Boggs, Louisiana Democrat, has made a strong plea for his bill on the ground that Congressmen rely on opinion ("lobby") advertising for indications of back-home sentiment.

We're glad the *Washburn* case decision came at this time. The Star's predicament throws new light on a good cause. Where there's Hope, Congress won't let democratic ideals die.

Mr. MANNS. Those who oppose legislation to remove the price tag from the right to petition generally base their argument on the premise that substituting a bill such as S. 467 for section 3 of H.R. 10650 would give business or other fully taxable profitmaking organizations an advantage over the ordinary citizen insofar as opposing or supporting legislation is concerned. This argument is not valid when directed against such legislation for several reasons.

First, the average citizen does not ordinarily oppose legislation by taking advertisements in a newspaper. He can organize committees, recruit volunteers, circulate petitions and organize protest meetings which will be of sufficient news value to be well covered by the press. Many of these avenues of expression are not directly open to the busi-

ness corporation in the same degree even when the business itself is threatened by legislation.

Second, neither an individual nor a business can deduct any expense not directly related to the production of taxable income. The Federal income tax law taxes the net income of a business operation arrived at by deducting from gross income the cost of raw materials, reserves for depreciation and bad debt, and all ordinary and necessary business expenses. Personal expenses are not deductible for income tax purposes.

For example, under existing tax law, a corporation or an individual owning rental housing may deduct the cost of repainting one of these rental houses. A poor widow may not deduct the cost of repainting the house which she owns and occupies. It is not a business expense. Deductibility does not depend entirely on whether something is good or bad for society but whether it is an ordinary and necessary business expense. In this regard the provisions of S. 467 are entirely consistent with existing tax law and do not penalize the individual.

Another argument which is frequently raised is that such legislation will lead to excesses and abuses. I am sure this committee can write this legislation so the flood gates will not be opened wide to result in unreasonable deductions or deductions for expenditures not directly concerned with the production of revenue for the business involved. To be deductible, the expenditures must be ordinary, necessary, related to the business activities of the enterprise involved, and must be reasonable. And remember, please, every dollar spent still comes out of profits at the end of the year.

Incidentally, the press of the Nation, working with their advertisers, have done an outstanding job for the Federal Government and for many worthwhile nonprofit foundations and civic causes. Newspapers have played, in cooperation with business and industry, a great part in helping to promote Government-sponsored programs during World War II and since through institutional advertising.

It seems to me that one of the crying needs of our country today is to stimulate more interest in the workings of our Government at all levels, more citizen participation in public affairs, more awareness of the great decisions facing the American people in this critical hour of human history. As Senator Hartke has pointed out so effectively, our legislators want and need the opportunity to receive information on both sides of every issue on which they vote. Regulation that tends to stifle freedom of speech and place a price tag on the right of petition renders a disservice to the Nation and its legislators.

May I add one further observation: By all odds the most active, most influential, aggressive and persistent lobbying in this country today is being carried on by the Federal Government and its multitudinous agencies. The 50 State governments, the counties, and municipalities are also increasingly vocal when it comes to agitating for what they want from Congress and State and local lawmaking bodies. This intensive and tireless governmental lobby is financed by the Nation's taxpayers—no one else. Is it proper that these same taxpayers—if they happen to disagree with the objective of some tax-financed lobbying campaign being waged to the detriment of their own business—should not enjoy the right of rebuttal without paying a tax penalty?

Mr. Chairman, as a newspaperman and a legislator at the State level, I join with the 205 editors of the press committee to urge that the Hartke-Kerr bill be substituted for section 3 of the tax bill now before your committee.

If I may make just one brief addition to my statement, Mr. Chairman, I would like to point out that in 1961 American industry spent $225,400,000 at the national level to support the American Red Cross, E bonds, better educational facilities and other programs in which the Government and the entire public are so interested. In the period from 1942 to 1961 industry, business, and the newspaper publishers themselves, spent over $3 billion in these programs.

I think it is a very impressive figure, indicating the scope of this public service institutional advertising. It certainly will be more difficult to promote certain advertising in the future if the status of such advertising is not clarified by congressional action.

The CHAIRMAN. I want to congratulate you on a very able statement.

Mr. MANNS. Thank you, sir.

The CHAIRMAN. Any questions?

Senator BENNETT. I would just like to ask the witness, Mr. Manns. I would like to discuss the problem of Alex Washburn of the Hope Star in Hope.

If he had used the news columns of his paper for the campaign to the point where he had lost $6,000 in the operation of his paper, would he have been able to take advantage of that as a proper deduction in his business?

Mr. MANNS. You mean if it had resulted in a loss for his year's operation?

Senator BENNETT. Yes. Your information, of course, is limited. I assume that Washburn bought advertising space probably in his own paper, in trying to sell this idea of a petition.

Mr. MANNS. Senator, I believe most of Mr. Washburn's $6,000 went for canvassing, circulating petitions, postage, printing, legal fees, etc. I do not know the amount of lineage that he ran in the advertising or news columns of his own newspapers.

Senator BENNETT. Let us put it this way: If he had used news lineage and had given up therefor $6,000 worth of advertising in order to provide the news lineage, that would have reduced his income by that amount, and if it had amounted to a loss or he would—it would have reduced his tax by that amount by reducing his income.

Mr. MANNS. That is true.

Senator BENNETT. But because he chose apparently to use advertising this did not become deductible.

Mr. MANNS. That was the ruling.

Senator BENNETT. Yes.

Mr. MANNS. And the Supreme Court would not even hear the case.

Senator BENNETT. This is the thing that bothers me a little bit about this situation. You touched on it at another point in your statement. You say on page 10:

> The average citizen does not ordinarily oppose legislation by taking advertisements in a newspaper. He can organize committees, recruit volunteers—

et cetera, et cetera—

> which will be of sufficient news value to be well covered by the press.

To put it another way, any individual or group that can command press coverage, for a point of view, gets that valuable coverage for free.

Mr. MANNS. That is exactly right, and the industry or business which is concerned with a matter of favoring or opposing legislation to protect its very life often cannot get such coverage.

Senator BENNETT. This might affect the well-being of a particular business, and if it came to you and tried to get news space as a business, to oppose the news space you have given to an organization, a committee, or the statement of their members, it probably would not have been able to get equal news space.

Mr. MANNS. That is correct.

Senator BENNETT. So when it takes this space and pays for it it must then pay for it at a terrific cost because such expense is not deductible under IRS rulings and court decisions.

Mr. MANNS. Advertising is often the only avenue of appeal for businesses, because their plight is often not newsworthy, it may concern only one business that——

Senator BENNETT. Even though the attack on it may be newsworthy,

Mr. MANNS. Even though the legislative attack on the business may be unjustified, yes, sir; the example is so often cited about a referendum on the sale of alcoholic beverages. Well-meaning citizens often feel the brewers and distillers have virtually unlimited funds. But, they say, who is going to speak for the citizens? The citizens have the loudest voice of all and get the most news coverage on such an issue. It is not usually necessary for them to resort to paid advertising. They have a more emotional appeal and prominent citizens on their committees. The news columns in which their cause is featured are far better than the advertising space, I hate to admit it.

Senator BENNETT. They get on the front page.

Mr. MANNS. That is right. That is certainly true. If anyone has an advantage it is the people who are fighting such an issue.

Just last week the Italian Government banned all types of tobacco advertising in Italy. If such a bill came before Congress, the tobacco industry, which depends on advertising to sell its products would have to fight for its very life. The tobacco industry would certainly be entitled to protect itself.

I think there is something so basic here that I do hope you gentlemen would look with favor on the substitution of S. 467 for section 3 of H.R. 10650.

The CHAIRMAN. Senator Hartke.

Senator HARTKE. Mr. Manns, assuming this situation stands as it is on the books at the present time, suppose that in the field of education we hear some of these ads on the radio, you know, about better schools and things of that sort, better education for your children, just suppose, assuming the Internal Revenue Service kept the present ruling that a group of business or industrial people decided they wanted to do something to help out some private institution, such as in my home State, of Evansville College, and in your State, William and Mary, by working for better salaries for the teachers or to acquire better qualified personnel, what would be the effect under the present situation, assuming you did not correct the legislation?

Mr. MANNS. It would depend, of course, Senator, on whether IRS interpreted the ad as dealing with legislation. It obviously would not

be deductible based on, well, if they felt as they did in one of the cases which I have cited, the *Timken Roller Bearing Co.* case. When it comes right down to it, there has been no hard and fast guide given the Internal Revenue Service by Congress on such matters.

The I.R.S. apparently allows one deduction and disallows another. But they are allowing fewer and fewer all the time. They follow this precedent and not allow any institutional advertising to be deductible as a business expense.

Senator HARTKE. What the Supreme Court has said is if Congress wants this type of item deductible it has got to spell it out.

Mr. MANNS. That is right.

Senator HARTKE. And they failed to spell it out, so in the face of these decisions by the Internal Revenue, if we do not like them, why, we have to correct them; isn't that right?

Mr. MANNS. That is certainly true. The Supreme Court was basing its decision on the precedent set by the rulings of IRS, which have no foundation in law at all.

Senator HARTKE. Well, as far as they are concerned they are not going to try to legislate—they have said in this system, at least, for the benefit of what we are talking about, they have said, "We are not going to legislate."

Mr. MANNS. They said they were following a precedent established by IRS. If your bill S. 467, is not substituted for section 3 in H.R. 10650 this confusion and injustice will continue, indefinitely.

Senator HARTKE. In the same field we have some problems in some areas about teenage drinking, and the question of temperance. Now, some efforts are being made by some temperance groups. Could they be permitted to deduct, if you do not change the law?

Mr. MANNS. This would of course be straight institutional advertising in that it does not attempt to influence the general public concerning pending legislation.

Senator HARTKE. One think I am very definitely not interested—I am interested in not having happen—is the fact that we permit a deductible item as far as partisan politics are concerned. But let us get off into the situation at the present time. We do have a lot of so-called civic organizations like the Jaycees, who go out into society and say, "Tomorrow is election day. Vote for the man of your choice, but be sure and vote." Or, "Let's go out and register. You cannot exercise your influence on election day unless you are registered to vote."

If these provisions as now are unchanged what would be the effect of the deductibility of these type campaigns?

Mr. MANNS. Well, if the Jaycees used sponsored advertising, I means encouraged local business firms to underwrite the advertising, it might or might not be deductible as a necessary business expense.

If they paid for it themselves, why, they are nonprofit anyway. These advertisements would not, apparently seek to influence legislation.

Senator HARTKE. They are a nonprofit organization, there is no question about that.

Mr. MANNS. But certainly if they got sponsors, as they usually do——

Senator HARTKE. The same field, so far as municipalities are concerned. Frequently they go on the question of a referendum for a bond issue, for expansion, as we see practically every city now, which has a committee for attracting new industry. They go out and they put out brochures and they get a group of the people together who go over the countryside and even buy land.

What about expenses involved in conducting these campaigns to attract new industry to their town? What is the deductibility of those items?

Mr. MANNS. The public utility companies have done a terrific job in that field. I mean over the whole country they have advertising space, they have advertising contacts, and they devote a lot of it to just such a thing, attracting industry.

Senator HARTKE. Take some of the railroads.

Mr. MANNS. The railroads, too.

Senator HARTKE. They say, "Get on our railroad line. We have industrial space. We will help you."

Mr. MANNS. That is right.

Senator HARTKE. Of course, they expect to get the railroad business, we understand what they were trying to do. But they are also trying to develop something for the communities along those lines, are they not?

Mr. MANNS. Yes, it is actually institutional advertising. I think it is one of the best kinds, but it is doing a public service, too.

Senator HARTKE. To reemphasize a little bit what you said before, suppose the State legislature, forgetting us in the Senate and Congress, here, suppose they did propose to enact some legislation which would just wipe business off the map for all intents and purposes, just destroy it. What recourse would you have so far as deductibility is concerned under the House bill?

Mr. MANNS. The cost of contacting your legislators would be deductible. You would not have any deduction for any advertising or public relations program developed to educate the public to oppose such arbitrary legislation.

Senator HARTKE. None whatsoever.

Mr. MANNS. None whatsoever.

Senator HARTKE. Is that right?

Mr. MANNS. None whatsoever. This policy is becoming more firmly established every year.

Senator HARTKE. You are going to have to admit that the word "lobbying" has a very bad connotation.

Mr. MANNS. Lobbying and propaganda, I think, are two things that are used in an unfriendly connotation. I notice that the Internal Revenue Service delights in using both of them.

Senator HARTKE. When lobbying becomes education then it sounds wonderful.

Mr. MANNS. That is right.

Senator HARTKE. But still under the Constitution, we all know that there are certain limitations on certain rights under the Constitution. We all realize that really if you want to tax sufficiently, the power to tax is still the power to destroy, and that is the power to exercise, wtih the good judgment of Congress. But one of the first things the founders of this country did was to institute a Bill of Rights, and the

first one of those statements, the first statement in the Bill of Rights, the first quotation there, the first amendment, said that Congress shall make no law abridging the freedom of speech or of the press or of the right of people peacefully to assemble and petition their Government for the redress of grievances.

Do you feel this is in any way a limitation upon this amendment in this statement of the Bill of Rights?

Mr. MANNS. I think that Congress now should act now to preserve and protect exactly the principles of the Bill of Rights you were speaking about.

Senator HARTKE. Well, in effect, Congress has acted by acquiescence, has it not?

Mr. MANNS. Yes, I would say so.

Senator HARTKE. The ruling was made as though it were an interpretation of the law, and since there has been no corrective action in face of the ruling it has the actual and full effect of law.

Mr. MANNS. Congress, in effect, has acted to that extent, by not acting.

Senator HARTKE. Congress has, in effect, acted to that extent.

Mr. MANNS. Yes, they certainly have.

Senator HARTKE. That is all.

The CHAIRMAN. Thank you very much.

Mr. MANNS. Mr. Chairman, here is a copy of over 50 programs that business and industry have sponsored. They are primarily of a government nature, I mean suggested by the U.S. Government. In a very short period of time they amounted to $98 million, of which the Government paid only $2 million. Here is $96 million worth of advertising that business, industry, the press paid for. The press probably secured paying business sponsors for most of the advertising. It just shows how interested business and industry are in public affairs and our way of life. If we stifle institutional advertising I am afraid it is going to have an unfortunate reaction.

I mean if you take my bread and butter away from me, I am going to have to be a little bit more conservative with what I have left. I cannot then afford to be as helpful as I have in the past. It has tremendous implications all the way through.

The CHAIRMAN. You have made a fine statement.

Mr. MANNS. Excuse me. I did not mean to take so much time Mr. Chairman and I appreciate your hearing me, very much.

The CHAIRMAN. We will recess and adjourn until 10 o'clock tomorrow morning.

(By direction of the chairman, the following is made a part of the record:)

THE COLUMBIA GAS SYSTEM, INC.,
New York, N.Y., April 5, 1962.

Subject: Revenue Act of 1962; legislative expenses.
The Honorable HARRY F. BYRD,
Chairman, Senator Committee on Finance, Washington, D.C.

DEAR SENATOR BYRD: Section 3 of the Revenue Act of 1962 (H.R. 10650), as passed by the House of Representatives on March 29, 1962, would amend section 162 of the code to specifically allow a deduction from gross income of costs directly related to appearances before and communications with a legislative body or a committee thereof or individual members thereof. This amendment is a step in the right direction. It would not, however, permit the deduction of expenses lawfully incurred by a taxpayer in presenting his position to the public

with respect to issues raised by initiative or referendum, whether on the Federal, State or local level. This means that deductions for expenditures incurred in connection with any submission of proposed legislation in a referendum would be disallowed; for example, a referendum to the voters on changes in gas rates in a particular city served by a Columbia System company.

As you know, with the economic system under which we live today being in large measure shaped by political action through legislation, many important legislative changes are first considered in referendums, and it is essential that corporate taxpayers convey their views regarding all proposed legislation to individual legislators, legislative bodies, employees, customers, stockholders and to the public in general.

We believe Congressman Hale Boggs of Louisiana aptly summed up the situation when he said:

"Mr. Speaker, no tax law, or administrative interpretations should be permitted to stand that would impair the ability to communicate freely to all sections of the public or elected representatives, views on legislation affecting the economic lives of our citizens, either through advertising, membership in an organization, distribution of literature or any other form of lawful communication.

"If we dilute the right of our citizens to petition for good laws by punitive taxation we deny them the right of self-protection from damaging and destructive legislative action."

We strongly urge you to carefully consider S. 467 now pending before your committee as a substitute for section 3 of H.R. 10650. The amendment proposed by S. 467 would allow the deduction of lawful expenditures incurred in providing information to the public on legislative issues. The bill was introduced by Senator Hartke (Senator Kerr has asked and received permission to have his name added as a cosponsor of the bill the next time it is printed).

We request that this letter be included in the record of any hearings your committee may hold on the question of legislative expenses.

Respectfully submitted.

JOHN W. PARTRIDGE.

BEACON MILLING CO.,
Cayuga, N.Y., April 12, 1962.

Hon. HARRY F. BYRD,
U.S. Senate,
Washington, D.C.

DEAR SENATOR BYRD: The Senate Finance Committee has under consideration a bill (H.R. 10650) to amend the Internal Revenue Code of 1954. Part of this bill deals with the taxation of cooperative businesses and their patronage dividend receiving members.

In the interest of moving toward equality of corporate taxation, I would urge you to support this bill and strive for its adoption by the Senate.

A survey made by the USDA in 1953 disclosed that the 25 principal regional cooperatives had total sales of $1,332,406,868 with net earnings of $37,057,483. Fifteen of these co-ops paid no Federal income taxes. The rest paid only 6.5 percent of their income, or $2,379,196. If these co-ops had been taxed, as were corporations, they would have paid $19,045,948 in Federal income taxes or 52 percent of their earnings. Cooperatives are now big business and should pay their fair share of government.

Tax advantages held by co-ops have enabled them to force their taxpaying competitors out of business. Private business cannot survive with this unequal taxation.

It is my understanding that the present bill provides for taxing the undistributed earnings of the cooperative corporation and, in addition, provide for deducting and withholding from the amount of each member's cash or scrip patronage dividend, a tax equal to 20 percent of such dividend, and pay the same to the U.S. Treasury. This is a move in the right direction but is still far from equality.

It is clear that co-ops are vigorously opposing the retention of this 20 percent of dividend for tax purposes. I would vigorously urge you to retain this provision in the bill. The tax should be levied where the income is, not somewhere else.

Private business can successfully compete with co-ops only if equally taxed. I would ask you to support this objective by reporting the bill out of committee and endorsing it with your favorable vote.

Very truly yours,

L. S. MIX, *Vice President.*

THE CHICAGO BAR ASSOCIATION,
Chicago, Ill., April 6, 1962.

Hon. HARRY F. BYRD,
U.S. Senate, Washington, D.C.

DEAR SENATOR BYRD: There is nothing so important to the administration of justice in Illinois as the adoption of the modern judicial article to our State constitution, which will be submitted to referendum at the November 1962 general election. Our hope for success is slim unless Congress acts at once to provide for deductibility for Federal income tax purposes of contributions for support of passage. In recognition of the urgency of this matter, the board of managers of the Chicago Bar Association, on March 29, 1962, adopted the enclosed resolution urging that section 3 of H.R. 10650, the Revenue Act of 1962, be amended to provide such a deduction.

The draft of amendment approved in the resolution conforms with S. 2716 (by Senator Dirksen) and H.R. 10080 (by Congressman Yates). We hope you will give highest priority to acceptance of this proposal by the Committee on Finance as a part of H.R. 10650.

Sincerely yours,

R. NEWTON ROOKS, *President.*

THE CHICAGO BAR ASSOCIATION

RESOLUTION OF THE BOARD OF MANAGERS, MARCH 29, 1962

Whereas the organized bar of Illinois and civic groups throughout the State of Illinois, through an organization known as the Committee for Modern Courts, are engaged in a campaign for the adoption of a proposed revision of the present judicial article of the Illinois constitution; and

Whereas sustained efforts over a long period of years to obtain the adoption of a modernized judicial article resulted in failure by a narrow margin in 1958 to obtain the required two-thirds vote in the general election, even though contributions toward support of the campaign for its passage were then ruled to be deductible as charitable contributions for Federal income tax purposes; and

Whereas the Internal Revenue Service has ruled, in reliance upon recent court decisions and revised Treasury regulations, that contributions for such a purpose are no longer deductible; and

Whereas past experience in Illinois indicates that adequate funds for the educational program for judicial reform cannot possibly be raised without the stimulus of deductibility of such contributions; and

Whereas the urgency of the need for constitutional authority for improvement of the administration of justice in Illinois is so great that a contribution to an organization dedicated solely to this cause is well nigh equivalent to the payment of taxes to State and local governments, which are fully deductible; and

Whereas section 3 of H.R. 10650, the Revenue Act of 1962, would expressly deny deductibility of a contribution with respect to the forthcoming referendum on the revised judicial article for Illinois, even though it might otherwise be an ordinary and necessary business expense: Be it

Resolved, That the Chicago Bar Association recommends that section 3 of H.R. 10650 be amended by adding thereto a new subsection (in conformity with S. 2716 (87th Cong., 2d sess.) introduced by Senator Dirksen and H.R. 10080 (87th Cong., 2d sess.) introduced by Congressman Yates) to amend section 170 (c)(1) of the Internal Revenue Code of 1954 (relating to charitable contributions) to be effective with respect to taxable years ending after December 31, 1961, and to read as follows:

"(1) A State, a territory, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, *or any nonprofit organization created and operated exclusively to consider proposals for the reorganization of the judicial branch of the government of any of the foregoing, to provide information, to make recommendations, and to seek public support or opposition as to such proposals*, but only if the contribution or gift is made for exclusively public purposes."

PUBLIC SERVICE CO. OF INDIANA, INC.,
Plainfield, Ind., April 17, 1962.

Hon. HARRY F. BYRD,
Chairman, Senate Finance Committee,
Washington, D.C.

DEAR MR. CHAIRMAN: In connection with the hearings now being held by your committee on H.R. 10650, we respectfully request that this letter stating our views concerning section 3 relating to the deductibility of certain expenses incurred in connection with legislative matters be included in the record of such hearings. For the convenience of the committee, 20 copies of the letter are enclosed.

Section 3 of H.R. 10650 amends section 162 of the Internal Revenue Code so as to provide Federal income tax deduction as ordinary and necessary expenses of costs incurred by a business in direct connection with (1) appearances before, submission of statements to, or sending communications to, the committees, or individual members, of Federal, State, or local legislative bodies with respect to legislation or proposed legislation of direct interest to the taxpayer, and (2) communication of information between the taxpayer and an organization of which he is a member with respect to legislation or proposed legislation of direct interest to the taxpayer and to such organization. It also provides that dues paid to a trade organization incurring expenses attributable to legislative matters referred to in (1) and (2) above also are deductible provided the taxpayer is a member of such trade organization.

However, section 3 as it now stands, specifically provides that amended section 162 shall not be deemed to allow deductions for any amounts paid in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums. We believe that the proposed legislation as so limited would not adequately provide fair and equitable relief from the limitations of present code section 162, and we therefore urge that proposed section 3 of H.R. 10650 be revised to provide specifically that the cost of advertising or otherwise expressing its views, incurred by a taxpayer in the ordinary course of his business, is deductible for Federal income tax purposes even though such advertisements or expressions of views deal in whole or in part with such matters, elections, or referendums. Where the owners or those responsible for the management of a business believe that a Government policy, actually existing or prospective, is or would be either detrimental or beneficial to the public interest and does or would adversely or beneficially affect the business in which the organization is engaged, it should not be subject to tax penalty in making known its views and pointing out its conclusions as to the effect of such policy or prospective policy upon the public and upon the business. It seems to us clear that business management has a right and a responsibility so to do, and that the tax laws should not penalize the fulfillment of that responsibility.

In this connection may we point out that the House report on the bill suggests in support of section 3 the desirability of encouraging taxpayers, who possess information bearing on the impact of existing laws or proposed legislation on their businesses, to make such information available to legislative or other governmental bdies. We submit that it is at least equally desirable that such views affecting the taxpayer's business should be made known to the public by the affected taxpayer. If section 3 of the bill is so revised that it will permit this without tax penalty resulting from such action, the public will be more fully informed on matters of real concern to it, and the good of the Nation as a whole will be served.

The enlargement of the scope of the tax exemption under section 3, which we are urging, would harmonize with the purpose of the section as it now stands since it would provide, as a deductible expense, costs incurred in informing the public with respect to a referendum submitted to the vote of the public on matters which concern the taxpayer's business. The presently proposed section 3 specifically allows deductions for expenses incurred in connection with communicating one's views to a legislator, and there can be no justifiable reason for distinguishing between tax treatment in the case of such a communication and tax treatment in the case of communicating one's views to the public where the public is, in essence, acting as a legislature in a referendum or an initiative matter.

Nothing that we have said above is intended to indicate in any degree a disagreement with the limitation now provided in section 3 that any amounts paid or incurred for participation or intervention in any political campaign of any candidate for public office should not be allowed as a tax deduction expense. We are in agreement that such limitation should be retained in any revision of the section.

We appreciate the consideration given by you and your committee to this request.

Very truly yours,

CARROLL H. BLANCHAR.

EL PASO ELECTRIC CO.,
El Paso, Tex., April 17, 1962.

Hon. HARRY F. BYRD,
Chairman, Senate Finance Committee,
Washington, D.C.

DEAR SENATOR BYRD: It has just come to our attention that your committee is considering H.R. 10650 and instead of appearing we respectfully request that this letter be entered in the record of the hearings on H.R. 10650.

We sincerely believe that section 3 of the bill should be amended to allow an investor-owned electric utility company like El Paso Electric Co. to aggressively compete with other utility operations, be they gas, electric cooperative, municipal or governmental, by advertising with the cost of such advertising recognized as a legitimate business expense and deductible as such before income taxes. We also feel that advertising deductions should be allowed in regard to legislative matters when such advertisements are required to permit business survival.

It has been said by some that the operation of an electric business is a monopoly, but in practice that is far from being true. Some of our competitors have tax advantages, the availability of money for construction at low interest rates, and other subsidies, which are not available to us. Unless we can tell our side of the story, as a business expense, we are put unfairly to a still greater disadvantage in the competition.

Respectfully submitted.

W. V. HOLIK, *President.*

WASHINGTON, D.C., *April 18, 1962.*

Hon. HARRY F. BYRD,
Chairman, Senate Finance Committee,
Washington, D.C.

DEAR SENATOR BYRD: At the suggestion of your staff, I am submitting herewith, for the record, certain views of the Magazine Publishers Association, Inc., with respect to the Internal Revenue Act of 1962, H.R. 10650, which is now pending before your committee.

The Magazine Publishers Association, Inc., represents 96 publishing companies which publish 250 weekly, monthly, or quarterly periodicals. Magazines now enter 44 million American homes where 125 million readers over 15 years of age rely upon them as a vital factor in adult education. Certainly, our publications carry a tremendous impact on the cultural, economic, and political course of the country.

Our industry is concerned with the limitation contained in that portion of section 3 in H.R. 10650 which disallows the deduction of amounts paid or incurred "(B) in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums." This prohibition would seem to be broad enough to strike a mortal blow to highly desirable public service and institutional advertisments. Rulings of Internal Revenue in recent years have disallowed, as ordinary business expenses, institutional advertising concerned with employee morale, the evils of communism, and general support of Government improvement.

Furthermore, over the years magazines have contributed space worth hundreds of millions of dollars in national programs. For example, sales of war and savings bonds alone committed almost one quarter billion dollars' worth of adver-

tising space. In addition, worthwhile nationwide programs have had comparable support, such as

National blood program
Ground Observer Corps
Forest fire prevention
Aid to higher education
United Nations
Radio Free Europe and others.

While space for these worthwhile projects has been donated, the costs of printing and distributing these pages have been proper deductions as ordinary business expenses.

In the crises of recent decades, four President—Roosevelt, Truman, Eisenhower, and Kennedy—have paid great tribute to the public services of magazines. It is conceivable, however, under the provision of H.R. 10650 cited above, that a national campaign on prevention of forest fires might well occur at a time when an agency of Government is seeking an increased appropriation on this item. Could we possibly be faced with a disallowance of the expense, because the campaign could be interpreted as bringing pressure to bear on Members of Congress? I appreciate this is an extreme example, but it certainly illustrates one of the dangers inherent in the provision above cited. Free speech is a basic element of American democracy and we feel the right to speak out, for or against Government action, even in advertisements, is fundamental and should be encouraged rather than impaired.

In 1958 an editorial published in the Saturday Evening Post, under the caption "Should the Power To Tax Include the Right To Censor Advertising?" stated:

"For example, it is hard to believe that the Nation's lawmakers meant to give tax collectors the right to decide that American business or industry should be penalized for stating its case and defending its right to exist, in the face of Government-sponsored competition, by means of paid advertisements. But that is what the tax authorities are doing, acting under a new interpretation of one of their own regulations, which declares that money spent on advertising 'for lobbying purposes, for the promotion or defeat of legislation or for the development or exploitation of propaganda' cannot be considered 'ordinary and reasonable expenses' deductible for tax purposes."

While this dealt with rulings of the Internal Revenue Service, it nevertheless seems to be pertinent with respect to the proposed section of the Internal Revenue Act of 1962.

The Magazine Publishers Association, Inc., endorses S. 467, which we understand is pending before your committee as an amendment to the legislation now under consideration. S. 467 contains the following allowance:

"(4) Expenses lawfully incurred in supporting or opposing or otherwise influencing legislation in the Congress or in a State legislature or in the legislative body of a county or other local governmental agency or in any submission of proposed legislation to the voters."

We believe this affords a proper solution to the problems raised by that provision contained in section 3 of H.R. 10650 and urge the committee to give it its very careful consideration.

Respectfully,

FRANCIS R. CAWLEY,
Vice President, Magazine Publishers Association, Inc.

SOUTHWESTERN ELECTRIC POWER CO.,
Shreveport, La., April 17, 1962.

Hon. HARRY F. BYRD,
Chairman, Senate Finance Committee,
Washington, D.C.

DEAR MR. CHAIRMAN: We should like to submit for your serious consideration some suggestions for changes in section 3 of H.R. 10650, on which measure your committee is now conducting hearings. We trust this letter may be entered in the record in lieu of personal appearances.

While we are in agreement with the general objectives sought in section 3, we feel that business in general, and our business in particular, will be done a grave injustice unless this section is amended. To put a business in a position where it cannot use accepted means of communicating information about its

product as a normal expense of doing business is certainly not in the American spirit of fairplay.

In recent years, our company has had the experience of having certain advertising, pointing to proposed Government competition with our business, disallowed as a business expense. In our opinion, this advertising was vital to the very existence and expansion of our company. It was just as important and necessary to our company as is any product advertising by business that has merchandise or services to sell.

Keeping the public in general, and our customers in particular, informed on some of the threats to our business, and to their ultimate welfare, in our opinion, is not only our privilege, but our obligation. It is an obligation we feel as keenly as we do the obligation of informing our customers of new uses for electric service.

For instance, we have vigorous competition from the natural gas companies. Our company advertises in all media in an effort to meet this competition and to get our share of the consumer dollar spent for utility service. We owe this to our customers, to our employees, and to our stockholders.

Competition from various Government projects, seeking to take away from us existing and prospective electric customers, is just as real as gas competition. Unless we are able to use available means of communication to inform people about this competition, how are we to meet it? Obviously, the people are going to make up their minds about how to react, but we must give them the information. We are the only ones who have it.

In our considered opinion, there is a necessity for advertising to meet this threat, which is a real one. It is imperative to the survival of our business. In the last quarter of a century, the record of Government encroachment in the electric business is stark evidence of the need for meeting this competition by all legitimate means available.

With the scope of Government extending more widely into all areas of business operation, it would be difficult indeed to do much advertising that could not in some way be interpreted as touching on legislative matters. As it now stands, section 3 would impose a severe and unwarranted handicap on the American tradition of free speech and the right to petition, which our Nation's people hold so dear. Therefore, we sincerely ask that section 3 of H.R. 10650 be modified or amended by your committee so that ordinary and necessary business expenses of advertising will be deductible even though a portion of such expense might be interpreted as touching a legislative matter.

Sincerely yours,

E. F. GRAHAM,
Executive Vice President.

CAROLINA POWER & LIGHT CO.,
Raleigh, N.C., April 18, 1962.

Hon. HARRY F. BYRD,
Chairman, Senate Finance Committee,
Washington, D.C.

DEAR SENATOR BYRD: In the interest of the time of your committee, I would like to request that this letter be entered on the record of the hearings you are now conducting on H.R. 10650. I would personally prefer to appear and testify in person but I realize that the time of this committee is limited.

With respect to tax credits for new investment in industrial plant, let me simply say that there can be no economic justification for treating public utilities any differently than any other industry. We are in the market competing for our share of the consumers' dollars just like the manufacturer of automobiles, furniture, or food.

Section 3 of this bill specifically disallows as an operating expense or tax deduction the expenses of informing the general public with regard to legislative matters. I want to illustrate how unfair and unsound such a proposal would be from our own recent experience. I am attaching hereto a pamphlet that we recently distributed to our 85,000 customers in South Carolina. This was a part of our effort to expose to the public the attempt of rural electric cooperatives to get the South Carolina General Assembly to adopt legislation which would have prevented us from building lines within certain stipulated distances of their lines. This means that the law would have prohibited us from serving customers in various areas of South Carolina which represented literally thousands of square miles of our service area in South Carolina.

We pointed out on page 13 of the pamphlet how that when the co-op takes a customer that could be served by us the State and local governments lose 11.7 cents out of every revenue dollar and the Federal Government loses 13.2 cents out of every revenue dollar.

This was an attempt to acquaint the taxpayers of South Carolina in our service area with the fact that the growth of the federally subsidized and tax exempt (at all levels) rural electric cooperatives meant a diminution of the local, State, and Federal tax base and could only result in the ultimate increase of taxes upon what is left in the tax base.

Under the present provisions of section 3 of H.R. 10650, the expenditure of printing and distributing this information among our customers apparently would be disallowed as a business expense in the ordinary course of business. If our competitor had been some other form of private enterprise, the expense would have been deductible for income tax purposes. But, because the only way that this competition can be dealt with happens to require the defeat of unfair, unsound, and discriminatory legislation, the Congress is being asked to tax a penalty against free enterprise.

We respectfully request that your committee rewrite section 3 so as to allow reasonable expenses to disseminate information to the general public with regard to legislative matters as deductible business expenses.

Most respectfully yours,

SHEARON HARRIS,
Vice President and Associate General Counsel.

UTAH POWER & LIGHT CO.,
Salt Lake City, Utah, April 17, 1962.

Hon. HARRY F. BYRD,
Chairman, Senate Finance Committee,
Washington, D.C.

DEAR SENATOR BYRD: It is respectfully requested that this letter of comment on certain provisions of H.R. 10650, now being considered by your committee, be entered in the record of hearings.

Section 2 of H.R. 10650 provides for a tax credit for investment in certain depreciable property. As passed by the House this section provides for a deduction credit of 7 percent on new investment for industry in general and of only 3 percent for regulated public utilities. Without entering the controversial area concerning the relative merits of the investment incentive credit versus other means of stimulating capital expenditures (depreciation reform, etc.), we believe that equitable tax treatment demands that the regulated public utilities be included along with all other industry at a uniform credit allowance. Any other action would discriminate against a large and important segment of the Nation's industrial complex and result in the regulated utilities bearing a disproportionately heavy share of the tax burden. We earnestly request that the investment incentive credit, if enacted, be made fully applicable to the regulated utilities at the same credit percentage granted other industry.

We believe that the provisions of section 3, which provide for Federal income deduction for business expenses incurred for legislative activity, is a tentative step in the right direction but we feel that the proposal does not adequately fulfill the full need for legislative reform of Code section 162. At present, ordinary and necessary expenses incurred in legislative activities, even if essential to the very survival of the taxpayer's business, are not deductible. The investor-owned electric utility industry is a classic example of existing discriminatory tax deductibility treatment in this particular regard. Our industry is, in a most real sense, confronted with tax-subsidized competition from Federal Government power agencies and other federally financed public power organizations. Yet any factual advertising devoted to explaining the unfair competitive advantage enjoyed by these public power agencies due to tax inequities and cost of money subsidies, or for that matter the cost of any advertisement which reflects unfavorably upon public power, is interpreted as a form of "lobbying" and is therefore not deductible.

This tax treatment, in view of the unrestricted advertising (or propagandizing) permitted governmental and quasi-governmental competitors, is unjustified and discriminatory. We therefore urge that section 3 be broadened to allow deductibility of ordinary and necessary business expenses incurred in advertising

related to pending or prospective legislative matters, but including a special exception disallowing deduction of expenses used for participation or intervention in any political campaign in support of or in opposition to any candidate for public office.

In our opinion, section 4 of H.R. 10650 would result in repeal of the time-tested "ordinary and necessary" business expense concept. It would substitute statutory judgment for business judgment as to allowable expenses and would also unnecessarily complicate administrative procedures relating to enforcement. We urge that section 4 be eliminated from H.R. 10650.

We also urge that a noticeable inequity contained in section 17 be rectified by making rural electric cooperatives subject to the tax treatment provision of this section to an equal degree accorded other cooperative businesses.

Sincerely,

E. M. NAUGHTON.

HOUSTON LIGHTING & POWER CO.,
Houston, Tex., April 16, 1962.

Hon. HARRY F. BYRD,
Chairman, Senate Finance Committee,
Washington, D.C.

DEAR MR. CHAIRMAN: With respect to section 3 of H.R. 10650, concerning the deductibility of certain expenses incurred in connection with legislative matters, we wish to have your committee consider carefully the matters set out in this letter and make such a part of the record of the hearings now in progress on said H.R. 10650.

Because of the staggering impact of governmental regulation, taxation, and competition, private companies like ours find it increasingly difficult to survive and to perpetuate the free, private enterprise which has been the lifeblood of this Nation's economy. The influence of government is felt at all levels—Federal, State, and local. It seeks through taxation and regulation to reduce or eliminate the profits which make dynamic expansion possible—then it seeks to seize upon this handicap to thrust forward with more and more tax-supported competition which could, if allowed to progress unopposed and unchecked, result in the eventual demise of all free enterprise.

The machinations of those pressing such policies, and the results of their implementation, must be made known to the legislators who are responsible for making and changing our laws. Both must also be made known to the electorate which selects legislators. The informational expenses incurred in making such known are the ordinary and reasonable expenses of survival—of our company and of our Nation. They should not be given the discriminatory tax treatment presently afforded (and proposed for extension by H.R. 10650).

Thus, it is our purpose in writing this letter to implore that any amendment to the Internal Revenue Code should make clearly deductible for Federal income tax purposes all lawful expenses which are ordinary and necessary to inform the legislators (and the general public by whom they are elected) at all levels of the facts and ramifications thereof, including the taxpayer's recommended position with respect thereto, relating to legislative, initiative or referendum proposals.

In our opinion, a substitution of S. 467 (introduced by Mr. Hartke on January 17, 1961) for the present section 3 of H.R. 10650 would be a step in the right direction. Proposed section 3 of H.R. 10650 permits the deduction of expenses incurred in directly communicating with legislators, or communicating with them through industry organizations, but denies the deduction of expenses incurred in getting facts before the general public.

This is indeed a anomoly. That in a nation such as ours, where the ultimate power is in the people and where government has only such powers and pursues such purposes as the people will, an attempt should be made to impede and shackle the dissemination of information to the electorate which exercises the ultimate discretion and which, meantime, selects the legislators who are the instrumentalities of the electorate's will.

Accordingly, we request that your committee modify H.R. 10650 to include the deductibility of all lawful expenses necessary to the preservation of our economic system.

Yours very truly,

T. H. WHARTON.

TEXAS POWER & LIGHT CO.,
Dallas, Tex., April 17, 1962.

Hon. HARRY F. BYRD,
Chairman, Senate Finance Committee,
Washington, D.C.

DEAR MR. CHAIRMAN: This is a respectful request that this letter be entered in the record of the hearings now being held by the Senate Finance Committee on H.R. 10650 with particular reference to section 3.

Our company is in agreement with the proposal to allow as a tax deduction, certain ordinary and necessary business expenses incurred in connection with legislative matters, but feels that section 3 should not specifically disallow advertising expense in connection with any attempt to inform the general public with reference to legislative matters, elections or referendums.

Our industry in general and our own company in particular are engaged in competition with rural electrification cooperatives which are largely tax exempt in supplying electrical energy. We are presently negotiating with a municipality in north Texas in competition with such a cooperative for a wholesale supply of power to the municipally operated distribution system. Furthermore, an agency of the Federal Government (Rural Electrification Administration) is presently urging our competitors to seek legislation at State levels which, if secured, will greatly increase the severity of such competition.

The cooperatives continue to promote their industry by full-scale advertising in national magazines, in local newspapers, on TV and radio. No tax costs are involved for them in doing so. We deem it a necessary business expense to meet such competition by use of similar media, and it appears only reasonable that such expense should be allowed as a deduction for tax purposes.

Our own Texas Congressmen tell us repeatedly that it is not enough to keep them advised concerning our problems and the issues before Congress which affect our business, but also that we should and must keep the folks back home informed so that voters whom they represent in Congress will likewise understand the issues, thereby achieving the result of truly representative action on their part in Congress. If we are to do this and thereby attempt to meet competition and preserve the income and property value of our own company, we must utilize the media available for communication with our own patrons.

We, therefore, respectfully request that section 3 of H.R. 10650 be amended to include as deductible, ordinary and necessary business expenses incurred in advertising even though such expenses be interpreted as relating to a legislative matter.

Yours very truly,

W. W. LYNCH.

CHAMBER OF COMMERCE OF THE UNITED STATES,
Washington, D.C., April 17, 1962.

The Honorable HARRY F. BYRD,
The U.S. Senate, Washington, D.C.

DEAR SENATOR BYRD: In accord with your kind permission, granted when Walter A. Slowinski testified on our behalf before your committee, we are submitting herewith a supplemental statement for inclusion in the record.

This statement deals exclusively with section 3 of H.R. 10650, relating to the deductibility of expenditures made to influence legislation.

Sincerely yours,

THERON J. RICE, *Legislative Action General Manager.*

SUPPLEMENTAL STATEMENT, CHAMBER OF COMMERCE OF THE UNITED STATES, ON SECTION 3, H.R. 10650

APPEARANCES, ETC., WITH RESPECT TO LEGISLATION

Under existing income tax law, deductions are allowed for ordinary and necessary expenses paid or incurred in carrying on a trade or business.

However, a problem has arisen over the deductibility for income tax purposes of business or trade expenses incurred to influence action by Congress or other legislative bodies with respect to legislative or constitutional proposals.

Section 3 of the bill under discussion (H.R. 10650) deals with the problem.

The national chamber contends that approval of section 3 would not remedy the problem.

In lieu of section 3, the chamber urges that section 162 of the Internal Revenue Code of 1954 with respect to legislative proposals be amended, either as provided by S. 467 introduced by Senator Hartke or H.R. 640 as introduced by Representative Boggs.

The language of the latter bill is that of a bill as amended by the House Ways and Means Committee in action taken in 1960; at that time, the amended bill was approved unanimously by the committee. However, final action was not completed during the 86th Congress.

Senator Hartke's bill contains the language of the unamended 1960 House bill. The problem will best be met by congressional approval of the provisions of one of these bills as a part of the current tax bill (H.R. 10650) rather than by approval of section 3 as now written.

The nature of the problem; the means for its solution

The Internal Revenue Code does not now and never has contained any provision prohibiting the deduction of an expense because it is incurred for the promotion or defeat of legislation or for lobbying purposes.

Prior to the enactment of the 1954 code, Treasury regulations disallowed deductions for expenditures incurred in making appearances, submitting material, or communicating with respect to legislative matters. (See regulations 118, secs. 39.23(o)–1(f) and 39.23(q)–1(a)). However, the regulations were not enforced uniformly.

Largely, then, the problem arose in 1959. In that year, the Supreme Court, in two companion decisions (*Cammarano* v. *U.S.* and *F. Straus & Sons, Inc.* v. *U.S.* (358 U.S. 498 (1959)), upheld the validity of the regulations. It should be noted that the Court felt itself bound to follow the regulations—in the absence of legislative action by Congress. In the decisions, the Court held that the amounts expended for legislative matters were "ordinary and necessary"; indeed, they involved the very survival of the taxpayer's business. Further, the Court recognized that the law contained no provisions specifically supporting the regulations. The Court ruled primarily on the debatable or at least dubious ground that the Treasury regulations had acquired the force of law because of congressional reenactment of the underlying statute. Exhibited strongly here was the lack of any firm knowledge of congressional intent; in effect, the Court decision sought to fill the vacuum of this intent.

Later in 1959, the problem was complicated further. New regulations, relating to deductions incurred with respect to legislative matters, spelled out more specifically deductions which would be disallowed. For instance, the new 1959 regulations require disallowance of a deduction for the portion of dues and other payments to any organization, a "substantial part" of the activities of which consist of efforts to influence legislation to the extent that such amounts are "attributable" to these activities. Likewise, the new regulations state that expenditures for the promotion or defeat of legislation include expenditures for the purpose of attempting to influence legislative members directly or indirectly, by urging or encouraging the public to make their views known to the members.

Uncertainties have plagued taxpayers and Federal employees as a result of the new Treasury regulations promulgated in 1959 on the heels of the Supreme Court decisions.

Section 3 of H.R. 10650: General provisions and reasoning

If in all other respects they qualify as trade or business expenses, certain types of expenses incurred with respect to legislative matters would be deductible under section 3.

Two categories of expenses would be recognized as deductible under the provisions of section 3:

> Expenses in direct connection with appearances, submission of statements or sending of communications * * * presented to committees, individual Members of Congress, or to committees or individual members of State or local governmental legislatures.
>
> Expenses in direct connection with the communication of information between the taxpayer and an organization of which he is a member either from the organization to the taxpayer or vice versa.

With regard to these two categories of deductible expenses, the legislation or proposed legislation must be of direct interest to the taxpayer and organization.

Further, where the taxpayer is an organization member and the organization pays or incurs expenses of the type referred to in section 3, dues which the taxpayer pays would be deductible to the extent that they are used for such purposes.

It is presumed that the remainder of the dues is likely to be deductible as ordinary and necessary business expenses. It is presumed sufficient if all the organization's legislative activity is related to the trade or business of a significant number of its members.

Two limitations would be placed under section 3 on deductions:

No deduction would be allowed for amounts paid or incurred for participation or intervention in political campaigns of any candidate.

No deduction would be allowed for expenditures to influence the general public, or segments thereof, with respect to legislative matters, elections or referendums. No deduction is intended to be allowed for expenses incurred in connection with what is usually called "grassroots" campaigns intended to develop a point of view among the public generally which in turn is directed toward the legislators.

The chamber agrees that the regulations issued in 1959 by the Treasury Department brought to a head many administrative and enforcement problems and uncertainties which have plagued both the Government and taxpayers.

But difficult as are the administrative and enforcement problems, even more important are the policy considerations involved in denying expenses with respect to legislative matters. Also, it is inconsistent to make nondeductible the expenses incurred in appearing before legislative bodies or legislators, while appearances before executive or administrative officials with respect to administrative matters, or before courts with respect to judicial matters, are deductible, where the expenses otherwise qualify as trade or business expenses, i.e., lawful expenditures.

The existing bar on deductions with respect to legislative matters must be changed. Presentations to the legislative branch should be on substantially the same footing in this respect as that with the other branches of government.

It is highly desirable that taxpayers who have information as to the impact of existing or proposed laws on their trade or business not be discouraged in making this information available. This information is necessary if citizens are to be able properly to evaluate the proposed legislation. Deduction of such expenditures by business is necessary also to determine clearly their real income for tax purposes. Making sure that others are aware of the effect of proposed legislation may be essential to the very existence of a taxpaying business.

Analyzing the content and reasoning of section 3 of H.R. 10650

The chamber believes that careful analysis of section 3 of H.R. 10650 will establish that it is neither an adequate nor proper solution to the problem which it is intended to resolve.

The chamber is in accord with the statement expressed by authors of the House report who maintain that policy considerations in the problem are paramount even to the administrative and enforcement considerations. Indeed, in this matter policy is an overriding and even overwhelming consideration.

The chamber urges that expenses incurred should be fully deductible alike, whether before executive-administrative, judicial or legislative bodies or officials, where such expenses otherwise would qualify as trade or business expenses, i.e., lawful expenditures.

Obviously, as the authors of section 3 and the chamber agree, change in the law emphatically is required here to rectify this disproportionate situation; whatever branch of government is involved, the general principle on deductions should apply. It should not be one thing for the legislative branch, and something different for the executive and judicial branches, as the existing situation admits.

Likewise, the chamber agrees that it is "desirable that taxpayers who have information bearing on the impact of present laws, or proposed legislation, on their trades or businesses not be discouraged in making this information available to the Members of Congress or legislators at other levels of government."

The chamber further heartily supports the statement by authors of the report that "The presentation of such information to the legislators is necessary to a proper evaluation on their part of the impact of present or proposed legislation."

In addition, the chamber agrees as to the difficulty in allowing trade or business expenses generally, while segregating expenses relating to legislative matters and denying deductions for them. Many expenses may be incurred primarily to inform a business itself as to the application of certain proposed legislation. But when such information also is made available to legislators, it is difficult to determine how expense allocations should be made between legislation and mere company planning. Also, where an organization is involved,

it is difficult to determine whether or not expenses involving legislation are substantial.

If anything, this is a serious underestimation of the difficulties, and it appears insufficient attention has been given to the obvious futilities involved in requiring taxpayers to undergo these difficulties as a part of compliance with the Federal taxing system. The chamber suggests the difficulties will be avoided if there is enactment of a general rule on the problem. This would have the added advantage of helping to maintain clarity in our tax laws and do away with the existing Treasury regulations which have led to the current problem.

As presently written, section 3 of H.R. 10650 would not reduce significantly the problem for the taxpayer presented by the existing situation; in some ways section 3 would serve to further complicate the taxpayer's problem.

In effect, the wording of section 3 sets up a principle: It permits deduction in direct dealings with Federal, State, and local legislators, singly or in groups; however, the wording specifically denies deductibility to the taxpayer where there is any indirect connection with these legislators.

In a democratic form of government such as ours, the chamber regards this direct-indirect distinction affecting deductibility as essentially improper.

On the other hand, the general legislative rule that would be provided on deductibility by S. 467 or H.R. 640 makes no distinctions, particularly between direct and indirect communication with legislators. These bills hold firmly to the principle that deductions should be admissible without regard as to whether or not they involve legislation. The principle would make certain that business expenses involving legislation, if otherwise ordinary and necessary, are lawful deductible expenditures. This is a clear statement of principle which a taxpayer may easily understand; it is not a principle founded upon arbitrary distinctions, such as section 3 contains.

To meet the problem created by the existing situation, a clear statement of principle is needed. In brief, its effect would be to eliminate any Federal tax on the taxpayer's right to petition legislators and their official bodies, Federal, State and local, or to make public views on issues pending before these members and their legislatures.

Establishing a policy on the right to speak out

A firm and clear legislative policy should be enacted which adequately and properly protects the rights of Federal taxpayers to speak out and speak up on legislative and constitutional issues as good public-minded citizens without being taxed for their words.

The United States is a vast country; its many diverse interests are all representative of the Nation. In this democracy, people must speak for groups locally and at State and local levels. To deny such speech, to put a tax literally upon it, is to deny the very essence of the democratic processes.

Better than most individuals, legislators know that spokesmen for groups, lobbyists, whether they work for profit or nonprofit organizations, by and large are straightforward, honorable, and intelligent.

Any policy in a democracy of taxing free speech will be seriously detrimental. With individuals, whether they be business executives, professionals or others, the existing Federal tax structure plays a large role indeed in decisionmaking. Under the current individual and corporate income tax system especially with its steeply progressive rates there is a growing sentiment that in this field we have reached, or are reaching, a point of diminishing returns which is reflected in turn in loss of potential for economic growth.

A long history supports the view that a policy of taxation which protects the right of taxpayers to speak out is encouraging to the economy and to the well-being, industry and initiative of its individual citizens. Throughout this century surely, and most particularly from the inception of the 16th amendment until 1959, it has been accepted generally that expenditures for presenting points of view were legitimate business expenditures and, consequently, deductible items. This general acceptance should now be given positive affirmation in our statutes; it should be made the law of the land.

Certainly, the existing situation is incapable of being defended. It also is all pervasive, reaching into the highest and lowest levels of government.

On the local as well as the Federal and State levels, governmental action may be of vital interest, even affecting the ability of a business to continue and its employees to retain their jobs. Today, we talk much about growth. One phase of growth is industrial development. Let us say, for example, that a community proposes growth-inspiring action. This may involve opening a new area,

provision of new or improved streets, additional sewers, more school facilities. This action all adds up in most cases, to the need for a bond issue. Facing such situations, communities seek to raise campaign funds to encourage more widespread public support. The purpose is therefore legislative, in effect. Legislative action, that is, in support of community growth and the creation of additional or improved jobs. Yet, under a literal interpretation of the existing Internal Revenue Service ruling, funds expended by businessmen or owners of firms, relative to such legislative action (a referendum, for example), would not be deductible. Obviously, continuance in effect of such a ruling puts an effective damper on community efforts toward growth; without business support of local public education for community development, community progress is jeopardized. At the very least, the cause of education for local development is seriously weakened.

Or take an example at a State level; a legislature proposes a regulatory tax, or other action. Again, expenses incurred in presenting business-employer viewpoints would not be deductible. And this remains true whether or not the viewpoint is individual, corporate, that of a chamber of commerce or trade association.

There are other implications arising from the existing situation. For example, the current Internal Revenue Service ruling, in effect, permits individual Internal Revenue agents—operating in various regions of the United States—to determine individually whether or not taxpayers are engaged in influencing legislation.

Or take the case of those who operate newspapers, radio, or television stations; all are closely involved in matters of advertising. An Internal Revenue Service agent in one place might rule this to be legitimate public relations with an advertising purpose and therefore a deductible expense. Elsewhere, however, another agent might rule—from similar evidence—that what is being done constitutes lobbying and therefore is not deductible.

In endorsing—without dissent—the bill as amended by its staff, members of the House Committee on Ways and Means emphatically expressed their favor of a general legislative rule on deductibility involving legislative or legislatively related activity.

Concluding remarks

We should remain mindful that the Constitution of the United States guarantees to citizens of this country certain rights. Men have always respected these rights—as the mark of a free people. Among these rights are those of freedom of religion, of assembly, of speech, and of freedom to petition the Government for a redress of grievances. Specifically, these four freedoms are spelled out in the first amendment to the Constitution.

Of these rights, perhaps the most important is that of freedom of petition—the right to speak out.

Strangely, it is necessary again to reaffirm this right—with proper and adequate legislation. The right to speak out has been threatened by court decisions and administrative regulations, arrived at in the absence of a firm statement of law by Congress.

It is time for Congress to set the record straight.

This can be done by enactment of a general rule respecting the deductibility of ordinary or necessary expenses in reference to legislative and legislatively related actions; that is, by declaring them to be in law as well as in fact truly admissible and lawful expenditures.

SUPPLEMENTAL STATEMENT OF THE NATIONAL ASSOCIATION OF MANUFACTURERS ON SECTION 3 OF H.R. 10650 ON TAX STATUS OF EXPENSES IN CONNECTION WITH APPEARANCES, ETC., WITH RESPECT TO LEGISLATION

The National Association of Manufacturers appreciates the opportunity to file an expanded supplemental statement on this very important, but widely misunderstood, question of the tax status of expenditures for legislative activities. It is submitted in a dual capacity. First, as a representative of the manufacturing companies making up the membership of the association, and, secondly, on behalf of the association, as an entity, since the dues payments it receives to support the services and representative voice it provides its member companies may ultimately be affected. This question, which has become so be-

clouded by confusion as to the nature of the "public policy" involved, is important to the operation of our representative form of government and congressional declaration of the public policy is urgently needed for the guidance of both the Government and affected taxpayers.

ROLE OF GOVERNMENT

Recognition of the scope of the present-day role of government—at all levels—and its impact on economic and business affairs of the Nation is essential to the formulation of a realistic and equitable public policy respecting the deductibility of amounts expended on legislative proposals bearing on business enterprises.

Our system of government is founded upon and our basic strength results from concepts of freedom: freedom to vote, freedom of expression, freedom of religion, freedom of the press, freedom of petition and the freedom from undue and unwarranted governmental restraint. The growth, expansion, and encroachment of government always involves balancing the necessity for government action for the common good against the possible impairment of some of these freedoms. Properly to achieve and maintain this balance, it is essential to representative government that freedom of speech and freedom to petition the government not only be preserved and protected but actively encouraged.

Government not only regulates business but competes with business; thus, in an era of ever-widening range of governmental activities there is a resulting impact on industry and business in particular and our economic structure in general. Consequently expenditures to provide information, whether to a legislative body or to the public generally, on matters of consequence to such business enterprises are in fact and should be treated as ordinary and necessary business expenses in the same context as are other costs of doing business such as wages, heat, light, etc. Absent such treatment, there is an effective curtailing of the right of expression by business concerns through proscription under the tax laws. This is especially important when the matters at issue involve policies or actions of the government—at all levels of the government—that can have an effect on a business enterprise and its right to do business or stay in business.

The purpose of the income tax law is to derive funds to support essential government services. The tax laws should be utilized solely for this basic purpose. The taxing power should never be used as a means of censorship; nor should it be used to establish a moral code which substitutes government judgment for the sound judgment of business management.

The question before you has two basic aspects. One has to do with the expenses of business taxpayers who participate in varying forms of legislative activities at the different levels of government as a means of protecting or preserving their economic interests. An equally important aspect involves the purposes and activities of business organizations or associations.

With the ever-expanding role and impact of government over business and economic affairs the services and information provided by such organizations have served a useful, if not essential, purpose in the structure of our complex society. The dues paid to such organizations are therefore a component of this issue.

Generally speaking, business organizations provide their members with a variety of technical reports, educational material, economic information, legislative status reports and analyses, and a representation of common interests which would otherwise not be available or would be prohibitive in cost. This cost factor is especially an element of consideration in the case of small business firms.

The banding together of persons to promote or protect common business interests through multipurpose organizations is a legitimate function that is encouraged by an express policy of Congress providing tax exemption for such organizations. The complexities of our legal, economic, and governmental structure have made the joining together, either in business or labor union organizations, a necessity in order to present a common spokesman for the views and interests of the members. Legislative activities and the dissemination of information on legislative developments are only one aspect of the services provided by business associations but these are important functions. To directly or indirectly proscribe such activties by tax sanctions on the dues paid to such organizations would be an effective means of silencing an integral part of our free enterprise society.

PRESENT LAW AND REGULATIONS

We have sought briefly to put this issue in perspective by referring to the present day ever-expanding role of government and how these issues are interwoven with the interests of business taxpayers and their organizations. The present regulations, with the inconsistent and admittedly uneven application which give rise to this issue warrant analysis.

The Internal Revenue Code has since its inception permitted a deduction for income tax purposes for ordinary and necessary expenses paid or incurred in connection with carrying on a trade or business. The Congress, through the Internal Revenue Code, has never specifically prohibited a deduction of such business expenses incurred for legislative or "lobbying" purposes, for the "promotion or defeat of legislation or propaganda relating thereto."

Prior to the enactment of the 1954 Revenue Code, Treasury Department regulations had dealt with this subject through provisions of administrative regulations which related to the deductibility of charitable contributions by individuals and corporations. The Supreme Court of the United States, in the case of *Textile Mills Corp.* v. *Commissioner*,[1] upheld application of these regulations, which were promulgated under the charitable contributions provisions of the code, to ordinary and necessary business expenses. Subsequently, in 1959 the Supreme Court rendered a further decision in companion cases which again sustained application of these administrative regulations. In *Cammarano* v. *U.S.* and *F. Strauss & Sons, Inc.* v. *U.S.*,[2] deductions were disallowed for amounts paid by the taxpayers to business organizations for the purpose of defeating proposals submitted to the voters of the respective States in initiative measures. The Supreme Court determined that the amounts were "ordinary and necessary" and met the requirements for deductibility as business expenses; nevertheless the Court upheld application of the regulations so as to bar the deduction of such expenses as being for "lobbying" of legislative purposes. The Supreme Court recognized that there were no statutory limitations on deductibility of such expenses but stated that the administrative regulations had acquired the force and status of law as they "constitute an expression of a sharply defined public policy" in light of the doctrine of statutory reenactment.

Whether such public policy has been sharply defined is a basic point of contention. It is a fundamental rule of law that public policy can be formulated only by the Congress. But Congress has never defined public policy in connection with business expenditures for legislative activities.

The regulations which were approved in the *Cammarano* case were those relating specifically to charitable contributions[3] and not to deductions under section 162 of the Internal Revenue Code. However, based upon the rationale of the *Cammarano* case, the Internal Revenue Service, on September 19, 1959, published proposed regulations under the ordinary and necessary business expense section (section 162) dealing with the deductibility of so-called lobbying expenses. Public hearings were held and the testimony of many spokesmen for business, labor unions, and professional groups were in accord that the regulations as so proposed were unwarranted, not based upon sound public policy and were so ambiguous in language as to be impossible of effective application. Notwithstanding this reaction, the regulations were published in final form on December 29, 1959, to become effective immediately and set forth the current enforcement policy of the Treasury Department on so-called lobbying expenditures.

Such regulations[4] provide that expenditures for "lobbying purposes, for the promotion or defeat of legislation, for political campaign purposes (including the support of or opposition to any candidate for public office), or for carrying on propaganda (including advertising) related to any of the foregoing purposes are not deductible from gross income."

The regulations further provide that dues or other payments which qualify as business expenses if paid to an organization such as a labor union or trade association are deductible in full unless a "substantial part" of the organization's activities consist of the activities enumerated in the above quotation.

While recognizing that precise and absolute definition of terms may not be attainable, we respectfully suggest that broad and ambiguous terms such as "lobbying purposes," "promotion or defeat of legislation," "propaganda," and

[1] 314 U.S. 326 (1941).
[2] 358 U.S. 498 (1959).
[3] Regulations 118, chs. 39.23(o)-1(f) and 39.23(q)-1(a).
[4] Regulations, ch. 1.162-15(c) (1), (2), (3).

"substantial part" are impossible of evenhanded administrative application by the Government and cannot constitute adequate guides for affected taxpayers. The Internal Revenue Service appears to have recognized its inability to define such terms with the result that the enforcement of this regulation has led to uneven application by various revenue agents. This is true with respect to the direct activities of the taxpayer, as well as the tax status of dues paid by a taxpayer to an organization of which he is a member. This fact has been recognized by the Treasury Department in a letter of February 26, 1960, to the chairman of the House Ways and Means Committee, which stated, in part, as follows:

"Legislative reappraisal of the present law and the proposed legislation will necessarily take account both of the practical administrative problems which now exist in this area as well as those which might develop under the proposed modification. Present law, particularly as it relates to the dues paid to trade associations, institutional advertising, and the grassroots type of lobbying expenditure, is difficult for the Internal Revenue Service to administer. It is difficult, *if not impossible*, for the Internal Revenue Service, with its present manpower, to 'censor' or 'monitor' lobbying of the advertising or grassroots variety. Indeed, it has been the general position of the Internal Revenue Service that it is not only impracticable but undesirable to attempt to substitute the judgment of the tax collector for that of the businessman in determining the character of the advertising appropriate for the business as long as it may reasonably be expected to increase the patronage of the business.

"It is only realistic to recognize that many of the expenditures in these areas which have passed the permissible borderline under the existing regulations have doubtless escaped detection in the audit of tax returns. Unless the Internal Revenue Service were to devote disproportionate manpower from its basic collection function to policing this difficult and controversial area, *it would seem that uniform enforcement would be an unattainable goal*. If there were to be a modification or relaxation of the existing rules, therefore, it would appear to be a desirable objective that it should help reduce, rather than aggravate, the practical administrative problems which are inherent in this area, and at the same time reduce to a minimum whatever inequalities among some taxpayers result from unavoidable imperfections in the administration of the law.

* * * * * * *

"The present rules have created problems of enforcement since it is difficult to 'police' advertising campaigns and expenditures by unions or trade associations in an effort to identify degrees of attempts to influence legislation and, with respect to taxpayers generally, it is difficult to make certain that expenditures definitely in the lobbying area are not in fact deducted in the guise of legal expenses, advertising, or the like." [Italics supplied.]

This administrative enforcement problem was forcefully and effectively set forth by the House Ways and Means Committee when it unanimously recommended to Congress, in July 1960, that remedial legislation be enacted in this area.[5]

This enforcement problem was again reviewed by the Committee on Ways and Means as a part of its hearings and studies which resulted in H.R. 10650. The Ways and Means Committee Report[6] also pointed out the anomoly under the present law that expenses incurred in appearing before legislative bodies are not deductible, while appearances before executive or administrative officials or before the courts are deductible where the expense is otherwise qualified as being related to the trade or business of the taxpayer. The Ways and Means Committee specifically noted:

"Your committee believes that the present bar on deductions with respect to legislative matters must be modified to place presentations to the legislative branch of Government on substantially the same footing in this respect as that with the other two coordinate branches of Government."

The Supreme Court, in the *Cammarano* case, also sought to justify the conclusion reached on the basis of the legal theory of statutory reenactment. This theory of reenactment is based upon the presumption that the Congress, in reenacting a statute, does so with the implied knowledge of administrative interpretations placed upon the law. The Congress, so the theory goes, having this implied knowledge, would have changed such administrative construction if it had deemed it to be erroneous or in conflict with its intent. However, as the

[5] H. Rept. 2077, 86th Cong., 2d sess.
[6] H. Rept. 1447, 87th Cong., 2d sess., p. 17.

Supreme Court has recognized in another decision,[7] reenactment * * * is an unreliable indicium at best."

In disposing of a constitutional question raised in the *Cammarano* case, the Supreme Court indicated that persons engaging in legislative activities must pay therefor without "public subvention." While not relevant to the question before the committee, it is contended by some that to allow business concerns to deduct legislative expenditures made for a business purpose would be to authorize a public subsidy for such expenditures. Such contention misconceives basic principles. It seemingly proceeds on the theory that all business income is Government property and that relinquishment of any degree of ownership of such income is a grant or gift of Government money to the taxpayer. The true principle, of course, is just the opposite, that is, all business income is private property subject to taking only through due process of law.

It is a basic principle of our income tax law that all ordinary and necessary expenses for the earning or production of income are to be recognized as an offset or deduction in determining net income subject to tax. Are not expenses to preserve the right to stay in or do business essential to the prdouction of income for a business enterprise? As a matter of logic, there is not more subvention or subsidy for legislative expenses than there is in the case of other lawful business expenditures.[8] There is certainly no congressional policy to justify such statement with respect to the tax status of legislative expenditures.

These cases and anlysis of the shifting and inconsistent legal theories of what is or is not public policy in connection with certain tax deductions point up the need for congressional disposition of this issue.[9]

ANALYSIS OF PROPOSED LEGISLATION

Section 3 of H.R. 10650, as passed by the House of Representatives, moves toward a solution of the problem but we respectfully submit that it does not come to grips with the full scope of the problem.

Section 3 permits deduction by a taxpayer for expenses which are ordinary and necessary to the conduct of his business in connection with appearances before or communications to committees or Members of the Congress or of a legislative body of a State or political subdivision of any State or possession of the United States with respect to legislation or proposed legislation of direct interest to the taxpayer. The bill also permits deduction of sums spent in connection with communication by a taxpayer and an organization of which he is a member with respect to legislation or proposed legislation of direct interest to the taxpayer and such organization.

This proposal recognizes and clarifies an important aspect of the problem as reviewed above. However, some of the limitations on the above general rule, set forth in section 3 of the bill, are unrealistic and would permit continuation of much of the confusion and uneven enforcement existing under the present situation.

Under the first limitation no deduction could be had for expenses in connection with political campaigns of candidates for public office. With this we concur and recognize that it is based upon an expressed public policy of the United States, as evidenced by the Congress in the Corrupt Practices Act.[10]

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[7] *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955).

[8] An illustration of the inconsistencies of the purported public policy and unsound philosophy underlying the present law can be found in related Supreme Court cases reaching different results. In *Commissioner* v. *Sullivan*, 356 U.S. 27 (1958), the taxpayer ran an illegal bookmaking operation but the Supreme Court permitted a tax deduction for rent and wages on the theory that if they were to deny deduction "we would come close to making this type of business taxable on the basis of its gross receipts, while all other business would be taxable on the basis of net income. If that choice is to be made, Congress should do it." Equally striking is *Lilly* v. *Commissioner*, 343 U.S. 90 (1952), where the Court found that the taxpayer-optician could deduct as "ordinary and necessary" the amounts paid to physicians as kickbacks on the price of eyeglasses. The Court stated that the ethics of this practice were questionable but there was not frustration of a declared public policy.

[9] The Federal Regulation of Lobbying Act, 2 U.S.C., chs. 261–270, is the only expression of congressional policy on so-called lobbying. This law merely requires that those who engage in defined activities must only register with the Congress. To suggest that legislative activities which are otherwise lawful under express congressional policy but are against public policy for tax purposes is incongruous.

[10] 18 U.S.C., sec. 610.

The limitation to which we take exception is that which disallows deductions "in connection with any attempt to influence the general public of segments thereof, with respect to legislative matters, elections, or referendums."

These sweeping limitations, in our view, are arbitrary in character and inconsistent with the bill's general principle of permitting deductions for legislative activities. We can see no logical reason for permitting taxpayers, or their organizations, to communicate views to legislative bodies on pending or proposed legislation and at the same time to deny tax deductibility for expenses in connection with informing the public. For example, in both the initiative and referendum the voters are performing a legislative function—they are the legislators, as the following definiton and explanation shows:

"The initiative is the power reserved to the people to propose laws and amendments to the Constitution and to enact or reject the same at the polls, generally independent of the legislature; the referendum is the power reserved to the people at their own option to approve or reject at the polls any act of the legislature. The referendum as thus defined is limited to the power of the people to approve or disapprove legislative acts at their own option and excludes the power to approve or reject legislation which has been referred to them by the legislative assembly. *Both the initiative and referendum are legislative in character.*" [11] [Emphasis added.]

If the initiative and referendum are "legislative in character" and the expression of views to legislators is recognized, we deem it illogical and inconsistent to limit the deductibility of expenses for informing the electorate. The *Cammarano* case, cited previously is an illustration of how important the issues involved in initiative matters can be to taxpayers. The economic effect on taxpayers involved in these cases was fully recognized by the Supreme Court and yet the basis of disallowances was upheld on grounds of purported public policy. If an informed electorate is an enlightened electorate, we submit that a public debate of the issues and dissemination of information on these issues should not be arbitrarily precluded by operation of sanctions under the tax law.

Another inconsistency in section 3 is that expenditures for "any attempt to influence the general public, or segments thereof" on legislative matters would be disallowed. The report of the Ways and Means Committee indicates that it is aimed at "what is usually called grassroot campaigns intended to develop a point of view among the public generally which in turn is directed toward the legislators." On a technical basis the use of phrases such as "any attempt," "general public, or segment thereof" and "legislative matters" are so incapable of precise definition that their use can only result in continued uneven administration, and certainly do not provide uniform criteria for the guidance of affected taxpayers. However, more important is the inconsistency in concept of precluding tax deductibility for expenses of this type.

In a recent case involving the Sherman Act, the Supreme Court stated a principle of law that seemingly creates a double standard in that the right of petition is to be treated one way under the antitrust laws and differently under the tax law. In this case the Supreme Court said:

"The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." [12]

With this statement we heartily concur. However, we find that under the present tax laws there appears to be just such imputation and a practical invasion of such freedoms so far as businesses are concerned.

In this same antitrust decision, the Supreme Court went on to say:

"The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors."

Thus, the double standard. For tax purposes the right of businesses to inform their representatives in government is proscribed for practical purposes. However, in the instance of an antitrust statute, which also expresses public policy, it is deemed to be a preservation of a basic freedom for businesses to inform their

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[11] 28 Am. Jur. sec. 2, p. 437.

[12] *Eastern RR. Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

representatives of their views on matters governmental. Such double standard is difficult to reconcile.[13]

There is a further double standard that points up the discriminatory aspects of the present situation. It is common knowledge that the executive branch of the Government extensively engage in "lobbying" activities. Almost every executive department in the Government has a high-level official charged with responsibility for congressional liaison. The activities of these officials in support of the various administration programs are well known. The views of these officials, and their colleagues, are solicited by congressional committees and Members. Are we to have the unfair situation whereunder only tax supported Government views are to be heard and the business taxpayer with an economic interest in legislative issues is to be curtailed through tax sanctions.

It is also well known that the Government also is in direct competition with proprietary business. This direct competition is supported by Government funds raised through taxation.

An instance of such competition, as well as the discriminatory treatment, is the disallowance of advertising costs to certain privately owned public utilities in their efforts to inform the public of the direct competition they are suffering from the Government. These investor-owned companies are not permitted to deduct such advertising expenses because, according to the Internal Revenue Service, the subject matter is one involving a "political controversy." Thus such companies are discriminated against for engaging in constitutionally protected freedom of expression.

Had such competition come from other private sources, there is little question that the advertising expenses involved would have been found deductible costs of doing business. Where the Government conducts business in a proprietary capacity, it would seem only fair that they do so in full competition in the marketplace. And yet, under the disposition reached in this illustration, the Treasury Department appears to be aiding a government sponsored function to the detriment of its private competitors by disallowing advertising expenditures as deductions. Thus, again, we find a double standard.

We submit that the Congress should thoroughly review the underlying public policy, as well as the tax philosophy involved in such discriminatory distinctions. It should be recognized that free speech or the free expression of views by business enterprises can be effectively limited or denied through the exercise of the taxing power. This principle was well stated in a recent decision by the Supreme Court of the United States[14] wherein the Court stated:

"It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. * * * It is settled that speech can be effectively limited by the exercise of the taxing power. *Grosjean* v. *American Press Co.*, 297 U.S. 233. To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that because a tax exemption is a 'privilege' or 'bounty' its denial may not infringe speech. * * * [The] denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech."

Or, as Mr. Justice Black phrased it in his concurring opinion in this case:

"California, in effect, has imposed a tax on belief and expression. In my view, a levy of this nature * * * constitutes a palpable violation of the first amendment, which of course is applicable in all its particulars to the States. * * * I am convinced that this whole business of penalizing people because of their views and expressions concerning government is hopelessly repugnant to the principles of freedom upon which this Nation was founded and which have helped to make it the greatest in the world."

In the *Cammarano* decision, the taxpayers sought to rely on the *Speiser* case, but this contention was summarily rejected by the Court on the basis of the following rationale:

"Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code. Nondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not aimed at the suppression of danger-

[13] For a more extensive discussion respecting the "double standard" see speech of Congressman Thomas M. Pelly of Washington, 107 Congressional Record, Mar. 20, 1961, p. A1910.

[14] *Speiser* v. *Randall*, 357 U.S. 513 (1958).

ous ideas.' 357 U.S., at 519. Rather, it appears to us to express a determination by Congress that since purchased publicity can influence the fate of legislation which will affect, directly or indirectly, all in the community, everyone in the community should stand on the same footing as regards its purchase so far as the Treasury of the United States is concerned."

We respectfully submit that this rationale is fallacious and is not sound as a matter of tax policy with respect to businesses which can exercise the right of petition only through methods of communications which require expenditure of funds. In support of our contention that this statement by the Court does not represent sound tax policy we submit not our justification but the answer to the argument, as advanced by the House Committee on Ways and Means in its recent report in connection with H.R. 10650, wherein the committee stated:

"It also is desirable that taxpayers who have information bearing on the impact of present laws, or proposed legislation, on their trades or businesses not be discouraged in making this information available to the Members of Congress or legislators at other levels of government. The presentation of such information to the legislators is necessary to a proper evaluation on their part of the impact of present or proposed legislation. The deduction of such expenditures on the part of business also is necessary to arrive at a true reflection of their real income for tax purposes. In many cases, making sure that legislators are aware of the effect of proposed legislation may be essential to the very existence of a business. *The deduction of legislative expenses for those who incur them for personal reasons is not proposed here, since such expenses are not deductible with respect to administrative or judicial presentations and have no bearing on the determination of true taxable income of a business.*" (H. Rept. 1447, p. 17.) [Emphasis added.]

Thus, the Congress should not be misled by emotional and superficially persuasive arguments that everyone in the community should stand on the same footing for tax purposes insofar as this tax issue is involved. It has been made abundantly clear in the Internal Revenue Code that business taxpayers are permitted many deductions that are not permitted taxpayers not engaged in a trade or business and eligible for deductions under section 162 of the Internal Revenue Code. For example, the costs of heat, light, wages, insurance, and related items of expense are fully deductible if incurred in a trade or business but are nondeductible to a taxpayer not so engaged. The real discrimination, as is noted earlier, and as the Ways and Means Committee report points out, is that a business taxpayer can deduct his cost of presenting views affecting his business to the courts or administrative agencies but is illogically precluded a tax deduction for the presentation of similar views to legislative bodies or its members.

Ordinary and necessary business expenses are such that they must be based upon the business judgment of the taxpayer and not the hindsight judgment of government officials. Further, the effective administration of the tax laws can prevent any abuses which may arise in this area, for it is fundamental that such expenditures must not only be ordinary and necessary but must also be reasonable in amount, related to the business of the taxpayer and lawful in purpose. Disallowance of certain categories of expenses based upon a nebulous "good" or "evil" standard distorts the basis of the internal revenue laws, encourages discriminatory enforcement, and raises serious constitutional questions.

If a business taxpayer deems it appropriate to attempt to inform the public, or segments thereof, and such expenses meet the other criteria for tax deductibility, they should be recognized and permitted, regardless of the media by which such taxpayer makes his views known and to whom those views are directed.

CONCLUSION

The fact that the House Ways and Means Committee has twice reported and the House has now passed legislation in this area is a significant recognition of the importance with which that body views section 3 of H.R. 10650. The solution adopted and now before this committee is not a full solution of the problem.

Clearly, the time has come for the Congress to formulate public policy for the guidance of the Treasury Department, the Internal Revenue Service, and all affected taxpayers. The time is past for improvising with regulations unsupported by an expression of congressional policy. The Congress should act forthrightly to insure that the right to communicate with the elected representatives in government is not infringed or abridged in any way by operation of the tax laws.

An adequate legislative solution of this problem is embodied in the proposal cosponsored by your colleagues, Senators Hartke and Kerr (S. 467). This proposal, or a proposal similar to that approved by the Committee on Ways and Means in July 1960, H.R. 7123 of the 86th Congress, or H.R. 640, and companion bills of the 87th Congress are more effective legislative remedies than section 3 of H.R. 10650. They would make clear the congresssional intent that no tax penalties should be imposed as a deterrent to the exercise of the right lawfully to participate in the legislative processes of government, local, State, or Federal.

WISCONSIN POWER & LIGHT CO.,
Madison, Wis., April 18, 1962.

In re section 3 of H.R. 10650

Hon. HARRY F. BYRD.
Chairman, Senate Finance Committee,
Washington, D.C.

DEAR MR. CHAIRMAN: We respectfully request that this letter be entered in the record of the hearings now being held on H.R. 10650.

We urge that section 3 be modified to make it clear that the cost of advertising incurred by a taxpayer in the ordinary course of his business is deductible, Federal income taxwise, even though the advertisement may have some general reference to pending or prospective legislative matters.

It appears quite anomalous to us that certain expenses may be deductible if incurred in connection with appearances before and submission of communications to legislative committees or individual members, and also incurred in communication of information between taxpayer and an organization of which he is a member, while on the other hand other expenditures which may be incurred making the taxpayers' views known to legislators through public advertising will not be deductible. Consistency would seem to require the allowance of both types of expense as tax deductions and we urge a consistent treatment of this matter, and that section 3 be broadened so as to permit deduction in either view.

Furthermore it appears that the proposed section will present administrative problems. It would appear that it would require the Internal Revenue Service to determine or monitor what expenses are made for appearances before, communications to, individual members or committees of legislative bodies, and what expenses are made for communication between the taxpayer and an organization of which he is a member with respect to legislation as contrasted with expenses for advertising which advertising may have some attempt to influence the general public or segment thereof with reference to legislative matters.

There can be no well-defined line. Furthermore the apportionment of expense items as between the purposes for which the expenditure may be permitted and the purposes for which it may not be permitted, certainly will be difficult and most probably would require frequent or annual negotiations to determine the proper allocation.

It would seem to us that a modification of the section so as to make it clear that cost of advertising incurred by a taxpayer in the ordinary course of business should be deductible, even though some part of the cost of advertising might have some general reference to pending or legislative matters. Of course, we recognize that advertising or expenditures relating to participation in political campaigns or on behalf of any public office would not be deductible in any case.

Sincerely,

CARL J. FORSBERG, *President.*

TRANSPORTATION ASSOCIATION OF AMERICA,
Washington, D.C., April 16, 1962.

Hon. HARRY F. BYRD,
Chairman, Committee on Finance,
U.S. Senate, Washington, D.C.

MY DEAR MR. CHAIRMAN: Your committee currently has under active consideration H.R. 10650, entitled "Revenue Revision Act of 1962." On behalf of the board of directors of the Transportation Association of America I would like to urge the enactment of section 3 of the bill, pertaining to appearances, etc., with respect to legislation.

We believe the background of this section and the justification for its inclusion in H.R. 10650 is clearly set forth in the report of the House Committee on Ways and Means and will be further amplified by supporting witnesses scheduled to testify before your committee on April 17, 1962.

We think that our position endorsing such provision would be better understood by a brief description of TAA. This association is a nonprofit research and educational organization devoting its efforts to the development and implementation of sound national policies which will assure the Nation of a strong transportation system under private ownership and operation. TAA is comprised of representative users, investors, and air, freight forwarder, highway, oil pipeline, rail, and water carriers, all of whom work cooperatively to carry out this basic objective.

Our policy positions are developed by eight special permanent advisory panels of experts in the user, investor, and carrier fields. They are thereafter reviewed and acted on by our 100-man board of directors.

The end result of such activities is that by the process of study, discussion, and compromise we are frequently able to resolve existing differences between carrier modes or among the users, investors, and common carriers as to problems affecting the national public interest. These views are then presented in public hearings to congressional committees. You can readily understand and appreciate the value of such a process in facilitating the enactment of needed legislation, otherwise impeded by differing and conflicting views within the transportation industry.

Our principal concern is that the Treasury Department regulations adopted in 1959 have subjected to question the possible disallowance for Federal income tax purposes of membership dues payable to associations. Our feeling is not only that the legislative activities under challenge by the Treasury Department are legitimate and proper but also that such dues should not become subject to possible disallowance by the Internal Revenue Service.

Accordingly, we urge your committee to report favorably section 3 of H.R. 10650 for recommended approval by the U.S. Senate and respectfully request that this letter be made a part of the official record of the hearings thereon.

Sincerely yours,

HAROLD F. HAMMOND.

SOUTH CAROLINA ELECTRIC & GAS CO.,
Columbia, S.C., April 23, 1962.

Hon. HARRY F. BYRD,
Chairman, Senate Finance Committee,
New Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: I am writing you this letter concerning section 3 of H.R. 10650 (deductibility of expenses incurred in connection with legislation). I respectfully ask that this be made part of the permanent record of the hearings on this measure.

While this section of the bill provides that ordinary and necessary business expenses may be deducted, certain instances in computing Federal income taxes would obviously obviate an allowance for a deduction for any amount paid or disbursed in an attempt to influence the general public, or any given portion thereof, on elections, referendums, or matters before State or the National Legislatures.

Certainly, this company concurs wholeheartedly in the proposal to allow as a tax deduction ordinary and necessary business expenditures involved in appearances before, or statements to, committees of individual members of legislative bodies in relation to legislature of direct interest to the taxpayer, and the other deductions enumerated in the bill. However, we believe that the bill does not go far enough. We feel strongly that code section 162 should provide that the costs of advertising intended to present the taxpayer's viewpoint to the public or any segment thereof on proposed legislation should be deductible as an ordinary and necessary business expense. We feel that the same should be true of expenses involved in what, for want of a better term, is commonly known as lobbying.

In its letter of February 26, 1960, to the chairman of the Ways and Means Committee, the Treasury Department pointed out a fact of which we are all thoroughly aware: the growing impact of Government in all its subdivisions upon

all individuals and businesses. Surely, it is not only proper, but vitally necessary that the taxpayer fully present his views to his elected representatives, or the appointees thereto, on issues which vitally affect him. I have had no little experience in this field, and know that quite often legislative officials have said that they find such expositions on proposed legislation helpful. I feel particularly strongly about this inasmuch as I represent an industry which is closely regulated by both Federal and State Governments, and which is vigorously and keenly competed with by tax-free rural electric cooperatives and agencies of the State and Federal Governments. Quite naturally, we wish to make our case known to our customers and the voters. There is no difference between this particular facet of the public versus private power controversy and two grocery stores putting the respective merits of their products and services before the public.

At the present high tax rate, industry and business could be well-nigh silenced if it is not accorded tax treatment of the kind I herein request. Further, the public would be denied vital information in a controversy which, we believe, goes a long way toward deciding the fate of our private enterprise system—the system which has undergirded our political freedom. This is particularly important when our opponents are able to advertise—and they do it lavishly—with income dollars upon which practically no tax dollars are paid. We, therefore, earnestly request that your committee modify section 3 of H.R. 10650 so that expenses of this type may be deductible as ordinary and necessary business expenses.

Cordially yours,

ARTHUR M. WILLIAMS, JR.

NEW YORK FARM BUREAU,
Ithaca, N.Y., April 23, 1962.

Senator HARRY F. BYRD,
Chairman, Senate Finance Committee,
Senate Office Building, Washington, D.C.

DEAR SENATOR BYRD: We are somewhat disturbed over some of the provisions of H.R. 10650, the proposed 1962 Revenue Act. Since this bill has passed the House, the Senate now has an opportunity to correct some of its disturbing features.

Among those which bothers us mostly in New York State are section 2 having to do with investment credit, section 17 on cooperative tax treatment, and section 19 with regard to withholding taxes from interest and dividend payments.

We believe that the credit for investment against taxes due rather than against income subject to taxation, might have some undesirable effects. Certainly in the beginning it would be discriminatory against those who for example had kept their plants in modern condition as against those who had delayed expenditures. The latter would be rewarded for such delays. We can also visualize investment for things of lesser importance because of its resulting in practically no net cost to the investor. We believe that the best method to promote investments is to have a tax structure which will permit an income out of which investments can be made.

Most farmers are members of one or more cooperatives organized for the marketing of agricultural products or purchasing of supplies needed in the production of agricultural products. Farmers are keenly interested in having successful cooperative organizations and having tax laws which will promote cooperatives and at the same time be equitable. Double taxation at the cooperative level and also at the patron level is not in the best interest of all concerned. It is best that all cash and noncash distributions be taxable at the patron level rather than at the cooperative level. However, it is important that responsibility for paying tax on taxable distributions should be firmly established in the statute.

The third matter on which we wish to comment has to do with the proposed withholding tax on dividends and interest. We can see no validity for such a proposal, particularly in view of the data processing equipment that Internal Revenue Service is getting into operation. It would be a tremendously expensive method of tax collection, the burden of which would be placed on private industry. It would also be a great burden on our senior citizens, many of whom depend to a considerable extent on income from interest and dividends. In

most instances such persons would have little or no legal tax obligation but they would hesitate to go through the difficult procedures to obtain a refund and would thus be deprived of income that they need and that is rightfully theirs. This section of the proposed bill should be deleted without question.

Yours sincerely,

C. K. BULLOCK,
Director, Commodity Department.

(Whereupon, at 4:25 p.m., the committee adjourned, to reconvene at 10 a.m., Wednesday, April 18, 1962.)

33-291 O - 76 - 129

REVENUE ACT OF 1962

HEARINGS

BEFORE THE

COMMITTEE ON FINANCE

UNITED STATES SENATE

EIGHTY-SEVENTH CONGRESS

SECOND SESSION

ON

H.R. 10650

AN ACT TO AMEND THE REVENUE ACT OF 1954 TO PROVIDE A CREDIT FOR INVESTMENT IN CERTAIN DEPRECIABLE PROPERTY, TO ELIMINATE CERTAIN DEFECTS AND INEQUITIES, AND FOR OTHER PURPOSES

APRIL 24 AND 25, 1962

PART 6

Printed for the use of the Committee on Finance

U.S. GOVERNMENT PRINTING OFFICE

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REVENUE ACT OF 1962

TUESDAY, APRIL 24, 1962

U.S. SENATE,
COMMITTEE ON FINANCE,
Washington, D.C.

The committee met, pursuant to recess, at 10 a.m., in room 2221, New Senate Office Building, Senator Harry F. Byrd (chairman) presiding.

Present: Senators Byrd, Kerr, Smathers, Douglas, Talmadge, McCarthy, Williams, and Curtis.

Also present: Elizabeth B. Springer, committee clerk; and Colin F. Stam and L. N. Woodward of the Joint Committee on Internal Revenue Taxation.

The CHAIRMAN. The committee will come to order.

The first witness is Mr. Randolph W. Thrower of the American Bar Association.

Senator TALMADGE. Mr. Chairman, may I say Mr. Thrower is a constituent of mine and friend, and it is a pleasure indeed to welcome him to this committee.

Mr. THROWER. Thank you, Senator.

The CHAIRMAN. You may proceed, sir.

STATEMENT OF RANDOLPH W. THROWER, CHAIRMAN, SECTION OF TAXATION, AMERICAN BAR ASSOCIATION; ACCOMPANIED BY RICHARD H. APPERT, CHAIRMAN, COMMITTEE ON TAXATION OF FOREIGN INCOME, AMERICAN BAR ASSOCIATION, AND ARTHUR B. WILLIS, CHAIRMAN, SPECIAL COMMITTEE ON EXTENSION OF WITHHOLDING ON DIVIDENDS AND INTEREST

Mr. THROWER. May name is Randolph W. Thrower; my address is 1500 First National Bank Building, Atlanta, Ga. I am appearing here on behalf of the American Bar Association in my capacity as chairman of the section on taxation of that association.

With your permission I would like to have here with me two of the committee chairmen of the section. On my right is Richard H. Appert of the firm of White & Case of New York City, who is the chairman of our committee on taxation of foreign income, and on my left is Mr. Arthur B. Willis of the firm of Willis, MacCracken & Butler of Los Angeles, Calif., who is chairman of our section's special committee on extension of withholding on dividends and interest.

Each has directed an intensive study of certain portions of the bill under consideration and can be of assistance in answering questions in these areas.

APPEARANCES WITH RESPECT TO LEGISLATION

We are pleased to see within the bill a provision for the deduction of business expenses legitimately incurred in making presentations before legislative bodies.

In 1958, one of my predecessors, Lee I. Park of the firm of Hamel, Morgan, Park & Saunders of Washington, D.C., testified before the Ways and Means Committee in support of an American Bar Association recommendation to this effect.

Our recommendation was confined to expenses incurred in connection with appearances before, or submission of statements to, committees of Congress or of any State or local legislative body.

Such presentations, on the one hand, are often essential to the economic livelihood of a business, and, on the other hand, they provide information that is often valuable to the legislators in making their decisions. Where the presentation is for the benefit of the business, and is not personal, we see no policy that would be served by disallowing the deduction of such legitimate business expenses.

Entertainment expenses and the expense of public campaigns would not be includible and thus these areas of possible abuse would not be involved.

The provisions of the House bill, I do need to point out, expand somewhat upon the American Bar Association recommendation but are not inconsistent with its basic premises. The American Bar proposal is limited to presentations to committees of Congress or local bodies having legislative powers, while the House bill also covers presentations to individual legislators and presentations to or by organizations of which the taxpayer is a member.

REVENUE ACT OF 1962

HEARINGS

BEFORE THE

COMMITTEE ON FINANCE

UNITED STATES SENATE

EIGHTY-SEVENTH CONGRESS

SECOND SESSION

ON

H.R. 10650

AN ACT TO AMEND THE REVENUE ACT OF 1954 TO PROVIDE A CREDIT FOR INVESTMENT IN CERTAIN DEPRECIABLE PROPERTY, TO ELIMINATE CERTAIN DEFECTS AND INEQUITIES, AND FOR OTHER PURPOSES

APRIL 30, MAY 1 AND 2, 1962

PART 8

Printed for the use of the Committee on Finance



U.S. GOVERNMENT PRINTING OFFICE

82190 WASHINGTON : 1962

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington 25, D.C. - Price $1.75

STATEMENT OF DAVID FLOWER, JR., CHAIRMAN, TAX COMMITTEE, ELECTRONIC INDUSTRIES ASSOCIATION

Mr. FLOWER. Mr. Chairman, Senators, my name is David Flower, Jr. I am director of tax affairs of the Raytheon Co. I am appearing today to testify in behalf of the Electronic Industries Association and its tax committee, of which I am chairman.

APPEARANCES, ET CETERA, WITH RESPECT TO LEGISLATION, SECTION 3

Section 3 of H.R. 10650 would provide a deduction for the costs (including dues to organizations) directly related to appearances before and communications with a legislative body or a committee or individual members thereof, provided such costs are otherwise ordinary and necessary business expenses. As passed by the House, this section takes at best a faltering and inadequate step toward correcting a punitive administrative holding that has been privileged to assume the force of law.

The report of the Committee on Ways and Means accompanying H.R. 10650 recognizes specifically the desirability that taxpayers who have information bearing on the impact of legislation on their trades or business not be discouraged in making this information available to legislators. It also recognizes that the deduction of such expenditures on the part of business is necessary to arrive at a true reflection of their real income for tax purposes. Communications on legisla-

tive issues cannot be so narrowly confined or so significantly impeded if we are to have laws responsive to the opinions and the balanced interests of informed citizens. This response will be encouraged materially by revising the scope of section 3 to allow the deduction of all ordinary and necessary expenses lawfully incurred in supporting or opposing or otherwise influencing legislation in the Congress or in a State or local legislative body or in any submission of proposed legislation to the voters.

Such provisions are contained in S. 467, cosponsored by Senators Hartke and Kerr in January 1961. The Electronic Industries Association strongly urges that the language contained in this bill be substituted for section 3 of H.R. 10650.

The CHAIRMAN. Thank you very much.

The committee will recess until 2:30.

(Whereupon, at 1:15 p.m., the committee recessed, to reconvene at 2:30 p.m. this same day.)

REVENUE ACT OF 1962

HEARINGS

BEFORE THE

COMMITTEE ON FINANCE

UNITED STATES SENATE

EIGHTY-SEVENTH CONGRESS

SECOND SESSION

ON

H.R. 10650

AN ACT TO AMEND THE REVENUE ACT OF 1954 TO PROVIDE A CREDIT FOR INVESTMENT IN CERTAIN DEPRECIABLE PROPERTY, TO ELIMINATE CERTAIN DEFECTS AND INEQUITIES, AND FOR OTHER PURPOSES

MAY 10 AND 11, 1962

PART 10

Printed for the use of the Committee on Finance



U.S. GOVERNMENT PRINTING OFFICE

82190 WASHINGTON : 1962

For sale by the Superintendent of Documents, U.S. Government Printing Office
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STATEMENT OF HON. DOUGLAS DILLON, SECRETARY OF THE U.S. TREASURY

Secretary DILLON. Thank you, Mr. Chairman.

I appreciate this additional opportunity to discuss with you the proposed Revenue Act of 1962. I would also like to suggest some changes in the bill. We have followed closely the suggestions, objections, and recommendations which have been offered in the extensive testimony which has been presented to your committee since April 2.

As the hearings have proceeded, we have held numerous meetings with persons interested in the bill, including some of the witnesses who appeared before the committee as well as representatives of other interested groups. We have worked with them to make technical improvements and to evaluate possible policy changes.

Today, I should like to outline a number of changes which are responsive to matters raised during the hearings and which we believe would improve the bill. These changes seem to us to be clearly called for. Undoubtedly further discussion in executive session will reveal other ways in which the bill can be improved. It is our desire to work closely with you and the staff of the joint committee to produce the most effective, the fairest, and the most practicable bill that can be developed.

Senator HARTKE. Mr. Secretary, with regard to section 3, which relates to deductions for expenses incurred in an attempt to express an opinion or to affect the outcome of legislation, I introduced a bill on this, S. 467, and our attempts to obtain any type of expression of opinion from the Treasury have resulted in failure.

After two letters to which we did not have a reply and after several requests, we were informed that no expression of opinion would be given, plus the fact that in your testimony here the only expression by the Treasury Department is the one-word sentence in regard to section 3, "the Treasury is opposed to this substantial change in the law."

I wonder, before we go into executive session, whether I could have some elaboration on this point for the benefit of the committee, because several Senators have indicated to me they feel that something along this line is at least desirable, and that this is a substantial change in the law as interpreted prior to the Internal Revenue decision about 1959.

Secretary DILLON. I just want to make the record clear. The Internal Revenue did not change anything. There was a court decision which emphasized the prior rule.

Senator HARTKE. That is right.

Secretary DILLON. And which may have had some effect on the practice.

Now, the administration feeling on this is that they feel this is a very important substantive question.

There were no hearings on it whatsoever in the House. That has been corrected to the extent that there has been public testimony here.

But when this matter was put into the bill and passed in the House, there had been no hearings on the matter. We had not been permitted to make our public statement, and there had been no chance for those who were opposed to this provision to state their views.

Now, what it does is, for the first time, to allow the Government to pay some of the expenses of trying to influence legislation, which is not solely a revenue question. It is really a very deep policy question.

And the views we express are not just Treasury views. I do not think there are any fundamental dollar revenue aspects involved here as far as the provision passed by the House is concerned. We just felt that this was the type of thing that should be very thoroughly considered and should preferably not be included in an overall bill. If Congress wished to pass a bill of this nature, it would be better to consider it separately, pass it separately, and allow the President the privilege of considering his attitude on it separately.

Now, we did feel much more strongly about some of the provisions for deducting advertising expenditures and things of that nature, because that could lead to certain advertising which could be very controversial. It would lead into the question, Would advertising to

defeat right-to-work laws be deductible? Also, for instance, would advertising by liquor companies to defeat local options be deductible?

It would raise all sorts of highly emotional issues which, we thought, were undesirable and should not be raised. That is the reason why we have opposed this at this time.

We do not think that the way the law is operating now is really going to be any great handicap to anybody. The Internal Revenue Service is trying to work out each case on its merits. It has decided that some portion of the dues paid should not be deductible by those who paid them in only a relatively small number of cases involving national organizations. If the amount of lobbying runs 5 percent or less, the Service generally drops the matter as de minimis and makes no effort to make any part of the dues nondeductible.

There are institutions or groups which are formed for the specific purpose of opposing or promoting a particular law or particular type of legislation or where almost all their expenses are lobbying, and in those cases the claimed deductions would be substantial.

That is the general reasoning we have followed, and I have no objection at all to putting it forward.

We felt, in effect, this was breaking a precedent of not permitting the deduction of expenses to influence legislation which has been on the books for a long time and which we think generally is sound. Of course, enactment of section 3 would set up some serious preferences, because nonbusiness individuals who may be very interested in particular legislation could get no deductions for their appearances if the deductions should be limited to business organizations.

That was our general philosophy.

Senator HARTKE. I recognize the point about the emotional issues, but also it would affect such things as trying to encourage referendums for a bond issue for the building of civic improvements and things of that sort just as easily.

Secretary DILLON. Sure. It is very complex; it cuts across many matters.

Senator HARTKE. The Treasury Department does not have any special interest in doing anything to those people who consume liquor, I do not believe, and they permit the expenses of advertising for certain alcoholic beverage concerns as a business deduction, so I do not believe that we should insert emotional issues as an objection when there are certain things which can be put on an emotional basis upon almost any part of this bill.

I think probably the yachts and things of that sort would be emotional issues which have been inserted, too, as well as on the savings and loan thing, the aspect that this is a new tax, which is an emotional issue.

But the Boggs bill was reported favorably by the House, by the 86th Congress, after hearings there, and this is not——

Secretary DILLON. I do not think there were any hearings.

Senator HARTKE. Were there not hearings in the 86th Congress?

Secretary DILLON. No, it was reported without hearings.

Senator HARTKE. I am not trying to do anything without hearings; but I am trying to get an expression of opinion from the Treasury.

Let me ask you this. You speak about individuals as far as preference to corporate or business structures over individuals. This is true

in almost every type of appearance for a business; for example, if they appear before an administrative group, they are permitted to deduct this as a business expense.

Secretary DILLON. That is correct.

Senator HARTKE. But if an individual appears before an administrative group in regard to his own personal rights, this is not a deductible item.

So this is not a departure in this respect.

Secretary DILLON. No, except as it bears on legislation. There it is entering a new field.

Senator HARTKE. And the truth of it is there are legislative matters which can have as material an effect upon the outcome and the determination of a business as can an administrative decision or a lawsuit, and this is a discrimination placed upon the activities of groups or individuals and on a business basis which distinguishes between administrative expenses those expenses to effect an administrative decision, whether it be to effect an increase in rates before the Interstate Commerce Commission or to ask for special consideration with regard to the Tariff Commission, and all these matters are presently considered as deductible items, and provides that the businesses have a right to appear there.

All I wanted really for the record was some expression from the Treasury other than a blanket opposition.

Secretary DILLON. I would say our opposition is much stronger to broadening this to advertising than it is to the provisions in the House bill. But even those provisions, we thought, were unnecessary. There were no hearings there. We feel that on a matter as important as this there should be full hearings, public hearings, in each body, and a full chance for consideration.

Also, as I mentioned, I think that the administration feels that this is something that could be better presented separately so that the President could consider his position on it; it should be passed by the Congress separately from other legislation.

Senator HARTKE. But, as I understand the position of the administration, it is that they would like to have it eliminated and have no further consideration of it in any separate way or otherwise.

Secretary DILLON. No.

We would like to have it eliminated from this bill, and if the Congress then cares to enact it, the President would consider what he would like to do about it.

Senator HARTKE. In other words, we should not anticipate any separate initiative from the administration on this?

Secretary DILLON. Oh, not initiative, no; that is correct.

Exhibit 159: Excerpts From Senate Report 87–1881 (Revenue Act of 1962)

Calendar No. 1843

87TH CONGRESS
2d Session

SENATE

REPORT
No. 1881

REVENUE ACT OF 1962

REPORT

OF THE

COMMITTEE ON FINANCE

UNITED STATES SENATE

TO ACCOMPANY

H.R. 10650

A BILL TO AMEND THE INTERNAL REVENUE CODE OF 1954 TO PROVIDE A CREDIT FOR INVESTMENT IN CERTAIN DEPRECIABLE PROPERTY, TO ELIMINATE CERTAIN DEFECTS AND INEQUITIES, AND FOR OTHER PURPOSES

TOGETHER WITH

INDIVIDUAL, ADDITIONAL, DISSENTING, SUPPLEMENTAL AND MINORITY VIEWS

AUGUST 16 (legislative day, August 15), 1962.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
87490 WASHINGTON : 1962

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington 25, D.C. - Price $1.25

Calendar No. 1843

87TH CONGRESS, 2d Session } SENATE { REPORT No. 1881

REVENUE ACT OF 1962

AUGUST 16 (legislative day, AUGUST 15), 1962.—Ordered to be printed

Mr. KERR, from the Committee on Finance, submitted the following

REPORT

together with

INDIVIDUAL, ADDITIONAL, DISSENTING, SUPPLEMENTAL AND MINORITY VIEWS

[To accompany H.R. 10650]

The Committee on Finance, to whom was referred the bill (H.R. 10650) to amend the Internal Revenue Code of 1954 to provide a credit for investment in certain depreciable property, to eliminate certain defects and inequities, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

III. APPEARANCES, ETC., WITH RESPECT TO LEGISLATION

(Sec. 3 of the bill and sec. 162(e) of the code)

A. Reasons for provision

Present law allows deductions for income tax purposes for ordinary and necessary expenses paid or incurred in carrying on a trade or business. No mention, however, is made in the statute of expenses incurred in making appearances, submitting material, or communicating with respect to legislative matters. However, Treasury regulations in effect prior to the enactment of the 1954 Code disallowed deductions for expenditures for such purposes (regulations 118, secs. 39.23(o)–1(f) and 39.23(q)–1(a)).

In 1959, the Supreme Court handed down two companion decisions upholding the validity of these regulations, *Cammarano* v. *U.S.* and *F. Straus & Sons, Inc.* v. *U.S.* (358 U.S. 498 (1959)). The Court held that although the amounts expended for legislative matters were "ordinary and necessary"—in fact essential to the very survival of the taxpayer's business—nevertheless they were not deductible because the regulations barred the deduction of this particular type of expense.

The Court recognized that the statute contained no provisions specifically supporting the regulations, but stated that they had acquired the force of law by reason of congressional reenactment of the underlying statute.

Following the *Cammarano* decision, the Treasury Department promulgated new regulations relating to deductions incurred with respect to legislative matters. These regulations, while following the general rules set forth in the earlier regulations, for the first time stated specifically that several different classes of expenditures are to be disallowed as deductions. For example, the new regulations require the disallowance of a deduction for the portion of dues and other payments to any organization, a "substantial part" of the activities of which consist of lobbying to the extent that such amounts are "attributable to" these activities. Similarly, the regulations now state that expenditures for the promotion or defeat of legislation include expenditures for the purpose of attempting to influence members of a legislative body, directly or indirectly, by urging or encouraging the public to contact the members.

The regulations issued by the Treasury Department in 1959 brought to a head many administrative and enforcement problems and uncertainties which have plagued both the Government and taxpayers. The difficulty in allowing trade or business expenses generally, but isolating expenses relating to legislative matters and denying deductions for them, stems in part from the difficulty in segregating and classifying such expenses. This is a form of detailed recordkeeping to which taxpayers are not accustomed. Moreover, in the case of many expenses which may primarily be incurred to inform the business itself as to the application of certain proposed legislation, when such information is also made available to legislators it is difficult to determine how an allocation of the expense should be made between legislation and mere planning of the company. Moreover, in the case of an organization, a determination must also be made as to whether the expenses of this type are substantial—a term which involves a difficult line of demarkation.

More important than the administrative and enforcement problems, however, are the policy considerations involved in denying expenses with respect to legislative matters. It appears anomalous, for example, that expenses incurred in appearing before legislative bodies or before legislators are not deductible while appearances before executive or administrative officials with respect to administrative matters, or before the courts with respect to judicial matters, are deductible where the expenses otherwise qualify as trade or business expenses. Your committee believes that the present bar on deductions with respect to legislative matters must be modified to place presentations to the legislative branch of Government on substantially the same footing in this respect as that which obtains in the other two coordinate branches of Government.

It also is desirable that taxpayers who have information bearing on the impact of present laws, or proposed legislation, on their trades or businesses not be discouraged in making this information available to the Members of Congress or legislators at other levels of Government. The presentation of such information to the legislators is necessary to a proper evaluation on their part of the impact of present or proposed legislation. The deduction of such expenditures on the

part of business also is necessary to arrive at a true reflection of their real income for tax purposes. In many cases making sure that legislators are aware of the effect of proposed legislation may be essential to the very existence of a business. The deduction of legislative expenses for those who incur them for personal reasons is not proposed here, since personal expenses generally are not deductible with respect to administrative or judicial presentations and have no bearing on the determination of true taxable income of a business.

B. Comparison of committee amendment with House provision

Your committee has retained the House provision relating to appearances, etc., with respect to legislation. The only change made is the addition of one category of deductible expenses. Your committee's amendment provides, in addition to the categories specified in the House bill, for the deduction of expenses incurred by a taxpayer in carrying on a trade or business if the expenses are in direct connection with the communication of information between the taxpayer and employees or stockholders with respect to legislation, or proposed legislation, of direct interest to the taxpayer. As in the case of the categories referred to in the House bill, expenses of this type, in order to be deductible, may not be for participation or intervention in political campaigns on behalf of candidates for public office or in connection with attempts to influence the general public (or segments thereof) with respect to legislative matters, etc.

C. General explanation of provision

The bill adds a new subsection (sec. 162(e)) to the provision of present law relating to the deduction of trade or business expenses. It provides that certain types of expenses incurred with respect to legislative matters are to be deductible if in all other respects they qualify as trade or business expenses.

The expenses which may be deducted are divided into three categories. The first category relates to expenses in direct connection with appearances, submission of statements or sending of communications. These appearances, statements or communications may be presented either to committees or individual Members of Congress or to committees or individual members of State or local governmental legislatures. The second category of expenses which may be deducted are those in direct connection with the communication of information between the taxpayer and an organization of which he is a member. The third category of expenses which may be deducted are those in direct connection with the communication of information between the taxpayer and an employee or stockholder. This communication of information may be either from the organization, employee or stockholder to the taxpayer or vice versa. In the case of all three categories of expenses referred to above, in order for the expense item to be deductible, it must be concerned with legislation or proposed legislation of direct interest to the taxpayer (and to the organization in the second case). Thus, the expenses may not be in connection with legislative matters such as nominations, etc., but rather must be in connection with specific legislation or proposals for legislation.

The bill also provides that where a taxpayer is a member of an organization and the organization pays or incurs the expenses of the types referred to above on behalf of its members, the dues which the

taxpayer pays to the organization in carrying on his trade or business are to be deductible to the extent they are used for such purposes. The remainder of the dues is likely already to be deductible as an ordinary and necessary business expense. Of course, the dues to an organization may be deductible although not all of the organization's legislative activity is connected with each specific member's trade or business. It is sufficient if all of the organization's legislative activity is related to the trade or business of a significant number of the members.

The bill provides two limitations on the deductions of the above-specified expenses for the specified types of legislative activity. It is not intended by your committee that any deduction be allowed for an amount paid or incurred for participation or intervention in any political campaign for any candidate. Of course, this includes participation or intervention in political campaigns in opposition to a candidate as well.

Your committee's bill further provides that no expense deduction is to be allowed for expenditures to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums. Thus, except to the extent allowed by existing law, no deduction is intended to be allowed for expenses incurred in connection with what is usually called "grassroot" campaigns intended to develop a point of view among the public generally which in turn is directed toward the legislators. However, your committee does not intend that this limitation should have any effect upon the deductibility of dues, contributions or other payments to organizations whose activities consist primarily of gathering and disseminating factual information, data and statistics. For example, a nonprofit organization would not be affected by the limitation if it were organized and operated for the propose of studying governmental affairs, Federal, State, or local (which might include analysis of legislation or proposed legislation) and of publishing and distributing to its members and the public factual reports and information on such governmental affairs. Such factual reports might contain data which could be used by subscribers and others to promote or defeat legislation, but so long as the organization itself did not engage in lobbying activities to promote or defeat legislation, payments to such organization will continue to be deductible to the same extent as under existing law.

Nothing in this provision is intended to permit the deduction of entertainment expenses. Such amounts, if deductible at all, must meet the tests set forth in section 4 of the bill, explained below, without regard to this provision.

This provision is to be effective with respect to taxable years beginning after December 31, 1962.

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SECTION 3. APPEARANCES, ETC., WITH RESPECT TO LEGISLATION

Except for the addition by your committee of a provision relating to stockholders and employees, this section is identical to section 3 of the bill as passed by the House. Subsection (a) of section 3 amends section 162 (relating to trade or business expenses) by redesignating subsection (e) as subsection (f) and by inserting after subsection (d) a new subsection (e) relating to appearances, etc., with respect to legislation.

Paragraph (1) of the new subsection (e) provides that the deduction allowed by subsection (a) of section 162 is to include all of the following ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business: (1) expenses in direct connection with appearances before, submission of statements to, or sending communications to, the committees, or individual members, of Federal, State, or local legislative bodies with respect to legislation or proposed legislation of direct interest to the taxpayer, (2) expenses in direct connection with communication of information between the taxpayer and an organization of which he is a member with respect to legislation or proposed legislation of direct interest to the taxpayer and to such organization, (3) that portion of dues with respect to any organization of which the taxpayer is a member which is attributable to the expenses of the activities above described in this paragraph which are carried on by such organization, and (4) expenses in direct connection with communication of information between the taxpayer and an employee or stockholder with respect to legislation or proposed legislation of direct interest to the taxpayer. Paragraph (1) also provides that the expenses referred to therein are to include, but not be limited to, the cost of preparing testimony and traveling expenses described in subsection (a)(2) of section 162.

Paragraph (2) of the new subsection (e) provides that the provisions of paragraph (1) are not to be construed as allowing the deduction of any amount paid or incurred (whether by way of contribution, gift, or otherwise)—

(1) for participation in, or intervention in, any political campaign on behalf of any candidate for public office, or

(2) in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums.

Subsection (b) of this section of the bill provides that the amendments made by subsection (a) are to apply to taxable years beginning after December 31, 1962.

SUPPLEMENTAL AND MINORITY VIEWS OF SENATORS PAUL DOUGLAS AND ALBERT GORE

The Deduction for Certain Lobbying Expenses of Taxpayers With Business Income

Section 3 would permit the deduction of certain lobbying expenses by taxpayers with business income. This would depart from a salutary principle which has been part of the income tax law since World

War I. It would provide unwarranted tax reduction where it is least needed for reasons which are specious. It would introduce novel distinctions into the tax law, producing new requirements difficult for the Internal Revenue Service to administer. The specific language in which the deduction is cast contains ambiguities which will create continuing uncertainty as to its exact meaning, and, most important, the relationship of this provision to the whole process by which our citizens seek to influence the enactment of legislation at all levels of government was not adequately considered. Section 3 should be deleted from the bill.

Under existing law the costs of efforts to influence legislation are not deductible, a rule applicable to *all* taxpayers. Whatever the motive for a citizen's efforts to influence legislation, he now bears the whole cost of that effort himself. No part of the expense can be passed on to the Federal Government through an income tax deduction. In the constant competition for legislative favor and results at National, State, and local levels, the Federal Treasury stands neutral—and properly so.

Section 3 would change all that. It would amend section 162 of the Internal Revenue Code of 1954, the section creating the general authority for deduction of the ordinary and necessary expenses of business operation. Section 3 would add a new subsection specifically authorizing deduction of lobbying expenses in certain categories by taxpayers with business income. Only those taxpayers with business income would receive any benefit. All others would still be subject to the existing rule of no tax benefits for lobbying, a result which follows necessarily from incorporation of the amendment in section 162 and one which is specifically spelled out by the House committee report.

Some specific typical examples will bring this into sharper focus. Suppose a measure is being considered, as many have been, involving a proposed change in the standards or testing procedures for food, drugs, or cosmetics. The costs of presenting the views of drug manufacturers and distributors would be deductible. The cost of presentations on behalf of consumers or of disinterested professional or technical advisers would not be. Or suppose that a State legislature is debating a measure designed to decrease stream pollution. Manufacturers who would be adversely affected by its enactment could deduct the cost of opposition. Members of the public interested in pure water for drinking or for recreational uses would have to finance their support of the measure entirely from their own pockets. Or, at the local level, a business owner of a piece of real estate could seek advantageous amendment of the local zoning ordinance, deducting the cost of his presentation before the local city council. The owners of nearby residences would not receive this help from the Federal Treasury in preparing the exhibits and briefs necessary for effective opposition.

These are discriminations impossible to justify. Can anyone seriously contend that consideration of legislative proposals affecting business taxpayers is seriously handicapped by absence or weakness of expression of business viewpoints? Is there any evidence that business taxpayers, individually or collectively, are now deterred from expressing themselves on these subjects by the present rule of tax neutrality which permits no deduction for lobbying expenses? To

ask these questions is to answer them. Of all viewpoints on legislative proposals, those of business are consistently the most ably represented before the Congress and before State and local legislative bodies. Why then should the cost of lobbying activities of taxpayers with business income be singled out for this preferential tax reduction? No adequate reason has been given.

Any discrimination at all among citizens in the exercise of their constitutional right to petition their representatives is patently undesirable. Discrimination by preferential tax deduction is magnified as the amounts spent for these purposes increase. Modern efforts to influence legislation cover a wide range of techniques, some of which are very costly. One can send a letter to his Senator for 4 cents. However, to stimulate tens of thousands to do so requires the expenditure of large amounts running sometimes into the hundreds of thousands, even millions, of dollars. But all this is well known. It has been thoroughly documented many times.

The application of section 3 would not be confined to nominal amounts. It would permit the deduction of some very large sums. In addition to provision for deduction of the costs involved in direct contacts with legislators (personal calls and visits, appearances before committees or statements filed with them), the cost of efforts to influence legislation indirectly are also made deductible in some instances. The costs of communications to organization members and to shareholders and employees have all been blanketed in.

When section 3 is applied to today's scene, we find that it will authorize giant corporations to deduct the cost of communicating the views of management officials to hundreds of thousands, even millions, of shareholders and employees, for the purpose of influencing them with respect to current controversial legislative proposals. To use a painfully familiar example, section 3 would authorize deduction of the cost of campaigns designed to produce a flood of letters opposing withholding on dividend income.

Under existing law these sums are not properly deductible—and never have been. To permit deduction now would shift a very large proportion of these heavy costs to the Federal Treasury, a disguised subsidy for which there would be no justification.

The effects of such subsidized efforts to influence legislation indirectly would not be confined to the recipient members, shareholders, and employees. The views expressed and their source would frequently come to the attention of families and friends of the recipients, thereby broadening the scope of the influence subsidized by the Federal Treasury. Of course, the benefits of section 3 as they would apply to these broadcast efforts to influence legislation can only benefit very large organizations. Small business taxpayers, as well as nonbusiness taxpayers, would have little or no use for it and could well suffer from its use where their interests on legislative matters are opposed to those who could take advantage of it.

True, not all lobbying costs of business taxpayers would be made deductible by section 3. The bill purports to create limitations which will restrict the kind of expenses for which a deduction can be claimed. Thus, to qualify for the deduction, the legislative proposal must be of "direct interest" to the taxpayer. In addition, specific provisions deny deductions for political campaign expenses or for efforts "to influence the general public, or segments thereof." How-

ever, a close inspection raises genuine doubt as to the precise meaning and application of these restrictions. They may, in fact, prove largely illusory.

Thus, one might ask, What subjects are not of "direct interest" to a large corporation? Any measure involving a tax or a change in the regulation of business or the marketing of securities or foreign trade or the terms of employment or labor relations or the monetary system will have some impact on every substantial business enterprise. Is it intended that the cost of testimony or statements or communications to shareholders or employees on this entire range of subjects is to be deductible? Similarly, can the prohibition against deductions for political campaign purposes be really effective? Granted that the cost of a folder urging shareholders to vote for Jim Darkwater will not be deductible, what of the cost of a folder urging a position on the principal issue dividing Darkwater from his opponent Bob Cleanriver? Can issues and the candidates be separated so easily? It is doubtful. Section 3 thus could make slightly veiled political contributions deductible. The benefit would not be universal though. To return for a moment to the anti-water-pollution measure used as an example before, suppose Darkwater is against it and Cleanriver is for it. The former's supporters could deduct the cost of their literature discussing the antipollution measure (and thus their support of Darkwater); supporters of Cleanriver could not.

Obviously, congressional memories are very short. For at least a century Senators and Representatives have regularly inveighed, individually and collectively, against lobbyists and their activities. The need for substantial disclosure by lobbyists, particularly in financial respects, has long been recognized. When a person or organization becomes a lobbyist, he is required to register as such and thereafter to report quarterly his expenditures for these purposes. In spite of these safeguards, every few years some lobbyists become so bold and their overreaching so bad that a special inquiry is required. A prime example was the creation in the 84th Congress of the Senate Special Committee To Investigate Political Activities, Lobbying, and Campaign Contributions. Its report states graphically the kinds of abuses which occur and the large sums of money available to be spent on efforts to influence legislation. Sugar quota bills attract lobbyists like flies and, like flies, their activities are not widely admired. The Senate Foreign Relations Committee is currently beginning an investigation of another group of lobbyists, an inquiry which has grown in large part out of concern for their lucrative financial arrangements. Nor are problems with lobbyists confined to Washington. Their influence on State legislators and their sometimes questionable methods in State capitols is notorious.

When projected against all this experience, section 3's proposed financial bonanza for one group of lobbyists and their employers seems ironic in the extreme, if not downright cynical.

There is no challenge here to lobbying per se. It is unquestionably legitimate. A constitutionally protected right of our citizens, it often supplies useful information and reactions on pending legislation. However, it would be foolish to exalt it unduly for these reasons. At best, lobbying is a mixed blessing for it is almost always exclusively concerned with self-interest rather than the broad public interest. Fortunately, section 3 presents only a narrow problem, viz., whether

or not the lobbying done by one segment of our society—taxpayers with business income—should be entitled to support from the Federal Treasury.

A number of arguments are made in favor of this measure. Some of them have a surface plausibility, but on close analysis none of them holds water. The issue is actually a simple one. We begin with a longstanding rule that all taxpayers, business and nonbusiness, who seek to influence the work of legislative bodies, National, State, or local, pay their own expenses in full without assistance from the Federal tax system. This neutral posture of the tax law is a healthy one and should be defended and strengthened. Legislation affects all our citizens. It is entirely suitable that all who seek to influence that legislation, directly or indirectly, should be treated alike. The expenses of all should be on the same footing as far as the Treasury of the United States is concerned. The only issue here is whether or not to depart from this principle of neutrality and equality. Plainly, the case for such a change has not been and cannot be proved.

Exhibit 160: Excerpts From H.R. 10650 (Revenue Act of 1962) as Reported by Senate Finance Committee

Calendar No. 1843

87TH CONGRESS
2D SESSION

H. R. 10650

[Report No. 1881]

IN THE SENATE OF THE UNITED STATES

APRIL 2, 1962
Read twice and referred to the Committee on Finance

AUGUST 16 (legislative day, AUGUST 15), 1962
Reported by Mr. KERR, with amendments

[Omit the part struck through or enclosed in black brackets and insert the part printed in italic]

AN ACT

To amend the Internal Revenue Code of 1954 to provide a credit for investment in certain depreciable property, to eliminate certain defects and inequities, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE, ETC.

(a) SHORT TITLE.—This Act may be cited as the "Revenue Act of 1962".

SEC. 3. APPEARANCES, ETC., WITH RESPECT TO LEGISLATION.

(a) IN GENERAL.—Section 162 (relating to trade or business expenses) is amended by redesignating subsection

(e) as subsection (f) and by inserting after subsection (d) the following new subsection:

"(e) APPEARANCES, ETC., WITH RESPECT TO LEGISLATION.—

"(1) IN GENERAL.—The deduction allowed by subsection (a) shall include all the ordinary and necessary expenses (including, but not limited to, traveling expenses described in subsection (a) (2) and the cost of preparing testimony) paid or incurred during the taxable year in carrying on any trade or business—

"(A) in direct connection with appearances before, submission of statements to, or sending communications to, the committees, or individual members, of Congress or of any legislative body of a State, a possession of the United States, or a political subdivision of any of the foregoing with respect to legislation or proposed legislation of direct interest to the taxpayer, ~~or~~

"(B) in direct connection with communication of information between the taxpayer and an organization of which he is a member with respect to legislation or proposed legislation of direct interest to the taxpayer and to such organization, *or*

"(C) in direct connection with communication of information between the taxpayer and an employee

or stockholder with respect to legislation or proposed legislation of direct interest to the taxpayer,

and that portion of the dues so paid or incurred with respect to any organization of which the taxpayer is a member which is attributable to the expenses of the activities described in subparagraphs (A) and (B) carried on by such organization.

"(2) LIMITATION.—The provisions of paragraph (1) shall not be construed as allowing the deduction of any amount paid or incurred (whether by way of contribution, gift, or otherwise)—

"(A) for participation in, or intervention in, any political campaign on behalf of any candidate for public office, or

"(B) in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums."

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 1962.

Exhibit 161: Excerpts From Senate Debate on H.R. 10650 (Revenue Act of 1962)

REVENUE ACT OF 1962

Mr. MANSFIELD. Mr. President, I wish to compliment and commend the distinguished Senator from Texas for the vigorous and courageous leadership he has shown in behalf of the postwar GI bill of rights. He has fought hard for the bill down through the years, and he was successful in getting it through the Senate in a previous Congress.

However, in view of the situation which has developed, I should like at this time to lay the pending bill aside so that I may discuss it once again with the policy committee when it next meets, and also with the distinguished minority leader, the Senator from Illinois, to see if we might possibly arrive at an agreement to limit debate on the bill at a future date.

I therefore move that the Senate proceed to the consideration of Calendar No. 1843, and that it be made the pending business.

Mr. JAVITS and Mr. MILLER addressed the Chair.

Mr. MANSFIELD. I yield to the Senator from New York.

Mr. JAVITS. A parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. JAVITS. May this be done without a vote?

Mr. MANSFIELD. It can. It can be done by unanimous consent.

The PRESIDING OFFICER. It may be done by unanimous consent.

Mr. MANSFIELD. I ask unanimous consent that the pending bill be laid aside and that the Senate proceed to the consideration of Calendar No. 1843.

The PRESIDING OFFICER. The clerk will state the bill by title for the information of the Senate.

The CHIEF CLERK. A bill (H.R. 10650) to amend the Internal Revenue Code of 1954 to provide a credit for investment in certain depreciable property, to eliminate certain defects and inequities, and for other purposes.

The PRESIDING OFFICER. Is there objection to the present consideration of the bill?

Mr. JAVITS. Has the pending bill been laid aside?

The PRESIDING OFFICER. A unanimous-consent request is pending that the Senate proceed to the consideration of the tax bill.

Mr. COOPER. Reserving the right to object, may I ask the distinguished majority leader whether he intends to bring up the veterans bill again this afternoon?

Mr. MANSFIELD. Not this afternoon. I intend to discuss it further with the policy committee and also wish to confer with the minority leader to see if it is possible to reach an arrangement under which the bill could be brought up later, under a limitation of debate.

Mr. COOPER. Not this week?

Mr. MANSFIELD. Not this week. There is nothing tricky about the request to lay the bill aside.

Mr. JAVITS. We do not mean to imply that there ever is anything tricky on the part of the majority leader. Does that include Monday as well?

Mr. MANSFIELD. It includes all of next week, as well.

Mr. COOPER. I am sure the majority leader knows that we do not mean to imply that there is anything tricky.

Mr. MANSFIELD. I am certain about that. I thought there might be a question about the request on that point. "Tricky" was the wrong word. No subterfuge is involved.

Mr. JAVITS. I voted for the bill when it was before the Senate previously. It was unfortunate that it was brought up quite suddenly, without an opportunity for study or preparation. I say that even though I was one of those who was in favor of the bill.

Mr. MANSFIELD. I have been waiting for that allegation or charge to be made.

Mr. JAVITS. I make no charge.

Mr. MANSFIELD. The fact that it came on so suddenly—and it did come on suddenly—is due to the fact that when bills are reported out of committees, they are taken up by the policy committee. The policy committee then gives the leader authority at his "discretion" to bring up a bill. What is done in effect, is that the question of scheduling is passed from the appropriate committee to the policy committee to a single individual. He looks at the calendar and wonders what he can bring up. He finds that half the bills are being objected to by Democrats and the other half by Republicans, and sometimes by both.

So he searches for something that he can bring up, first determining whether there is a Senator in the city who is either for or against it. Then the bill is called up. He is then told that the bill has been called up suddenly. Of course it has. However, what can he do under these circumstances?

There was more difficulty attached to this bill than I thought there would be when I called it up. I am glad the Senator from Texas has had an opportunity once again to show his deep interest and initiative in connection with this bill.

Mr. JAVITS. Mr. President, will the Senator yield?

Mr. MANSFIELD. I yield.

Mr. JAVITS. I wish to compliment the Senator from Montana.

Mr. MANSFIELD. The Senator always does that. I appreciate it.

Mr. JAVITS. I commend him and compliment him for his traditional fairness. The Senator has displayed again what is in his character, and I thank him for it.

Mr. PROUTY. Mr. President, I should like to point out that the substitute I intend to offer for the Cooper amendment is not ready. I am deeply concerned about the lack of progress which has been made with the higher education bill. It was my purpose to incorporate my substitute for peacetime veterans' benefits in the general higher education bill, which we all know is at present stymied in conference. I am very much in favor of this legislation and I hope it will be enacted. I believe also that the peacetime veterans should be given a preference over nonveterans where student assistance is concerned. I regret that I did not have an opportunity to offer my amendment today but I understand the circumstances, and I applaud the majority leader for deferring action in view of those circumstances.

Mr. MANSFIELD. This is one of the consequences of taking bills up suddenly. I am sure the Senator understands my problem, just as I am sure I understand why he has not had an opportunity to propose his amendment.

Mr. YARBOROUGH. Mr. President, will the distinguished majority leader yield?

Mr. MANSFIELD. I yield.

Mr. YARBOROUGH. First, I thank the majority leader for the privilege of having made a start on the consideration of the bill. The majority leader told me he was hopeful that amendments could be disposed of rapidly and that there would be an opportunity to finish the consideration of the bill today, before other pressing measures got in the way.

I ask the majority leader if it is not probable that the Senate will return to the consideration of the bill at this session. I understand that a Senator on our side of the aisle has an amendment, in addition to the one which the distinguished Senator from Vermont [Mr. PROUTY] says he intends to offer. Will it be possible for the Senate to return to the consideration of the bill later, in the hope that there will be time in a busy schedule to complete action on the bill?

Mr. MANSFIELD. That is my hope.

Mr. President has my request been agreed to?

The PRESIDING OFFICER. Is there objection to the request of the Senator from Montana that the Senate proceed to the consideration of House bill 10650?

There being no objection, the Senate proceeded to consider the bill, which had been reported from the Committee on Finance with amendments.

Mr. MANSFIELD. Mr. President, what is the pending business?

The PRESIDING OFFICER. Calendar No. 1843, H.R. 10650.

REVENUE ACT OF 1962

Mr. MANSFIELD obtained the floor.

Mr. PROXMIRE. Madam President, will the Senator from Montana yield to me? I should like to ask him a question.

The PRESIDING OFFICER (Mrs. NEUBERGER in the chair). Does the Senator from Montana yield?

Mr. MANSFIELD. Yes.

Mr. PROXMIRE. Madam President, in this morning's Wall Street Journal is an article on page 3 relating to the tax bill. I should like to read a portion of it to the Senator from Montana, the majority leader, and ask him if it is true.

The article states:

Senate Democratic leaders plan to employ harsh parliamentary tactics against liberal efforts to restore some of President Kennedy's recommendations to the Senate Finance Committee's version of the tax-revision bill.

The article further says:

In an attempt to complete Senate action on the measure before the Labor Day weekend, the Democratic leadership—acting with the tacit acquiescence of the administration—will try to table, or kill, most, if not all of the Kennedy proposals being offered by liberal Democratic Senators as amendments to the bill. Because a tabling motion is not debatable, this tactic tends to accelerate action by the slow-moving Senate. Debate on the measure began Saturday afternoon and will continue today.

The question by the Senator from Wisconsin is: Has there been any plan, or has there been any agreement, that the leadership would move to cut off debate on the amendments?

This Senator feels very strongly, as he indicated by his discussion of the bill on Saturday last, that this is a tremendously important bill which goes right to the heart of our whole economic system.

I think it is a bill which will require very protracted and detailed debate. I think it would be most unfortunate if the Senate, which is known as the greatest deliberative body in the world, should decide to cut off debate, and particularly debate on amendments designed to restore the proposals of the administration originally made with respect to the tax bill.

Mr. MANSFIELD. No; no agreement has been made. I do not know anything about the story to which the Senator refers, which he states is carried in the Wall Street Journal.

However, so far as the leadership is concerned, it would not foreclose the use of tabling motions on occasion. It is within the rules of the Senate to use them. It has not been decided what procedure we shall follow.

I wish to state, so long as the Senator has raised the question, that he has written me a letter to the effect that he would object to any unanimous-consent request seeking to limit debate on this bill. If that is the case, and if there will be no limitation, then of course the leadership will feel free at any time to move to table motions or amendments.

Mr. PROXMIRE. Madam President, will the Senator yield for a minute?

Mr. MANSFIELD. If I may continue, I have not had any conversations with anybody in the administration about this. I do not intend to. What will be done on this side will be done on my own responsibility.

Mr. PROXMIRE. I say to the Senator that there is absolutely no intention on the part of this Senator, or on the part of any Senator of whom I know, to prevent a final vote on the bill. We all want a vote on the bill, one way or the other, up or down. This is the reason why this Senator chose Saturday afternoon to make his long speech. In that way I did not delay the bill 1 minute.

On the other hand, I do feel, in all fairness, there should be as much time as possible for a thorough and complete debate on each of these very, very important amendments. If the consideration of the bill does take a week, or even more than a week, it seems to me it would be a week very well spent.

Mr. MANSFIELD. I assure the Senator that if tabling motions are offered they will be offered only after there is a reasonable amount of debate on the amendments being offered.

Mr. PROXMIRE. I hope that we can get together on a reasonable period, so that there will be an opportunity for thorough discussion, particularly in view of the fact that there is absolutely no intent to return the bill to the committee or to delay the bill for weeks or to set off the vote until 1963. The intention is only to make sure that there is ample time for all views to be discussed. Members on the other side of the aisle feel fully as strongly as Members on this side of the aisle in respect to the bill.

Mr. GORE. Madam President, will the Senator from Montana yield?

Mr. MANSFIELD. I yield.

Mr. GORE. I should like respectfully to suggest to the able and distinguished majority leader that if the time arrives when no other Senator seeks recognition to speak on an amendment, a motion to table would be unnecessary because then the Senate could at that time vote on the merits of the amendment. It would seem to me that a vote directly upon acceptance or rejection of the amendment would be far preferable to a tabling motion.

I recognize that there are circumstances under which the majority leader would feel justified in resorting to a motion to lay on the table. I am also confident that he recognizes it is the most severe legislative restriction within the rule book. I would hope that he would lean over backward to permit votes on amendments up or down on the merits rather than on motions to table.

I offer that only as a friendly suggestion, and as a Member of the Senate who loves this arm of the Government and likes to see it proceed to consider measures on the basis of substance and merit.

Mr. MANSFIELD. I thank the Senator.

Mr. WILLIAMS of Delaware. Madam President, will the Senator yield?

Mr. MANSFIELD. I yield.

Mr. WILLIAMS of Delaware. I wish to join others in suggesting that there be no effort to railroad the bill through by tabling amendments without giving those offering such amendments an opportunity to get a vote on the merits of their amendments. I know of no disposition on the part of any Senator to delay consideration of the bill, if the leadership wants it scheduled. However, as the leadership knows, several amendments will be offered. Personally, I think the administration is making a great mistake to schedule the bill at the present time because we have in our committee the bill to extend the Reciprocal Trade Act. I think that that is one of the most important bills now awaiting the consideration of the Senate. I regret to see it being bypassed.

Mr. MANSFIELD. Madam President, the administration is not scheduling the tax proposal at the present time. It is being scheduled by the majority leader because it has been cleared by both the Finance Committee and the Policy Committee. It should take its turn on the calendar. There is nothing much else we could turn to. But I wish to make very clear that it is not being done at the suggestion or the desire of the administration. It is a move which has been made solely as the responsibility of the Democratic leader.

Mr. WILLIAMS of Delaware. I appreciate the fact that the majority leader is taking the responsibility for it. But I am still not unmindful of the fact that some time ago representatives of the administration, I understand, contacted the chairman of the committee. He can speak for himself; but I do know that I was contacted with the strong suggestion that the trade bill be given top priority. There was a request and assurance that there would be no consideration of the tax bill until after the trade bill was reported.

Mr. MANSFIELD. That is news to me. I was not contacted in that way. I know of no such happening. I do not doubt the Senator's word. I am sure that what

he has stated did happen, but so far as I am concerned, no one approached me about it.

Mr. WILLIAMS of Delaware. I was given that assurance, and the first indication I had that the bills would be scheduled otherwise was a newspaper report that as a result of a meeting at the White House the tax bill would be scheduled earlier, thus giving it priority over the trade bill.

This action may well jeopardize the enactment of the trade bill at this session.

The White House report was the basis of my statement that the administration was a party to the rescheduling of these bills.

I have supported the reciprocal trade program in the past, and I have every reason to think that I would support it again this year. However, it is an important measure and one which will require several days of work in executive session in our committee. I would have liked to have seen us get the trade bill before the Senate—at least on the calendar—before Labor Day in order that it could have been given prompt consideration. However, as the majority leader knows, with the tax bill before the Senate, those of us who are on the Finance Committee will now be required to be on the floor of the Senate, which means that there can be no further serious consideration in the Finance Committee of the trade bill until after the tax bill is disposed of. We cannot be in both places. For that reason only I make this statement.

Mr. MANSFIELD. I am not aware of any statement issued by the White House as to when the tax bill would be taken up. I can state, however, that there was a meeting of the Democratic policy committee on last Tuesday. That was the first time the committee had an opportunity to consider the tax bill on the calendar. It was reported by the policy committee, I believe, unanimously. After the policy committee meeting was concluded, I informed the press that it was my intention to take up the tax bill after certain other bills were out of the way. I did so because there was not much else on the calendar to which we could refer.

As far as meetings are concerned, I offer to the distinguished chairman of the Finance Committee, the senior Senator from Virginia [Mr. BYRD], the use of the leadership office, room P–34, right outside the Senate Chamber, for any meetings he desires to hold on any subject, including the trade bill, during the course of the consideration of the tax bill.

Mr. WILLIAMS of Delaware. I appreciate that. The majority leader has always been most cooperative, and I wish to cooperate. But one cannot be in the office of the majority leader, room P. 34, working on the trade bill and at the same time be on the floor of the Senate, following the debate on the tax bill.

Mr. MANSFIELD. That is true, but if there is an opportunity, the committee could go in there and use the room.

Mr. WILLIAMS of Delaware. I suggest that during the period the tax bill is under consideration there can be no further consideration of the trade bill. I am sure that the administration recognizes that. The members of the Finance Committee cannot be present on the floor of the Senate and keep informed as to what is going on here and at the same time doing their duty as members of any committee meeting in executive session.

Mr. MANSFIELD. That is a matter which the committee itself must consider.

Mr. KERR. Madam President, will the Senator yield?

Mr. MANSFIELD. I yield.

Mr. KERR. I should like to ask the Senator from Delaware if he knows by what authority he can say there would be no further consideration in the Finance Committee of the trade bill so long as the tax bill is pending on the floor of the Senate?

Mr. WILLIAMS of Delaware. Madam President, will the Senator from Montana yield?

Mr. MANSFIELD. I yield.

Mr. WILLIAMS of Delaware. I am speaking only from a practical standpoint. The Finance Committee does have permission to continue its meetings. I agreed to that permission in the Senate at the time it was requested, and I recognize that if the Finance Committee, with its 17 members, insisted on meeting, they could get a quorum, even though some of us were following the tax bill on the floor of the Senate; but I do not think they will take advantage of any of us in that manner. I only say that I, as one member of the committee, would regret very much to have a procedure adopted by which meetings of the Finance Committee would be held simultaneously with consideration of the tax bill in the Senate, thereby depriving some members of the committee of an opportunity to do their work on that bill. I hope there will not be such steamroller tactics threatened or recommended by the administration at this time. This is not a national convention.

Mr. KERR. Madam President, will the Senator yield?

Mr. MANSFIELD. I yield.

Mr. KERR. The Senator from Oklahoma is one who believes that the Finance Committee has the capacity to continue to give consideration to the trade bill while the tax bill is under consideration on the floor of the Senate. The Senator from Oklahoma would not agree to the conclusion that the Finance Committee did not have greater capacity than that. The Finance Committee began consideration of the tax bill on April 2. It has been the subject of as many hearings as any bill that I can recall ever being considered by the committee. I hope there is room on the desk of each Senator for all the volumes of hearings the committee produced on that subject. The committee considered the bill for weeks. I do not know of many provisions in the bill that have the unanimous approval of all members of the committee. Every provision in the bill was thoroughly discussed, debated, negotiated, and explored before conclusions were reached. The committee reported the bill. The Senator from Oklahoma is aware that many members of the committee are going to give the Senate an opportunity to sit in on the deliberations on various features of the bill which may be both educational and at times inspirational.

No one is more certain than the Senator from Oklahoma that the Senate can, if it so chooses, proceed with the orderly consideration of the tax bill, and that the Finance Committee, with its tremendously able leadership and the magnificent mental qualification of the ranking Republican member and the devotion of all of its members on both sides of the aisle, can proceed with its deliberations, especially in view of the courteous offer of the majority leader that the committee may use an office immediately off the floor for its deliberations while we go through whatever may occur on the floor, and each Senator will reserve the right, and probably use it, to describe his views in connection with the deliberations and actions by the Senate on the tax bill.

Mr. CURTIS. Madam President, will the Senator yield?

Mr. MANSFIELD. I yield.

Mr. CURTIS. Whatever is decided by the leadership, I certainly will willingly comply with. I wish to point out one of the problems of having the Senate Committee on Finance meet at the same time the tax bill is being considered on the floor. The Senator from Oklahoma can only be in one or the other of two places. That will mean that one of the places, either in the committee room or in the Senate Chamber, will be deprived of the services of the Senator from Oklahoma. With his unusual charm he can persuade in the most eloquent manner. He has a keen mind and he can reach back in history for important incidents and recite them. He knows the Internal Revenue Code thoroughly. He has had wide business experience. I merely wish to say that should we decide to operate in two places at the same time, that meeting which is deprived of the presence of the distinguished Senator from Oklahoma probably will be able to get along without him, but not nearly as well as if he were present.

Mr. KERR. Madam President, I did not know that CURTIS was of such highly concentrated Irish origin. The only thing this reminds me of, along with the green color of the volumes of the hearings, is that what he has said is the greatest blarney to which I have ever been subjected.

Were the Senator from Oklahoma able to encompass in the limited mental dimensions that he has the great knowledge and background and experience the Senator from Nebraska ascribes to him, along with that of his own limited understanding, he might approach the stature described so entertainingly and charmingly by the Senator from Nebraska.

Mr. WILLIAMS of Delaware. Madam President, will the Senator from Montana yield?

Mr. MANSFIELD. I yield.

Mr. WILLIAMS of Delaware. I enjoyed the compliments being exchanged by the Senator from Nebraska and the Senator from Oklahoma, but being practical let us recognize what is happening. As the majority leader knows, we are

having difficulty getting a quorum in the committee even now. The record will show that I have tried to cooperate in getting a quorum for committee meetings. On Friday last the Finance Committee sat for a full hour between 10 and 11 waiting for a quorum to develop, but we had to adjourn at 11 o'clock because a quorum could not be obtained. The chairman was present and I was present but we would not get a quorum, and the meeting had to adjourn.

The Finance Committee meeting scheduled for today had to adjourn again because a quorum could not be obtained. That meeting had been scheduled for 10 o'clock this morning. It was canceled. Why? The members of the Finance Committee had to be on the floor of the Senate. That is the kind of problem that will confront us.

There are many sections of this proposed tax bill which are highly controversial, as the Senator from Oklahoma has said. Many sections of the bill will require the full attendance of members of the committee on the floor of the Senate to discuss them. They should be on the floor of the Senate when various amendments are being proposed. I do not see how we can possibly be in both places at the same time. I am pointing all this out from a very practical standpoint. I have no intention of trying to obstruct the consideration of either bill, but it may well happen that we will not get much done on the trade bill in committee until after the tax bill has been disposed of on the floor of the Senate.

That is the practical situation which has developed in our committee.

We have a system of operation in the Committee on Finance—and no one has suggested that we change it—that if some of the members of the committee are not present we take tentative action only on proposals. These actions can later be reconsidered by any member who was not present. That means that anyone of the members may reopen a question that had been tentatively decided by perhaps nine members of the committee. The result will be that under these circumstances, with the tax bill being considered on the floor and the committee trying to meet on the trade bill, actually nothing will be accomplished on the trade bill.

The administration is well aware of that fact, and unless they are now scuttling the trade bill I cannot understand why they agreed to set it aside.

I keep hearing a persistent rumor—I cannot conceive of its being true—that the administration is jockeying the trade bill into the position where they can settle for a 1-year extension of the Reciprocal Trade Act and then blame that decision on the Congress. I hope there is no substance to that rumor.

Mr. MANSFIELD. It is not true. The Senator has been mentioning that rumor several times. He mentioned it several times during the past week. He mentioned it on the radio, I understand, in an interview with the Senator from New York [Mr. KEATING] yesterday. There is absolutely nothing to it. The most foolish thing we could do would be to extend the Reciprocal Trade Act, since we would be legislating on nothing, because there is nothing to extend.

As far as we are concerned, we intend to take up the trade bill once it is reported from committee, and we intend to stay with it until it is disposed of one way or another. It will not be set aside. The Senator knows that that is the way things will be done.

Mr. WILLIAMS of Delaware. Madam President, I am glad to have that assurance. I assure the Senator from Montana that I did not start that rumor. It appeared in the newspaper several times last week. It has been a persistent rumor, and the action being taken here today lends credibility to it. We are now proceeding in a manner which may well jockey us into that kind of position.

Mr. MANSFIELD. No. The tax bill is on the calendar. I address an inquiry to the Senator from Virginia, the distinguished chairman of the Finance Committee. Is it not true that it is the intention of the committee to consider fully the trade bill and to report it to the Senate and to have it disposed of on the floor of the Senate?

Mr. BYRD of Virginia. Yes; the Senator is correct. I wish to make a statement on that point.

As chairman of the Committee on Finance I will expedite in every possible way the completion of the committee's work on the trade bill. We have already had the hearings on the bill. Now it is a question of voting in committee on provisions in the bill.

The chairman of the Finance Committee has always insisted, and will continue to insist, that a quorum be present. If a member of the committee has a proxy and leaves it, that would be counted for purposes of a quorum, of course. Without a quorum being present, we should not vote on these vital matters, because the trade bill, in my judgment, is one of the most important bills that has been presented to the Senate during my service in the Senate.

While we will expedite the consideration of the trade bill in every way possible, we must bear in mind that the time has come to vote on the bill in committee, not to hold hearings. The hearings have been held. It would be rather against my desires, as the chairman of the committee, to be absent from the floor of the Senate while the tax bill is under consideration.

The chairman called a meeting of the Finance Committee for 10 o'clock this morning. He did not know at the time he set the meeting that the Senate would convene at 10 o'clock. That meeting of the committee had to be called off, as a result of the Senate's meeting at 10.

I wish to say to my friend, my beloved leader—and I say with all sincerity that he is one of the finest leaders, and most able and considerate, that I have ever served with in the Senate—that I will do everything possible in handling the two bills, but I cannot do the impossible. A person cannot be in two places at the same time, as must be obvious to everyone. We will do all we can, and the chairman of the committee will use his office off the floor to do everything he can.

The hearings on the tax bill cover about 12 volumes of testimony, containing 4,934 pages. The hearings lasted, off and on, for nearly 4 months. We heard 200 witnesses. As passed by the House, this has been one of the most controversial tax bills ever to come to the Committee on Finance.

It has been the policy of the committee during all my time—and I served on it under Senator Harrison, under Senator Millikin, and under Senator George—to have full and complete hearings on vital matters referred to the committee. This policy was carried out in this case to the extent that we have nearly 5,000 pages of testimony on the bill. The committee held some hearings in the afternoon, as well as in the morning. I believe we have covered the ground. I have brought in individual views, to which I will refer.

I wish to say that I favor the bill as the committee reported it with the exception of the part that I deal with in my individual views. This is the first time during my service on the committee that I have ever submitted individual views taking exception to provisions in a committee bill. With the exception of the so-called investment credit section, I think there are many good features in the bill. In my opinion, it is a far better bill than the one which came from the House.

The PRESIDING OFFICER. The Senator from Oklahoma.

Mr. KERR. Madam President, first, I ask unanimous consent that all committee amendments be adopted and that the bill as thus amended be considered as original text for the purpose of further amendment to the bill.

Mr. GORE. Madam President, I object.

The PRESIDING OFFICER. Objection is heard.

Mr. KERR. Madam President, I thank the distinguished Senator from Tennessee for showing his hand. There are many amendments in this bill, and his tactic demonstrates that he is interested purely and solely in delay, because this would change the parliamentary procedure whereby the bill would be considered. The Senator from Oklahoma does not object to that. He believes his physical endurance is equal to that of the Senator from Tennessee, although he does not know that his mental capacity is anywhere in the same orbit as the Senator from Tennessee feels his is. The Senator from Oklahoma will be glad to stand on the floor of the Senate and handle the bill in accordance with the necessary procedure, if the Senator from Tennessee still objects. The Senator from Oklahoma hopes, however, the Senator from Tennessee may reconsider and withdraw the objection.

Mr. GORE. Madam President, will the Senator yield?

Mr. KERR. I yield.

Mr. GORE. I have no dilatory motives in mind in objecting to the request. I understand that such an obnoxious amendment as H.R. 10 may be offered——

Mr. KERR. I did not ask that to be considered. I ask that the committee amendments be adopted and that the bill as thus amended be considered as original text for the purpose of further amendment to the bill. That is the ordinary procedure on every other bill that the committee brings to the floor, and is usually followed so that there may be orderly procedure. I am sure that three-fourths of the committee amendments will be acceptable to the Senator from Tennessee. Yet, under the procedure we shall have to follow if his objection is continued, we shall have to take up each committee amendment separately, as I understand the parliamentary procedure, and consider it.

Mr. GORE. Madam President, will the Senator yield?

Mr. KERR. I yield.

Mr. GORE. Nearly all of the amendments adopted by the Senate Finance Committee made the bill worse instead of better. The Senator has no right to indulge in the presumption that I would agree to most of the amendments; as a matter of fact, I am opposed to most of the amendments adopted by the Senate Finance Committee. Therefore, I shall insist upon my objection, in order to preserve my parliamentary rights to vote on those amendments.

Mr. KERR. Very well. If the Senator insists, he insists.

Mr. CURTIS. Madam President, will the distinguished Senator yield at that point?

Mr. KERR. I yield.

Mr. CURTIS. What bill is before the Senate? Is it the House bill?

Mr. KERR. The committee bill, H.R. 10650 as amended by the Senate committee, is before the Senate.

Mr. CURTIS. If I correctly understood the unanimous-consent request made by the distinguished senior Senator from Oklahoma, to which an objection was made, my query is, Do we start out with the House bill before us?

Mr. KERR. As I understand the parliamentary procedure, in view of the objection by the Senator from Tennessee—and I will ask the Parliamentarian to advise the Presiding Officer to correct me if I am in error—under the parliamentary procedure the committee bill is before the Senate. The committee amendments will have precedence. The first procedure would be to go through the bill and to vote on the amendments as they appear in the bill.

The PRESIDING OFFICER. The Senator is correct. The House bill is before the Senate, and the committee amendments will be considered one at a time.

Mr. KERR. And the amendments will have precedence. Until they are acted upon, as some might seek to amend them when they are before the Senate, our procedure will be to go through the bill and to act on all the amendments put into the bill by the committee before other amendments, other than an amendment to a committee amendment, would be in order.

The PRESIDING OFFICER. The Senator is correct.

Mr. GORE. Madam President, will the Senator yield for a parliamentary inquiry?

Mr. CURTIS. Then if a committee amendment should fail, we would revert back to the House position on that particular amendment?

Mr. KERR. Insofar as the matter before the Senate is concerned, the Senator is correct.

Mr. WILLIAMS of Delaware. Madam President, will the Senator yield?

Mr. KERR. I yield.

Mr. WILLIAMS of Delaware. I have no objection to the unanimous-consent request which the Senator from Oklahoma has made. This is the customary procedure. As I understand it, in the absence of such an agreement the motion which the Senator from Virginia and some others of us will make to strike from the bill those sections dealing with investment credit would not be in order until after the Senate had gone through the tedious process of acting on each individual amendment in the bill.

Mr. KERR. I think that is correct. Therefore, I repeat what I said, that the action by the Senator from Tennessee can be generated from one purpose only, and that is a dilatory purpose.

Mr. GORE. Madam President, will the Senator yield?

Mr. KERR. For a question.

Mr. GORE. By what right does the senior Senator from Oklahoma attribute to the junior Senator from Tennessee a motive of which he, the senior Senator from Oklahoma, has no knowledge?

Mr. KERR. The Senator from Oklahoma makes the statement, first, on the basis of the right of freedom of expression on the Senate floor; and, second, on the basis of the evidence before the Senator from Oklahoma and the expression of an honest opinion.

There is no possible way for the Senator from Tennessee to prevent the consideration by the Senate of the committee amendments; and he knows, being the experienced parliamentarian he is and one of the most able authorities in the Senate on the rules of the Senate, that the committee amendments will have priority; and he knows that his objection and the failure of the Senate to agree to the request by the Senator from Oklahoma—a procedure which has been followed, so far as I know, in respect to 99 out of 100 bills brought before the Senate by committee—means that the Senate now will have to go through this bill of 392 pages and consider separately each amendment put in the bill by the committee. Then, following that, we shall have the usual procedure of Senators seeking to offer further amendments to the bill.

Madam President, if that is not dilatory, if that is not calculated to cause and to secure delay, then the Senator from Oklahoma is unable to read the evidence plainly before him which results from the action of the Senator from Tennessee.

Mr. GORE. Madam President, will the Senator yield?

Mr. KERR. For a question.

Mr. GORE. I take it the Senator feels that he is entitled to express his personal opinion, which he has now done?

Mr. KERR. Madam President, I do not yield for that, unless it is a question.

Mr. GORE. That is a question. I take it that the Senator feels justified in expressing his personal opinion as to the motives of the junior Senator from Tennessee. Is that correct?

Mr. KERR. That is correct.

Mr. GORE. Does that not in fact constitute a change from the Senator's previous statement, in which he made a flatfooted statement, and did not qualify it as being a matter of his opinion?

Mr. KERR. Well, the Senator may find a distinction there, but it is one without a difference.

Mr. GORE. Madam President, will the Senator yield for a question?

Mr. KERR. Yes.

Mr. GORE. Is not the matter before the Senate——

Mr. KERR. H.R. 10650.

Mr. GORE. Is there not a constitutional requirement that revenue measures shall originate in the House of Representatives?

Mr. KERR. The Senator is familiar with that provision of the Constitution, the same as is the Senator from Oklahoma.

Mr. GORE. If the Senator will permit me to preface my next question with an expression of gratitude for his generous references to my limited knowledge of the rules of the Senate, I will thank the Senator. Then I wish to say to him that I am well aware of the parliamentary rights of every Member of the Senate.

Amendments have been proposed to the bill by a majority of the Senate Finance Committee which would wreck the bill of a Democratic President. I expect to oppose the adoption of some of those amendments, and I want the right to do so without having them summarily acted upon here by a unanimous-consent operation.

Mr. KERR. I say to the Senator from Tennessee—and he knows it as well as I—that the action requested by the Senator from Oklahoma, if agreed to, would not impair a single right or privilege that the Senator from Tennessee has in that regard. He would still have the right under the unanimous-consent agreement to offer any amendment to the bill which he now has the right to offer. The Senator knows that.

Mr. BUSH. Madam President, will the Senator yield for a question?

Mr. KERR. I yield.

Mr. BUSH. If we follow the pattern suggested by the Senator from Oklahoma, we would start consideration of the bill as though it had no amendments, would we not?

Mr. KERR. The bill will be considered an original text, and it would be subject to and open for amendment by any Senator.

Mr. BUSH. And even the committee amendments would be open to amendments, as though they were not amendments but were a part of the original bill, would they not?

Mr. KERR. The Senator is entirely correct.

Mr. BUSH. That is what the Senator from Oklahoma wants?

Mr. KERR. That is what I asked unanimous consent to obtain.

Mr. BUSH. I would think that would be the orderly way to proceed. I do not know how we can get at the bill unless we do it that way.

Mr. KERR. We will get at it. We will be in that posture many legislature hours, and perhaps days later than now. As I say, my physical endurance, I hope and the Lord be willing, is equal to that of the Senator from Tennessee. Therefore, I promise him faithfully that we will arrive at that point.

Madam President, I shall address myself briefly to some of the statements which have been made on the floor before I move into the presentation of my statement on the bill.

Mr. GORE. Madam President, will the Senator yield?

Mr. KERR. For a question.

Mr. GORE. Being aware, as the Senator from Oklahoma is aware, that the junior Senator from Tennessee offered several amendments, as has already been attested to by the senior Senator from Oklahoma, but without having had too much luck with his amendments in the Committee on Finance, would not the junior Senator from Tennessee be clearly within his rights as a Senator to appeal to the Senate as a whole for the correction of errors and mistakes not only in the bill but in the majority report, which gives legislative intent with respect to the bill?

Mr. KERR. The Senator from Tennessee is clearly within his rights. The Senator from Oklahoma respects him as much as he respects any other Member. Like the Senator from Oklahoma, he is within his rights to do that. Although the Senator from Tennessee felt one provision of the House bill was abhorrent to him, he did not get around to offering an amendment. The Senator from Oklahoma does not know whether that was because he was weary of well-doing, or whether he decided to wait until he had a larger forum in which to give expression to his great thoughts and language, by bringing them up on the floor of the Senate.

Mr. GORE. In either event, my friend from Oklahoma will, I am sure, be happy to afford the Senator from Tennessee that opportunity.

Mr. KERR. Oh, the Senator from Oklahoma will have a lot of fun with the Senator from Tennessee.

I have great affection for the Senator from Tennessee. He and I have a great deal in common, including bull—that is, Angus bulls and Angus cattle. The Senator from Tennessee has been very close to the Senator from Oklahoma in many ways, both on and off the Senate floor. He loves him and respects him, and once in a while agrees with him. When I do agree with him, I find it a source of great pleasure. I remind my good friend from Virginia, the chairman of the committee, that he and I will be together on the bill at least 15 times for each time the Senator from Tennessee will be.

Madam President, the pending bill, H.R. 10650, represents a major revision and reform of our Federal tax system. It has been under consideration by Congress since April 20, 1961, when the President sent up his tax message. It was under consideration by the other body for almost 1 year.

Your committee began hearings on this bill on April 2, 1962, and has been working on it almost constantly since that time. As indicated in the committee report, we heard testimony on the bill for 29 days. The testimony fills 12 volumes—nearly 5,000 printed pages. In addition, the Committee on Finance has considered this bill in executive session over a period of many weeks.

This has not been an easy bill. The further we discuss it, the more apparent that will become. It contains important legislation in many areas. The bill as passed by the House covered 21 separate areas, and the bill with the committee's amendments covers 27. Several of the members of the committee filed individual, additional dissenting, supplemental, or minority views on one or more provisions. Probably none of us would have phrased all of the provisions of the bill exactly as they have been phrased. First, the other body and then your committee has had to work out compromises on many of the provisions. But, Madam President, it is a tribute to our legislative system and to the Senate and the Finance Committee that differences have been resolved, decisions have been reached and this constructive bill is now before us for consideration and action.

This process is inevitable on any major tax bill. The bill of necessity must be a compromise of conflicting views. It must take account of the views of the administration; the views of the other body; and the views of the Finance Committee and the Senate. Under the leadership of our great chairman and in large part due to his continuing and patient effort, the committee has done a fine job. The very fact that some members of the committee believe the bill goes too far while others believe that it does not go far enough is an indication that the bill in fact goes down the middle of the road. Thus, we have retained the investment credit which is so necessary to our economic growth. At the same time the Long amendment—which I shall explain somewhat later—provides that to the extent taxpayers receive an investment credit with respect to property, they must reduce their depreciation basis by the amount of the credit.

That is a complete answer to the claim that the bill gives a taxpayer more than 100 cents back for every dollar of investment he makes. In the first place, a

taxpayer depreciates 100 percent of the value of his investment. His investment in the property is 93 percent. He depreciates 100 percent of this amount. Depreciation is not given on any part of the tax credit. It is a reduction of income subject to tax. A taxpayer can get his credit on 7 cents of a dollar. On this he gets no depreciation. This is treated as if it were an investment made by someone else. His depreciable base will be reduced by the amount of the tax credit. As a result he can depreciate only 93 percent of the cost of a property. In this the taxpayer and the Government are treated as jointly purchasing the property. This is the result of an amendment adopted by the committee. It provides that whatever the amount of the tax credit a taxpayer gets with reference to the investment in an item, the depreciation base is reduced by this amount. Thus if he gets a 7-percent tax credit, his depreciation base is reduced from $1 to 93 cents, and the depreciation, then, which he charges off from taxable income is 93 cents on the dollar, not to 100 cents on the dollar.

In the area of taxation of foreign income, the bill is a compromise of conflicting views. The President asked us to end tax deferral for foreign subsidiaries and there are those on our committee who believe we should have done this. That was not the conclusion, however, of either the House or your committee. We recognized the principle that income earned in foreign countries by Americans through foreign subsidiaries should be treated in the same manner as income earned by the nationals of those countries—so long as the earnings remain abroad. However, many abuse situations have been called to the attention of your committee where, through the use of tax-haven devices, taxes are being avoided through the diversion of income to companies incorporated outside of the countries where normal operations are being carried on. These tax-haven abuse situations are corrected by your committee's bill even though tax deferral for foreign operations in general is continued. Numerous other tax loopholes which exist in the foreign area are also plugged by this bill.

In other areas as well, the committee's bill works out compromises where there are different points of view. In the taxation of mutual savings banks, and savings and loan associations, your committee's bill, while not going as far as the administration asked, nevertheless, raises $180 to $205 million of additional revenue. In the tax treatment of mutual fire and casualty insurance companies your committee and the House have found a compromise that recognizes the real differences among the various kinds of companies in the industry.

In dealing with the problem of underreporting of dividends and interest, the committee also has found at least a partial answer which is a more moderate approach than withholding. We recognize that between four and five billion dollars of dividend and interest income presently is escaping taxation. However, instead of providing a withholding system which involves burdens for both the payors and the many people who owe little or no taxes, the committee has followed the course of requiring full information reporting to both the Government and the recipients on all dividend and interest payments of $10 or more. While I personally counseled the committee to follow the course of withholding, I realize that the more moderate provision in the bill will go far to correct the underreporting of dividends and interest.

I shall refer to this again, and often, Madam President, because to the extent it does what its principal author indicated his judgment was that it would do, it not only would eliminate any deficit by reason of the bill, it will provide a surplus by reason of the bill.

In dealing with entertainment expenditures also, the committee has adopted a balanced approach which neither prevents the deduction of legitimate entertainment expenses nor permits the continuation of the abuse situations which have been called to your committee's attention.

I believe that the bill makes a substantial improvement in our tax structure and will lay to rest many of the tax problems which have been plaguing us for many years. At the same time this bill will, through the investment credit, provide a necessary stimulant to our economic growth.

The revenue impact of the bill is difficult to determine. Because of the nature of many of its provisions, adequate statistical information is not available. This probably accounts for the fact that the revenue estimates furnished the committee vary more than is usually the case. The estimates of the staff of the Joint Committee are that the bill on a full year's basis will result in a revenue loss of $555 million.

The estimate made by the Joint Committee is that on a 1-year basis the bill will result in a revenue loss of $555 million. The comparable estimate of the Treasury Department is that the bill will result in a loss of $210 million. However, neither of these estimates takes into account the stimulative effect of the bill on investments and the level of economic activity, nor does either of them take into account the extent to which the reporting substitute will recover taxes not now being paid on unreported interest and dividends.

The Joint Committee staff has made no estimate on this basis but the Treasury Department has estimated that the stimulative effect will reduce the revenue loss under the bill to $15 million—a negligible loss for a bill of the magnitude of H.R. 10650. If the estimates of the revenue that will be collected because of the Byrd dividend and interest reporting amendment are valid and prove to be justified, the bill will actually result in increased revenue to the Treasury. In other words, under these provisions the additional revenue collected under the provisions of this bill will exceed the amount of the revenue lost to the Treasury under the provisions of the bill.

Mr. President, at this point I ask unanimous consent to have printed in the RECORD three tables showing the revenue estimates prepared by the staff of the Joint Committee and the Treasury Department for your committee. In addition to the full-year revenue effect, these tables also show the revenue effect anticipated in the fiscal year 1963. The revenue loss in this case is greater than will be the eventual impact of the bill because the loophole closing provisions do not become effective immediately.

Mr. KERR.

LEGISLATIVE APPEARANCES

Although not explicitly provided for in the statute, court decisions in the Cammarano and Straus cases have interpreted long-existing Treasury regulations as denying a deduction for expenses incurred in making appearances, submitting material, or communicating with respect to legislative matters.

The House version of the bill would modify these court interpretations of existing law, in order to permit deductions for expenses relating to appearance before, presentation of statements to, or communications sent to a legislative body, committee, or individual legislator at any level of government if the expenses are otherwise ordinary and necessary business expenses. In addition, a similar deduction is provided for the portion of dues paid to an organization which are used for similar legislative expenses, to the extent they are related to the businesses of the members. Your committee also has added an amendment providing that expenses of communicating information with respect to legislation between the taxpayer and its employees or stockholders also are to be deductible, where the matter is of direct business concern to the taxpayer. This provision does not permit the deduction of expenses incurred in attempts to influence the general public, or large groups of the public, through advertising or other campaigns, nor does it permit the deduction of expenses associated with political campaigns.

Your committee sees no reason why legitimate expenses incurred for appearances before legislative bodies or legislators should not be deductible while similar appearance before executive officials with respect to administrative matters, or before courts with respect to judicial matters, are deductible. Your committee believes that the legislative branch

of the Government in this respect should be placed on the same footing as the other two coordinate branches of Government.

It is also believed that it is desirable that taxpayers having information bearing on the impact of present or proposed legislation which affect their trades or businesses not be discouraged in making this information available to the responsible legislators. This information is essential to a proper evaluation on the part of the legislators of the impact on businesses of present or proposed legislation.

The deduction for legislative expenses is limited to cases in which expenses are related to the trade or business of the taxpayer, since only these expenses are pertinent to the determination of true taxable income of a business. In this respect, it might be noted that this is the same distinction presently made in the case of appearances before executive or judicial bodies.

Mr. LAUSCHE. Mr. President, will the Senator from Oklahoma yield for a question?

The PRESIDING OFFICER (Mr. HICKEY in the chair). Does the Senator from Oklahoma yield to the Senator from Ohio?

Mr. KERR. I yield.

Mr. LAUSCHE. Has the committee dealt at all with the problem—which has been under discussion for several years—of allowing business enterprises to deduct, as business expenses, funds spent in payment of newspaper advertisements dealing with national issues and policies pending in the Congress? This is a deduction for which business enterprises have argued to a considerable extent.

Mr. KERR. The committee went into that question at length, and during extensive periods of time. I believe that every approach which could be devised by men of ingenuity and resourcefulness was made in presenting that matter to the committee. Each approach made was discussed at great length, and was turned down by the committee as regularly as it was offered.

Mr. LAUSCHE. What the Senator from Oklahoma has just now described is as far as the committee went in allowing such a deduction for funds spent in acquainting legislatures and their members with current political and economic problems.

Mr. KERR. And also by a taxpaying corporation in explaining those matters to its own stockholders and its own employees.

Mr. LAUSCHE. I thank the Senator from Oklahoma very much.

Mr. KERR. But the general run of expenditures to influence legislation by advertisements in news media or other means of communication was discussed at great length, and the committee decided that it could not justify the allowance of deductions for the cost of such expenditures.

Mr. KERR.

Mr. President, I have explained briefly the more significant provisions of the bill. A full explanation of the other provisions in this bill appears to me to be unnecessary at this time. In addition, the committee report before the Senate contains an explanation of each of the provisions in the bill. I am sure that as the debate progresses I will want to delve more deeply into various provisions and I, of course, will be glad to answer any questions to the extent of my information and my physical endurance. I am also attaching to my statement a summary of the bill as amended by the committee which, Mr. President, I ask to have made a part of the RECORD at the end of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. KERR. Mr. President, in conclusion, let me say, Mr. President, that this legislation represents a major step in the revision of our tax structure. It provides a significant stimulus for investments in order to achieve needed economic growth and to help our balance of payments. It wipes out tax haven and other abuse situations in the foreign area and removes serious inequities and loopholes in our domestic tax structure. This tax measure is a necessary initial step in any revision of our tax structure, and I urge all Senators to support its passage.

EXHIBIT 1

SUMMARY OF BILL AS OFFERED REPORTED BY THE SENATE COMMITTEE ON FINANCE

SECTION 1. SHORT TITLE, ETC.

The act is to be cited as the "Revenue Act of 1962."

SECTION 2. ALLOWANCE WITH RESPECT TO LEGISLATION

A deduction is provided for costs relating to appearances before, preparation of statements to, or communications sent to a legislative body, a legislative committee, or individual legislator (Federal, State, or local), if the expenses are otherwise ordinary and necessary business expenses. A deduction also is allowed for the portion of dues paid to an organization which are used for allowable legislative expenses to the extent that they are related to the businesses of its members. In addition, the expense of communication of information with respect to legislation between the taxpayer and the organization of which he is a member, and between a taxpayer and his employees and shareholders, is deductible if the matter is of direct interest to the members or taxpayers. This provision does not permit the deduction of expenses incurred for attempts to influence the general public, or segments of the public (by advertising or otherwise), or for expenses concerned with political campaigns. This provision applies to taxable years beginning after December 31, 1962.

Mr. KERR. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator from Oklahoma will state it.

Mr. KERR. First, however, if the distinguished junior Senator from Tennessee [Mr. GORE] is in the Chamber——

Mr. PROXMIRE. The Senator from Tennessee will return to the Chamber in a few minutes.

Mr. KERR. Mr. President, I shall repeat my request for unanimous consent that the committee amendments be agreed to en bloc; and that the bill as thus amended be considered as original text for the purpose of further amendments. However, on the assumption that the request will be objected to, I address this parliamentary inquiry to the Chair: What will be the parliamentary procedure with reference to the consideration of the bill as affected by the committee amendments?

The PRESIDING OFFICER. If the unanimous-consent request is objected to, the order of business before the Senate will be the first amendment that has been proposed by the committee.

Mr. KERR. The first committee amendment?

The PRESIDING OFFICER. That is correct.

Mr. KERR. Mr. President, in view of that fact, and the fact that I have been on the floor about 4 hours, I shall yield the floor at this time.

I say to the distinguished Senator from Wisconsin that I shall be in the Chamber repeatedly and shall be happy, from time to time, to answer any questions he may have to the extent of my ability.

Mr. PROXMIRE. Mr. President, I have a series of questions to address to the Senator from Oklahoma. I will appreciate it if he will yield to me later in the day.

The PRESIDING OFFICER. The first committee amendment will be stated.

The LEGISLATIVE CLERK. On page 8, line 2, after the word "Code" and the period, it is proposed to strike out "Whenever" and insert "Except as otherwise expressly provided, whenever".

Mr. DOUGLAS. Mr. President——

The PRESIDING OFFICER (Mr. PELL in the chair). The Senator from Illinois is recognized.

SUPPORT FOR PRESIDENT'S TAX PROPOSALS

Mr. DOUGLAS. Mr. President, legislative decisions on important matters are not primarily made inside the walls of this Chamber. Such decisions are instead largely made by public opinion outside this Chamber; they are made by public opinion acting on the information primarily furnished to the public by the press.

Over the weekend I began to think that insofar as the struggle over this tax bill is concerned, I was living in a world of Alice in Wonderland—a world in which the stated issues and problems were exactly contrary to the issues really at stake. At times it seems like George Orwell's "1984" with its doublespeak and its contradictory slogans such as "War is peace," and so forth.

The junior Senator from Tennessee [Mr. GORE] and I have been closely associated with this tax bill ever since it came from the House of Representatives and ever since the Senate Finance Committee began its hearings in April. We attended the committee hearings, and we worked in the executive sessions of the committee. In the main, we fought for the original program of the President of the United States.

We saw amendment after amendment submitted which largely would gut the recommendations made by the President. In our minority views, the Senator from Tennessee and I urge—in the main—that the substantial features of the President's original program be returned to the bill and be enacted into law. We intend to fight on the floor of the Senate for those principles.

Therefore, it was quite proper, I believe, for the Senator from Tennessee to object to the request of the Senator from Oklahoma [Mr. KERR] that the committee amendments be agreed to en bloc, for many of the committee amendments would help to wreck the President's original program. Certainly the committee should be required to justify every eviscerating amendment which it proposes.

Mr. President, those are the facts, and I think they will become evident to the country.

Mr. DOUGLAS.

When the administration proposed this bill a year and a half ago, it was intended to close a few of the loopholes which disgrace our tax system—most conspicuous of which, of course, is the 27½-percent depletion allowance on gas and oil, which is the particular pet of the Senator from Oklahoma—and which cause grave injustices and irregularities in the application of our tax laws. The total amount of revenue which would have been saved to the Treasury, and hence to the people, was, by the terms of the President's original proposal, approximately $2.3 billion.

We have prepared a summary table which shows the President's original proposals, together with what happened to them in the House, together with what happened to them in the Senate Finance Committee. Here is a record so that we can see who did the dirty work at the crossroads.

I ask unanimous consent that this summary of the evolution, or devolution, or degeneration, of the President's tax bill be printed in the RECORD at this point in my remarks.

There being no objection, the table was ordered to be printed in the RECORD.

TABLE I.—*Evolution of the Revenue Act of 1962—with pertinent revenue estimates*[1]

LOOPHOLE CLOSERS

President's proposals of Apr. 20, 1960	Revenue gain	House bill	Revenue gain	Revenue decrease compared to President's proposal	Finance Committee bill	Revenue gain	Revenue decrease compared to House bill	Revenue decrease compared to President's proposal
	Millions		*Millions*	*Millions*		*Millions*	*Millions*	*Millions*
Sec. 4. Expense accounts: Provides that the cost of business entertainment, including club dues, and the maintenance of entertainment facilities (such as yachts and hunting lodges) be disallowed in full as a tax deduction. Restrictions should also be imposed on the amount to be deducted as business gifts, on travel expenses for vacations that are combined with business travel, and on excessive personal living expenses incurred on business travel away from home.	$220	Under the House bill expenditures for entertainment activities must be directly related to the active conduct of the taxpayer's trade or business and those for entertainment facilities (such as yachts must meet an additional test of being directly related to the active conduct of the trade or business. Disallowance was allowed for business gifts in excess of $25, a de minimis rule was added to the provision dealing with traveling expenses, and a new rule requiring substantiation of expenditures was adopted.	$125	$125	The Finance Committee added to the directly related test of the House bill a less exacting test permitting the deductions if they are directly "associated with" the taxpayer's trade or business. In addition, the committee's report devises weak and confusing guidelines unlike the report of the House Ways and Means Committee which provided some meaningful guidelines that made the House provision workable and effective.	$60	$65	$190

TABLE I.—*Evolution of the Revenue Act of 1962 with pertinent revenue estimates*[1]—Continued

LOOPHOLE OPENERS

	Billions		*Billions*	*Millions*		*Billions*	*Millions*	*Millions*
Sec. 2. Investment credit: Investment in new real and personal depreciable property having a useful life of 6 years or more qualified for a credit of 10 percent to the extent the new investment exceeded current depreciation allowances. A different credit was allowed on new investment between 3 and 100 percent of current depreciation allowances, with maximum credit of 10 percent on the first $2,000 of new investment. The credit was not to affect the depreciable cost of the property. Residential property, property used outside the United States, and property used by public utilities (other than transportation) were ineligible. The credit deductible in any one year was limited to 30 percent of tax liability, but the excess could be carried forward for 5 years. The proposed effective date was Jan. 1, 1961.	$1.7	The House approved the tax credit plan, but made the following changes: (1) Eliminated the "excess approach" in favor of a 7-percent flat across-the-board credit; (2) Excluded all buildings and certain other real property, but made personal property of hotels and motels eligible; (3) Permitted $50,000 of used property to qualify; (4) Eliminated any limitation on the use of the credit on the taxpayer's first $25,000 of tax liability; adopted a 25-percent limitation on the tax liability above $25,000; (5) Approved a 3-percent credit for public utilities; (6) Dropped the useful life requirement to 4 years, but scaled down the benefits of the credit for assets with lives between 4 and 8 years; (7) Moved the effective date up to Jan. 1 1962.	[1] $1.395	$305	The Senate Finance Committee modified the House bill in the following manner: (1) Required that the credit be subtracted from the taxpayer's cost of the property before permitting the taxpayer to compute his depreciation allowance. (2) Disallowed a credit upon the investment of insurance proceeds, and upon the purchase of livestock. (3) Approved a 3-year carryback of unused credits, in addition to the 5-year carryover. (4) Moved the effective date up to July 1, 1962.	[1] $1.340	$55	$300
Sec. 3. Lobbying expenditures: The President did not recommend that a deduction be allowed for lobbying expenditures and the Treasury Department is opposed to the allowance of any deductions in this area.	.....	The House bill permits business taxpayers to deduct the following lobbying expenditures the cost of appearance before and communicating with committees of Federal, State, or local legislative bodies, contacting individual legislators, transmitting legislative information between a taxpayer and an organization of which he is a member, and the portion of the dues paid by a member attributable to the carrying on of such activities by the organization.	(2)	.....	The Finance Committee expanded the House provision to cover the cost of sending lobbying material to employees and stockholders.	.....	(2)	.....

[1] All estimates in this table are those of the Treasury except for the investment credit as passed by the House and as passed by the Senate Finance Committee, and the revenue figures for reporting of dividends and interest, where the Joint Committee on Internal Revenue Taxation's figures are used.

[2] $670 million based on 1959 data, $780 million based on 1960 data, $880 million for 1963, based on trends from previous years.

[2] No estimates available.

Mr. DOUGLAS.

I may say, also, as a further example, the administration originally proposed that the present provisions as interpreted by the Supreme Court in the case of Cammarano et al. against United States as respects lobbying, should be continued. The House weakened these provisions. The Senate Finance Committee went them one better. So, as a result, there has been recommended a great weakening of the lobbying tax deduction provisions, which would play directly into the hands of big business and result in the ordinary taxpayer financing a large portion of the lobbying activities of the big corporations of the country.

Indeed, the savings and loan campaign against the withholding provision would, under the terms of the lobbying proposal, be largely financed by the American taxpayers.

There was also a weakening of the expense account provisions. In the original form, the expense account provisions were quite good. Those were weakened in the House. They were still further weakened by the Senate committee.

I will defy even the most careful lexicographer, or dictionary expert, to tell what the committee means by the expense account provisions it recommends. It is a formula for confusion. Once I nearly said "for deception," but I thought better of that. I will say it is a formula for confusion.

Mr. PROXMIRE. Mr. President, will the Senator yield in respect to the lobbying provision?

Mr. DOUGLAS. Yes; I am glad to yield.

Mr. PROXMIRE. Is it true that the bill, as it came to the Senate from the committee, would provide that businesses could subtract, as an expense of doing business, the cost of lobbying Members of Congress, members of State legislatures, and members of city councils?

LOBBYING EXPENSES TAX DEDUCTIBLE

Mr. DOUGLAS. That is correct. And they could also get others to lobby them directly and make that tax free.

Mr. PROXMIRE. Suppose there were a situation in which a proposed gambling law was before the Congress, or before a city council, and suppose this proposed law would make it easier for the gambling syndicate to operate, in that it would increase profits. It would be possible, then, for them to subtract that item as an expense of doing business. How about the opposition?

Mr. DOUGLAS. The Senator has mentioned a very important point. Under the bill those who have a direct and appreciable business interest in the decision of a legislative body can lobby that body, have their expenses deducted, and under the Senate amendment they could organize campaigns among their stockholders and members. All of that kind of activity would be a business expense.

But if a member of a church who objected to the gambling provision of a law, feeling that it went against public morals, lobbied against that provision, he would not have the benefit of such a tax deduction, because it could not be said that he had a direct business interest. In other words, the general interest of the citizen and taxpayer, and the general and diffused interest of the consumer would have no deduction supplied to them when lobbying is engaged in in their behalf.

Mr. PROXMIRE. Would the expenses of the League of Women Voters, which certainly is divorced from any pecuniary or financial interest, and whose position on issues is based upon very careful study, analysis, and understanding of what would best serve the public interest, be deductible in any way?

Mr. DOUGLAS. They would not. As I understand, contributions to the League of Women Voters are not tax exempt now. The lobbyist appearing to give testimony in support of the program of the League of Women Voters could not deduct his expenses.

Mr. PROXMIRE. On the basis of the Senator's experience in both the city council of Chicago and in the Senate, and also his broad knowledge of Government in our country, does the Senator feel that the special financial interests are being so consistently defeated by the advocates of the public interest and are suffering so because of the great power of the League of Women Voters, the Civil Liberties Union, and the other pro bono publico groups, that they need that kind of protection in order to provide for their opportunity to defend themselves?

Mr. DOUGLAS. Of course not. One of the gravest weaknesses in modern democracy is the fact that the so-called special and concentrated private interests, in the form of the producing groups, are powerfully organized and can bring to bear great pressures on legislative bodies, whereas the diffused general interest of consumers and small taxpayers is relatively little represented. The obstacles are great to start with because any particular act or bill does not mean much to the individual consumer or taxpayer.

GAS BILL GOOD EXAMPLE

Let us consider the gas bill which Senator KERR sponsored. To the gas and oil industry that bill meant $600 million a year. But to the 30 million householders who use gas to cook and heat it meant on the average only $20 a year. Very few people will become sufficiently interested in the subject, study it, and then be able to afford to come to Washington to lobby against it when only $20 a year for each is involved. As a result, the powerful interests of the producing groups are strong and vigorous. The diffused general interest groups are weak.

I sometimes think an analogy is what happened to the Incas of Peru and the Indians of Mexico. The Aztecs and the other Indian tribes outnumbered Cortez and his men 1,000 to 1. But the Indians were divided. They were relatively uninterested. Cortez had firearms, armor, and horses. He overthrew an empire.

The same thing happened in Peru. Time after time in our city councils, State legislatures, and the Congress of the United States, the same thing tends to happen.

There is already a great disparity in strength. The protective devices which James Madison thought were embodied in the Constitution of the United States, and which he developed in the 10th paper of the Federalist, and with respect to which he relied upon conflicting economic interests to offset each other—are what Mr. Galbraith calls the theory of "countervailing power"—no longer operate very fully because we are now getting cross lobbying, for example, on the part of the National Association of Manufacturers, the American Farm Bureau, and the American Medical Association. All those great groups support each other. The result is a terrific combination against which it is very difficult to stand up and fight successfully.

The lobbying provision in the tax bill would still further intensify that imbalance. I think that is the word. It would make possible a deduction from the tax bills of the wealthy for lobbying expenses, which would be paid for by Uncle Sam, while the weak, general consumer or small taxpayer would have no protection.

In my opinion, the lobbying provision started by the House and completed by the Finance Committee is one of the most inequitable in the bill. The provision appears early in the bill. There will be a yea-and-nay vote on it when the Senator from Oklahoma proposes, as I suppose he will propose, that it be included. We shall then see who is for the big vested interests, the special interests, and selfish interests, and who is for the people.

Mr. PROXMIRE. Is it the conclusion of the Senator from Illinois that at present a most serious weakness in American democracy is the pressure of organized financial interests that use the organized pressure to get special interest legislation at the expense of the public interest?

Mr. DOUGLAS. The Senator is completely correct.

Mr. PROXMIRE. The proposal would aggravate that situation.

Mr. DOUGLAS. That is correct.

Mr. PROXMIRE. Is it not true that the section of the bill about which we are speaking has never been recommended by the Kennedy administration or by the Department of the Treasury?

Mr. DOUGLAS. It has been opposed by the Treasury Department.

Mr. PROXMIRE. They have opposed it. They do not want it. They think it is wrong.

Mr. DOUGLAS. The proposal has been opposed by the administration. In the Cammarano case the Supreme Court in a unanimous opinion handed down by Justice Harlan, with no dissenting opinion that I can find, held that the tax system should be neutral so far as lobbying is concerned. The Court held that tax credits should not be given either to those who had a direct business interest or to those who oppose the direct business interest and fight for the general interest. It is the Cammarano verdict which the Senate Finance Committee, and to some degree the House Ways and Means Committee, are now seeking to reverse.

Mr. PROXMIRE. In the interest of our friends across the aisle, is it not true that the Eisenhower administration also opposed that particular provision?

Mr. DOUGLAS. I think that is true.

Mr. PROXMIRE. That is the understanding of the Senator from Wisconsin. Is it not also true that one of the reasons that provision got through the House of Representatives was that it was a new section of the bill on which the House Ways and Means Committee held no hearings. With the kind of closed rule the House had on the bill, there seems to have been a violation of the rules, and if there had been an objection, it would have been possible to block consideration of the tax bill on that basis.

Mr. DOUGLAS. That is my understanding of the parliamentary procedure. There was no testimony on this provision. The House Ways and Means Committee, as I understand, inserted it at the last minute. They asked for a closed rule, which meant that the only motion that could be made, except on final passage, was a motion to recommit, which means that it is necessary to take the bill as a whole or defeat the bill. I am very frank to say that I believe the bill would have been defeated in the House had not some of us gone to certain Members who wanted to oppose the bill in the House and said to them, "We hope you do not defeat the bill in the House. Let it come to the Senate. We hope that we can take this and other features out of the bill on the floor of the Senate." That was not trying to obstruct the bill, as certain writers charge, but trying to help the bill become law.

Mr. PROXMIRE. Therefore we have a provision in the bill which would serve the interests of special vested financial interests. There is no question that it would weaken the already comparatively feeble strength of those who argue for the public interest. It is opposed by the Kennedy administration, and was opposed by the Eisenhower administration, and only got in this bill because of a parliamentary evasion.

Mr. DOUGLAS. That is correct.

Mr. PROXMIRE. I thank the Senator.

THE DEDUCTION FOR CERTAIN LOBBYING EXPENSES OF TAXPAYERS WITH BUSINESS INCOME

Mr. DOUGLAS. Mr. President, section 3 would permit the deduction of certain lobbying expenses by taxpayers with business income. This would depart from a salutary principle which has been part of the income tax law since World War I. It would provide unwarranted tax reduction where it is least needed for reasons which are specious. It would introduce novel distinctions into the tax law, producing new requirements difficult for the Internal Revenue Service to administer. The specific language in which the deduction is cast contains ambiguities which will create continuing uncertainty as to its exact meaning, and, most important, the relationship of this provision to the whole process by which our citizens seek to influence the enactment of legislation at all levels of government was not adequately considered. Section 3 should be deleted from the bill.

Under existing law the costs of efforts to influence legislation are not deductible, a rule applicable to all taxpayers. Whatever the motive for a citizen's efforts to influence legislation, he now bears the whole cost of that effort himself. No part of the expense can be passed on to the Federal Government through an income tax deduction. In the constant competition for legislative favor and results at National, State, and local levels, the Federal Treasury stands neutral—and properly so.

Section 3 would change all that. It would amend section 162 of the Internal Revenue Code of 1954, the section creating the general authority for deduction of the ordinary and necessary expenses of business operation. Section 3 would add a new subsection specifically authorizing deduction of lobbying expenses in certain categories by taxpayers with business income. Only those taxpayers with business income would receive any benefit. All others would still be subject to the existing rule of no tax benefits for lobbying, a result which follows necessarily from incorporation of the amendment in section 162 and one which is specifically spelled out by the House committee report.

SPECIFIC EXAMPLES

Some specific typical examples will bring this into sharper focus. Suppose a measure is being considered, as many have been, involving a proposed change in the standards or testing procedures for food, drugs, or cosmetics. The costs of presenting the views of drug manufacturers and distributors would be deductible. The cost of presentations on behalf of consumers or of disinterested professional or technical advisers would not be. Or suppose that a State legislature is debating a measure designed to decrease stream pollution. Manufacturers who would be adversely affected by its enactment could deduct the cost of opposition. Members of the public interested in pure water for drinking or for recreational uses would have to finance their support of the measure entirely from their own pockets. Or, at the local level, a business owner of a piece of real estate could seek advantageous amendment of the local zoning ordinance deducting the cost of his presentation before the local city council. The owners of nearby residences would not receive this help from the Federal Treasury in preparing the exhibits and briefs necessary for effective opposition.

These are discriminations impossible to justify. Can anyone seriously contend that consideration of legislative proposals affecting business taxpayers is seriously handicapped by absence or weakness of expression of business viewpoints? Is there any evidence that business taxpayers, individually or collectively, are now deterred from expressing themselves on these subjects by the present rule of tax neutrality which permits no deduction for lobbying expenses? To ask these questions is to answer them. Of all viewpoints on legislative proposals, those of business are consistently the most ably represented before the Congress and before State and local legislative bodies. Why then should the cost of lobbying activities of taxpayers with business income be singled out for this preferential tax reduction? No adequate reason has been given.

Any discrimination at all among citizens in the exercise of their constitutional right to petition their representatives is patently undesirable. Discrimination by preferential tax deduction is magnified as the amounts spent for these purposes increase. Modern efforts to influence legislation cover a wide range of techniques, some of which are very costly. One can send a letter to his Senator for 4 cents. However, to stimulate tens of thousands to do so requires the expenditure of large amounts running sometimes into the hundreds of thousands, even millions, of dollars. But all this is well known. It has been thoroughly documented many times.

LARGE SUMS INVOLVED

The application of section 3 would not be confined to nominal amounts. It would permit the deduction of some very large sums. In addition to provision for deduction of the costs involved in direct contacts with legislators—personal calls and visits, appearances before committees or statements filed with them—the cost of efforts to influence legislation indirectly are also made deductible in some instances. The costs of communications to organization members and to shareholders and employees have all been blanketed in.

When section 3 is applied to today's scene, we find that it will authorize giant corporations to deduct the cost of communicating the views of management officials to hundreds of thousands, even millions, of shareholders and employees, for the purpose of influencing them with respect to current controversial legislative proposals. To use a painfully familiar example, section 3 would authorize deduction of the cost of campaigns designed to produce a flood of letters opposing withholding on dividend income.

Under existing law these sums are not properly deductible—and never have been. To permit deduction now would shift a very large proportion of these heavy costs to the Federal Treasury, a disguised subsidy for which there would be no justification.

The effects of such subsidized efforts to influence legislation indirectly would not be confined to the recipient members, shareholders, and employees. The views expressed and their source would frequently come to the attention of families and friends of the recipients, thereby broadening the scope of the influence subsidized by the Federal Treasury. Of course, the benefits of section 3 as they would apply to these broadcast efforts to influence legislation can only benefit very large organizations. Small business taxpayers, as well as nonbusiness taxpayers, would have little or no use for

it and could well suffer from its use where their interests on legislative matters are opposed to those who could take advantage of it.

LIMITATIONS ILLUSORY

True, not all lobbying costs of business taxpayers would be made deductible by section 3. The bill purports to create limitations which will restrict the kind of expenses for which a deduction can be claimed. Thus, to qualify for the deduction, the legislative proposal must be of "direct interest" to the taxpayer. In addition, specific provisions deny deductions for political campaign expenses or for efforts "to influence the general public, or segments thereof." However, a close inspection raises genuine doubt as to the precise meaning and application of these restrictions. They may, in fact, prove largely illusory.

Thus, one might ask, What subjects are not of "direct interest" to a large corporation? Any measure involving a tax or a change in the regulation of business or the marketing of securities or foreign trade or the terms of employment or labor relations or the monetary system will have some impact on every substantial business enterprise. Is it intended that the cost of testimony or statements or communications to shareholders or employees on this entire range of subjects is to be deductible? Similarly, can the prohibition against deductions for political campaign purposes be really effective? Granted that the cost of a folder urging shareholders to vote for Jim Darkwater will not be deductible, what of the cost of a folder urging a position on the principal issue dividing Darkwater from his opponent Bob Cleanriver? Can issues and the candidates be separated so easily? It is doubtful. Section 3 thus could make slightly veiled political contributions deductible. The benefit would not be universal though. To return for a moment to the anti-water-pollution measure used as an example before, suppose Darkwater is against it and Cleanriver is for it. The former's supporters could deduct the cost of their literature discussing the anti-pollution measure—and thus their support of Darkwater—supporters of Cleanriver could not.

Obviously, congressional memories are very short. For at least a century Senators and Representatives have regularly inveighed, individually and collectively, against lobbyists and their activities. The need for substantial disclosure by lobbyists, particularly in financial respects, has long been recognized. When a person or organization becomes a lobbyist, he is required to register as such and thereafter to report quarterly his expenditures for these purposes. In spite of these safeguards, every few years some lobbyists become so bold and their overreaching so bad that a special inquiry is required. A prime example was the creation in the 84th Congress of the Senate Special Committee To Investigate Political Activities, Lobbying, and Campaign Contributions. Its report states graphically the kinds of abuses which occur and the large sums of money available to be spent on efforts to influence legislation. Sugar quota bills attract lobbyists like flies and, like flies, their activities are not widely admired. The Senate Foreign Relations Committee is currently beginning an investigation of another group of lobbyists, an inquiry which has grown in large part out of concern for their lucrative financial arrangements. Nor are problems with lobbyists confined to Washington. Their influence on State legislators and their sometimes questionable methods in State capitols is notorious.

CYNICAL TAXATION

When projected against all this experience, section 3's proposed financial bonanza for one group of lobbyists and their employers seems ironic in the extreme, if not downright cynical.

There is no challenge here to lobbying per se. It is unquestionably legitimate. A constitutionally protected right of our citizens, it often supplies useful information and reactions on pending legislation. However, it would be foolish to exalt it unduly for these reasons. At best, lobbying is a mixed blessing for it is almost always exclusively concerned with self-interest rather than the broad public interest. Fortunately, section 3 presents only a narrow problem; namely, whether or not the lobbying done by one segment of our society—taxpayers with business income—should be entitled to support from the Federal Treasury.

A number of arguments are made in favor of this measure. Some of them have a surface plausibility, but on close analysis none of them holds water. The issue is actually a simple one. We begin with a longstanding rule that all taxpayers, business and nonbusiness, who seek to influence the work of legislative bodies, National, State, or local, pay their own expenses in full without assistance from the Federal tax system. This neutral posture of the tax law is a healthy one and should be defended and strengthened. Legislation affects all our citizens. It is entirely suitable that all who seek to influence that legislation, directly or indirectly, should be treated alike. The expenses of all should be on the same footing as far as the Treasury of the United States is concerned. The only issue here is whether or not to depart from this principle of neutrality and equality. Plainly, the case for such a change has not been and cannot be proved.

Mr. PROXMIRE. Mr. President, will the Senator yield for one more observation?

Mr. DOUGLAS. Certainly.

Mr. PROXMIRE. On page 23 of the committee report the following language occurs:

> Your committee's amendment provides, in addition to the categories specified in the House bill, for the deduction of expenses incurred by a taxpayer in carrying on a trade or business if the expenses are in direct connection with the communication of information between the taxpayer and employees or stockholders with respect to legislation, or proposed legislation, of direct interest to the taxpayer.

In other words, the Finance Committee, in addition to all other things, has provided that a corporation can lobby its employees and stockholders in its interest, and therefore considerably aggravates and increases the power of a special interest to get the kind of legislation it wants to achieve.

Mr. DOUGLAS. Yes. For example we know that the pressure against the withholding feature of this bill was carried out by building and loan associations, and if the lobbying provisions were now law they could have made Uncle Sam pay 52 percent of the cost of lobbying against the bill—52 percent of the cost which they had in circularizing their members, depositors, copartners, or what have you.

Similarly in the Du Pont bill, which the Senator from Tennessee and I opposed at the opening of this session, if the lobbying provisions were in effect the Du Pont Co. could get a refund of expenses incurred in circularizing their stockholders and their employees, in making ex parte statements to them, and in getting them, in turn, to write to the legislators.

There are tremendous possibilities of evil and excessive pressure which these two measures open up; namely, the House amendment permitting the underwriting of direct lobbying, not only by officers, but also of others, of legislative bodies; and the Senate Finance Committee amendment permitting circularization of stockholders and members and depositors, and the like.

Mr. GORE. Mr. President, will the Senator yield?

Mr. DOUGLAS. Yes, I am glad to yield.

Mr. GORE. Does not it go much further, in fact, than the Senator has described? Does not it include research and travel expense items and contacts—whatever that means—not only of congressional committees and Members of Congress, but also of State legislatures, municipal councils, and county governments; indeed, does not this provide for a tax deduction of nationwide lobbying organizations on a permanent basis, from the local level to the national level?

Mr. DOUGLAS. The Senator is correct. Not only does it help finance lobbying and circularization, but, also as he says, the staff work which lies behind it, such as research and legal services and public relations works.

Mr. GORE. And retainer fees.

Mr. DOUGLAS. Yes.

Mr. GORE. Public relations fees.

Mr. DOUGLAS. Yes.

Mr. GORE. Lawyers' fees, accountants' fees, statisticians' fees.

Mr. DOUGLAS. And fees of Washington representatives.

Mr. GORE. Oh, yes.

Mr. DOUGLAS. And of representatives in Springfield and Madison and Albany and Nashville. Also the context with which all of this takes place.

Mr. GORE. With which they succeeded in the Du Pont bill and in the withholding provision of the pending bill

in thoroughly misleading the American people.

Mr. DOUGLAS. That is correct.

Mr. GORE. Will the Senator yield for one further question?

Mr. DOUGLAS. Yes; gladly.

Mr. GORE. Is it the Senator's purpose, first, to oppose the adoption of the amendment approved by the Senate Committee on Finance, which makes it worse——

Mr. DOUGLAS. I hope that if the leadership is not able to get it through and if we defeat it, we will then move to strike out the House provision.

EXPENSE ACCOUNT PROVISIONS

The second way in which this bill was gutted was in the matters dealing with expense accounts and entertainment.

HOUSE SOLUTION TO THE PROBLEM

The test adopted by the House of Representatives is that the expense of an entertainment activity will not be deductible unless "directly related to the active conduct of the taxpayer's trade or business." Where an expense connected with a facility such as a yacht or a hunting lodge is involved, the taxpayer must also show that the facility "was used primarily for the furtherance of the taxpayer's trade or business." On its face, this standard seems almost as broad as present law and would appear to present many of the same problems.

However, in its report the House Ways and Means Committee has explained its test in a way which provides a number of tangible, practical, and meaningful guidelines: The report states that under its test the taxpayer—

Will have to show more than a general expectation of deriving some income at some indefinite future time from the making of the entertainment-type expenditure; however, he will not be required to show that income actually resulted from each and every expenditure for which a deduction is claimed.

If the expenditure is for entertainment which occurs under circumstances where there is little or no possibility of conducting business affairs or carrying on negotiations or discussions relating thereto, the expenditure will generally be considered not to have been directly related to the active conduct of business. Thus, the absence of the taxpayer or his representative from the entertainment activity ordinarily indicates that the entertainment was not directly related to the conduct of the taxpayer's trade or business. Similarly, if the group of persons entertained is large or the circumstances substantial, the cost of the entertainment will not be deductible, in the absence of a clear showing of a direct relationship to the active conduct of the trade or business.

This clear statement of legislative intent coupled with the statutory language provides a workable and reasonable solution to the difficult expense account problem and should go a long way toward reducing the abuses outlined above. However, critics of the House proposal attacked this crucial committee report statement on the ground that it had no support in the statute.

In view of the broad language of the statute, requiring explanatory implementation to make it useful, this contention is baseless. The true reason for the complaint is the fact that the statute as interpreted by the Ways and Means Committee report has some real teeth in it.

Even so, we are not asking that the business community adopt Spartan standards. The House bill, which we hope will be restored, recognized the general custom of business entertaining at meals in restaurants. It specifically permits the deduction of entertainment presently allowable through furnishing food and drink in restaurants and hotels in an atmosphere conductive to business discussion. No business need be discussed. It thus leaves undisturbed the most significant portion of goodwill entertainment conducted in this country. It strikes only at the high, wide, and fancy living and indulgence in personal pleasures which all taxpayers ought to pay for themselves without Government subsidy.

FINANCE COMMITTEE SOLUTION FORMULA FOR DECEPTION

The only change in the pertinent House statutory language made by the Finance Committee is, as has been stated by the Senator from Tennessee, the addition of the words "or associated with." Thus, a taxpayer can deduct an entertainment expenditure which is only "associated" with the active conduct of his trade or business, as well as one which is directly related thereto. Since this statutory language is quite similar to that of the House bill—equally broad, in any event—one would reasonably expect again to find a helpful explanation as to what the committee intended to accomplish by its additional phrase "or associated with."

Unfortunately, such is not the case. Unlike the clear, concise, and workable guidelines set forth in the House report the Finance Committee report is a mass of vague, disconnected statements and examples which are destined to spawn controversies so numerous and intense as to make the highly unsatisfactory expense account picture of today seem most pleasant. In addition, the Senate report attempts to paint a picture of virtue and righteousness, but even a casual glance beneath the surface reveals that the virtuous exterior is more illusion than reality. For example, the report states:

Nothing in your committee's bill is to be construed as allowing a deduction for any expense which is against public policy or which violates the public conscience. Deducting an expense incurred for such purpose under the guise of generating "business goodwill" will not be condoned and under your committee's amendment is not deductible. Thus, the cost of liquor purchased for the entertainment of customers and the promotion of goodwill (which under existing law has been held deductible) will be disallowed if the serving of liquor violates the public morals of the community as expressed in local law.

Very few local laws forbid the consumption of liquor. I think there are only two States in the Union where the sale of liquor is forbidden, but I am not sure that its consumption is forbidden in any State.

Another example of expenses for immoral purposes which have been claimed on tax returns under existing law involves expenditures to provide "call girls" for the purpose of entertaining clients. Under your committee's amendment no deduction whatsoever is to be allowed for expenditures of this nature. In no legitimate sense are they "directly related to or associated with the active conduct" of a trade or business.

COMMITTEE ACTION NO MORAL BROOM

The foregoing suggests that the committee's action will serve as a moral broom to disallow expenditures where liquor is illegal under local law, and where "call girls" are utilized as "business" entertainment. However, expenditures such as these, which violate clearly defined lines of public policy, are not deductible under present law. See *Smith*, 33 T.C. 861 (1960); *R. E. L. Finley*, 27 T.C. 406 (1956); *U.S.* v. *Winters*, 261 F. 2d 675 (1958). What then will be accomplished under the committee's language? Is it not clear that this is simply a smokescreen thrown up to suggest that abuses are being remedied whereas in actuality little, if anything, is being accomplished beyond present law?

The Finance Committee report stresses the desirability and wholesomeness of "goodwill" entertainment. It states:

Goodwill has long been recognized as a legitimate objective of business entertaining and where the purpose of the expense and its clear relation to a business is firmly established, the expense ordinarily will continue to be deductible.

The report further states:

To eliminate the harshness resulting from the House report, amendment of the language of the House bill is necessary. * * * This new language will permit deduction of expenses for entertainment, amusement, or recreation incurred for the creation or main-

tenance of business goodwill without regard to whether a particular exception applies. However, this new language will apply only if the taxpayer demonstrates a clear business purpose and shows a reasonable expectation of deriving some income or other benefit to his business as a result of the expenditure. If he meets this test, the expenditure will be considered to be associated with the active conduct of his trade or business; otherwise, the expense will be disallowed under your committee's amendment.

GOODWILL ALLOWED

A close analysis of these statements makes it eminently clear that expenditures for goodwill have been given preferred status. In these references to "goodwill," the committee has presented our sophisticated expense account society with a blueprint for continued high living at Government expense. These statements are a readymade formula for deception which will leave the Internal Revenue Service with an impossible enforcement task, for, in effect, almost all entertainment expenditures, both for the creation and maintenance of business goodwill are declared to be henceforth deductible. In stating that the taxpayer must demonstrate a clear business purpose and show a reasonable expectation of deriving some income or other benefit to his business from the making of the entertainment expenditure, the committee report has added nothing to the requirements of present law. The taxpayer must meet precisely the same test today, but, as hundreds of cases illustrate, such vague and generalized requirements present are so easy to meet as to be practically meaningless.

Furthermore, although the committee report makes numerous references to goodwill, it gives no indication as to what is encompassed by this term. Nowhere is goodwill defined. How does a businessman go about creating goodwill—whatever goodwill is? It seems clear that the sky is the limit. If a businessman—in his judgment—thinks a big yacht may be helpful in developing some customers, does not this committee report language put the official congressional stamp of approval on his deduction of these substantial costs of maintaining and operating such a "business" asset? Is not a revenue agent foreclosed from effectively examining into the matter?

In the light of all the foregoing statements respecting goodwill, very little is salvaged from the following comment—particularly in view of the illustration given as to what is meant by "vague goodwill."

Where goodwill generated by the expense is vague or where the possibility of the expenditure resulting in the production of income is remote, no deduction will be permitted. For instance, under present law a taxpayer may deduct expenses of entertaining buyers and others associated with his trade or business even though at the time he does the entertaining he already has more business than he can handle. Under your committee's amendment, however, no deduction will be allowed because, with a large backlog of unfilled orders, such entertainment ordinarily cannot be regarded as being associated with efforts to produce income.

This narrow "exception" to the basic theme of the Finance Committee report that all goodwill entertainment is deductible is scant evidence of tightening up present law. Rare indeed is the case where the taxpayer has such a backlog of unfilled orders that his entertainment activities cannot be regarded as being associated with efforts to produce income. It is interesting to note that even in such an extreme case the report hedges the consequences by providing that "ordinarily" the deduction will not be allowed. Moreover, there is a good possibility that entertainment expenditures in such a unique case are not deductible under present law because they are in the nature of capital expenditures. Cf. *James Schulz* (16 T.C. 901). Here again the committee has done nothing more than set up a strawman—to give the illusion that a cutback on existing law is being effected. In reality nothing has been accomplished—except that perhaps another arena for conflict has been created.

The harshness of which the report speaks is that the House provision, as explained by the Ways and Means Committee's report, has some effect and will disallow some entertainment expenditures which are deductible under present law. Presumably that is the purpose of this legislation. However, one must struggle hard to tell which of the above-described cases would be denied deduction under the Finance Committee report. How much, if anything, would be disallowed to the corporation which spent and deducted almost $1 million in 1 year for yachts, club dues, shipboard conventions, hunting and fishing trips, and parties? Does not a corporation make such expenditures to develop goodwill? We have already seen that goodwill expenditures are clearly deductible under the Finance Committee report. How about the banker who deducted a substantial part of the cost of his daughter's coming-out party as a business expense? Was he not also developing customer goodwill? Certainly the Government is not, under the Finance Committee report, free to disallow expenses regardless of the form of entertainment the taxpayer may adopt to develop goodwill. Similarly, in all the other cases set forth above, the taxpayer would appear to be able to continue to deduct all entertainment expenditures.

Mr. DOUGLAS. Mr. President, on balance, the bill as reported by the Finance Committee is a poor one. Although there are worthwhile sections in the bill these are hardly sufficient to outweigh those sections which are, either in whole or in part, faulty.

As we have already pointed out, many of the President's major recommendations have been ignored or watered down. The committee has chosen to strike the withholding provision, which was passed by the other body. It has failed to include in the bill such obviously needed reforms as the repeal of the dividend credit and exclusion as recommended by the President. In almost every instance, expense accounts and foreign operations, for example, where the committee did approve a section or provision recommended by the President and adopted by the House, that provision has been materially weakened.

As if the emasculation of many of the President's major recommendations were not enough, the Finance Committee has added, by way of afterthought, several rather petty addenda to the bill. Sections 21 through 25 really have no place in this bill. Some of these additions are merely pending bills masquerading as general legislation, while others are of such minor consequence that they have far too little stature to warrant their consideration in this bill when so many more important subjects are being left to a later, more general, tax reform bill.

The Senate must now proceed to a painstaking examination of each provision contained in the bill.

Thank the Lord, the junior Senator from Tennessee [Mr. GORE] refused to give unanimous consent to have the amendments of the committee agreed to en bloc. They will now have to be considered individually. The burden of proof will pass from those of us who are trying to defend the President's program to those who are trying to defeat the President's program. The issues at stake can then be shown in their real light.

Possibly the press may wake up as to who is defending the President and who is opposing the President. I hope that the Wall Street Journal is not correct in its prophecy of this morning that the Democratic leadership will move "with harsh parliamentary tactics against liberal efforts to restore some of President Kennedy's recommendations to the Senate Finance Committee version of the tax bill."

REVENUE ACT OF 1962

The Senate resumed the consideration of the bill (H.R. 10650) to amend the Internal Revenue Code of 1954 to provide a credit for investment in certain depreciable property, to eliminate certain defects and inequities, and for other purposes.

Mr. HUMPHREY. Mr. President, so that the Senate may be informed, a discussion has taken place between the Senator in charge of the bill, the Senator from Oklahoma [Mr. KERR], and the chairman of the committee, the Senator from Virginia [Mr. BYRD], the Senator from Tennessee [Mr. GORE], the Senator from Wisconsin [Mr. PROXMIRE], and other Senators relating to the procedure which it is hoped will be followed tomorrow. That procedure will be as follows:

Senators who are deeply interested in the amendments to the bill will examine each of the committee amendments and separate from them those which are controversial in terms of the need of extra debate. The other committee amendments, those which are not of a controversial nature, will be offered and will be agreed to en bloc, so that the bill will stand as new text or as a new bill with the exception of those amendments which will be excluded from the understanding as of tomorrow.

Mr. GORE. Mr. President, will the Senator from Minnesota yield?

Mr. HUMPHREY. I yield.

Mr GORE. The bill contains about 175 committee amendments. Most of them are minor. It is the consensus, as the Senator from Minnesota has correctly stated, that with the exception of six or eight amendments it will be possible to agree to the remaining amendments en bloc. And between now and the time when the Senate meets tomorrow, I and other Senators will go through this 400-page bill and will try to develop with the chairman of the committee, the Senator from Virginia [Mr. BYRD], the Senator from Oklahoma [Mr. KERR], and other Senators an agreement along this line.

Mr. PROXMIRE. Mr. President, will the Senator from Minnesota yield for a parliamentary inquiry?

Mr. HUMPHREY. I yield for that purpose.

Mr. PROXMIRE. I should like to ask the Presiding Officer whether it would be in order to accept some of the committee amendments and thus amend the bill, with the understanding that the bill would then be considered as original text, subject to further amendment. Is that parliamentarily possible, and would that be acceptable?

The PRESIDING OFFICER (Mr. HICKEY in the chair). The Chair understands that the proposal made by the acting majority leader is just such as the Senator from Wisconsin has outlined, and the Chair understands that the proposal is that that be ordered by unanimous consent.

Mr. PROXMIRE. I thank the Chair.

Mr. HUMPHREY. Mr. President, that is the purpose of the suggestion to which the Senator from Tennessee and I addressed ourselves—namely, that the Senate would agree to these amendments en bloc—with the major controversial amendments excluded. Then we would have, for all practical purposes, a new text; and the remaining amendments could be considered in connection with it, as amendments to that new text.

The PRESIDING OFFICER. That is in accordance with the understanding of the Chair.

Mr. HUMPHREY. Mr. President, I thank all Senators for their cooperation.

Mr. DIRKSEN. Mr. President, if the Senator from Minnesota will yield, I should like to suggest that I hope the amendments in the print will be listed and identified in such a way that will be easy for Senators to understand them, so there will not be any difficulty or objection to amendments because of any misunderstanding by Senators as to exactly what the amendments are. So I think a list should be made.

Mr. GORE. I will work with the chairman of the committee, the Senator from Virginia [Mr. BYRD], the Senator from Oklahoma [Mr. KERR], the Senator from Minnesota [Mr. PROXMIRE], the Senator from Illinois [Mr. DOUGLAS], the Senator from Delaware [Mr. WILLIAMS], and other Senators, so that if an agreement is reached—and I am sure one will be—we shall prepare a list by means of which Senators can be guided.

Mr. DIRKSEN. And also a list of the major amendments on which separate action is sought.

REVENUE ACT OF 1962

Mr. KERR. Mr. President, I ask that the Chair lay before the Senate the unfinished business.

Without objection, the Senate resumed the consideration of the bill (H.R. 10650) to amend the Internal Revenue Code of 1954 to provide a credit for investment in certain depreciable property, to eliminate certain defects and inequities, and for other purposes.

The PRESIDING OFFICER (Mr. LAUSCHE in the chair). The question is on agreeing to the committee amendment on page 8, in lines 2 and 3.

Mr. KERR. Mr. President, after consultation with the distinguished Senator from Tennessee [Mr. GORE], the Senator from Illinois [Mr. DOUGLAS], the Senator from Delaware [Mr. WILLIAMS], and the Senator from Virginia [Mr. BYRD], I should like to propound a unanimous-consent request; namely, that the following amendments—which I shall designate specifically in a moment—are not agreed to by this unanimous-consent request——

Mr. DOUGLAS. Mr. President, will the Senator from Oklahoma yield for a moment?

Mr. KERR. I yield.

Mr. DOUGLAS. The Senator from Oklahoma means the following committee amendments; does he not?

Mr. KERR. That is correct.

Mr. President, I was saying that I wish to propound the following unanimous-consent request: That the following committee amendments are to be considered in succession, following consideration of the amendment to section 2, which is to be offered by the senior Senator from Virginia [Mr. BYRD]; that all other committee amendments are agreed to en bloc and are to be considered as part of the original text of the bill, and subject to further amendment; and that after consideration by the Senate of the 11 amendments which I shall now specifically identify—being committee amendments—and after they are acted on by the Senate, the entire bill then shall be considered as part of the original text, and subject to further amendment.

The specific amendments to be excepted from this agreement, as heretofore stated, are as follows:

First. The committee amendment on page 41, in line 18, through page 42, in line 4, and page 42, in line 7, being the expense account amendment.

Second. The committee amendment eliminating entirely section 482 of the bill. This section would have strengthened the allocation formula in section 482 of the code; and the committee amendment is on page 52, line 1, through page 57, in line 22.

Third. The gross-up committee amendment, on page 121, in line 3, through page 127, in line 1.

Fourth. The withholding committee amendment, on page 307, line 9, through page 369, line 19.

Fifth. The clearing land committee amendment, on page 381, line 16, through page 384, line 24.

Sixth. The charitable contributions amendment, on page 385, line 1, through page 386, line 6.

Seventh. The determination of the number of stockholders committee amendment, on page 386, line 7, through page 388, line 10.

Eighth. The committee amendment on the Twin Cities Street Railway, on page 388, line 11, through page 389, line 14.

Ninth. The committee amendment on the pension plan for the Hod Carriers Union, on page 389, line 15, through page 390, line 8.

Tenth. The committee amendment on the surviving partner in a two-man partnership, on page 390, line 9, through page 391, line 21.

Eleventh. The committee amendment on page 305, in lines 23 and 24.

Mr. GORE. Mr. President, will the Senator from Oklahoma yield?

Mr. KERR. I yield.

Mr. GORE. The last six amendments are not major ones, except the very last one, which is the——

Mr. KERR. I think the Senator from Tennessee means the last seven.

Mr. GORE. Yes, except the last one, which has been temporarily requested by the senior Senator from Ohio. They are proposed additions to the bill or so-called riders to the bill——

Mr. KERR. They are not completely related to the other parts of the bill.

Mr. GORE. That is correct. So this proposed agreement will reduce the number of controversial committee amendments to five major subject matters; and, in addition, the agreement will make it in order, before action on any of these exceptions to the en bloc agreement, for the chairman of the committee to offer an amendment to section 2.

Mr. SMATHERS. Mr. President, will the Senator from Oklahoma yield for a question?

Mr. KERR. I yield.

Mr. SMATHERS. The amendment the able chairman of the committee expects to offer deals with the investment credit provision, does it not?

Mr. KERR. That is correct; and it is one of the amendments which, under the proposed unanimous-consent agreement, will become part of the original text of the bill, and subject to further amendment.

Mr. JAVITS. Mr. President, will the Senator from Oklahoma yield for a question?

Mr. KERR. I yield.

Mr. JAVITS. What will be the situation of Senators who wish to amend section 12, relating to controlled foreign corporations?

Mr. KERR. As I understand, any Senator who wishes to have any part of the bill amended will be in a position identically the same as that he would be in either if this unanimous-consent request is agreed to or if it is not agreed to. Ordinarily a unanimous-consent agreement is made in regard to all committee amendments—in other words, that they be agreed to en bloc and considered part of the original text to the bill, and subject to further amendment. But such a unanimous-consent request, when made yesterday, was objected to.

The unanimous-consent agreement now being requested is proposed after consultation with Senators who lodged the objection yesterday.

The result of this unanimous-consent agreement, if entered into, will be that all of the committee amendments, except the 11 committee amendments specifically excepted, will be agreed to en bloc, and of course, will be subject to amendment by any Member, but not until the committee amendments which have not been agreed to and have not, by means of this agreement, been made part of the original text, and subject to amendment, have been acted upon, whereupon, after the action on all the committee amendments is completed, the ones agreed to will be part of the original text; and then the entire bill, as it then will stand, will be subject to amendment, the same as though the request made yesterday had been agreed to.

Mr. JAVITS. In dealing with those 11 amendments, would it be more efficient to complete our action on them before other amendments are offered?

Mr. KERR. That would be in order.

Mr. JAVITS. Perhaps I misunderstood the Senator.

Mr. KERR. Then let me address a parliamentary inquiry to the Chair:

When a committee' amendment is not made a part of the original text, is not that amendment open to amendment when the Senate is considering it?

The PRESIDING OFFICER. The answer is in the affirmative.

Mr. JAVITS. Mr. President, a parliamentary inquiry: When amendments are offered to amendments which have not been made part of the original text, are not such amendments therefore limited to amendments in the second degree—which means only one amendment or no substitute?

The PRESIDING OFFICER. As a general rule, amendments in the second degree are always in order.

Mr. JAVITS. And therefore, in the case of amendments which are not incorporated in the bill as part of the original text, there would be the possibility of only one amendment, which would itself be a second-degree amendment?

The PRESIDING OFFICER. One amendment to the amendment.

Mr. JAVITS. Yes.

Let me ask the Senator from Oklahoma whether among the 11 committee amendments enumerated is included the entire committee amendment with regard to controlled foreign corporations—section 12?

Mr. KERR. No, it is not.

Mr JAVITS. So that would be in the original text of the bill, as covered by the unanimous-consent request?

Mr. KERR. Yes.

Mr. JAVITS. Does the proposed agreement also include the savings and loan provision?

Mr. KERR. Yes.

Mr. JAVITS. So that one, too, under this agreement, would be made part of the original text?

Mr. KERR. Yes.

Mr. DOUGLAS. Mr. President, will the Senator from Oklahoma yield for a clarification and explanation of a point?

The PRESIDING OFFICER (Mr. YOUNG of Ohio in the chair). Does the Senator from Oklahoma yield to the Senator from Illinois?

Mr. KERR. I yield.

Mr. DOUGLAS. In the original discussions with the Senator from Oklahoma, it was proposed by the Senator from Tennessee [Mr. GORE] and myself that the lobbying provision would also have to be proposed as a committee amendment. It will be noticed, upon a close reading of the RECORD, that this one is not now included in the exceptions.

Mr. KERR. Yes.

Mr. DOUGLAS. And this has been done with the full agreement of the Senator from Tennessee [Mr. GORE] and myself.

I think perhaps it is appropriate, however, that the RECORD should show why we agreed to this. It will be remembered that the original House bill made no alteration in the law concerning deductions for lobbying. The House Ways and Means Committee, at the last moment, without anyone really knowing what had happened, added a provision which permitted deductions for direct lobbying by business interests which had a business concern in legislation. This legitimatized tax deductions for direct lobbying on the part of officers, employees, and other representatives, and mass representation before not only Congress, but State legislatures, local councils, county bodies, and the like.

The Senate Finance Committee endorsed this provision and went it one better. It also permitted deductions for expenses connected with all communications on legislation between officers of the companies, stockholders, members, and employees, so that a company could circularize its stockholders, employees, and associates against a measure and get them to lobby and charge this as a business lobbying deduction. In other words, it would have permitted as a deduction from taxable income expenses in connection with efforts made by building and loan associations and certain mutual savings banks to strike out the withholding plan, and would legitimatize and have the Treasury pay 52 percent of the expenses of DuPont Co. in connection with efforts in favor of the DuPont tax bill which Congress passed so overwhelmingly in the early part of the year.

Likewise, it would permit the deduction of expenses by A.T. & T. in getting the satellite communications bill through Congress so that Uncle Sam would pick up 52 percent of those costs.

In the opinion of some of us, this is a gross abuse, and we object not only to the Senate amendment, but to the House provision.

Therefore, for technical reasons, in order to have one vote taken instead of two, we have agreed to the committee amendment on this point with the understanding that at an appropriate time I shall offer an amendment to strike both the House and the Senate provisions.

I will say in advance we will not prolong the discussion on this point. I think it could well be concluded, in view of the adequate discussion which we had yesterday in 1½ or 2 hours. On behalf of the Senator from Tennessee, the Senator from Wisconsin, and myself, I am ready to agree to a limitation of 2 hours on this amendment when such a request is made, and I hope no motion to table will be entered against it.

Mr. MANSFIELD. Mr. President, will the Senator yield?

Mr. DOUGLAS. I yield.

Mr. MANSFIELD. I think the Senator is more than fair. If it is agreeable, I would like to give favorable consideration to a limitation of 2 hours on that particular amendment.

Mr. DOUGLAS. It is understood, I hope, that this exclusion of the lobbying provision from the agreement which is now being made does not mean in any degree that those who are opposed to both lobbying amendments have folded their tents and withdrawn from the battle. Quite the contrary, is true; we are going to take the field and do our best. In the meantime, I strongly urge Members of the Senate, of the press, and citizens to read the debate of yesterday on lobbying, because I think these provisions are indefensible.

At present the law is neutral so far as lobbying is concerned. The law does not permit deductions either by special business interests or advocates of the general interest. But this amendment would permit the special interests to take their deductions, but would not permit the individual citizen to get the deduction. It would be difficult for him to do that, anyway; but this is a one-sided furnishing of additional weapons to those who already have nearly all the resources.

I do not think the conscience of the country can long stand these two amendments.

I make this explanation so that we can know exactly where the lines of battle are drawn and what the issues are.

I thank the Senator from Oklahoma for giving me permission to make this statement.

The PRESIDING OFFICER. Is there objection to the unanimous-consent request? The Chair hears none, and it is so ordered.

The amendments agreed to en bloc are as follows:

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In section 3, on page 39, line 18, after the word "taxpayer", to strike out "or"; in line 23, after the word "organization", to insert a comma and "or"; after line 23, to insert:

"(C) in direct connection with communication of information between the taxpayer and an employee or stockholder with respect to legislation or proposed legislation of direct interest to the taxpayer,"

LOBBYING EXPENSE DEDUCTIONS

Mr. KEFAUVER. Madam President, the provision in the tax bill which provides for deduction of lobbying expenses has been called a sleeper. This is certainly true because it was not proposed by the President and it was written into the bill by the House Ways and Means Committee even though hearings had not been held on the subject. The Treasury Department opposes it.

But it is more than just a sleeper. It is a sleeping giant. It will put lobbying at State, local, and Federal levels on a completely new basis and mushroom the efforts of special interest groups to obtain favorable legislation.

If this becomes law, it will do away with a principle which has been in our tax laws since 1919. I do not believe the public should pay the cost of anyone's attempting to influence legislation. I therefore hope the Senate will act favorably on the amendment of my colleague from Tennessee Senator GORE, and the Senator from Illinois, Senator DOUGLAS, which seeks to strike this provision from the bill.

Like many other pieces of recent legislation favoring special interest groups, this has not received the public attention which it deserves. To me, it is a shocking and outrageous proposal that the public should pay, by reduced tax revenues, for lobbying activities for legislation to favor special groups. But, strangely enough, this drastic change in present law has received little attention in the press and I do not believe very many of the American people are aware of it. Section 3 of the bill would allow a deduction for expenses, including traveling expenses, incurred in carrying on any trade or businesss "in direct connection with appearances before, submission of statements to, or sending communications to, the committees or individual Members of Congress or any legislative body of a State, a possession of the United States, or a political subdivision of any of the foregoing with respect to legislation or proposed legislation of direct interest to the taxpayer."

This means that a corporation or any other business could take a tax deduction for the expenses of coming to Washington, hiring lobbyists or attorneys to prepare statements, or draft amendments, and even the cost of circularizing individual Senators or Representatives.

It would have the same effect for lobbying activities before State legislatures and city councils.

Madam President, I hesitate to call this a giveaway because that seems to have the result of helping legislation rather than hurting it lately. But this bill unquestionably will result in a reduction of tax revenues to the Federal Government. I do not think anyone can estimate how much this might be because there is no way of telling. By making lobbying less expensive, it will undoubtedly encourage lobbying. In fact, I will show in a moment that that is its apparent purpose. We can undoubtedly then expect increased lobbying activities and expect that money will be spent for lobbying which would otherwise have been spent in other ways. When one considers that this will operate to encourage lobbying before every city council and every State legislature, as well as the Congress, it is impossible to guess what the total effects of this bill will be. But to the extent that tax deductions are taken for these lobbying activities, those taxpayers' liabilities are reduced and other taxpayers have a correspondingly greater burden. Thus, to the extent these deductions are taken, the cost is transferred to the general public.

This is not only unwise, in that it will mushroom lobbying activities for special interests, but I think it is unfair, and this is the reason why such concessions have never been made in previous laws.

I do not mean to say that lobbying is not a legitimate and often worthwhile activity. It assists Congress in having the aid and viewpoint of groups who are affected by legislation, but I cannot believe that there is such a shortage of lobbying activity that we need to encourage it by tax advantages. It is already unfortunate that there is no lobby for consumers and the public at large to represent their interests in legislation, but it will only compound the one-sided picture we often get if we allow tax incentives to encourage more and better lobbying.

Let us consider what the effects of this legislation might be. As Senator GORE and Senator DOUGLAS pointed out in their very fine minority views in the committee report, a State legislature might be considering a measure designed to decrease stream pollution. A manufacturing company which was perhaps dumping waste in the stream and would be affected by such a law could deduct the costs of sending its lawyers and officials to the State capitol, their room and lodging while staying there and legal fees for the preparation of testimony before committees, proposed amendments and promotional literature circulated to legislators. On the contrary, homeowners or members of the general public interested in pure water for drinking or recreational uses would have to finance their support of such a law entirely from their own pockets with no tax deduction.

Another example cited in the minority views would be that a businessman could deduct expenses of lobbying to change a zoning ordinance which affected his property, but the owners of residences who would also be affected would not benefit from reduced taxes for the cost of their preparing exhibits and briefs to oppose a change.

Let us consider some examples closer to home. A.T. & T. could have deducted from its taxable income the costs of its attorneys and public relations men in working for the communications satellite bill. Businessmen who were concerned with sugar quotas could have deducted the costs of lobbying on the Sugar Act. An American company which wanted high protective tariffs to avoid competition from imports could deduct the cost of lobbying against the trade bill. These examples could be multiplied many times. And if this bill is enacted, we can expect that the intensive lobbying efforts to which we are often subjected will be multiplied greatly.

When one considers the sort of legislation on the books in the various States, many other examples occur. For instance, the liquor industry could deduct the cost of lobbying for liberalized liquor laws. In a State which has local option for gambling, operators of gambling establishments and manufacturers of gambling devices could pass on to the Federal Treasury a part of the costs of trying to get legalized gambling throughout the State. Individuals who opposed liberalized liquor or gambling laws could not deduct the costs of opposing such legislation.

Another provision of this section authorizes the deduction of that portion of the dues paid to an organization which is attributable to lobbying expenses. In other words, trade associations which conduct lobbying for special groups would now be able to solicit more and bigger dues on the inducement of the tax deduction. But contributions to the League of Women Voters by civic-minded citizens are still not deductible to any extent because it attempts to influence legislation. Thus, associations who represented special interests in legislative matters would be given an advantage over associations which concern themselves with matters of general public interest of a nonbusiness nature.

In the hearings before the Finance Committee, Mr. Stanley H. Ruttenberg, of the AFL–CIO, made a very persuasive argument against this provision. I would like to quote from his testimony on page 610 of the hearings:

I might just say on lobby expenses we strongly urge that this provision be removed from the bill. It is a provision which, in

effect, would permit corporations of America to double their amount of expenditure on lobbying, and thereby increase substantially their lobbying activities.

We think that there is no reason to give them tax exemption for lobbying expenses any more than there is reason to give the individual worker who pays dues to his organization the right to deduct expenses for lobbying activities.

The corporation ought to be on the same basis as the individual. The tax-free institutions, the nonprofitable institutions like the U.S. Chamber of Commerce, National Association of Manufacturers, American Farm Bureau Federation, AFL-CIO, other organizations have tax-exempt status and, therefore, their expenditures can be made on various activities.

Only a minor proportion of the AFL-CIO's expenditures are made on lobbying but that fits within the concept of a tax-free organization.

But as far as an individual union member is concerned, any portion of his dues which are attributed to lobbying is not a deductible item on his income tax return just as expenditures by corporations should not be as they are not now an item for deductible allowances. Under this bill such lobbying expenditures now not deductible by corporations would be permitted to be deductible and we think this provision ought to be removed.

Unions represent and protect the workingman's interests in labor legislation and general legislation. The benefits they secure to him are as meaningful as those which business lobbyists secure for their interests. In fact, their interests may be directly opposed in some legislation. Why should not the workingman be allowed the same tax consideration for petitioning his representatives?

Madam President, under the general corporate tax rate of 52 percent, this deduction will cut in half the effective cost of lobbying. As Mr. Ruttenberg pointed out, this will enable them to double expenditures for lobbying with no effect on their profits.

Anyone who thinks this is not intended to accomplish just this result should study the testimony in support of it before the Finance Committee. At page 1960 of part 5, appears the testimony of Mr. George D. Webster, an attorney in the District of Columbia who appeared on behalf of the District Bar Association. He strongly urged enactment of this provision and the language of his testimony at the bottom of page 1961 is almost exactly the same as the language of the Finance Committee report on this provision at page 22 of the report. He said that it appeared anomalous to the association that legal fees for appearances of lawyers before legislative bodies or contacts with individual legislators are not deductible, while such appearances and contacts with tribunals or administrative officials are deductible. The committee report adopts the same language, leaving out only the words "to the association." Mr. Webster went on to say that his association believed that presentations to the legislative branch should not be discriminated against.

I am a member of the legal profession myself, but I do not believe we should raid the Public Treasury in order to increase the use of Washington lawyers for lobbying purposes. Mr. Webster also justified this provision as eliminating discrimination between lawyers' fees in presentations to the legislatures and lawyers' fees in appearances before courts and agencies. The two things are very different. In every court and in every agency, there is an adversary proceeding with someone representing both points of view. This is not true of lobbying for special interests. More often only one side of the picture is heard and the general public or the consumer, or whoever may be affected by the legislation on the other side, is not heard at all. It is for this reason that the costs should not be passed on to the public by tax deductions.

Madam President, in my opinion, this is one of the worst legislative proposals we have considered in a long time. It would increase the imbalance in what is already a deficit tax bill. But worse than that. It is discriminatory and it would multiply lobbying and the effects of lobbying by special interests. I strongly urge my colleagues in the Senate to join me in voting to remove it from the bill and keep present law.

REVENUE ACT OF 1962

The Senate resumed the consideration of the bill (H.R. 10650) to amend the Internal Revenue Code of 1954 to provide a credit for investment in certain depreciable property, to eliminate certain defects and inequities, and for other purposes.

Mr. MANSFIELD. Mr. President, I am about to propound a unanimous-consent request.

I ask unanimous consent that on the pending Dirksen amendments time be limited to 1 hour, one-half hour to be under the charge of the Senator from Illinois, the minority leader, and one-half hour to be under the charge of the Senator from Oklahoma [Mr. KERR].

Mr. FULBRIGHT. Mr. President, reserving the right to object, when would the vote come under this request?

Mr. MANSFIELD. In 1 hour or less.

Mr. FULBRIGHT. Beginning when?

Mr. MANSFIELD. Right now.

Mr. GORE. Mr. President, reserving the right to object, this limitation in no sense applies to H.R. 10, does it?

Mr. MANSFIELD. No; only to the pending amendments.

The PRESIDING OFFICER. Is there objection?

Mr. MILLER. Mr. President, reserving the right to object, may I be advised what the proposed unanimous-consent agreement is?

Mr. MANSFIELD. One hour on the amendments, a half hour to a side. It has been cleared with the Senators directly interested. I thought there was no objection to it.

The PRESIDING OFFICER. Is there objection?

Mr. MILLER. Mr. President——

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the time allotted be 20 minutes, 10 minutes on a side.

Mr. MILLER. For each amendment pending?

Mr. MANSFIELD. No; on the pending amendments.

The PRESIDING OFFICER. Is there objection? The Chair hears none, and it is so ordered.

Mr. MANSFIELD. Mr. President, is time running?

The PRESIDING OFFICER. Time is running.

Mr. DIRKSEN. Mr. President, I yield 3 minutes to the distinguished Senator from Kansas [Mr. CARLSON].

The PRESIDING OFFICER. The Senator from Kansas is recognized for 3 minutes.

Mr. CARLSON. Mr. President, I had made arrangements to discuss with the Senator from Oklahoma an understanding I have with regard to some language in the report. I would not like to use this time, which is running against the time of the Senator from Illinois, until the Senator from Oklahoma is on the floor. He stepped out of the Chamber only for a few moments.

I shall be glad to proceed with my discussion of section 3 of H.R. 10650. First, with a brief reference to some of the legislative history surrounding the adoption of this section in the House of Representatives. Except for a minor change in the Senate Finance Committee, this section is the same as enacted by the House of Representatives.

I have been advised when section 3 was discussed by Chairman WILBUR D. MILLS of the House before the House Rules Committee on March 20, 1962, he was careful to exclude from the advertising ban the so-called institutional advertising. Regarding advertising for or against legislation, Chairman MILLS was careful to point out that that was included in the ban, but further on in his testimony before the House Rules Committee, he stated that:

> A company may want to get its name before the people and buy space in national magazines and tell us all we ought to be against sin and be for motherhood. That kind of thing can be deducted, but to put an ad in the paper that the people ought to write their Congressmen to be against H.R. 9000 would not be allowed under existing prevailing regulations.

I subscribe to this limited application of section 3 in this measure, but feel we should be very careful not to eliminate advertising having to do with good will and, in a broader sense, real public services. In light of this background, I should like to ask my distinguished colleague, the ranking majority member of the Senate Finance Committee, the following questions:

First, would a company be denied the right of tax deduction for costs incurred in carrying advertising that promotes the sale of savings bonds?

Mr. KERR. The answer is "No."

Mr. CARLSON. Second, would a company be denied the right to charge off the costs of ads having to do with blood bank donations, the prevention of forest fires, or Community Chest contributions?

Mr. KERR. No.

Mr. CARLSON. Third, would an insurance company be denied the right to a tax deduction for promoting highway safety, as a part of their advertising campaign?

Mr. KERR. The answer would be "No," if unrelated to pending or proposed legislation.

Mr. CARLSON. Fourth, would a roadbuilding machinery company be denied deductions on a general plea for improved highways?

Mr. KERR. The answer is "No," if unrelated to pending or proposed legislation.

Mr. CARLSON. Fifth, I have in my hand an advertisement of a bank in Virginia comparing our system with that of the Communist. Will the cost of this ad be excluded under section 3?

Mr. KERR. The answer to that question is "No," if it is unrelated to pending or proposed legislation.

Mr. CARLSON. I agree with my distinguished colleague that the answer to all of these questions is generally "No," and in light of this, I have one more question: Is it not the intent of this legislation to prohibit advertising that deals with a legislative proposal arising under local, State, or National law when the advertising is in general directed toward pending or proposed legislation?

Mr. KERR. The answer to that question is "Yes."

Mr. CARLSON. I am satisfied with those answers. I thank the Senator from Oklahoma. I am satisfied both with the contents of section 3 and the legislative history accompanying it.

I ask unanimous consent that I may have placed in the RECORD at this point an extract from a statement by the chairman of the House Ways and Means Committee, the Honorable WILBUR D. MILLS, when he appeared before the Rules Committee of the House and discussed this matter.

There being no objection, the extract was ordered to be printed in the RECORD, as follows:

EXTRACT OF STATEMENT BY HON. WILBUR D. MILLS, MARCH 20, 1962, WASHINGTON, D.C.

(Hearings before the Committee on Rules on H.R. 10650, a bill to amend the Internal Revenue Code to provide a credit for investment in certain depreciable property, to eliminate certain defects and inequities, and for other purposes.)

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Mr. MILLS. Read the report particularly with respect to this. I think you will like it.

Mr. MADDEN. I went over that last night and I did not cover it all. Is there something in here so that the big lobbies that come to Washington can have the taxpayers pay for their lobbying expenses?

Mr. MILLS. Any expenses of this sort that are incurred in lobbying are disallowed, or supposed to be.

Mr. MADDEN. There is something in here.

Mr. MILLS. Do you mean this additional section in the bill, section 3? That has to do with appearances before committees of Congress, yes.

Mr. MADDEN. Does that include expenses for people to come to Washington and entertain, and whatnot, so that they can conduct a lobbying action?

Mr. MILLS. That involves the right of appeal to people, I think, to Congress. Does it not? Here they can fight a case all the way through the courts, through the Supreme Court. They can deduct those expenses if they are incident to a business.

Mr. MADDEN. I am not talking about court procedure. I am talking about the propaganda that goes out, advertising expenses on propaganda on legislation.

Mr. MILLS. Let me talk about that a second. They can do all that. That is admitted, isn't it? A man's business is in jeopardy, it is in the court. He can deduct the expenses incident to the protection of his business in that respect.

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Mr. MADDEN. Pertaining to legislation?

Mr. MILLS. No, in court, all the way through the Supreme Court.

Mr. MADDEN. In a lawsuit. Go ahead.

Mr. MILLS. Say he is also in jeopardy in a business way before a department of Government. Say it is the Federal Communications Commission. He is in the television business or radio business, he can deduct all the expenses for any appearance before the Commission in preservation of his business, but that same individual cannot even come to Washington to appeal to the Congress not to pass a bill that it is hearing or considering in committee that drives him out of business.

Mr. MADDEN. There has been a lot of publicity in the newspapers and magazines against a piece of legislation or for a piece of legislation.

Mr. MILLS. That is not involved here. This is limited to appearances before Congress, the committees of Congress, Members of Congress, the cost of preparing material for these appearances. That is what is involved here. No entertainment or anything of that sort.

Mr. MADDEN. But in regard to propaganda and publicity and advertising for or against legislation, they can deduct that?

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Mr. MILLS. That is not involved here and they cannot deduct it.

Mr. MADDEN. Nothing is mentioned in this bill about that?

Mr. MILLS. They cannot deduct it under Treasury regulations, unless it is institutional type. A company may want to get its name before the people and buys space in national magazines and tells us all we ought to be against sin and for motherhood.

That kind of thing can be deducted. But to put an ad in the paper that the people ought to write their Congressman to be against H.R. 9000 would not be allowed under existing prevailing regulations.

Mr. CARLSON. I thank the Senator from Oklahoma.

DELETE LOBBYING AMENDMENT

Mr. DOUGLAS. Mr. President, I call up my amendment designated "8–25–62—G" and ask that it be read.

The PRESIDING OFFICER. The amendment will be stated.

The CHIEF CLERK. On page 38, beginning with line 17, it is proposed to strike out all through line 21 on page 40—section 3 of the bill, relating to appearances, and so forth, with respect to legislation.

Mr. DOUGLAS. Mr. President, it is with a sense of deep discouragement that I rise to propose this amendment. During the past weeks we have seen included in the bill provision after provision unjustly designed to favor large corporations, and we have seen defeated amendment after amendment intended to introduce a greater degree of tax reform into our laws. These votes have been overwhelming. The leadership on both sides of the aisle have tried to protect the wealthy and powerful, have opposed the administration in connection with many crucial features, and have opposed provisions designed to protect the general taxpayers and the Treasury.

So, Mr. President, in the light of past performance, I have little expectation that my amendment will be adopted.

Nevertheless, it is one's duty to remain at one's post and discharge what one conceives to be one's obligation, even though the odds against one are heavy. The first general order to which a soldier must be faithful is not to leave his post unless he is properly relieved. So long as one serves in the Senate, he has the obligation, even though he stands with a very small group, to try to make legislation as good as possible.

WHAT THE HOUSE DID

My amendment deals with lobbying. It aims at striking out two provisions which were not in the original bill submitted by the President, and to which, indeed, the administration says it is opposed. One of these amendments was inserted by the House Ways and Means Committee at the last minute—no one knows quite why. The bill then went to the House under a closed rule which prohibited amendments, and which only permitted the body of the House to vote either for the bill as a whole or against the bill as a whole. It is the amendment which permitted tax deductions for expenses incurred in direct appearances by business groups and corporations before legislative bodies—not only the traveling expenses, but also all other expenses incurred by a trade or business in connection with such appearances.

This would apply whether the appearances were before local bodies, such as city councils, or whether they were before State legislatures or the Congress; and it would include the cost of preparing testimony and the cost of all the research and developmental work in that connection. It would also permit deductions of the expenses of mass appearances, not only individual appearances and dues by organizations which lobbied for their divers business interests. That was the House provision; and it is to be found on page 39, between line 5 and line 23.

WHAT THE FINANCE COMMITTEE DID

Then the Senate Finance Committee went one better—or one worse—than that; it voted to permit deductions for lobbying costs connected with communications between a business firm and their employees or stockholders, with respect to legislation or proposed legislation of direct monetary interest to the taxpayer. That amendment was approved by a very large majority in the Senate Finance Committee, with the Senator from Tennessee, the Senator from Illinois, and perhaps one or two other Senators voting in the negative.

If these two amendments are enacted, we shall legitimitize very large amounts of expenditures by special interests, for the purpose of effecting legislation, while denying any comparable right to those who seek to defend the general interest, whether they comprise consumers, small taxpayers, or general citizens. I think it is worthwhile for us to know what the existing law on this subject really is.

EXISTING LAW—LOBBYING NOT DEDUCTIBLE

Following the Cammarano decision, there was affirmed the principle that the tax laws should be neutral insofar as lobbying is concerned, and that expenditures by business groups before legislative bodies for the purpose of furthering their own financial interests, are not tax deductible. There can be no question of their right to appear before legislative groups or regulatory bodies; that is a part of their right as citizens. There is no intent to deprive them of their right of petition. But up until now, at least, the law has been that they should pay for such appearances themselves; that Uncle Sam should not pay 52 percent of the cost of such appearances, by exempting those amounts from the corporate income tax.

On the other hand, those who appear because of a general interest as consumers or as small taxpayers are expected to pay these costs themselves. If they feel that a given tax measure, such as the present one, is against the public interest, and if they wish to testify against it, and if they go to the expense of appearing and testifying, they must pay the costs themselves; they may not be charged off as expenses, and the taxpayer may not obtain a tax deduction for them. That is the law—namely, that the tax system shall be neutral insofar as lobbying costs are concerned.

But we well know that, in practice, business concerns frequently are able to evade or avoid the meaning of the law, by disguising lobbying expenses and putting them in other categories. Instead of hiring "lobbyists," they will hire "attorneys" or "economists" or "research specialists"; and these men will appear, not as "lobbyists," but as "legal representatives." They will put lawyers on retainer—ostensibly to be called upon for legal services, but in reality held in reserve to influence legislation.

PRESENT LAW RESTRAINS BAD PRACTICE EVEN IF NOT PERFECT

In practice, a great deal of the lobbying expenses of the corporations and the big industries of the country are charged off as business expenses and escape taxation; but the law holds these expenditures in some degree of restraint. It is not a perfect protection, by any means, but it operates to some degree as a restraint.

If anyone looks at the political scene, and the pressures operating on city councils, and on State legislatures, and on the Congress of the United States, I think he would have to say that the large companies of this country are not unduly handicapped. Quite the contrary, they are very powerful. They spend large sums of money. They are able to shape and influence legislation. They are very powerful.

GENERAL INTEREST WEAK

The general interest, however, is already extremely weak. Any particular measure, such as the gas bill, which our good friend from Oklahoma got through the Senate in 1950, and helped to get through in 1956, may mean a gain of $600 million a year to the producers, but it will only cost, let us say, $20 a year to each of the 30 million consumers who use gas for household purposes. And the consumer has so many things on his or her mind that it is hard to get excited over $20 a year, or 5 or 6 cents a day. And so the great mass of consumers tend not to be interested in this measure, or, if they are interested in it, they hardly feel it is worth their while to go to the labor and expense of running up against these powerful lobbies when their own interests are so infinitesimal.

So, as I said on the floor of the Senate last week, the struggle all too often is one in which the concentrated power of the producing interests conquers over the diffused general interest.

LOBBYING FOR TAX PRIVILEGES

And it is so in tax measures, too. Those who seek special favors in getting a particular measure which will mean millions, tens of millions, and hundreds of millions of dollars to them, can carry on quite a campaign. The individual taxpayer among the 60 million who pay income taxes will not be greatly affected. But, of course, what happens is that, special privilege, after special privilege, after special privilege is able to write these measures into the laws and administrative rulings of the Nation, the general interest, the general taxpayer, the general consumer, becomes burdened with a multitude of exactions which, taken in their totality, are extreme and great.

This, I think, is one of the great weaknesses of modern democracy.

BILL MAKES MATTERS WORSE

These two amendments would make the situation much worse, because now,

instead of the corporations meeting these costs, the Government will instead meet 52 percent of the costs, and the small taxpayers themselves will have to underwrite the lobbying campaigns, which, in a large percentage of the cases, are directed against them. The small taxpayers not only have to pay for any efforts they make on behalf of the public interest but they do not get any tax exemptions for them. In addition, they have to pay half the cost of the lobbying expenses of these selfish special interests which want to get special favors for themselves. I think this section of the bill adds insult to injury.

DOUBLE STANDARD DEVISED

Now let us take up a few of the measures which have come before the Senate. Suppose we take the matter of drug safety or drug pricing. The costs of presenting the views of the drug manufacturers or distributors would be deductible. The general taxpayer would meet half of those costs. But the cost of presenting evidence on behalf of the consumers or of disinterested professional or technical advisers would not be tax deductible.

Suppose, on the State level, that a State legislature is debating a measure designed to decrease stream pollution. Manufacturers who dump industrial wastes into the rivers, who would be adversely affected by the enactment of such a law, could deduct the cost of their opposition. Members of the public interested in pure water for drinking or for recreational uses would have to finance their support of the measure entirely from their own pockets.

Or, at the local level, a business owner of a piece of real estate could file an advantageous amendment of a local zoning ordinance and deduct the cost of his presentation and appearance before the local city council; but owners of nearby residences would not receive this help from the Federal Treasury in the preparation of exhibits and briefs necessary for effective opposition.

LOBBYING CAMPAIGNS DEDUCTIBLE

In the great struggle in which some of us went down to overwhelming defeat last week, that of withholding of the basic income tax on interest and dividends, the building and loan associations and the banks and mutual savings banks, which launched one of the greatest lobbies and letter campaigns ever seen in the history of the United States or of this body, could deduct not merely the cost of their direct appearances, but also the cost of the letterwriting campaign. For they circularized not merely their employees, but also their members and their stockholders. As a result many Senators, and I assume each Senator, received scores of thousands of letters. I have stated before that I received 75,000. Another Senator has said that he received over 50,000. I know of other cases where the number was almost as great.

This amendment, once passed, will permit these building and loan associations and banks to deduct the cost of their circularizing their members and stockholders, and Uncle Sam will pay 52 percent of the bill.

Mr. BUSH. Mr. President, will the Senator yield at that point?

Mr. DOUGLAS. I yield.

Mr. BUSH. My recollection is that I received thousands of letters on that subject, too, but they were all paid for by the individual citizens themselves, who were protesting against that provision of the bill.

May I say to the Senator it seems to me that what the building and loan associations and the savings banks may have done was, in sending out their normal monthly statements, or whatever they send out, to enclose a statement which alerted the saver to the issue before the Senate. I would say the great bulk of the expense incurred by that corporation was incurred by the savers themselves, the citizens themselves.

Mr. DOUGLAS. First let me say that these members and depositors in the building and loan associations and in the savings banks did not write to us in an unsolicited fashion. They were solicited by the institutions. In some cases, as the Senator says, slips were sent out with the ordinary dividend statements.

At least in those cases the cost of printing of the slips would be tax deductible under the committee amendment. In a very large proportion of the cases however the people were circularized by individual letter. Many savings institutions mailed a letter to each one of their depositors or members, asking them to write to their Senators protesting against the measure.

At present this type of communication is legally not tax deductible, although I grant that frequently it is very hard for the Internal Revenue Service agents to go through the books and to detect precisely the postage and printing and expense involved on these particular letters.

In this case the Finance Committee amendment would permit these types of costs to be tax deductible, and 52 percent of the cost would be borne by the general public.

POWERFUL GROUPS STRENGTHENED

Mr. President, one of the weaknesses of modern democracy, as I have said, is the extraordinary disparity between the great and concentrated power of special and powerful interests and the diffused weakness of the general interest. The committee and House amendments would still further intensify and accentuate this lack of balance.

I fear that what the Senate is about to do, with the cooperation of the leadership on both sides of the aisle—if it is about to do what I fear it will do—will help to drive another nail in the coffin of effective political democracy.

I am not going to speak more on this subject although I will answer questions.

Mr. PROXMIRE. Mr. President, will the Senator yield?

Mr. DOUGLAS. Yes, I am glad to yield.

Mr. PROXMIRE. Under the provision in the bill, if a gambling syndicate, a group of liquor dealers, or others wished to support or to oppose proposed legislation, which involved their particular interests, and they hired an expert to do all of the research they wished to have done, so that they could make a strong case, how much of the expense would the general taxpayer be required to pay, assuming a large corporation were involved?

Mr. DOUGLAS. Fifty-two percent.

Mr. PROXMIRE. Assuming that the action on the part of the liquor lobby or on the part of the gambling lobby was opposed by a group of clergymen or a group of people who felt very strongly that the action might adversely affect the morals of the people of the community, or the moral fiber of the community, how much of their expense would that group be allowed to subtract from taxes?

Mr. DOUGLAS. Not 1 cent.

Mr. PROXMIRE. Suppose one of these big financial corporations wished to send not 1 or 2 or even 3, but a very large number of skilled lobbyists to Washington, so that there could be assigned 1 man to each 10 Senators and Representatives in Congress, at a big expense, how much of that expense would the general taxpayer have to bear?

Mr. DOUGLAS. Fifty-two percent.

Mr. PROXMIRE. Would it be possible under the Senate version of the bill for a very large corporation, such as Du Pont or American Telephone & Telegraph Co., which might have an interest in legislation pending before the Congress, to send out literature, or to send out men, for that matter—to send out communications in almost any manner—to stimulate the stockholders or the employees to support the position of the company? If they did so, how much of the expense would the general taxpayer have to bear?

Mr. DOUGLAS. Under the bill as it comes to us, the corporation would be able to avoid the payment of the corporate income tax on these expenditures, and the general taxpayer would pay 52 percent of the expenditures.

Mr. PROXMIRE. The Senator from Illinois has served in this body since 1949. He also served on the Chicago City Council some years before that.

Mr. DOUGLAS. The Senator is correct.

Mr. PROXMIRE. The Senator has had great experience. Has the Senator ever felt lonely, in the sense that he was ignored by special interest groups which had an interest in advancing themselves? Has the Senator ever felt he did not have a sufficient number of lobbyists writing to him, coming to see him, or contacting him? Does the Senator feel he needs these "pen pals," only more so?

Mr. DOUGLAS. I believe in the right of petition, and I believe that business concerns have a right to have lobbyists. I try to see them and to listen to their arguments. Very frequently they are able to present information which I did not previously have. Very frequently they are able to present arguments of which I was not previously aware. I think they carry out, properly, a very valuable function.

Mr. PROXMIRE. I share that viewpoint.

Mr. DOUGLAS. What I object to is the granting to the big corporations,

which have a direct business and financial interest, of a tax deduction of 52 percent, whereas the people who are trying to defend the general interest have to pay all of their expenses from their own pockets, though they already suffer from the disadvantage that their interest in a particular measure may be slight, although the concentrated interest of the producing or business group is tremendous.

Mr. PROXMIRE. The question asked by the Senator from Wisconsin went to a different point. I heard a Member of the House of Representatives protest this provision in the law quite vigorously. He argued that he is now swamped with special interest group proposals.

What the Senator has said is true. These people often perform very valuable service. They ought to have a right to present their viewpoint.

Is it not very likely, however, that if the bill shall pass, the staffs of all Senators will be deluged with even more correspondence? My staff must spend some 70 percent of its time, or more, answering mail. I have to spend a great deal of my time talking to people who have a special interest in proposed legislation.

Along with the Senator from Illinois, I am happy to do that, but I must say that if this provision in the bill is made law, the burden may likely become nearly intolerable. There will be an incentive for corporations to send representatives to the Congress, with the general taxpayer forced to pay 52 percent of the cost. It seems to me this would greatly increase the burden on Members of Congress. Is that not a correct assumption?

Mr. DOUGLAS. I think the Senator from Wisconsin is completely correct.

In the old days, after the Civil War, when Sam Ward was the king of the lobby, he used to entertain Members of Congress with champagne suppers, and there would be shares of stock to be distributed and cash as well.

EXPENSES OF MAIL CAMPAIGNS

I think the modern lobbyist operates in a more wholesale fashion. He is increasingly trying to muster mail campaigns from constituents. This bill would open the gates for tremendous mail campaigns.

The doctors loosed one on health care for the aged. I am sure they will now seek to deduct the costs of that campaign from their personal incomes.

The savings institutions loosed a tremendous campaign with respect to withholding. The various interests seeking to get protective tariffs or to prevent the trade bill from going through in any effective form will be able to make deductions.

We are all acquainted with the historic struggle between the truckers and the railroads on piggybacks which swamped our offices with mail. I received, I think, 10,000 letters from the truckers, and then I received about 15,000 from the railways. A Senator has to answer all that mail.

The Senator from Wisconsin is quite correct. A large proportion of our time is now devoted to attempting to respond to the pressures which come upon us. One can stand up under it and would welcome it but to have the general taxpayer called upon to finance special interests is more than I can personally understand.

Mr. PROXMIRE. I should like to ask the Senator to answer arguments raised by those who favor this provision in the bill reported by the committee. I refer the Senator to page 22 of the committee report, in which the majority, which favors this position, says:

> The difficulty in allowing trade or business expenses generally, but limiting expenses relating to legislative matters and denying deductions for others, stems in part from the difficulty in segregating and identifying such expenses. This is a form of accounting recordkeeping to which taxpayers are not accustomed. Moreover, in the case of many expenses words may profitably be improved to inform the business itself as to the application of certain proposed legislation, when such information is also made available to legislators. It is difficult to determine how an allocation of the expense should be made between legislation and mere planning of the campaign.

It has been the experience of the Senator from Wisconsin that that would involve no difficulty.

Mr. DOUGLAS. None at all. These costs could be segregated.

Mr. PROXMIRE. And that has been the law until now.

Mr. DOUGLAS. That is correct. It is a law which has been imperfectly executed, but one which has had some restraining influence.

Mr. PROXMIRE. Why would it not be perfectly possible for a business firm to keep track of the cost of hiring its lobbyists and exclude the cost from its expenses in computing its taxes?

Mr. DOUGLAS. And also the cost of correspondence designed to influence legislation. Those costs could be segregated. We must do so in our own offices in segregating our personal mail from our official mail.

Mr. PROXMIRE. The next point about which the Senator from Wisconsin wishes to ask the Senator from Illinois is the provision in the argument in the committee report a little further down, as follows:

> It appears anomalous, for example, that expenses incurred in appearing before legislative bodies or before legislators are not deductible while appearances before executive or administrative officials with respect to administrative matters, or before the courts with respect to judicial matters, are deductible where the expenses otherwise qualify as trade or business expenses.

Does it not occur to the Senator from Illinois that legislation should be and must be a matter of general interest and cover the whole generality of the body politic?

Mr. DOUGLAS. That is correct.

Mr. PROXMIRE. All 180 million Americans without discrimination?

Mr. DOUGLAS. That is correct.

Mr. PROXMIRE. To design legislation for a specific industry or individual would be the worst thing that could happen in respect to legislation. In other words, legislation should be designed to apply equally to all people. It should not be designed, as regulations sometimes must be, or as decisions by the administration under the law must be, in accordance with a particular special interest involved.

Mr. DOUGLAS. The Senator from Wisconsin has made an admirable reply to his own question. Proceedings before a regulatory body are necessarily narrow and refer to special and particular interests, and it is legitimate for such special and particular interests to deduct their expenses connected with appearing to defend their interests. But as the Senator has said, it is an entirely different thing when we deal with legislation supposedly affecting all people as equally as possible.

Mr. PROXMIRE. At the bottom of page 23 of the committee report it is stated—

> The bill also provides that where a taxpayer is a member of an organization and the organization pays or incurs the expenses of the types referred to above on behalf of its members, the dues which the taxpayer pays to the organization is exempt and the trade or business are to be responsible to the extent they are used for such purposes.

As I understand, what that language means in the way the bill is drafted and is interpreted at other places, too, in the committee report, is an organization—whether it be the National Association of Manufacturers, the chamber of commerce, or other group—which is representing the particular pecuniary interest of the member.

Mr. DOUGLAS. That is correct.

Mr. PROXMIRE. Under those circumstances dues could be subtracted.

Mr. DOUGLAS. That is correct.

Mr. PROXMIRE. On the other hand, if one were to contribute to a church group, the League of Women Voters, the Civil Liberties Union, or the Americans for Constitutional Government, the contributions would not be subtracted because the expense is not directly related to one's making a living. Is that correct?

Mr. DOUGLAS. That is correct.

Mr. PROXMIRE. Such interpretation would particularly discriminate against groups which fight for the public interest as they see it, whether they are conservatives, liberals, or whatever they are.

Mr. MILLER. Mr. President, will the Senator yield at that point for a clarification of the record?

Mr. DOUGLAS. I yield.

Mr. MILLER. Referring to the dues to which the Senator from Wisconsin alluded, for example, in connection with the chamber of commerce—would not that interpretation be applicable to the portion of the dues of the union member paying union dues?

Mr. DOUGLAS. It might be; but offhand I am not certain.

Mr. MILLER. Insofar as such dues might be used by the union organization in connection with its legislative activities?

Mr. DOUGLAS. It might be held that the interest in question was a general interest and not a direct pecuniary interest.

Mr. PROXMIRE. It is the understanding of the Senator from Wisconsin that union dues are deductible in computing income taxes. Is that true?

Mr. DOUGLAS. Most union members do not take the deduction.

Mr. PROXMIRE. They do not itemize their returns.

Mr. DOUGLAS. That is correct.

Mr. PROXMIRE. So they do not get the benefit either way.

I should like to ask the Senator from Illinois two additional questions on the point, because I think it is important. The majority argues that in the provisions of the bill there are exceptions to safeguard public interest. They say:

It is not intended by your committee that any deduction be allowed for an amount paid or incurred for participation or intervention in any political campaign for any candidate.

That is in the second paragraph on page 24. While that may be correct, is it not perfectly possible that in case after case there may be an overwhelming issue between candidates for public office? In those circumstances, under the terms of the bill a large corporation could circularize all its employees in many towns—that could mean most of the people who live in the town.

Mr. DOUGLAS. That is correct.

Mr. PROXMIRE. In many States they may be the dominant force in the State.

Mr. DOUGLAS. That is correct.

Mr. PROXMIRE. Without mentioning names all the stockholders could be circularized to take a position in effect in favor of candidate A as against candidate B.

Mr. DOUGLAS. The material distributed would not mention the candidates but would mention the issues which everyone would know divided candidate A and candidate B; and the company could take a stand on the issues with its stockholders and employees, charge off the expense, and get a tax deduction.

Mr. PROXMIRE. So one-half of that kind of politicking would be paid for by all the taxpayers throughout the country as a result of the company taking a deduction from its income tax.

Mr. DOUGLAS. That is correct.

Mr. BUSH. Mr. President, will the Senator yield for a question?

Mr. DOUGLAS. I yield.

Mr. BUSH. Would not the language on page 40, line 12, outlaw that kind of deduction entirely?

Mr. DOUGLAS. It would not be a direct intervention in a campaign. It might be said to be the marshaling of opinion opposed to a given course of legislation with its employees and stockholders. It might be defended on that ground. Those taking the deduction could piously say, "We are not favoring candidate A as compared to candidate B. We are only opposed to TVA or to health care for the aged."

Mr. BUSH. The language is:

(B) In connection with any attempt to influence the general public, or segment thereof, with respect to legislative matters, elections, or referendums.

Mr. PROXMIRE. "Stockholders" are defined in the committee report in such a way as to exempt them.

Mr. DOUGLAS. The reference is to attempts to influence employees or stockholders. But the appeal could not be made tax deductible if addressed to the general public. If someone tried to appeal to the general public, the expense of such attempt would not be tax deductible. It would only be tax deductible when one could appeal to the direct pecuniary interest or alleged pecuniary interest of one's stockholders and employees. But if he should try to appeal to the general interest, he would be out of luck.

Mr. PROXMIRE. I come to my last question. The first sentence in the third paragraph on page 24 reads:

Your committee's bill further provides that no expense deduction is to be allowed for expenditures to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums.

The reference is to the general public, but the law is explicit in providing that if an attempt is made to influence employees and stockholders, who, as the Senator from Illinois has pointed out, may be a very large and perhaps decisive part of the general public, in a city or even a State, the cost of the attempt is tax deductible, and the general taxpayer must pay for it.

Mr. MILLER. Mr. President, will the Senator yield?

Mr. DOUGLAS. I yield.

Mr. MILLER. In discussing the question with the Senator from Connecticut, the Senator from Illinois talked about direct intervention in a campaign.

Mr. DOUGLAS. I said it would not be direct intervention.

Mr. MILLER. The Senator used the word "direct." That is the basis for my question. The language of the bill contains nothing about "direct" intervention. In a case such as the one the Senator from Illinois or the Senator from Wisconsin suggested—I do not recall which—when the issues are so clearly defined that a position on an issue would identify a candidate, I think it would be straining the language of the bill considerably if under those circumstances, in the light of what is set forth beginning on line 12, page 40, such expenses would be allowable. The language is:

(a) For participation in, or intervention in, any political campaign on behalf of any candidate for public office—

The timing of the information that is being sent out would be presumptive of the intention to intervene in a political campaign, under the circumstances of the example the Senator from Illinois has used.

Mr. DOUGLAS. That is possible, but I call attention to the clause beginning on line 24, page 39:

In direct connection with communication of information between the taxpayer and employee or stockholder with respect to legislation or proposed legislation of direct interest to the taxpayer.

As I have said, a doctor could certainly claim that health care for the aged was of direct interest to him; or the American Medical Association could claim that it was; or the Du Pont Co., could claim that their bill, which they got through Congress with bipartisan support at the beginning of this session, was of direct interest to them. A savings institution could claim that the withholding provision in the tax bill was of direct interest to them; and so on.

Mr. MILLER. Mr. President, the provision starting on line 12 of page 40 comes after this statement, and I therefore say would be a definite limitation on the expense which the Senator is now talking about. I would suggest that if in the middle of an election, where the line was clearly drawn between candidates, let us say, on a savings and loan issue, if a savings and loan association got out a mailing which clearly identified the candidate through the issue, that would constitute an intervention, because the timing, I believe, in line 12 would be a limitation on the expenses, to which the Senator has referred, on line 24 on page 39, because this material starting on line 12 of page 40 comes later.

Mr. DOUGLAS. The Senator said the intervention on behalf of any candidate must be direct. However, some influences in life are not only direct, but also indirect. Sometimes an indirect influence is more important than a direct influence.

The American Medical Association and doctors have been carrying on a campaign against health care for the aged, and they could indirectly influence the election of Senators and Congressmen. Similarly on every measure they could decide that they were working for no particular candidate, but would say they were trying to educate the stockholders and employees about proposed legislation. It could be said to them, "But this will help John Jones, and not Jack Smith." They could reply, "Oh, we did not know that. What we are trying to do is build up employee and stockholder sentiment about proposed legislation."

Mr. MILLER. I would agree if the language starting on line 12, page 40, contained the word "direct." It does not contain the word "direct." Therefore, we can read the language as being direct or indirect. This intervention can be indirect intervention.

Mr. DOUGLAS. Of course, no one knows what the courts or administrative officials will do. In order to be safe, the Senator from Iowa should vote for my amendment in order to make it certain that it will not be used that way.

Mr. President, I ask unanimous consent that a section of my minority views on lobbying expenses be printed in the RECORD at this point in my remarks.

There being no objection, the excerpt was ordered to be printed in the RECORD, as follows:

THE DEDUCTION FOR CERTAIN LOBBYING EXPENSES OF TAXPAYERS WITH BUSINESS INCOME

Section 3 would permit the deduction of certain lobbying expenses by taxpayers with business income. This would depart from a salutary principle which has been part of the income tax law since World War I. It would provide unwarranted tax reduction where it is least needed for reasons which are specious. It would introduce novel distinctions into the tax law, producing new requirements difficult for the Internal Revenue Service to administer. The specific language in which the deduction is cast contains ambiguities which will create continuing uncertainty as to its exact meaning, and, most important, the relationship of this provision to the whole process by which our citizens

seek to influence the enactment of legislation at all levels of government was not adequately considered. Section 3 should be deleted from the bill.

Under existing law the costs of efforts to influence legislation are not deductible, a rule applicable to all taxpayers. Whatever the motive for a citizen's efforts to influence legislation, he now bears the whole cost of that effort himself. No part of the expense can be passed on to the Federal Government through an income tax deduction. In the constant competition for legislative favor and results at National, State, and local levels, the Federal Treasury stands neutral—and properly so.

Section 3 would change all that. It would amend section 162 of the Internal Revenue Code of 1954, the section creating the general authority for deduction of the ordinary and necessary expenses of business operation. Section 3 would add a new subsection specifically authorizing deduction of lobbying expenses in certain categories by taxpayers with business income. Only those taxpayers with business income would receive any benefit. All others would still be subject to the existing rule of no tax benefits for lobbying, a result which follows necessarily from incorporation of the amendment in section 162 and one which is specifically spelled out by the House committee report.

Some specific typical examples will bring this into sharper focus. Suppose a measure is being considered, as many have been, involving a proposed change in the standards or testing procedures for food, drugs, or cosmetics. The costs of presenting the views of drug manufacturers and distributors would be deductible. The cost of presentations on behalf of consumers or of disinterested professional or technical advisers would not be. Or suppose that a State legislature is debating a measure designed to decrease stream pollution. Manufacturers who would be adversely affected by its enactment could deduct the cost of opposition. Members of the public interested in pure water for drinking or for recreational uses would have to finance their support of the measure entirely from their own pockets. Or, at the local level, a business owner of a piece of real estate could seek advantageous amendment of the local zoning ordinance, deducting the cost of his presentation before the local city council. The owners of nearby residences would not receive this help from the Federal Treasury in preparing the exhibits and briefs necessary for effective opposition.

These are discriminations impossible to justify. Can anyone seriously contend that consideration of legislative proposals affecting business taxpayers is seriously handicapped by absence or weakness of expression of business viewpoints? Is there any evidence that business taxpayers, individually or collectively, are now deterred from expressing themselves on these subjects by the present rule of tax neutrality which permits no deduction for lobbying expenses? To ask these questions is to answer them. Of all viewpoints on legislative proposals, those of business are consistently the most ably represented before the Congress and before State and local legislative bodies. Why then should the cost of lobbying activities of taxpayers with business income be singled out for this preferential tax reduction? No adequate reason has been given.

Any discrimination at all among citizens in the exercise of their constitutional right to petition their representatives is patently undesirable. Discrimination by preferential tax deduction is magnified as the amounts spent for these purposes increase. Modern efforts to influence legislation cover a wide range of techniques, some of which are very costly. One can send a letter to his Senator for 4 cents. However, to stimulate tens of thousands to do so requires the expenditure of large amounts running sometimes into the hundreds of thousands, even millions, of dollars. But all this is well known. It has been thoroughly documented many times.

The application of section 3 would not be confined to nominal amounts. It would permit the deduction of some very large sums. In addition to provision for deduction of the costs involved in direct contacts with legislators (personal calls and visits, appearances before committees or statements filed with them), the cost of efforts to influence legislation indirectly are also made deductible in some instances. The costs of communications to organization members and to shareholders and employees have all been blanketed in.

When section 3 is applied to today's scene, we find that it will authorize giant corporations to deduct the cost of communicating the views of management officials to hundreds of thousands, even millions, of shareholders and employees, for the purpose of influencing them with respect to current controversial legislative proposals. To use a painfully familiar example, section 3 would authorize deduction of the cost of campaigns designed to produce a flood of letters opposing withholding on dividend income.

Under existing law these sums are not properly deductible—and never have been. To permit deduction now would shift a very large proportion of these heavy costs to the Federal Treasury, a disguised subsidy for which there would be no justification.

The effects of such subsidized efforts to influence legislation indirectly would not be confined to the recipient members, shareholders, and employees. The views expressed and their source would frequently come to the attention of families and friends of the recipients, thereby broadening the scope of the influence subsidized by the Federal Treasury. Of course, the benefits of section 3 as they would apply to these broadcast efforts to influence legislation can only benefit very large organizations. Small business taxpayers, as well as nonbusiness taxpayers, would have little or no use for it and could well suffer from its use where their interests on legislative matters are opposed to those who could take advantage of it.

True, not all lobbying costs of business taxpayers would be made deductible by section 3. The bill purports to create limitations which will restrict the kind of expenses for which a deduction can be claimed. Thus, to qualify for the deduction, the legislative proposal must be of "direct interest" to the taxpayer. In addition, specific provisions deny deductions for political campaign expenses or for efforts "to influence the general public, or segments thereof." However, a close inspection raises genuine doubt as to the precise meaning and application of these restrictions. They may, in fact, prove largely illusory.

Thus, one might ask, What subjects are not of "direct interest" to a large corporation? Any measure involving a tax or a change in the regulation of business or the marketing of securities or foreign trade or the terms of employment or labor relations or the monetary system will have some impact on every substantial business enterprise. Is it intended that the cost of testimony or statements or communications to shareholders or employees on this entire range of subjects is to be deductible? Similarly, can the prohibition against deductions for political campaign purposes be really effective? Granted that the cost of a folder urging shareholders to vote for Jim Darkwater will not be deductible, what of the cost of a folder urging a position on the principal issue dividing Darkwater from his opponent Bob Cleanriver? Can issues and the candidates be separated so easily? It is doubtful Section 3 thus could make slightly veiled political contributions deductible. The benefit would not be universal though. To return for a moment to the anti-water-pollution measure used as an example before, suppose Darkwater is against it and Cleanriver is for it. The former's supporters could deduct the cost of their literature discussing the antipollution measure (and thus their support of Darkwater); supporters of Cleanriver could not.

Obviously, congressional memories are very short. For at least a century Senators and Representatives have regularly inveighed, individually and collectively, against lobbyists and their activities. The need for substantial disclosure by lobbyists, particularly in financial respects, has long been recognized. When a person or organization becomes a lobbyist, he is required to register as such and thereafter to report quarterly his expenditures for these purposes. In spite of these safeguards, every few years some lobbyists become so bold and their overreaching so bad that a special inquiry is required. A prime example was the creation in the 84th Congress of the Senate Special Committee To Investigate Political Activities, Lobbying, and Campaign Contributions. Its report states graphically the kinds of abuses which occur and the large sums of money available to be spent on efforts to influence legislation. Sugar quota bills attract lobbyists like flies and, like flies, their activities are not widely admired. The Senate Foreign Relations Committee is currently beginning an investigation of another group of lobbyists, an inquiry which has grown in large part out of concern for their lucrative financial arrangements. Nor are problems with lobbyists confined to Washington. Their influence on State legislators and their sometimes questionable methods in State capitols is notorious.

When projected against all this experience, section 3's proposed financial bonanza for one group of lobbyists and their employers seems ironic in the extreme, if not downright cynical.

There is no challenge here to lobbying per se. It is unquestionably legitimate. A constitutionally protected right of our citizens, it often supplies useful information and reactions on pending legislation. However, it would be foolish to exalt it unduly for those reasons. At best, lobbying is a mixed blessing for it is almost always exclusively concerned with self-interest rather than the broad public interest. Fortunately, section 3 presents only a narrow problem, viz, whether or not the lobbying done by one segment of our society—taxpayers with business income—should be entitled to support from the Federal Treasury.

A number of arguments are made in favor of this measure. Some of them have a surface plausibility, but on close analysis none of them holds water. The case is actually a simple one. We begin with a longstanding rule that all taxpayers, business and nonbusiness, who seek to influence the work of legislative bodies, National, State, or local, pay their own expenses in full without assistance from the Federal tax system. This neutral posture of the tax law is a healthy one and should be defended and strengthened. Legislation affects all our citizens. It is entirely suitable that all who seek to influence that legislation, directly or indirectly, should be treated alike. The expenses of all should be on the same footing as far as the Treasury of the United States is concerned. The only issue here is whether or not to depart from this principle of neutrality and equality. Plainly, the case for such a change has not been and cannot be proved.

Mr. DOUGLAS. Mr. President, I ask for the yeas and nays on my amendment.

The yeas and nays were ordered.

Mr. BUSH. Mr. President, I wish to oppose the amendment of the Senator from Illinois. It seems to me that this is a very disturbing amendment, one which discriminates very much against small business organizations in this country. The amount which large corporations, the ones the Senator from Illinois is talking about, spend in connection with appearances before committees and Members of Congress and agencies of the Government, is a very small matter for the large corporations, but it may be of great importance to the smaller companies.

It seems to me that the committee amendment is very considerate—as opposed to the Douglas amendment—in that it gives the smaller business companies an opportunity to assert their own self-defense, so-called, when Government has its hand in almost everything, and most small corporations have some business to transact in Washington and must wait upon their Representatives and Senators and some of the agencies, and even appear before committees.

It is a real hardship for them not to be able to charge off as business expenses such appearances in connection with which these expenses are incurred. Such appearances are made by labor organizations and by such groups as the League of Women Voters, and a great many other nonprofit organizations. So I would say, as I read the amendment, having listened carefully to the debate, that the purpose of the committee amendment is to correct an injustice and to give the smaller business organizations a better chance to defend themselves and to state their case before Members of Congress or before committees or before governmental agencies. I very much hope that the amendment of the Senator from Illinois will not prevail.

Mr. PROXMIRE. Mr. President, will the Senator yield?

Mr. BUSH. I yield.

Mr. PROXMIRE. Is it not true that under present law when any businessman comes to Washington and appears before an agency of Government, other than Congress, if the visit relates to his business, the expenses of his trip are deductible at the present time?

Mr. BUSH. I hope so.

Mr. PROXMIRE. That is correct.

Mr. BUSH. That being the case, I see no reason why these people should not be given the same treatment when appearing before the Congress.

Mr. PROXMIRE. Is it not true that the members of other groups to which the Senator has referred, such as the League of Women Voters, cannot subtract their expenses? I am referring to the members of the league who make contributions to the league.

Mr. BUSH. Such organizations do not pay any income tax, because they are nonprofit organizations.

Mr. PROXMIRE. I mean the people who contribute to the league. The contribution they make to the league is not deductible, although it is for members of a trade association, for example.

Mr. BUSH. I assume that if members of the league come here as delegates, their State organization pays their expenses. If that is the case, they should be able to deduct their expenses, if they have a legitimate case.

Mr. PROXMIRE. I agree with the Senator. However, they cannot do it. They are not allowed to do it. The amendment of the Senator from Illinois would do away with a very severe imbalance. The members of the league cannot deduct their contributions from their income taxes.

Mr. BUSH. I would correct that imbalance the other way. I would be liberal in giving them a chance to deduct their expenses, or to have someone assume the expenses, if they have business to transact with the Federal Government in their own interest. I do not believe, because organizations have an interest, that it is necessarily an interest against the public interest. That has been so often said here this afternoon. Many people come to Washington who belong to small organizations. They may consist of 40, 50, or 60 people. Not long ago a delegation came to see me on the trade bill. One of the organizations employs 60 people, another 200 or 300 people. These are important employers in little towns in my State. What the Senator from Illinois wants to do, as I see it, is to deprive them of the privilege given them under the bill of charging their expenses against their income account.

Mr. PROXMIRE. I agree 100 percent that those business groups often do represent the public interest. But whether they do or not they should in all instances be heard and be given every encouragement to appear. Their appearance is not on the same basis as the appearance of nonprofit groups, because the activities of such groups as the League of Women Voters or the Committee for Constitutional Action, or any other such group, are not related to any financial benefit but to a deep conscientious conviction. So under the present tax laws, unless we violate in some way the principle of permitting only those expenses to be deducted which are related to increasing income or reducing cost, I do not see how we can give the same consideration to other groups. Unless we can equate it in that way, it seems to me it would be much better to carry on with the present law, which treats all groups equally.

Mr. CURTIS. Mr. President, will the Senator from Connecticut yield?

Mr. BUSH. I yield.

Mr. CURTIS. I do not think we can compare a business entity with nonbusiness or nonprofit organizations which are interested in causes. The purpose of a deduction under the income tax law, is to enable a taxpayer to determine his net income, so that the Government may apply and collect the tax. If a small businessman must make an expenditure of any kind, whether it is for a repair or for buying supplies, that expenditure, of course, must be deducted from his gross income to ascertain whether there is enough income from which to pay the tax.

By the same token, in this day of big government, if small business must come to the Government and present its case, as an ordinary and necessary step to take in transacting business, that expense cannot be distinguished from any other expense, and it should be deductible.

Mr. BUSH. The Senator is absolutely correct.

Mr. CURTIS. An organization may be a worthwhile organization, but may not be engaged in a trade or a business, so is not taxed. Therefore, there is no necessity for determining its net income, and the principle of the business deduction does not apply at all.

Mr. BUSH. The Senator is absolutely correct.

Mr. CURTIS. I think it might be well to show the legislative intent as to why paragraph (C) was included as a committee amendment. That paragraph reads:

In direct connection wih communication of information between the taxpayer and an employee or stockholder with respect to legislation or proposed legislation of direct interest to the taxpayer.

That provision was adopted by the committee after it had rejected an argument for extending it to the general public. The committee decided that that would not be a proper tax deduction, because such an extension would go quite far. But the committee very appropriately, I think, contended that the language in paragraph (C) was something vital to the business and was a proper business expense.

Mr. BUSH. I think that is absolutely correct.

Mr. President, I again express the hope that the amendment will be rejected.

Mr. KERR. Mr. President, the amendment in the bill which the Senator from Illinois seeks to strike is in reality a very simple amendment and, in my judgment, an equitable and just amendment. The Senator from Illinois made two or three significant remarks. He said there is no way to foretell what the Supreme Court will do. That is true. If the Supreme Court had not done something that was not foreseen, this amendment would not have been necessary, because under the 1954 code, section 162(a), is the provision:

There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

Among other things—

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business.

That language is specifically in the basic income tax law. It provides that the income tax percentages shall not apply to that part of the expenditures by a taxpayer made in carrying on any trade or business, including traveling expenses, meals, lodging, and so forth, while away from home in the pursuit of a trade or business.

In spite of that plain provision in the law, the Treasury issued regulations which were to the contrary, and said that if they were expenditures to come to Washington to see Members of Con-

gress, such expenditures were not deductible.

The Supreme Court held that in view of these regulations having been promulgated by the Treasury, the act of Congress was ineffective, in view of the fact that it did not specifically repeal them.

Therein, as I said, the Senator from Illinois is right; we cannot tell what the Supreme Court will do.

The Supreme Court handed down two decisions upholding the validity of the regulations.

Mr. DOUGLAS. Mr. President, will the Senator yield?

Mr. KERR. Please let me finish.

In Cammarano against United States and F. Straus and Sons, Inc., against United States, the Court held that although the amounts expended for legislative matters were "ordinary and necessary"—in fact, essential to the very survival of the taxpayer's business—nevertheless they were not deductible because the regulations barred the deduction of this particular type of expense.

Congress finally got around to recognizing its duty of establishing the rights of taxpayers.

Mr. DOUGLAS. Mr. President, will the Senator yield?

Mr. KERR. I yield.

Mr. DOUGLAS. Is the Senator quoting from——

Mr. KERR. I am quoting from the committee report.

Mr. DOUGLAS. Is the Senator quoting the opinion of the Court as handed down by Justice Harlan?

Mr. KERR. I would not know.

Mr. DOUGLAS. Or is the Senator quoting the concurring opinion of Justice Douglas?

Mr. KERR. I am reading from the report of the committee with reference to the bill.

Mr. DOUGLAS. The Senator is not going back to the decision itself?

Mr. KERR. I am not reading from the language of the decision.

Mr. DOUGLAS. The Senator said that the Court had held that those expenses were ordinary and necessary. I have the decision before me. I cannot find that anywhere in the Harlan opinion, which was joined in by eight of the nine members of the Court. There is language of a similar nature in the concurring opinion of Justice Douglas. I think the Senator is quoting the exception, not the rule.

Mr. KERR. Mr. President, if the Supreme Court had not handed down the decision holding that the language of the statute did not mean what it said, and was adversely affected by regulations, then this amendment would not be necessary. The reason why the committee amendment is necessary is that the code, in 1954, specifically provided that such expenses were deductible.

Mr. DOUGLAS. No, it did not. It provided for expenses which were ordinary and necessary to the conduct of a business.

Mr. KERR. I liked what the Senator said about the first amendment to the Constitution.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Mr. DOUGLAS. There was no violation of that in the Cammarano case.

Mr. KERR. I understand. The Constitution guarantees the people the right to petition the Government, provided it is at their own expense.

Mr. DOUGLAS. But it does not create a business interest and provide that the taxpayers shall pay 52 percent.

Mr. KERR. Oh, the Senator kind of tickles me about that. He talks about consumers. I am a consumer. A consumer has a right to this deduction if he comes here to talk about his trade or business.

Mr. DOUGLAS. No; he does not.

Mr. KERR. Yes, he does, if he comes here in connection with his trade or business.

Mr. DOUGLAS. But not in his function as a consumer; not in his function as a generalized taxpayer.

Mr. KERR. The big corporation cannot get a deduction for its expenses in coming here as a consumer.

Mr. DOUGLAS. But it can get a deduction for its expenses when it appears here in connection with its direct financial interest as a producer.

Mr. KERR. It can get a deduction for its expenses if it comes here in relation to a legislative matter directly connected with its business, and so can a consumer.

Mr. DOUGLAS. But the consumer's interest is not directly related.

Mr. KERR. But every consumer has a trade or business.

Mr. DOUGLAS. But the consumption function is not included.

Mr. KERR. Well, that is subject to another tax; it has not been overlooked, I say to the Senator from Illinois.

Mr. DOUGLAS. I am sure it has not; and the Senator from Oklahoma would heap more onerous sales taxes on the consumers, too.

Mr. KERR. That is not correct, and I defy the Senator to show that I have ever said anything in that regard. I do not impute his motives. I simply say he has made an incorrect statement, and I challenge him to document to the contrary.

Mr. DOUGLAS. The effect of what the Senator from Oklahoma is doing is to make the tax system of the country more regressive.

Mr. KERR. That is a matter of opinion, Mr. President.

Mr. DOUGLAS. No, it is a matter of fact.

Mr. KERR. It is stated as a fact; I know some Senators think their opinions are automatically facts. But I know of no law making it so, nor do I know of any law making their opinions binding on the Congress.

Mr. DOUGLAS. The Senator from Oklahoma is proceeding in his characteristic fashion.

Mr. KERR. That is marvelous. And so is the Senator from Illinois. And I am sure he is enjoying it as much as the Senator from Oklahoma is.

Mr. DOUGLAS. It is never a pleasure to debate with the Senator from Oklahoma.

Mr. KERR. Then why waste so much time doing it?

Mr. DOUGLAS. Because I think some matters of principle are involved. I do not take pleasure in insulting fellow Senators.

Mr. KERR. Then why do it? Why make the statement that the Senator from Oklahoma is in favor of sales taxes? That was making an attack by the use of a statement not based on fact. However, I do not regard it as an insult. I do not think the Senator from Illinois could insult me, Mr. President. I love him; I respect him; I am delighted to debate with him; I would not be denied that privilege, or have it denied him, for anything in the world—although it is a great job to try to keep his mind on his business or to try to keep his statements in line with the record. But even that is not a burden, I admit.

Mr. President, this provision in the Constitution is a very valid one and a very interesting one.

The Senator from Illinois said special privilege after special privilege after special privilege exert pressure and get special legislation against consumers.

You know, Mr. President, all the people who come here constitute all of America. The people who come here to petition their Congress represent the sum total of the population of the United States; and it is our job to represent them. As was said by the Senator from Illinois, every once in a while they bring us information we did not have. It probably happens as often to me as it does to any other Senator. I welcome them, if they are from Oklahoma; I want them to come here.

But I sat here and listened to the Senator from Wisconsin and the Senator from Illinois talk about how unbearable it was for their constituents to come here and press upon them their matters of interest. I wish to say to the people from Oklahoma that it is not unbearable to the Senator from Oklahoma for his people to come here.

Mr. DOUGLAS. May I ask whether the Senator from Oklahoma is speaking for the administration when he speaks now?

Mr. KERR. I am speaking for KERR, of Oklahoma, and I did not know the administration had authorized DOUGLAS to speak for it.

Mr. DOUGLAS. No, it has not. But the Treasury has announced that it is opposed to these provisions; and it is extraordinary to see the Senator from Oklahoma sitting in the seat of the Democratic leadership and opposing amendments which are quite in harmony with the administration.

Mr. KERR. And it is amazing to me to see the Senator from Illinois sitting here and lobbying for the administration and getting a deduction for his expenses. [Laughter.]

Yet that is done under the law:

For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, territory, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year of living

expenses shall not be deductible for income tax purposes in excess of $3,000.

Why, Mr. President, every Member of Congress has a deductible item of up to $3,000 for living expenses while attending to his business here, even though his business for the moment is lobbying for the administration. Yet he would deny that right to his constituents.

Mr. President, I wish to say that I am glad to have my constituents come here. I would be worried if they did not come.

Mr. President, all in the world that this provision does is to say that business people or consumers or laborers or truckers or farmers who come here to talk to their Members of Congress about their business can deduct, for income-tax purposes, their expenses of coming here and doing that. Would not it be an empty right to guarantee them the right to petition their Members of Congress, and then say, "You have that right, but you must pay all the expenses out of your own funds, and they will not constitute a deduction"—although the income tax applies only to the net income after the deductions specifically mentioned in the 1954 code; and the reference to that would not be necessary except for the fact that the Supreme Court disregarded it and held that it was not effective.

Mr. President, I urge that the amendment be rejected.

Mr. COOPER. Mr. President, I should like to ask one or two questions of either the Senator from Oklahoma or the Senator from Illinois. I have listened to the arguments made for the amendment, and I have listened to the arguments made against it.

As I understand it, the argument made by the Senator from Oklahoma is that these expenses are like other expenses; that if they are directly related to or associated with the carrying on of the trade or business, then, so the Senator from Oklahoma argues, they should be deductible, if they are involved in presenting claims for legislation.

Mr. KERR. Yes.

Mr. COOPER. And I also understand that that would apply, as a matter of policy, in connection with the taxpayer's right to petition.

But I ask about provision (1) on page 39, to which the Senator from Nebraska referred. As I understand, there is no connection with the obtaining by the employer or stockholder of information in reference to proposed legislation of direct interest to the taxpayer. If this section remains in, as I see it, such expenses would be deductible if they are for transportation, for travel, or for food or for preparing information or statements, or talks between a taxpayer and the employers or stockholder, with respect to legislation.

Mr. KERR. In connection with his own business.

Mr. COOPER. His own business?

Mr. KERR. Yes.

Mr. COOPER. I must say that in this case I cannot see that the same argument would apply to this section; I refer to the argument supporting the deduction of expenses by a taxpayer who presents his case to this legislative body or to some other legislative body. I should like to know the rationale in favor of arguing that expenses covered by subparagraph (C) should be deductible expenses. Accepting the Senator's argument that a taxpayer should have the right to deduct expenses for presenting his case before a legislative body, whether of the Federal Government, a State, or a local subdivision of government—on what reasoning can the same argument be applied to a taxpayer discussing legislation with his employees or stockholders? Is not that a normal expense of his business which does not bear directly upon his presentation of the business' interest—whether corporate or individual—to a legislative body?

Mr. KERR. Mr. President, is the Senator directing a question to me?

Mr. COOPER. Yes.

Mr. KERR. One of the responsibilities of management is to operate its business in such a way as to pay a return to the stockholders on their investment. Certainly, management has the responsibility of keeping the stockholders and the employees informed as to legislation which affects their business. Why should a business or trade be denied the right to deduct the expense of informing its owners of matters which could adversely affect it, when they are charged with the responsibility of management? Otherwise, it occurs to the Senator from Oklahoma, they would be derelict in their duty. If an insurance policy is taken out against fire loss, that is a deductible expense. If a lawyer is hired on a retainer basis to protect the company and to handle its business in accordance with the law, that is a deductible expense. If a law is proposed which would have an adverse effect, the cost of opposing that law in Congress is deductible. Should not the managers have a right to deduct the expense of informing the stockholders or employees so they can be protected, just as they are protected against fire, adverse litigation, or other matters affecting the welfare or profitability of the business?

Mr. COOPER. If Congress wants to, it can extend the right to deduct expenses in this or other fields, but I think there is a distinction here.

Mr. KERR. I say to the Senator that while that is a separate item from that of sending someone to Washington, it still has to be directly connected with the trade or business; but the amendment of the Senator from Illinois would strike both provisions out of the bill.

Mr. COOPER. As has been argued, and reported, this entire section is bottomed on the idea that a taxpayer—one carrying on a trade or business—should be able to deduct expenses for appearing, communicating, or preparing to present his case to legislative bodies upon pending or proposed legislation. That is the essence of the section. If it is desired to give the taxpayer such deductions for appearing before legislative bodies, preparing testimony, and for necessary and proper expenses in connection with presenting their petitions—if one wants to use the constitutional phrase—to a legislative body, such a purpose is understandable. But the provision I am talking about is something else. The taxpayer would also be permitted to deduct expenses for communications between the taxpayer and his stockholders or his employees—persons who do not have jurisdiction for the enactment of legislation.

For example, this would cover all kinds of expenses for communications between persons and to persons who are not charged with legislation. Admitting the reasoning upon which the plea for the entire section is based—that of the presentation of a position to a legislative body—it does not apply to carrying on a kind of campaign with stockholders for or against legislation. There is a distinction between these two kinds of expenses.

Mr. KERR. I can understand how one could make a differentiation, but the majority of the Finance Committee felt that this language was consistent with the language of the entire provision. The Senator from Oklahoma concurred in that feeling. That action certainly is not binding on the Senate.

The proposed amendment would strike out the entire section. After that amendment was disposed of, if the Senator from Kentucky wanted to offer an amendment to strike out the particular portion to which he is addressing himself, it would be in order. I would not agree with him, but it would be in order.

Mr. CURTIS. Mr. President, will the Senator yield?

Mr. COOPER. I yield.

Mr. CURTIS. I am opposed to the amendment that is offered.

Mr. COOPER. Is the Senator responding to the question I raised?

Mr. CURTIS. Yes. I believe that paragraph (C) should be the law, anyway, but I also think it is well to keep it in the bill. Certainly, it is a duty of management to keep the stockholders and owners informed, if it is a necessary expense of doing business, and without the doing of business, no employees could be kept employed.

May I also point out that in lines 6 and 7 of page 39 of the bill are the words "ordinary and necessary." This section is not an invitation to businessmen to come to Washington on anything which might be interesting. It has to be an ordinary and necessary expense. The business must be threatened or it must be proposed that burdensome Government regulations are to be put on the business which might result in loss of operations or loss of jobs. To defend against that kind of legislation, as the Senator from Oklahoma has pointed out, is just the same as defending the business against fire or any other business hazard.

Mr. COOPER. I understand and agree with the Senator on the paragraphs dealing with the presentation of position to legislative bodies. I understand that legitimate expenses are incurred in presenting views on legislation at Washington, or Frankfort, Ky., or Omaha, Nebr., on legislation which may be critical to the business. But the Senate version extends the House version and permits deductions for functions which the business performs anyway, and which are not communications, appearances, with legislative bodies or officials.

Mr. CURTIS. The business would perform it anyway, but there should be a deduction for it.

Mr. COOPER. With respect to expenses incurred in connection with taxpayers appearing before Congress or other legislative bodies, it would be reasonably easy to ascertain whether the expenses were necessary for a legislative purpose, because the legislation or proposed legislation could be identified, as well as the committees or members. But I do not know how it could practicably be determined whether expenses covered by subparagraph (C) were necessary in the case of legislation which was proposed or pending before a legislative body.

My question is, Why was it added? What is the rationale?

Mr. CURTIS. I have stated my reason.

Mr. COOPER. For the purpose of informing the stockholders or employees about legislation?

Mr. CURTIS. No; because it is a necessity of doing business.

Let us consider a hypothetical case of an industry threatened by a trade agreement or a tariff change. If the industry were threatened with injury, that would be a threat to the employees. Suppose that this caused an explanation to be made to the employees, as to what the industry believed about the situation. Suppose it caused a petition to be printed, so that employees might sign their names. There would be a communication to them. I think that would be the same necessary expense of doing business as a fire insurance policy would be.

Mr. MILLER. Mr. President, would the Senator yield?

Mr. COOPER. I yield.

Mr. MILLER. Perhaps I can be helpful.

I wish to say that I agree with the Senator from Nebraska that, generally speaking, such expenses are deductible expenses now. There is no point, even, in having the provision enacted for those, since that is already a part of the law and is already contained in the concept of what is ordinary and necessary.

I can visualize a situation which might develop in which a different aspect might arise. For example, let us consider the case mentioned by the Senator from Nebraska, in which a mailing might be made to employees and to stockholders, calling their attention to the fact that a certain bill was pending in the Congress and that, if enacted, it might cause considerable hardship to the company. That would be all that would be said, and I think that would be a deductible expense under the present law. That would be a matter of information. Usually that information would be contained in some kind of a weekly or monthly letter of information to the people involved, anyway.

Let us assume, however, that coupled with the information there would be a statement, "We urge upon you to contact your Members of Congress. This is the list of the Members of Congress. Write to them along this line. Here is a sample letter you might use."

I would suggest that then they would be getting into an area prohibited under present tax law, which would be the effort to influence legislation. It would be almost a direct invitation to people to participate in a mass movement to affect legislation.

I think this type of activity probably would not be allowable as a deduction under the present state of the law, but under the proposed provision it would be deductible.

I think each Senator must reach a judgment as to whether that latter type of activity is a kind of activity to be encouraged, to be put in about the same category as the first activity. So far as I am concerned, I wish to say that the junior Senator from Iowa believes it is a good idea for people to be educated on these things, and I think it is all right. But there would be a question, in the present state of the law.

Mr. PROXMIRE. Mr. President, will the Senator yield for a question?

Mr. COOPER. I yield.

Mr. PROXMIRE. The Senator from Kentucky has raised a question to which there has been no answer. What the proponents of the amendment argue is that this expense should be allowed as a deduction as a necessary business expense. The Senator from Kentucky raised the question as to why it would be a necessary expense to tell the stockholders about proposed legislation or to tell employees about proposed legislation unless there were a desire for them to take some kind of action to bring pressure on the Congress, on a State legislative body, or on a city council, or to take a particular action which the business might wish them to take.

So far as that being a necessary business expense is concerned, in the sense of reducing cost or of increasing income, it is perfectly obvious and apparent it would not be. I think the question raised by the Senator from Kentucky has not been answered at all.

The Senator from Nebraska made a noble attempt to given an example, under the Trade Agreement Act, of a company which might be injured. In that particular case, he said, the employees should be told the situation, for they might wish to sign a petition. Certainly that would be fair, but it would have nothing to do with reducing cost or increasing income, unless there were a desire to bring pressure upon a legislative body.

Mr. MILLER. Mr. President, will the Senator yield at that point, so that I may develop the idea about increasing income or reducing cost? It is not merely a question as to whether it will increase income or reduce cost. It also involves the question of maintaining income. That would involve ordinary and necessary expense. If the business volume of a taxpayer were threatened by proposed legislation, it would be an ordinary and necessary business expense to seek to maintain volume by fighting the proposed legislation.

Mr. PROXMIRE. That might be. The Senator from Kentucky very wisely divided his question. He said that appearances before a legislative body might involve a necessary expense, but that the carrying on of a campaign among stockholders would have nothing to do with it. The stockholders could do nothing about that.

Mr. COOPER. Mr. President, I believe I still have the floor.

Mr. MILLER. Mr. President, if the Senator will permit, the Senator from Iowa wished to make the point that this would be only one step removed from having a lawyer go to the city of Washington, D.C., to say something about a bill being considered, of importance to a company. What would be the difference between that case and notifying the stockholders, so that they, in turn, could write to their representatives in Congress? It seems to me the same objective would be involved.

If someone is opposed to sending a lawyer to Washington, D.C., and allowing the taxpayer to take that expense as a deduction, naturally the same person would be opposed to allowing a business deduction based on stockholders contacting Members of Congress.

Mr. PROXMIRE. Mr. President, if the Senator will permit. I should be glad to answer that.

Mr. MILLER. If the Senator believes in the first, I think he will believe in the second.

Mr. COOPER. Mr. President, I offer an amendment, which I send to the desk and ask to have stated.

The PRESIDING OFFICER (Mr. HART in the chair). The amendment will be stated for the information of the Senate.

The LEGISLATIVE CLERK. Beginning on line 24, page 34, it is proposed to strike out all through line 2 on page 40.

Mr. COOPER. Mr. President, this puts the question before the Senate.

Mr. PROXMIRE. Mr. President, will the Senator yield for a question?

Mr. COOPER. I yield.

Mr. PROXMIRE. I say to the Senator from Iowa that if employees were to go to the city of Washington, D.C.——

The PRESIDING OFFICER. The Senator will suspend.

The Chair is advised that the proposed amendment does not bear on the Douglas amendment.

Mr. KERR. Mr. President, I should like to remind the distinguished Senator from Kentucky that after the pending amendment is voted upon, his amendment then would be in order.

Mr. COOPER. I wrote the amendment hurriedly in pencil, and I will perfect it.

Mr. KERR. Mr. President——

The PRESIDING OFFICER. The Chair assumes that the Senator from Kentucky temporarily is withholding his amendment.

Mr. KERR. It could not be before the Senate, because it has not been completed.

Mr. COOPER. The amendment is completed now. I ask that it be stated.

The PRESIDING OFFICER. The Chair is now advised that the amendment offered by the Senator from Kentucky is in order, and the amendment will be stated for the information of the Senate.

The LEGISLATIVE CLERK. Beginning on line 24, page 39, it is proposed to strike out through line 2 on page 40.

Mr. KERR. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. KERR. Is the parliamentary situation one in which the amendment offered by the Senator from Kentucky is to be considered a substitute for the amendment offered by the Senator from Illinois?

The PRESIDING OFFICER. The Chair is advised that it will be regarded as a perfecting amendment.

Mr. KERR. I would say to the Presiding Officer in that relationship, as I understand the situation, the Senator from Illinois offered an amendment to strike out a very great deal of language.

The PRESIDING OFFICER. The Senator is correct.

Mr. KERR. Now the Senator from Kentucky has offered an amendment to strike out only a limited part of that same language.

The PRESIDING OFFICER. The Chair is advised that this is in order as a perfecting amendment.

Mr. KERR. I understand.

Mr. COOPER. Mr. President, may I ask the status of my amendment?

The PRESIDING OFFICER. The amendment has been stated. The question is on agreeing to the amendment offered by the Senator from Kentucky.

Mr. McCARTHY. Mr. President, as I understand the amendment offered by the Senator from Kentucky, it would leave in section 3, the deductions which are to be allowed, to include all necessary and ordinary expenses paid or incurred in the taxable year in direct connection with appearances before committees of Congress or legislative bodies. It would also leave intact section (B) on page 39, providing for communications between the taxpayer and the organization of which he is a member.

However, the effect would be to strike from the bill section (C), beginning on page 39, which would allow deductions "in direct connection with communication of information between the taxpayer and an employee or stockholder with respect to legislation or proposed legislation of direct interest to the taxpayer."

This section was added in the Finance Committee, and I think it would open the way to real abuse.

I was in favor of allowing deductions for the ordinary expenses of lobbying. But I do think that the proposed deduction which would permit deductions in connection with communications of information between the taxpayer and his employer or stockholders would open the way to the use of the deduction for political purposes. If such a deduction were to be allowed, it should be part of a general change in the law, so that individual voters or individual citizens could have the same advantages. I hope that the amendment offered by the Senator from Kentucky will be agreed to.

Mr. COOPER. Mr. President, I ask that my amendment be perfected by adding on line 23 the word "or." I make the request because of the reference to "(C)." The last word in line 23 would be "or."

Mr. JAVITS. Mr. President, will the Senator yield?

Mr. COOPER. I yield.

Mr. JAVITS. I wish to express my agreement with the Senator from Kentucky and the Senator from Minnesota. I think we are approaching or apparently getting into a field which needs some charting. The proposal is a fair way to begin. I am somewhat acquainted with the legal problems of corporations. I think there should be some analogy with the authority of trade unions. If the amendment is trimmed in the way my colleagues have now designed it, it will get started upon that path without going beyond it.

The reason is that almost any general piece of legislation, no matter how broad, will affect a major company. Therefore we would open quite a door in the proposal with relation to stockholders and employees. It may be justified, but I think we are well advised to start in a limited way with what the Senators have outlined. I support them in their amendment.

The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from Kentucky.

Mr. JAVITS. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

The yeas and nays were not ordered.

Mr. COOPER. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. KERR. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Is there objection? The Chair hears none, and it is so ordered.

Mr. KERR. Mr. President, I ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second?

The yeas and nays were ordered.

The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from Kentucky.

Mr. COOPER. Mr. President, as the Senator from New York has said, when testimony is adduced, on this particular section, necessity for it may be demonstrated. But the committee report deals only with the question of taxpayers appearing before and communicating with legislative bodies. There has been opposition even to these deductions. So far as I am concerned, I have felt that taxpayers have the right to present their cases before legislative bodies. But it seems to me that this particular provision would add a new element, which is not connected with the problem of taxpayers presenting their cases before legislative bodies.

Taxpayers would have the right to deduct for their communications to employees or stockholders, upon matters which, it seems to me, are wholly the concern of their business considered in the context of the entire section which is dealing with the presentation of issues before legislative bodies. It seems to me that this provision is an extension beyond the purpose of the entire section.

The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from Kentucky. The yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. DOUGLAS. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. DOUGLAS. Is the amendment of the Senator from Kentucky an amendment to the bill or an amendment to my amendment?

The PRESIDING OFFICER. The amendment would amend the language of the bill which the amendment of the Senator from Illinois proposes to strike.

Mr. KERR. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. KERR. If the Cooper amendment is agreed to, then the Senate will vote on the Douglas amendment, which would strike the remainder of the language of the section.

The PRESIDING OFFICER. The Senator is correct.

Mr. KERR. It is kind of like cutting a dog's tail off an inch at a time so it would not hurt so badly.

Mr. GORE. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. GORE. How is it possible that while one amendment to a section of the bill is pending, an amendment in the second degree to the same section to which the pending amendment applies, may be considered?

The PRESIDING OFFICER. The Chair is advised that the amendment is a perfecting amendment, intended for the purpose of perfecting a portion of the bill proposed to be stricken.

Mr. MILLER. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. MILLER. I regret that the Senator from Iowa is still not clear on the question. Do I correctly understand that the Cooper amendment would amend the Douglas motion in such a way that the only portion that would affect the bill would be on page 39 to strike the language starting on line 23 with the word "or" and going over to line 2 on page 40?

The PRESIDING OFFICER. The Chair is advised that it would not affect the Douglas motion. The action in the Cooper amendment would not affect the motion by the Senator from Illinois to strike out what may thereafter be left.

Mr. DOUGLAS. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. DOUGLAS. If the amendment does not affect my motion, how can it be a perfecting amendment to my motion?

The PRESIDING OFFICER. The Chair is advised that, in the parliamentary sense, it is not a perfecting of the language in the Senator's amendment at all.

Mr. McCARTHY. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. McCARTHY. If the amendment is agreed to, then the bill would be without section (C). The Douglas amendment would then strike out sections (A) and (B), because (C) would be gone. So the practical effect would be the same, it seems to me, in any case.

If the amendment is agreed to, the Douglas motion would run only to (A) and (B) because only those two sections would be left in the bill.

The PRESIDING OFFICER. The Parliamentarian points out that the Senate could change any section that remains in the bill thereafter.

Mr. McCARTHY. The Douglas motion now runs to sections (A), (B), and (C). If the Cooper amendment is agreed to, no section (C) would remain.

The PRESIDING OFFICER. The motion of the Senator from Illinois would have the effect of striking out all that remains in the bill after action on the Cooper amendment.

Mr. HOLLAND. Mr. President, to simplify the question, I ask for a division of the three elements in the Douglas amendment.

The PRESIDING OFFICER. The Chair is advised that the yeas and nays having been ordered on the Cooper amendment, the request for a division on the other parts, not included in the Cooper amendment, is not in order at this time.

Mr. PASTORE. Mr. President, a parliamentary inquiry.

The PRESIDENT. The Senator will state it.

Mr. PASTORE. If the Cooper amendment were rejected, would not the Douglas motion have to be modified? Otherwise, we would have to vote on part C a second time. Is that not correct?

The PRESIDING OFFICER. The question would then come on the amendment of the Senator from Illinois to strike out all of that section, whereas the amendment of the Senator from Kentucky is to strike out only one section.

Mr. PROXMIRE. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. PROXMIRE. Is it not true that the motion of the Senator from Illinois was pending, and therefore the Cooper amendment would be in order only as an amendment to the motion of the Senator from Illinois?

The PRESIDING OFFICER. The Chair is advised that the Senator's statement is not correct. The Cooper amendment is a preferential one and seeks to perfect the language of the text which the Douglas motion would strike out.

Mr. HICKENLOOPER. Mr. President, I ask for the regular order.

The PRESIDING OFFICER. The question is on agreeing to the amendment offered by the Senator from Kentucky [Mr. COOPER].

The yeas and nays have been ordered, and the clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. METCALF (when his name was called). On this vote I have a pair with the Senator from Texas [Mr. YARBOROUGH]. If he were present and voting he would vote "yea." If I were at liberty to vote, I would vote "nay." I therefore withhold my vote.

The rollcall was concluded.

Mr. MANSFIELD. I announce that the Senator from Nevada [Mr. BIBLE], the Senator from North Dakota [Mr. BURDICK], the Senator from Mississippi [Mr. EASTLAND], the Senator from Louisiana [Mr. ELLENDER], the Senator from Arkansas [Mr. FULBRIGHT], the Senator from Minnesota [Mr. HUMPHREY], the Senator from Washington [Mr. MAGNUSON], the Senator from Utah [Mr. Moss], the Senator from Maine [Mr. MUSKIE], the Senator from Florida [Mr. SMATHERS], the Senator from Massachusetts [Mr. SMITH], and the Senator from Texas [Mr. YARBOROUGH] are absent on official business.

I further announce that the Senator from New Mexico [Mr. ANDERSON], the Senator from Alaska [Mr. GRUENING], the Senator from Wyoming [Mr. HICKEY], and the Senator from Missouri [Mr. SYMINGTON] are necessarily absent.

I further announce that, if present and voting, the Senator from North Dakota [Mr. BURDICK], the Senator from Louisiana [Mr. ELLENDER], the Senator from Alaska [Mr. GRUENING], the Senator from Minnesota [Mr. HUMPHREY], the Senator from Washington [Mr. MAGNUSON], the Senator from Utah [Mr. Moss], the Senator from Maine [Mr. MUSKIE], and the Senator from Massachusetts [Mr. SMITH] would each vote "yea."

On this vote, the Senator from Florida [Mr. SMATHERS] is paired with the Senator from Missouri [Mr. SYMINGTON]. If present and voting, the Senator from Florida would vote "nay," and the Senator from Missouri would vote "yea."

Mr. DIRKSEN. I announced that the Senators from Maryland [Mr. BUTLER and Mr. BEALL], the Senator from Utah [Mr. BENNETT], the Senator from South Dakota [Mr. BOTTUM], the Senator from Indiana [Mr. CAPEHART], the Senators from New Hampshire [Mr. COTTON and Mr. MURPHY], the Senator from Arizona [Mr. GOLDWATER], the Senator from Idaho [Mr. JORDAN], the Senator from California [Mr. KUCHEL], the Senator from Kentucky [Mr. MORTON], the Senator from Massachusetts [Mr. SALTONSTALL], and the Senator from Delaware [Mr. WILLIAMS] are necessarily absent.

The Senator from Wisconsin [Mr. WILEY] is detained on official business.

If present and voting, the Senator from Maryland [Mr. BEALL], the Senator from Indiana [Mr. CAPEHART], and the Senator from Idaho [Mr. JORDAN] would each vote "nay."

The result was announced—yeas 40, nays 29, as follows:

[No. 238 Leg.]

YEAS—40

Aiken	Carroll	Clark
Bartlett	Case	Cooper
Byrd, W. Va.	Church	Dodd
Douglas	Long, Hawaii	Proxmire
Eagle	Long, La.	Randolph
Gore	McCarthy	Russell
Hart	McGee	Scott
Hayden	McNamara	Sparkman
Hill	Monroney	Stennis
Jackson	Morse	Talmadge
Javits	Neuberger	Williams, N.J.
Keating	Pastore	Young, Ohio
Kefauver	Pell	
Long, Mo.	Prouty	

NAYS—29

Allott	Fong	McClellan
Boggs	Hartke	Miller
Bush	Hickenlooper	Mundt
Byrd, Va.	Holland	Pearson
Carlson	Hruska	Robertson
Chavez	Johnston	Smith, Maine
Curtis	Jordan, N.C.	Thurmond
Dirksen	Kerr	Tower
Ervin	Lausche	Young, N. Dak.
	Mansfield	

NOT VOTING—31

Anderson	Fulbright	Murphy
Beall	Goldwater	Muskie
Bennett	Gruening	Saltonstall
Bible	Hickey	Smathers
Bottum	Humphrey	Smith, Mass.
Burdick	Jordan, Idaho	Symington
Butler	Kuchel	Wiley
Capehart	Magnuson	Williams, Del.
Cotton	Metcalf	Yarborough
Eastland	Morton	
Ellender	Moss	

So Mr. COOPER's amendment was agreed to.

Mr. COOPER. Mr. President, I move that the vote by which the amendment was agreed to be reconsidered.

Mr. KEATING. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The question now recurs on the motion of the Senator from Illinois [Mr. DOUGLAS], to strike out section 3, as amended.

Mr. GORE. Mr. President, a number of Senators have indicated that they have engagements. I understand that the Arkansas Choir is about to present a program. I will make an offer. If Senators will give me their attention for 5 minutes, I will finish in 5 minutes.

I think the philosophical basis for support of or opposition to the amendment was amply delineated by comments of the distinguished and able senior Senator from Oklahoma [Mr. KERR], who said a few moments ago that the people who come to Washington "to petition their Congress represent the sum total of the population of the United States; and it is our job to represent them." He also stated that "all the people who come here constitute all of America."

I fear there is a tendency to feel that this is so; but I deny that it is or ought to be a fact. True, we are now tending to become a government by organization and for organization. This is contrary to the fundamental concept of our system which is based upon individual citizenship and the concept that Members of Congress represent the whole people and must give the interests of the whole people more weight than is given private interests, no matter how organized.

The question involved in this amendment is not the constitutional right of petition. That is not at issue in the bill at all. No right is impinged by the pending amendment. The right of petition is clear; indeed, Congress could not deny it if it desired to do so. What is involved? I think there is here a basic

question of public policy in the ends which can properly be promoted by tax law—the policy of giving legislative endorsement by way of tax deduction to lobbying on a national scale; tax deduction for lobbying not only with respect to contacts with Members of Congress, but appearances before congressional committees. It is activity at the congressional level that we hear most about.

But if we read the bill, starting at the bottom of the section, instead of the first sentence of the section, we find that a tax deduction is provided for lobbying all the way down to the grassroots—with respect to legislative bodies of the counties; the city council of the smallest incorporated town in every State; and State legislatures.

Dues are made tax deductible. What kind of dues? In what amount? How assessed? No definition is provided. I believe the records show that last year the American Medical Association spent more money for lobbying than any other organization in the United States. Suppose next year the AMA spent twice that much, or 10 times that amount; and at the end of the year, each individual member of the AMA received a notice saying, 'Your dues are thus and so"—perhaps 10 times or 25 times what they were last year. No limits are placed by the bill; there is no definition in the bill. The word used is "dues". For what purpose? For the purpose of buying $100-a-plate dinners? For the purpose of ringing doorbells in an attempt to manufacture sentiment?

The real question before the Senate is a simple one: Do we want to preserve the traditional concept of our democratic way of life that Members of Congress represent individual citizens, or do we want to give legislative endorsement and encouragement to government by organization and for organization? The question is just that simple, it seems to me.

Perhaps it is old fashioned, but I prefer to view my job otherwise. I do not wish to see the people of the country misled—as they were, recently, into thinking that a withholding procedure was a new tax.

Mr. President, sometimes I feel that my heaviest responsibility is to represent those who are least aware of their need for representation—to be of assistance to the people who do not belong to special-interest lobbies.

Mr. PASTORE. Mr. President, will the Senator from Tennessee yield?

Mr. GORE. I yield.

Mr. PASTORE. The Senator does make a point; but it has been my experience, in serving on congressional committees, that they invite people to come to Washington and to testify before them, and not all the witnesses are subpenaed. Many of them are invited to come to testify, in order to help the committee make its record. Does the Senator take the position that they should have to pay their own expenses, out of their own pockets, rather than be able to have them handled as deductible expenses? Such witnesses testify before many committees—in fact, before all the committees, including the Joint Committee on Atomic Energy. When we invite them to come before the committees, as witnesses, to help the committees, how would the Senator from Tennessee have their expenses treated?

Mr. GORE. It seems to me that when Congress wishes to receive testimony from an individual who is knowledgeable in a given area, Congress should be able to provide reimbursement of his expenses.

Mr. PASTORE. But Congress does not do that; that is done only when a witness is subpenaed. Only when a witness is subpenaed are his expenses paid. Otherwise, there is absolutely no appropriation for any such purpose.

Many witnesses come here and testify before the congressional committees at their own expense. For instance, witnesses testify for that purpose before the Joint Committee on Atomic Energy. The Senator from Tennessee says they would have to pay their expenses out of their own pockets. That makes no sense at all.

Mr. GORE. But there is no reason why there could not be such an appropriation; and I think public policy might well be served by adopting such a policy.

Mr. PASTORE. But that would have to be done, it seems to me, before this provision is discarded; otherwise there would be a vacuum.

Mr. GORE. On the contrary, if the provisions of this section of the bill are adopted, it seems to me the other course is foredoomed. I think this is quite an unwise provision. The Senator from Rhode Island and the Senator from Tennessee are discussing expenses in connection with appearing and testifying before a congressional committee. But I say to my friend from Rhode Island that will be a minuscule part of the expenses dealt with and encouraged by this provision. Senators should read the section. Let them find in it some definition of "dues" or some definition of "expenditures" or some definition of "research," or some way, by means of this provision, whereby the Government could deny a tax deduction for a retainer fee paid to the leading politician in every congressional district or in every county in the country, or to lawyers or public-relations experts. This provision gives legislative sanction to nationwide lobbying organizations, operating from the level of city councils and the magistrates' courts in the counties to the State legislatures and to the Congress. This provision is more serious than some seem to think. I feel that its adoption would be a grave mistake.

Mr. President, I promised to be brief; and I now take my seat.

Mr. HOLLAND. Madam President——

The PRESIDING OFFICER (Mrs. NEUBERGER in the chair). The Senator from Florida is recognized.

Mr. HOLLAND. Madam President, I strongly support the provision of the committee bill which is being attacked by means of this amendment; and I oppose the amendment.

Everyone knows that when a business, large or small, a corporation or an individual, is being sued in court and is being threatened, either in its entirety or in regard to any part—large or small—of its equities, it has a right to employ lawyers or economists or specialists or other professional men in various fields, and the expenses in connection with employing them are deductible as business expenses. Everyone knows that, and it is taken for granted.

Madam President, the greatest Chief Justice our country ever had made one statement for which he will always be remembered—namely, that the power to tax is the power to destroy.

When taxation is proposed or threatened against a business, and when the business believes the tax will be destructive in whole or in part of its property rights, why is it any less a business expense for that business to employ someone who can properly defend it, and, in that connection, send to Washington someone—whether a lawyer or an economist or an engineer or some other expert—and have the knowledge that that expert will do his best to represent the business, and have the knowledge that the expense of employing that expert will be deductible as a business expense?

It seems to me that is so reasonable and is such a commonsense proposal that no one could for a moment deny it.

Shall we say that anyone who is engaged in business or who has a business, large or small, does not have the right to defend himself when he is confronted with a legislative proposal which he regards as injurious or destructive of his business, and does not have the right to regard the expenses of his defense as expenses which he should be allowed to deduct from his income tax statement? It seems to me that such a provision is just full of commonsense and reason and equity, and of course I support it.

The only other provision left in the Senate version of the bill against which the amendment is directed is the similar provision allowing such a business to deduct as a business expense its payment to an association or organization of which it is a part—an organization which is conducting the defense or is engaging in the representation of a group of businesses—for example, a railroad which pays dues to the National Association of Railroads for assembling the facts which relate to the entire industry may deduct such dues, and similar cases will occur to all Senators. That is all that is left in this provision of the bill.

The only provision which might have been subjected to reasonable question was the one which was attacked by the Senator from Kentucky. In its wisdom, the Senate has deleted that provision. I did not agree with that act of deletion, but I do agree that that provision was more subject to question than the two portions which are left.

But the provision now under consideration simply cannot be questioned—the provision that any businessman shall have a right to proceed to his own defense and, in that connection, to employ those he may need to represent and defend him—whether it be a lawyer or an economist or an engineer, or whoever, in his opinion, will properly represent his particular business and regard such employment as a business expense. I think the committee provision should

be defended, and that the amendment should be rejected.

Mr. KERR. Madam President, all of us know that the Government is collecting taxes of nearly $100 billion a year from the American people and from American businesses, both large and small, regardless of the size of their financial activities or interests. Such taxes are collected from corporations, many of them regulated and controlled, and all of them having to do with the life, the health, the vigor, and the vitality of American business.

To say that the expenses should not be deductible when a taxpayer or citizen comes to Washington in connection with a matter directly related to his business is, as the Senator from Florida has just now said, like saying to that taxpayer that if he has a matter which is in court, he can employ a lawyer to help defend him, but he cannot deduct the expense of employing the lawyer—or that if a taxpayer or a businessman has a matter before the Federal Trade Commission or the Federal Power Commission or the Interstate Commerce Commission, he can defend himself, but cannot deduct that expense as a business expense.

I cannot imagine the concept of those who would say that expenses directly connected with the trade or business of a taxpayer should not be deductible—when the taxpayer travels to Washington and testifies before a congressional committee, when the Congress is in the process of increasing taxes, which now total nearly $100 billion a year, or is in the process of expanding the restrictions or controls, which already are most burdensome.

So I join the Senator from Florida in urging that the amendment be rejected.

The PRESIDING OFFICER. The question is on agreeing to the motion of the Senator from Illinois [Mr. DOUGLAS] to strike out section 3 on page 38, line 17 through line 2 page 40, as amended by the Senator from Kentucky [Mr. COOPER].

The yeas and nays have been ordered, and the clerk will call the roll.

The Chief Clerk proceeded to call the roll.

Mr. HART (when his name was called). On this vote I have a live pair with the Senator from Nevada [Mr. BIBLE]. If he were present and voting, he would vote "nay." If I were at liberty to vote, I would vote "yea." I therefore withhold my vote.

The rollcall was concluded.

Mr. KERR. I announce that the Senator from Nevada [Mr. BIBLE], the Senator from North Dakota [Mr. BURDICK], the Senator from Mississippi [Mr. EASTLAND], the Senator from Louisiana [Mr. ELLENDER], the Senator from Arkansas [Mr. FULBRIGHT], the Senator from Minnesota [Mr. HUMPHREY], the Senator from Washington [Mr. MAGNUSON], the Senator from Montana [Mr. MANSFIELD], the Senator from Utah [Mr. MOSS], the Senator from Maine [Mr. MUSKIE], the Senator from Georgia [Mr. RUSSELL], the Senator from Florida [Mr. SMATHERS], the Senator from Massachusetts [Mr. SMITH], the Senator from Alabama [Mr. SPARKMAN], and the Senator from Texas [Mr. YARBOROUGH] are absent on official business.

I further announce that the Senator from New Mexico [Mr. ANDERSON], the Senator from Alaska [Mr. GRUENING], the Senator from Wyoming [Mr. HICKEY], and the Senator from Missouri [Mr. SYMINGTON] are necessarily absent.

I further announce that, if present and voting, the Senator from Mississippi [Mr. EASTLAND], the Senator from Louisiana [Mr. ELLENDER], the Senator from Montana [Mr. MANSFIELD], and the Senator from Missouri [Mr. SYMINGTON] would each vote "nay."

I further announce that, if present and voting, the Senator from Texas [Mr. YARBOROUGH] would vote "yea."

On this vote, the Senator from Alaska [Mr. GRUENING] is paired with the Senator from Florida [Mr. SMATHERS]. If present and voting, the Senator from Alaska would vote "yea," and the Senator from Florida would vote "nay."

Mr. YOUNG of North Dakota. I announce that the Senators from Maryland [Mr. BUTLER and Mr. BEALL], the Senator from Utah [Mr. BENNETT], the Senator from South Dakota [Mr. BOTTUM], the Senator from Indiana [Mr. CAPEHART], the Senators from New Hampshire [Mr. COTTON and Mr. MURPHY], the Senator from Arizona [Mr. GOLDWATER], the Senator from Idaho [Mr. JORDAN], the Senator from California [Mr. KUCHEL], the Senator from Kentucky [Mr. MORTON], the Senator from Massachusetts [Mr. SALTONSTALL], and the Senator from Delaware [Mr. WILLIAMS] are necessarily absent.

The Senator from Illinois [Mr. DIRKSEN], the Senator from Iowa [Mr. HICKENLOOPER], and the Senator from Wisconsin [Mr. WILEY] are detained on official business.

If present and voting, the Senator from Maryland [Mr. BEALL], the Senator from Utah [Mr. BENNETT], the Senator from South Dakota [Mr. BOTTUM], the Senator from Indiana [Mr. CAPEHART], the Senator from Illinois [Mr. DIRKSEN], the Senator from Idaho [Mr. JORDAN], the Senator from California [Mr. KUCHEL], the Senator from Kentucky [Mr. MORTON], and the Senator from Massachusetts [Mr. SALTONSTALL] would each vote "nay."

The result was announced—yeas 13, nays 51, as follows:

[No. 289 Leg.]

YEAS—13

Bartlett	Gore	Pell
Carroll	Kefauver	Proxmire
Church	McNamara	Young, Ohio
Clark	Morse	
Douglas	Neuberger	

NAYS—51

Aiken	Hayden	Metcalf
Allott	Hill	Miller
Boggs	Holland	Monroney
Bush	Hruska	Mundt
Byrd, Va.	Jackson	Pastore
Byrd, W. Va.	Javits	Pearson
Cannon	Johnston	Prouty
Carlson	Jordan, N.C.	Randolph
Case	Keating	Robertson
Chavez	Kerr	Scott
Cooper	Lausche	Smith, Maine
Curtis	Long, Mo.	Stennis
Dodd	Long, Hawaii	Talmadge
Eagle	Long, La.	Thurmond
Ervin	McCarthy	Tower
Fong	McClellan	Williams, N.J.
Hartke	McGee	Young, N. Dak.

NOT VOTING—36

Anderson	Fulbright	Moss
Beall	Goldwater	Murphy
Bennett	Gruening	Muskie
Bible	Hart	Russell
Bottum	Hickenlooper	Saltonstall
Burdick	Hickey	Smathers
Butler	Humphrey	Smith, Mass.
Capehart	Jordan, Idaho	Sparkman
Cotton	Kuchel	Symington
Dirksen	Magnuson	Wiley
Eastland	Mansfield	Williams, Del.
Ellender	Morton	Yarborough

So Mr. DOUGLAS' motion to strike out section 3 was rejected.

Mr. KERR. Madam President, I move that the vote whereby the motion was rejected be reconsidered.

Mr. CURTIS. Madam President, I move to lay that motion on the table.

The PRESIDING OFFICER. The question is on agreeing to the motion to lay on the table the motion to reconsider.

The motion to lay on the table was agreed to.

REVENUE ACT OF 1962

The Senate resumed the consideration of the bill (H.R. 10650) to amend the Internal Revenue Code of 1954 to provide a credit for investment in certain depreciable property, to eliminate certain defects and inequities, and for other purposes.

Mr. PROXMIRE. Madam President, it is my understanding that the Senate is about to adjourn. Before the Senate adjourns, I wish to say that this is one of the saddest days in the history of the Senate, in my judgment. The failure of the Douglas amendment was a real tragedy. It goes far beyond tax legislation because it relates to all legislation that comes before us. I think we should now be aware that what we have done in the tax bill is to provide special advantages to those persons and corporations that have a financial interest in the legislation. The advantage is perfectly enormous. It means that one-half the cost of lobbying legislation would be borne by the Federal Government if the lobbyists

are large corporations. Of course, small corporations would not have that advantage.

But the public interest and those who advocate the public interest, whether they are the Civil Liberties Union, the League of Women Voters, or Americans for Constitutional Reform, or any group that fights for their ideals would not have an equal opportunity or equal advantage. The administration directly opposed this lobbying provision. The House under a closed rule had no chance to vote on it. The Senate collapsed.

I intended to vote against the bill even before the Douglas amendment failed. Now I feel that it is important that all Senators give the most careful and thoughtful consideration to the action which was taken today especially the 36 Senators who failed to vote on the Douglas amendment. This has indeed been a tragic day for the U.S. Senate.

Mr. PROXMIRE.

BILL SUBSIDIZES BUSINESS LOBBYING

In my judgment, the worst provision in the bill is the subsidizing of lobbying of the Congress, of State legislatures, and of city councils by business through the Federal Government, in effect, paying half the cost of that lobbying. This will be true because this bill authorizes corporations for the first time to deduct lobbying expenses in computing taxes. I think all of us who have served in State legislatures or in the Congress recognize that lobbying by business groups is very intense and very effective. Mostly, that lobbying is informative. I see no reason why it should be discouraged. As a matter of fact, there is a constitutional protection for lobbying. But I cannot see any justification for Congress writing into the tax laws a subsidy, in effect, for corporations to engage in this kind of lobbying, particularly in view of the fact that it would give a special advantage to those who seek pecuniary advantage out of legislation, as opposed to those who stand up to fight for conviction, for ideals, and for principles, but not so that they will get particular financial advantage from legislation.

The PRESIDING OFFICER. The question is, Shall the bill pass?

The yeas and nays have been ordered; and the clerk will call the roll.

The legislative clerk called the roll.

Mr. MANSFIELD (after having voted in the affirmative). Mr. President, on this vote I have a pair with the Senator from Tennessee [Mr. GORE]. If he were present and voting, he would vote "nay." If I were at liberty to vote, I would vote "yea." Therefore, I withhold my vote.

Mr. KEFAUVER. Mr. President, on this vote I have a pair with the Senator from Missouri [Mr. SYMINGTON]. If he were present and voting, he would vote "yea." If I were at liberty to vote, I would vote "nay." Therefore, I withhold my vote.

The vote was recapitulated.

Mr. HUMPHREY. I announce that the Senator from Mississippi [Mr. EASTLAND], the Senator from Washington [Mr. MAGNUSON], the Senator from Oregon [Mrs. NEUBERGER], and the Senator from Tennessee [Mr. GORE] are absent on official business.

I further announce that the Senator from New Mexico [Mr. ANDERSON], the Senator from Nevada [Mr. BIBLE], the Senator from Wyoming [Mr. HICKEY], and the Senator from Missouri [Mr. SYMINGTON] are necessarily absent.

I further announce that, if present and voting, the Senator from New Mexico [Mr. ANDERSON], the Senator from Nevada [Mr. BIBLE], the Senator from Mississippi [Mr. EASTLAND] and the Senator from Washington [Mr. MAGNUSON] would each vote "yea."

On this vote, the Senator from Wyoming [Mr. HICKEY], is paired with the Senator from Oregon [Mrs. NEUBERGER]. If present and voting, the Senator from Wyoming would vote "yea," and the Senator from Oregon would vote "nay."

Mr. KUCHEL. I announce that the Senator from Utah [Mr. BENNETT], the Senator from South Dakota [Mr. BOTTUM], the Senator from Arizona [Mr. GOLDWATER], the Senator from Kentucky [Mr. MORTON], and the Senator from New Hampshire [Mr. MURPHY] are necessarily absent.

The Senators from Vermont [Mr. AIKEN and Mr. PROUTY] are absent on official business.

If present and voting, the Senator from Vermont [Mr. AIKEN], the Senator from Utah [Mr. BENNETT], the Senator from South Dakota [Mr. BOTTUM], and the Senator from New Hampshire [Mr. MURPHY] would each vote "yea."

On this vote, the Senator from Kentucky [Mr. MORTON] is paired with the Senator from Arizona [Mr. GOLDWATER]. If present and voting, the Senator from Kentucky would vote "yea," and the Senator from Arizona would vote "nay."

The result was announced—yeas 59, nays 24, as follows:

[No. 247 Leg.]

YEAS—59

Allott	Fulbright	Monroney
Beall	Hartke	Moss
Butler	Hayden	Mundt
Byrd, Va.	Hill	Muskie
Byrd, W. Va.	Holland	Pastore
Cannon	Humphrey	Pearson
Capehart	Jackson	Pell
Carlson	Javits	Randolph
Carroll	Johnston	Robertson
Case	Jordan, N.C.	Scott
Chavez	Jordan, Idaho	Smathers
Church	Kerr	Smith, Mass.
Cooper	Kuchel	Smith, Maine
Cotton	Long, Mo.	Sparkman
Dirksen	Long, Hawaii	Talmadge
Dodd	Long, La.	Wiley
Ellender	McCarthy	Williams, N.J.
Engle	McClellan	Young, N. Dak.
Ervin	McGee	Young, Ohio
Fong	Metcalf	

NAYS—24

Bartlett	Hart	Proxmire
Boggs	Hickenlooper	Russell
Burdick	Hruska	Saltonstall
Bush	Keating	Stennis
Clark	Lausche	Thurmond
Curtis	McNamara	Tower
Douglas	Miller	Williams, Del.
Gruening	Morse	Yarborough

NOT VOTING—17

Aiken	Goldwater	Morton
Anderson	Gore	Murphy
Bennett	Hickey	Neuberger
Bible	Kefauver	Prouty
Bottum	Magnuson	Symington
Eastland	Mansfield	

So the bill (H.R. 10650) was passed.

Mr. KERR. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. MANSFIELD. Mr. President, I move to lay that motion on the table.

The PRESIDING OFFICER. The question is on agreeing to the motion to lay on the table the motion to reconsider.

The motion to lay on the table was agreed to.

Mr. BYRD of Virginia. Mr. President, I move that the Senate insist upon its amendments and request a conference with the House of Representatives thereon; and that the Presiding Officer appoint the conferees on the part of the Senate.

The motion was agreed to; and the Presiding Officer appointed Mr. BYRD of Virginia, Mr. KERR, Mr. LONG of Louisiana, Mr. SMATHERS, Mr. WILLIAMS of Delaware, Mr. CARLSON and Mr. BENNETT conferees on the part of the Senate.

Exhibit 162: Excerpts From Revenue Act of 1962

Public Law 87-834

AN ACT

October 16, 1962
[H. R. 10650]

To amend the Internal Revenue Code of 1954 to provide a credit for investment in certain depreciable property, to eliminate certain defects and inequities, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Revenue Act of 1962.

SECTION 1. SHORT TITLE, ETC.

(a) SHORT TITLE.—This Act may be cited as the "Revenue Act of 1962".

(b) TABLE OF CONTENTS.—

Sec. 1. Short title, etc.
(a) Short title.
(b) Table of contents.
(c) Amendment of 1954 code.
Sec. 2. Credit for investment in certain depreciable property.
(a) Allowance of credit.
(b) Rules for computing credit.
(c) Deduction for unused credit.
(d) Certain corporate acquisitions.
(e) Statutes of limitations and interest relating to investment credit carrybacks.
(f) Technical amendment.
(g) Clerical amendments.
(h) Effective date.
Sec. 3. Appearances, etc., with respect to legislation.
(a) In general.
(b) Effective date.

SEC. 3. APPEARANCES, ETC., WITH RESPECT TO LEGISLATION.

(a) IN GENERAL.—Section 162 (relating to trade or business expenses) is amended by redesignating subsection (e) as subsection (f) and by inserting after subsection (d) the following new subsection:

"(e) APPEARANCES, ETC., WITH RESPECT TO LEGISLATION.—

"(1) IN GENERAL.—The deduction allowed by subsection (a) shall include all the ordinary and necessary expenses (including, but not limited to, traveling expenses described in subsection (a)(2) and the cost of preparing testimony) paid or incurred during the taxable year in carrying on any trade or business—

"(A) in direct connection with appearances before, submission of statements to, or sending communications to, the committees, or individual members, of Congress or of any legislative body of a State, a possession of the United States, or a political subdivision of any of the foregoing with respect to legislation or proposed legislation of direct interest to the taxpayer, or

"(B) in direct connection with communication of information between the taxpayer and an organization of which he is a member with respect to legislation or proposed legislation of direct interest to the taxpayer and to such organization,

and that portion of the dues so paid or incurred with respect to any organization of which the taxpayer is a member which is attributable to the expenses of the activities described in subparagraphs (A) and (B) carried on by such organization.

"(2) LIMITATION.—The provisions of paragraph (1) shall not be construed as allowing the deduction of any amount paid or incurred (whether by way of contribution, gift, or otherwise)—

"(A) for participation in, or intervention in, any political campaign on behalf of any candidate for public office, or

"(B) in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums."

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 1962.

Exhibit 163: IRS Proposed Rule on Lobbying Expenditures, August 4, 1964

Pages 11175–11251

PART I

FEDERAL REGISTER

VOLUME 29 NUMBER 151

Washington, Tuesday, August 4, 1964

Proposed Rule Making

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[26 CFR Part 1]

INCOME TAX

Notice of Proposed Rule Making

Notice is hereby given, pursuant to the Administrative Procedure Act, approved June 11, 1946, that the regulations set forth in tentative form below are proposed to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury or his delegate. Prior to the final adoption of such regulations, consideration will be given to any comments or suggestions pertaining thereto which are submitted in writing, in duplicate, to the Commissioner of Internal Revenue, Attention: CC: LR, Washington, D.C., 20224, within the period of 30 days from the date of publication of this notice in the FEDERAL REGISTER. Any person submitting written comments or suggestions who desires an opportunity to comment orally at a public hearing on these proposed regulations should submit his request, in writing, to the Commissioner within the 30-day period. In such case, a public hearing will be held, and notice of the time, place, and date will be published in a subsequent issue of the FEDERAL REGISTER. The proposed regulations are to be issued under the authority contained in section 7805 of the Internal Revenue Code of 1954 (68A Stat. 917; 26 U.S.C. 7805).

(SEAL) BERTRAND M. HARDING,
Acting Commissioner of Internal Revenue.

In order to conform the INCOME TAX Regulations (26 CFR Part 1) under section 162 of the Internal Revenue Code of 1954 to section 3(a) of the Revenue Act of 1962 (76 Stat. 973), such regulations are amended as follows:

PARAGRAPH 1. Section 1.162 is amended by redesignating subsection (e) of section 162 as subsection (f), by adding new subsection (e) to section 162, and by revising the historical note. These amended and added provisions read as follows:

§ 1.162 Statutory provisions; trade or business expenses.

SEC. 162. *Trade or business expenses.* * * *

(e) *Appearances, etc., with respect to legislation.*—(1) *In general.* The deduction allowed by subsection (a) shall include all the ordinary and necessary expenses (including, but not limited to, traveling expenses described in subsection (a)(2)) and the cost of preparing testimony) paid or incurred during the taxable year in carrying on any trade or business—

(A) In direct connection with appearances before, submission of statements to, or sending communications to, the committees, or individual members, of Congress or of any legislative body of a State, a possession of the United States, or a political subdivision of any of the foregoing with respect to legislation or proposed legislation of direct interest to the taxpayer, or

(B) In direct connection with communication of information between the taxpayer and an organization of which he is a member with respect to legislation or proposed legislation of direct interest to the taxpayer and to such organization, and that portion of the dues so paid or incurred with respect to any organization of which the taxpayer is a member which is attributable to the expenses of the activities described in subparagraphs (A) and (B) carried on by such organization.

(2) *Limitation.* The provisions of paragraph (1) shall not be construed as allowing the deduction of any amount paid or incurred (whether by way of contribution, gift, or otherwise)—

(A) For participation in, or intervention in, any political campaign on behalf of any candidate for public office, or

(B) In connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums.

(f) *Cross reference.* For special rule relating to expenses in connection with subdividing real property for sale, see section 1237.

(Sec. 162 as amended by sec. 8, Technical Amendments Act 1958 (72 Stat. 1606); secs. 7(b) and 8, Act of Sept. 14, 1960 (Public Law 86-779; 74 Stat. 1003, 1008); sec. 3(a), Revenue Act 1962 (76 Stat. 973).)

PAR. 2. Section 1.162-15 is amended to read as follows:

§ 1.162-15 Contributions, dues, etc.

(a) *Contributions to organizations described in section 170.*—(1) *In general.* No deduction is allowable under section 162(a) for a contribution or gift by an individual or a corporation if any part thereof is deductible under section 170. For example, if a taxpayer makes a contribution of $5,000 and only $4,000 of this amount is deductible under section 170(a) (whether because of the percentage limitation under either section 170(b) (1) or (2), the requirement as to time of payment, or both) no deduction is allowable under section 162 (a) for the remaining $1,000.

(2) *Scope of limitations.* The limitations provided in section 162(b) and this paragraph apply only to payments which are in fact contributions or gifts to organizations described in section 170. For example, payments by a transit company to a local hospital (which is a charitable organization within the meaning of section 170) in consideration of a binding obligation on the part of the hospital to provide hospital services and facilities for the company's employees are not contributions or gifts within the meaning of section 170 and may be deductible under section 162(a) if the requirements of section 162(a) are otherwise satisfied.

(b) *Other contributions.* Donations to organizations other than those described in section 170 which bear a direct relationship to the taxpayer's business and are made with a reasonable expectation of a financial return commensurate with the amount of the donation may constitute allowable deductions as business expenses, provided the donation is not made for a purpose for which a deduction is not allowable by reason of the provisions of paragraph (b)(1)(i) or (c) of § 1.162-20. For example, a transit company may donate a sum of money to an organization (of a class not referred to in section 170) intending to hold a convention in the city in which it operates, with a reasonable expectation that the holding of such convention will augment its income through a greater number of people using its transportation facilities.

(c) *Dues.* Dues and other payments to an organization, such as a labor union or a trade association, which otherwise meet the requirements of the regulations under section 162, are deductible in full. For limitations on the deductibility of dues and other payments, see paragraph (b) and (c) of § 1.162-20.

(d) *Cross reference.* For provisions dealing with expenditures for institutional or "good will" advertising, see § 1.162-20.

PAR. 3. There is inserted immediately after § 1.162-19 the following new section:

§ 1.162-20 Expenditures attributable to lobbying, political campaigns, attempts to influence legislation, etc., and certain advertising.

(a) *In general*—(1) *Scope of section.* This section contains rules governing the deductibility or nondeductibility of expenditures for lobbying purposes, for the promotion or defeat of legislation, for political campaign purposes (including the support of or opposition to any candidate for public office) or for carrying on propaganda (including advertising) related to any of the foregoing purposes. For rules applicable to such expenditures in respect of taxable years beginning before January 1, 1963, and for taxable years beginning after December 31, 1962, see paragraphs (b) and (c), respectively, of this section. This section also deals with expenditures for institutional or "good will" advertising.

(2) *Institutional or "good will" advertising.* Expenditures for institutional or "good will" advertising which keeps the taxpayer's name before the public are generally deductible as ordinary and necessary business expenses provided the expenditures are related to the patronage the taxpayer might reasonably expect in the future. For example, a deduction will ordinarily be allowed for the cost of advertising which keeps the taxpayer's name before the public in connection with encouraging contributions to such organizations as the Red Cross, the purchase of United States Savings Bonds, or participation in similar causes. In like fashion, expenditures for advertising which presents views on economic, financial, social, or other subjects of a general nature, but which does not in-

volve any of the activities specified in paragraph (b) or (c) of this section for which a deduction is not allowable, are deductible if they otherwise meet the requirements of the regulations under section 162.

(b) *Taxable years beginning before January 1, 1963*—(1) *In general.* (i) For taxable years beginning before January 1, 1963, expenditures for lobbying purposes, for the promotion or defeat of legislation, for political campaign purposes (including the support of or opposition to any candidate for public office), or for carrying on propaganda (including advertising) related to any of the foregoing purposes are not deductible from gross income. For example, the cost of advertising to promote or defeat legislation or to influence the public with respect to the desirability or undesirability of proposed legislation is not deductible as a business expense, even though the legislation may directly affect the taxpayer's business.

(ii) If a substantial part of the activities of an organization, such as a labor union or a trade association, consists of one or more of the activities specified in the first sentence of this subparagraph, deduction will be allowed only for such portion of the dues or other payments to the organization as the taxpayer can clearly establish is attributable to activities other than those so specified. The determination of whether such specified activities constitute a substantial part of an organization's activities shall be based on all the facts and circumstances. In no event shall special assessments or similar payments (including an increase in dues) made to any organization for any of such specified purposes be deductible. For other provisions relating to the deductibility of dues and other payments to an organization, such as a labor union or a trade association, see paragraph (c) of § 1.162-15.

(2) *Expenditures for promotion or defeat of legislation.* For purposes of this paragraph, expenditures for the promotion or the defeat of legislation include, but shall not be limited to, expenditures for the purpose of attempting to—

(i) Influence members of a legislative body directly, or indirectly by urging or encouraging the public to contact such members for the purpose of proposing, supporting, or opposing legislation, or

(ii) Influence the public to approve or reject a measure in a referendum, initiative, vote on a constitutional amendment, or similar procedure.

(c) *Taxable years beginning after December 31, 1962*—(1) *In general.* Except as otherwise provided in subparagraph (2) of this paragraph, expenditures for lobbying purposes, for the promotion or defeat of legislation (see paragraph (b)(2) of this section), for political campaign purposes (including the support of or opposition to any candidate for public office), or for carrying on propaganda (including advertising) related to any of the foregoing purposes are not deductible from gross income for taxable years beginning after December 31, 1962.

(3) *Appearances, etc., with respect to legislation*—(i) *General rule.* Pursuant to the provisions of section 162(e) certain types of expenses incurred with respect to legislative matters are deductible under section 162(a) if they otherwise meet the requirements of the regulations under section 162. Expenses incurred with respect to legislative matters which may be deductible are those ordinary and necessary expenses (including, but not limited to, traveling expenses described in section 162(a)(2) and the cost of preparing testimony) paid or incurred by the taxpayer during a taxable year beginning after December 31, 1962, in carrying on any trade or business which are in direct connection with—

(a) Appearances before, submission of statements to, or sending communications to, the committees, or individual members of Congress or of any legislative body of a State, a possession of the United States, or a political subdivision of any of the foregoing with respect to legislation or proposed legislation of direct interest to the taxpayer, or

(b) Communication of information between the taxpayer and an organization of which he is a member with respect to legislation or proposed legislation of direct interest to the taxpayer and to such organization.

For provisions relating to dues paid or incurred with respect to an organization of which the taxpayer is a member, see subparagraph (3) of this paragraph.

(ii) *Legislation or proposed legislation of direct interest to the taxpayer*—(a) *Legislation or proposed legislation.* The term "legislation or proposed legislation" includes bills and resolutions introduced by a member of Congress or other legislative body referred to in subdivision (i)(a) of this subparagraph for consideration by such body as well as oral or written proposals for legislative action submitted to the legislative body or to a committee or member of such body.

(b) *Direct interest.* (1) Legislation or proposed legislation is of direct interest to a taxpayer when it has a direct and substantial, as distinguished from an indirect or incidental, effect on his trade or business. For example, the legislation or proposed legislation is of direct interest to a taxpayer if it will necessitate a substantial change in the day-to-day conduct or the normal operation or affairs of the taxpayer's trade or business; will prohibit or limit the conduct of such business; or will give rise to doubts as to the desirability or advisability of continuing the particular trade or business. Legislation or proposed legislation is not of direct interest to a taxpayer merely because it affects business in general. Furthermore, a taxpayer is not considered to have a direct interest in matters such as nominations, appointments, or the operation of the legislative body. The fact that legislation or proposed legislation will directly affect a taxpayer's stockholders, customers, or employees does not, in itself, mean that the legislation or proposed legislation is of direct interest to the taxpayer. Further, a taxpayer who is engaged in a highly skilled line of endeavor, or who is a recognized expert in a particular field, does not have a direct interest in legislation or proposed legislation solely by virtue of the special education, training, or experience that qualifies him to render an expert opinion on the merits or possible effect of such legislation or proposed legislation. However, to meet the direct interest it is not necessary that all provisions of the legislative proposal directly affect the taxpayer's trade or business. The test will be considered to have been met if the taxpayer establishes that at least one of the proposals directly affects his trade or business. Legislation or proposed legislation is of direct interest to an organization when it is of direct interest to a significant number of its members.

(2) The application of subdivision (ii)(b)(1) of this subparagraph may be illustrated by the following examples:

Example (1). A taxpayer engaged in the wholesale distribution of beer has a direct interest in legislation or proposed legislation that would place the retail sale of alcoholic beverages exclusively in the hands of the State in which the taxpayer conducts his business.

Example (2). A taxpayer engaged in the business of selling merchandise at retail in State X has a direct interest in legislation or proposed legislation that would levy a general sales tax to be collected by the vendor upon sales within State X.

Example (3). A professor of economics who is a recognized authority on state fiscal policy and who also serves as an advisor and consultant in the field of State and local governmental financing, does not have a direct interest, either in his capacity as a professor or as an advisor and consultant, in legislation or proposed legislation that would establish limitations on the borrowing authority of a State and its political subdivisions.

Example (4). A taxpayer engaged in the manufacture and distribution of building supplies does not have a direct interest in legislation or proposed legislation that would establish a new university in the State in which the taxpayer conducts his business.

(iii) *Allowable expenses.* To be deductible under section 162 (a), expenditures which meet the tests of deductibility under the provisions of this paragraph must also qualify as ordinary and necessary business expenses under section 162(a) and, in addition, be in direct connection with the carrying on of the activities specified in subdivision (i)(a) or (i)(b) of this subparagraph. For example, a taxpayer appearing before a committee of the Congress to present testimony concerning legislation or proposed legislation in which he has a direct interest may deduct the ordinary and necessary expenses directly connected with his appearance, such as traveling expenses described in section 162(a)(2), and the cost of preparing testimony.

(3) *Deductibility of dues and other payments to an oraganization.* If a substantial part of the activities of an organization, such as a labor union or a trade association, consists of one or more of the activities specified in subparagraph (1) of this paragraph (exclusive of those activities which meet the tests of subdivisions (i) and (ii) of subparagraph (2) of this paragraph), deduction

will be allowed only for such portion of the dues or other payments to the organization as the taxpayer can clearly establish is attributable to activities other than those so specified. The determination of whether such specified activities constitute a substantial part of an organization's activities shall be based on all the facts and circumstances. In no event shall a deduction be allowable for that portion of a special assessment or similar payment (including an increase in dues) made to any organization, for any of the activities specified in subparagraph (1) of this paragraph, exclusive of those activities which meet the tests of subdivisions (i) and (ii) of subparagraph (2) of this paragraph. If an organization pays or incurs expenses allocable to activities which meet the tests of subdivisions (i) and (ii) of subparagraph (2) of this paragraph, on behalf of its members, the dues paid by a taxpayer are deductible to the extent used for such activities. Dues will be considered to be used for such an activity, and thus deductible, although the activity is not connected with the taxpayer's trade or business, if the activity is related to the trade or business of a significant number of the organization's other members. For other provisions relating to the deductibility of dues and other payments to an organization, such as a labor union or a trade association, see paragraph (c) of § 1.162–15.

(4) *Limitations.* No deduction shall be allowed under section 162(a) for any amount paid or incurred (whether by way of contribution, gift, or otherwise) in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums. For example, no deduction shall be allowed for any expenses incurred in connection with "grassroot" campaigns or any other attempts to urge or encourage the public to contact members of a legislative body for the purpose of proposing, supporting, or opposing legislation.

[F.R. Doc. 64–7752; Filed, August 3, 1964; 8:48 a.m.]

Exhibit 164: IRS Final Rule on Lobbying Expenditures, April 20, 1965

FEDERAL REGISTER

VOLUME 30 • NUMBER 75

Tuesday, April 20, 1965 • Washington, D.C.

Pages 5569–5614

Title 26—INTERNAL REVENUE

Chapter I—Internal Revenue Service, Department of the Treasury

SUBCHAPTER A—INCOME TAX

[T.D. 6819]

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Appearances, etc., With Respect to Legislation

On August 4, 1964, notice of proposed rule making with respect to the amendment of the Income Tax Regulations (26 CFR Part 1) under section 162 of the Internal Revenue Code of 1954 (relating to trade or business expenses) to conform the regulations to changes made by section 3(a) of the Revenue Act of 1962 (76 Stat. 973) was published in the FEDERAL REGISTER (29 F.R. 11190). After consideration of all such relevant matter as was presented by interested persons regarding the rules proposed, the amendment of the regulations as proposed is hereby adopted, subject to the changes set forth below:

Paragraph (c) of § 1.162-20, as set forth in paragraph 3 of the notice of proposed rule making, is changed by revising subparagraph (1), that portion of subparagraph (2)(i) preceding subdivision (a) thereof, and subparagraphs (2)(ii)(b) and (3).

[SEAL] SHELDON S. COHEN,
Commissioner of Internal Revenue.

Approved: April 10, 1965.

STANLEY S. SURREY,
Assistant Secretary of the Treasury.

In order to conform the Income Tax Regulations (26 CFR Part 1) under section 162 of the Internal Revenue Code of 1954 to section 3(a) of the Revenue Act of 1962 (76 Stat. 973), such regulations are amended as follows:

PARAGRAPH 1. Section 1.162 is amended by redesignating subsection (e) of section 162 as subsection (f), by adding new subsection (e) to section 162, and by revising the historical note. These amended and added provisions read as follows:

§ 1.162 Statutory provisions; trade or business expenses.

Sec. 162. *Trade or business expenses.* • • •

(e) *Appearances, etc., with respect to legislation*—(1) *In general.* The deduction allowed by subsection (a) shall include all the ordinary and necessary expenses (including, but not limited to, traveling expenses described in subsection (a)(2) and the cost of preparing testimony) paid or incurred during the taxable year in carrying on any trade or business—

(A) In direct connection with appearances before, submission of statements to, or sending communications to, the committees, or individual members, of Congress or of any legislative body of a State, a possession of the United States, or a political subdivision of any of the foregoing with respect to legislation or proposed legislation of direct interest to the taxpayer, or

(B) In direct connection with communication of information between the taxpayer and an organization of which he is a member with respect to legislation or proposed legislation of direct interest to the taxpayer and to such organization, and that portion of the dues so paid or incurred with respect to any organization of which the taxpayer is a member which is attributable to the expenses of the activities described in subparagraphs (A) and (B) carried on by such organization.

(2) *Limitation.* The provisions of paragraph (1) shall not be construed as allowing the deduction of any amount paid or incurred (whether by way of contribution, gift, or otherwise)—

(A) For participation in, or intervention in, any political campaign on behalf of any candidate for public office, or

(B) In connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums.

(f) *Cross reference.* For special rule relating to expenses in connection with subdividing real property for sale, see section 1237.

[Sec. 162 as amended by sec. 5, Technical Amendments Act 1958 (72 Stat. 1608); secs. 7(b) and 8, Act of Sept. 14, 1960 (Public Law 86-779, 74 Stat. 1002, 1003); sec. 3(a), Revenue Act 1962 (76 Stat. 973).]

PAR. 2. Section 1.162-15 is amended to read as follows:

§ 1.162-15 Contributions, dues, etc.

(a) *Contributions to organizations described in section 170*—(1) *In general.* No deduction is allowable under section 162(a) for a contribution or gift by an individual or a corporation if any part thereof is deductible under section 170. For example, if a taxpayer makes a contribution of $5,000 and only $4,000 of this amount is deductible under section 170(a) (whether because of the percentage limitation under either section 170(b) (1) or (2), the requirement as to time of payment, or both) no deduction is allowable under section 162 (a) for the remaining $1,000.

(2) *Scope of limitations.* The limitations provided in section 162(b) and this paragraph apply only to payments which are in fact contributions or gifts to organizations described in section 170. For example, payments by a transit company to a local hospital (which is a charitable organization within the meaning of section 170) in consideration of a binding obligation on the part of the hospital to provide hospital services and facilities for the company's employees are not contributions or gifts within the meaning of section 170 and may be deductible under section 162(a) if the requirements of section 162(a) are otherwise satisfied.

(b) *Other contributions.* Donations to organizations other than those described in section 170 which bear a direct relationship to the taxpayer's business and are made with a reasonable expectation of a financial return commensurate with the amount of the donation may constitute allowable deductions as business expenses, provided the donation is not made for a purpose for which a deduction is not allowable by reason of the provisions of paragraph (b)(1)(i) or (c) of § 1.162-20. For example, a transit company may donate a sum of money to an organization (of a class not referred to in section 170) intending to hold a convention in the city in which it operates, with a reasonable expectation that the holding of such convention will augment its income through a greater number of people using its transportation facilities.

(c) *Dues.* Dues and other payments to an organization, such as a labor union or a trade association, which otherwise meet the requirements of the regulations under section 162, are deductible in full. For limitations on the deductibility of dues and other payments, see paragraph (b) and (c) of § 1.162-20.

(d) *Cross reference.* For provisions dealing with expenditures for institutional or "good will" advertising, see § 1.162-20.

PAR. 3. There is inserted immediately after § 1.162-19 the following new section:

§ 1.162-20 Expenditures attributable to lobbying, political campaigns, attempts to influence legislation, etc., and certain advertising.

(a) *In general*—(1) *Scope of section.* This section contains rules governing the deductibility or nondeductibility of expenditures for lobbying purposes, for the promotion or defeat of legislation, for political campaign purposes (including the support of or opposition to any candidate for public office) or for carrying on propaganda (including advertising) related to any of the foregoing purposes. For rules applicable to such expenditures in respect of taxable years beginning before January 1, 1963, and for taxable years beginning after December 31, 1962, see paragraphs (b) and (c), respectively, of this section. This section also deals with expenditures for institutional or "good will" advertising.

(2) *Institutional or "good will" advertising.* Expenditures for institutional or "good will" advertising which keeps the taxpayer's name before the public are generally deductible as ordinary and necessary business expenses provided the expenditures are related to the patronage the taxpayer might reasonably expect in the future. For example, a deduction will ordinarily be allowed for the cost of advertising which keeps the taxpayer's name before the public in connection with encouraging contributions to such organizations as the Red Cross, the purchase of United States Savings Bonds, or participation in similar causes. In like fashion, expenditures for advertising which presents views on economic, financial, social, or other subjects of a general nature, but which does not involve any of the activities specified in paragraph (b) or (c) of this section for which a deduction is not allowable, are deductible if they otherwise meet the requirements of the regulations under section 162.

(b) *Taxable years beginning before January 1, 1963*—(1) *In general.* (i) For taxable years beginning before January 1, 1963, expenditures for lobbying purposes, for the promotion or defeat of legislation, for political campaign purposes (including the support of or opposition to any candidate for public office), or for carrying on propaganda (including advertising) related to any of the foregoing purposes are not deductible from gross income. For example, the cost of advertising to promote or defeat legislation or to influence the public with respect to the desirability or undesirability of proposed legislation is not deductible as a business expense, even though the legislation may directly affect the taxpayer's business.

(ii) If a substantial part of the activities of an organization, such as a labor union or a trade association, consists of one or more of the activities specified in the first sentence of this subparagraph, deduction will be allowed only for such portion of the dues or other payments to the organization as the taxpayer can clearly establish is attributable to activities other than those so specified. The determination of whether such specified activities constitute a substantial part of an organization's activities shall be based on all the facts and circumstances. In no event shall special assessments or similar payments (including an increase in dues) made to any organization for any of such specified purposes be deductible. For other provisions relating to the deductibility of dues and other payments to an organization, such as a labor union or a trade association, see paragraph (c) of § 1.162-15.

(2) *Expenditures for promotion or defeat of legislation.* For purposes of this paragraph, expenditures for the promotion or the defeat of legislation include, but shall not be limited to, expenditures for the purpose of attempting to—

(i) Influence members of a legislative body directly, or indirectly by urging or encouraging the public to contact such members for the purpose of proposing, supporting, or opposing legislation, or

(ii) Influence the public to approve or reject a measure in a referendum, initiative, vote on a constitutional amendment, or similar procedure.

(c) *Taxable years beginning after December 31, 1962*—(1) *In general.* For taxable years beginning after December 31, 1962, certain types of expenses incurred with respect to legislative matters are deductible under section 162(a) if they otherwise meet the requirements of the regulations under section 162. These deductible expenses are described in subparagraph (2) of this paragraph. All other expenditures for lobbying purposes, for the promotion or defeat of legislation (see paragraph (b)(2) of this section), for political campaign purposes (including the support of or opposition to any candidate for public office), or for carrying on propaganda (including advertising) relating to any of the foregoing purposes are not deductible from gross income for such taxable years.

(2) *Appearances, etc., with respect to legislation*—(i) *General rule.* Pursuant to the provisions of section 162(e), expenses incurred with respect to legislative matters which may be deductible are those ordinary and necessary expenses (including, but not limited to, traveling expenses described in section 162(a)(2) and the cost of preparing testimony) paid or incurred by the taxpayer during a taxable year beginning after December 31, 1962, in carrying on any trade or business which are in direct connection with—

(a) Appearances before, submission of statements to, or sending communications to, the committees, or individual members of Congress or of any legislative body of a State, a possession of the United States, or a political subdivision of any of the foregoing with respect to legislation or proposed legislation of direct interest to the taxpayer, or

(b) Communication of information between the taxpayer and an organization of which he is a member with respect to legislation or proposed legislation of direct interest to the taxpayer and to such organization.

For provisions relating to dues paid or incurred with respect to an organization of which the taxpayer is a member, see subparagraph (3) of this paragraph.

(ii) *Legislation or proposed legislation of direct interest to the taxpayer*—(a) *Legislation or proposed legislation.* The term "legislation or proposed legislation" includes bills and resolutions introduced by a member of Congress or other legislative body referred to in subdivision (i)(a) of this subparagraph for consideration by such body as well as oral or written proposals for legislative action sub-

mitted to the legislative body or to a committee or member of such body.

(b) *Direct interest*—(1) *In general.* (i) Legislation or proposed legislation is of direct interest to a taxpayer if the legislation or proposed legislation is of such a nature that it will, or may reasonably be expected to, affect the trade or business of the taxpayer. It is immaterial whether the effect, or expected effect, on the trade or business will be beneficial or detrimental to the trade or business or whether it will be immediate. If legislation or proposed legislation has such a relationship to a trade or business that the expenses of any appearance or communication in connection with the legislation meets the ordinary and necessary test of section 162(a), then such legislation ordinarily meets the direct interest test of section 162(e). However, if the nature of the legislation or proposed legislation is such that the likelihood of its having an effect on the trade or business of the taxpayer is remote or speculative, the legislation or proposed legislation is not of direct interest to the taxpayer. Legislation or proposed legislation which will not affect the trade or business of the taxpayer is not of direct interest to the taxpayer even though such legislation will affect the personal, living, or family activities or expenses of the taxpayer. Legislation or proposed legislation is not of direct interest to a taxpayer merely because it may affect business in general; however, if the legislation or proposed legislation will, or may reasonably be expected to, affect the taxpayer's trade or business it will be of direct interest to the taxpayer even though it also will affect the trade or business of the other taxpayers or business in general. To meet the direct interest test, it is not necessary that all provisions of the legislation or proposed legislation have an effect or expected effect, on the taxpayer's trade or business. The test will be met if one of the provisions of the legislation has the specified effect. Legislation or proposed legislation will be considered to be of direct interest to a membership organization if it is of direct interest to the organization, as such, or if it is of direct interest to one or more of its members.

(ii) Legislation which would increase or decrease the taxes applicable to the trade or business, increase or decrease the operating costs or earnings of the trade or business, or increase or decrease the administrative burdens connected with the trade or business meets the direct interest test. Legislation which would increase the social security benefits or liberalize the right to such benefits meets the direct interest test because such changes in the social security benefits may reasonably be expected to affect the retirement benefits which the employer will be asked to provide his employees or to increase his taxes. Legislation which would impose a retailer's sales tax is of direct interest to a retailer because, although the tax may be passed on to his customers, collection of the tax will impose additional burdens on the retailer, and because the increased cost of his products to the consumer may reduce the demand for them. Legislation which would provide an income tax credit or exclusion for shareholders is of direct interest to a corporation, because those tax benefits may increase the sources of capital available to the corporation. Legislation which would favorably or adversely affect the business of a competitor so as to affect the taxpayer's competitive position is of direct interest to the taxpayer. Legislation which would improve the school system of a community is of direct interest to a membership organization comprised of employers in the community because the improved school system is likely to make the community more attractive to prospective employees of such employers. On the other hand, proposed legislation relating to Presidential succession in the event of the death of the President has only a remote and speculative effect on any trade or business and therefore does not meet the direct interest test. Similarly, if a corporation is represented before a congressional committee to oppose an appropriation bill merely because of a desire to bring increased Government economy with the hope that such economy will eventually cause a reduction in the Federal income tax, the legislation does not meet the direct interest test because any effect it may have upon the corporation's trade or business is highly speculative.

(2) *Appearances, etc., by expert witnesses.* (i) An appearance or communication (of a type described in paragraph (c)(2)(i)(a) of this section) by an individual in connection with legislation or proposed legislation shall be considered to be with respect to legislation of direct interest to such individual if the legislation is in a field in which he specializes as an employee, if the appearance or communication is not on behalf of his employer, and if it is customary for individuals in his type of employment to publicly express their views in respect of matters in their field of competence. Expenses incurred by such an individual in connection with such an appearance or communication, including traveling expenses properly allocable thereto, represent ordinary and necessary business expenses and are, therefore, deductible under section 162. For example, if a university professor who teaches in the field of money and banking appears, on his own behalf, before a legislative committee to testify on proposed legislation regarding the banking system, his expenses incurred in connection with such appearance are deductible under section 162 since university professors customarily take an active part in the development of the law in their field of competence and publicly communicate the results of their work.

(ii) An appearance or communication (of a type described in paragraph (c)(2)(i)(a) of this section) by an employee or self-employed individual in connection with legislation or proposed legislation shall be considered to be with respect to legislation of direct interest to such person if the legislation is in the field in which he specializes in his business (or as an employee) and if the appearance or communication is made pursuant to an invitation extended to him individually for the purpose of receiving his expert testimony. Expenses incurred by an employee or self-employed individual in connection with such an appearance or communication, including traveling expenses properly allocable thereto, represent ordinary and necessary business expenses and are, therefore, deductible under section 162. For example, if a self-employed individual is personally invited by a congressional committee to testify on proposed legislation in the field in which he specializes in his business, his expenses incurred in connection with such appearance are deductible under section 162. If a self-employed individual makes an appearance, on his own behalf, before a legislative committee without having been extended an invitation his expenses will be deductible to the extent otherwise provided in this paragraph.

(3) *Nominations, etc.* A taxpayer does not have a direct interest in matters such as nominations, appointments, or the operation of the legislative body.

(iii) *Allowable expenses.* To be deductible under section 162 (a), expenditures which meet the tests of deductibility under the provisions of this paragraph must also qualify as ordinary and necessary business expenses under section 162(a) and, in addition, be in direct connection with the carrying on of the activities specified in subdivision (i)(a) or (b) of this subparagraph. For example, a taxpayer appearing before a committee of the Congress to present testimony concerning legislation or proposed legislation in which he has a direct interest may deduct the ordinary and necessary expenses directly connected with his appearance, such as traveling expenses described in section 162(a)(2), and the cost of preparing testimony.

(3) *Deductibility of dues and other payments to an organization.* If a substantial part of the activities of an organization, such as a labor union or a trade association, consists of one or more of the activities to which this paragraph relates (legislative matters, political campaigns, etc., exclusive of any activity constituting an appearance or communication with respect to legislation or proposed legislation of direct interest to the organization (see subparagraph (2)(ii)(b)(1)), a deduction will be allowed only for such portion of the dues or other payments to the organization as the taxpayer can clearly establish is attributable to activities to which this paragraph does not relate and to any activity constituting an appearance or communication with respect to legislation or proposed legislation of direct interest to the organization. The determination of whether a substantial part of an organization's activities consists of one or more of the activities to which this paragraph relates (exclusive of appearances or communications with respect to legislation or proposed legislation of direct interest to the organization) shall be based on all the facts and circumstances. In no event shall a deduction be allowed for that portion of a special assessment or similar payment (including an increase in dues) made to any organization for any activity to which this paragraph relates if the ac-

does not constitute an appearance or communication with respect to legislation or proposed legislation of direct interest to the organization. If an organization pays or incurs expenses allocable to legislative activities which meet the tests of subdivisions (i) and (ii) of subparagraph (2) of this paragraph (appearances or communications with respect to legislation or proposed legislation of direct interest to the organization), on behalf of its members, the dues paid by a taxpayer are deductible to the extent used for such activities. Dues paid by a taxpayer will be considered to be used for such an activity, and thus deductible, although the legislation or proposed legislation involved is not of direct interest to the taxpayer, if, pursuant to the provisions of subparagraph (2)(ii)(b)(1) of this paragraph, the legislation or proposed legislation is of direct interest to the organization, as such, or is of direct interest to one or more members of the organization. For other provisions relating to the deductibility of dues and other payments to an organization, such as a labor union or a trade association, see paragraph (c) of § 1.162–15.

(4) *Limitations.* No deduction shall be allowed under section 162(a) for any amount paid or incurred (whether by way of contribution, gift, or otherwise) in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums. For example, no deduction shall be allowed for any expenses incurred in connection with "grassroot" campaigns or any other attempts to urge or encourage the public to contact members of a legislative body for the purpose of proposing, supporting, or opposing legislation.

(Sec. 7805 of the Internal Revenue Code of 1954; 68A Stat. 917; 26 U.S.C. 7805)

[F.R. Doc. 65–4077; Filed, Apr. 19, 1965; 8:47 a.m.]

Exhibit 165: *Consumers Power Co.* v. *United States*, 427 F.2d 78 (6th Cir. 1970)

CONSUMERS POWER COMPANY,
Plaintiff-Appellee,
v.
UNITED STATES of America,
Defendant-Appellant.

CONSUMERS POWER COMPANY,
Plaintiff, Cross-Appellant,
v.
UNITED STATES of America,
Defendant, Cross-Appellee.
Nos. 19916, 19917.

United States Court of Appeals,
Sixth Circuit.
June 5, 1970.

Action by gas and electric producer for refund of federal income taxes paid. The United States Disrict Court for the Eastern District of Michigan, Thomas P. Thornton, J., 299 F.Supp. 1180, held that certain contributions to national advertising campaign were not deductible from ordinary income but that amount of certain death benefit certificates issued to retiring employee was deductible in year certificates issued and appeals were taken. The Court of Appeals, Brooks, Circuit Judge, held that amounts privately-owned electric producer paid as pro rata share of national advertising campaign attacking public power as creeping socialism and otherwise disparaging quality of service rendered by government producers was not deductible as an ordinary and necessary business expense but rather was an expenditure in furtherance of promotion or defeat of legislation or propaganda relating to such purpose within regulation rendering such expenses nondeductible, but that amount of certificates could be deducted only in year in which payments were actually made where death benefit plan was merely a program of deferred compensation for services rendered.

Affirmed in part, reversed in part.

1. Internal Revenue ⇐568.2

Amounts privately-owned electric producer paid as pro rata share of national advertising campaign attacking public power as creeping socialism and otherwise disparaging quality of service rendered by government producers was not deductible as an ordinary and necessary business expense but rather was an expenditure in furtherance of promotion or defeat of legislation or propaganda relating to such purpose within regulation rendering such expenses nondeductible. 26 U.S.C.A. (I.R.C.1954) § 162.

2. Internal Revenue ⇐577

Where death benefit plan was merely a program of deferred compensation for services rendered, amount of death benefit certificates issued to retiring employees was deductible only in year in which payments were actually made and not in year in which certificates issued. 26 U.S.C.A. (I.R.C.1954) §§ 404(a), 404 (a) (5).

Richard W. Perkins, Dept. of Justice, Washington, D. C., for the United States; Johnnie M. Walters, Asst. Atty. Gen., Lee A. Jackson, William A. Friedlander, Attys., Dept. of Justice, Washington, D. C., on the brief.

Clifford H. Domke and William O. Allen, Jackson, Mich., on the brief for Consumers Power Co.

Before COMBS and BROOKS, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

BROOKS, Circuit Judge.

This appeal involves questions relating to the federal income tax liability of the plaintiff-appellee, Consumers Power Company. Consumers brought suit to recover a portion of the income taxes it paid for the taxable years 1954 through 1957. Two issues are presented on review. First, Consumers argues that it should have been able to deduct from its gross income as ordinary and necessary business expenses payments made to the Electric Companies Advertising Program (ECAP), an organization of privately owned electric power companies, for a national advertising

campaign carried on during the four year period in question. Second, Consumers contends that it was correct in deducting the face amount of certain death benefit certificates it issued to retiring employees in the years in which the certificates were issued rather than in the years when the death benefits were actually paid. The District Court disallowed the deductions for the expenses of the advertising program, but permitted Consumers to deduct the face amount of the death certificates in the years in which they were issued. See, 299 F. Supp. 1180 (1969).

The payments Consumers made to the Electric Companies Advertising Program were its pro rata share of the cost of a national advertising campaign. An examination of the materials used show the campaign had a two-fold purpose: 1. explaining how electricity can make for more comfortable living, and 2. pointing out the "bad features" of publicly owned electric power companies as compared to privately owned companies. The advertisements for which the District Court disallowed deductions were the ones which in some way attacked public power. Some of the disallowed advertisements made a hard sell attack on public power calling it "creeping socialism", while others simply suggested that private power companies can provide faster service because, unlike with publicly owned power companies, there was no waiting to have funds appropriated for the needed electrical facilities. Many of the advertisements were directed toward the Tennessee Valley Authority, and several admonished the public to let their congressmen know how they felt about governmental ownership of electric power companies.

[1] The deductibility of the cost of these advertisements is governed by whether it was an "ordinary and necessary" business expense (Title 26 U.S.C. § 162). The Internal Revenue has promulgated 26 C.F.R. § 1.162.20(b) [1] in conjunction with the "ordinary and necessary" business expense section of the Code. This regulation has been considered by the courts at various times. See, Cammarano v. United States, 358 U.S. 498, 79 S.C. 524, 3 L.Ed.2d 462 (1959); American Hardware & Equipment Company v. Commissioner of Internal Revenue, 202 F.2d 126 (4th Cir. 1953); Roberts Dairy Company v. Commissioner of Internal Revenue, 195 F.2d 948 (8th Cir. 1952); Southwestern Electric Power Company v. United States, 312 F.2d 437, 160 Ct.Cl. 262 (1963). And our review of the disallowed advertisements in light of the interpretation given 26 C.F.R. § 1.162.20 (b) by these cases supports the District Court's determination of nondeductibility. Several of the advertisements are what might be called border line cases for deductibility, but we defer to the District Court's judgment in those cases. However, it should be noted that this regulation, 26 C.F.R. § 1.162.20(b), is apparently capable of infinitely encompassing proportions. In a situation similar to the present one, where no legislation is pending, and a company's

1. (b) Taxable years beginning before January 1, 1963—(1) In general. (i) For taxable years beginning before January 1, 1963, expenditures for lobbying purposes, for the promotion or defeat of legislation, for political campaign purposes * * * or for carrying on propaganda (including advertising) related to any of the foregoing purposes are not deductible from gross income. For example, the cost of advertising to promote or defeat legislation or to influence the public with respect to the desirability or undesirability of proposed legislation is not deductible as a business expense, even though the legislation may directly affect the taxpayer's business.

* * * * *

(2) Expenditures for promotion or defeat of legislation. For purposes of this paragraph, expenditures for the promotion or the defeat of legislation include, but shall not be limited to, expenditures for the purpose of attempting to—

(i) Influence members of a legislative body directly, or indirectly by urging or encouraging the public to contact such members for the purpose of proposing, supporting, or opposing legislation,

* * * * *

chief competitor is governmentally owned, the regulation could possibly be extended to disallow a deduction for the cost of an advertisement which simply conveys a competitive message. It is not inconceivable that the expenditures for this type of advertisement might fall into the disallowed category of expenditures which according to the Internal Revenue "include, but shall not be limited to * * *" attempts to "influence members of a legislative body * * * indirectly by urging or encouraging the public to contact such members for the purpose of proposing, supporting or opposing legislation." Such type of coercive use of this regulation to discourage private industry from competing in an ordinary business fashion with a publicly owned business would clearly not be in keeping with the intent of the "ordinary and necessary" business expense provision of the Code.

[2] The other question presented on this appeal is whether Consumers should have been able to deduct the amount of certain death benefit certificates issued to retiring employees in the year the certificates were issued or only in the year the benefits were actually paid. The District Court allowed the deduction in the year in which the certificates were issued. It based its decision in part on the argument that Title 26 U.S.C. § 404 (a) and (a) (5) [2] would not apply under these circumstances because Consumers' death plan was not a plan for "deferred compensation". However, 26 C.F.R. § 1.404(a)–1 (a) (1) states that "section 404(a) also governs the deductibility of unfunded pensions and death benefits paid directly to former employees or their beneficiaries." In addition, death benefit plans have in the past been classified as compensations. See, New York Post Corporation v. Commissioner of Internal Revenue, 40 T.C. 882 (1963); Seavey & Flarsheim Brokerage Company v. Commissioner of Internal Revenue, 41 B.T.A. 198 (1940). Our examination of Consumers' death benefit plan, and the circumstances surrounding its establishment, leads us to the conclusion that it was a program of deferred compensation for services rendered. Thus, Title 26 U.S.C. § 404(a) controls and Consumers can only deduct the amount of death benefits paid under its plan in the years in which the payments are actually made.

Affirmed in part, reversed in part.

2. * * * if compensation is paid or accrued on account of any employee under a plan deferring the receipt of such compensation, such * * * compensation shall not be deductible under section 162 or section 212; but, if they satisfy the conditions of either of such sections, they shall be deductible under this section, subject, however, to the following limitations as to the amounts deductible in any year.

Exhibit 166: Revenue Rule 74–407

26 CFR 1.162-20: Expenditures attributable to lobbying, political campaigns, attempts to influence legislation, etc., and certain advertising.

Business expenses; attempt to influence legislation through stockholders. The expenses incurred by a domestic corporation for preparing, printing, and distributing to its shareholders a pamphlet focusing on proposed legislation which would adversely affect the company's tax liability and suggesting that the shareholders contact their congressmen to make known their views concerning such proposed legislation are not deductible as business expenses by reason of section 162(e)(2)(B) of the Code.

Rev. Rul. 74-407

Advice has been requested whether, under the circumstances described below, expenses incurred in connection with communication of information between the taxpayer and its shareholders in connection with legislation or proposed legislation of direct interest to the taxpayer are deductible under section 162(e) of the Internal Revenue Code of 1954.

The taxpayer, a domestic corporation engaged in manufacturing, published a pamphlet in 1973 which it mailed to its shareholders. The pamphlet focused on proposed legislation that would eliminate tax incentives for taxpayers to make capital improvements. In addition, the pamphlet explained why such legislation would be detrimental to the shareholders, and suggested measures that would increase the tax incentives for capital improvements. The pamphlet further suggested that the shareholders make their views known to their congressional representatives.

The specific question is whether the expenses incurred by the taxpayer in preparing, printing, and distributing the pamphlet to its shareholders are not deductible as a business expense by reason of section 162(e)(2)(B) of the Code.

Section 162(e)(1) of the Code provides that the deduction allowed by section 162(a) shall include all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business (A) in direct connection with appearances before, submission of statements to, or sending communications to, the committees, or individual members, of Congress or of any legislative body of a State, a possession of the United States, or a political subdivision of any of the foregoing with respect to legislation or proposed legislation of direct interest to the taxpayer, or (B) in direct connection with communication of information between the taxpayer and an organization of which he is a member with respect to legislation or proposed legislation of direct interest to the taxpayer and to such organization, and that portion of the dues so paid or incurred with respect to any organization of which the taxpayer is a member which is attributable to the expenses of the activities described in subparagraphs (A) and (B) carried on by such organization.

Section 162(e)(2)(B) of the Code provides that the provisions of 162(e)(1) shall not be construed as allowing the deduction of any amount paid or incurred (whether by way of contribution, gift, or otherwise) in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums.

Legislative consideration was given to a provision allowing a deduction for expenditures incurred in direct connection with communication of information between a taxpayer and a shareholder with respect to legislation or proposed legislation of direct interest to the taxpayer, thus excepting such expenditures from the provisions of section 162(e)(2)(B) of the Code. However, such provision was not adopted. See 108 Cong. Rec. 18493 (1962).

Accordingly, it is held that the expenses incurred by the taxpayer in preparing, printing, and distributing the pamphlet to its shareholders are the type of expenses described in section 162(e)(2)(B) of the Code. Consequently, they are not includible within the class of expenses described in section 162(e)(1) and which are deductible under section 162(a).

Exhibit 167: Revenue Rule 78–111

Section 162.—Trade or Business Expenses

26 CFR 1.162-20: Expenditures attributable to lobbying, political campaigns, attempts to influence legislation, etc. and certain advertising.

Expenses incurred to influence legislation through stockholders. No deduction is allowable under section 162(a) of the Code for expenses incurred by a corporation in printing and distributing to its shareholders its president's remarks given before a state legislature concerning the corporation's opposition to certain proposed legislation; Rev. Rul. 74-407 amplified.

Rev. Rul. 78-111

Advice has been requested whether, under the circumstances described below, expenses incurred by a taxpayer in printing the text of a speech and distributing copies to its shareholders are deductible for Federal income tax purposes in view of section 162(e)(2)(B) of the Internal Revenue Code of 1954.

The taxpayer is a corporation engaged in the manufacturing business in state *Y*. An environmental protection bill is currently pending before the legislature of state *Y* that if enacted would require manufacturing companies to meet certain antipollution guidelines. The taxpayer's president testified before the legislature in opposition to the proposed bill.

The taxpayer had the text of its president's remarks printed in pamphlet form and distributed to its shareholders. The remarks enumerated the taxpayer's objections to the legislation and set forth the taxpayer's recommendations for an environmental program. It was also noted in the text that if the proposed bill currently before the legislature were passed, the taxpayer would be required to incur substantial capital expenditures to meet the antipollution guidelines.

Section 162(e)(1) of the Code provides that the deduction allowed by section 162(a) shall include all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business (A) in direct connection with appearances before, submission of statements to, or sending communications to, the committees, or individual members, of Congress or of any legislative body of a state, a possession of the United States, or a political subdivision of any of the foregoing with respect to legislation or proposed legislation of direct interest to the taxpayer, or (B) in direct connection with communication of information between the taxpayer and an organization of which the taxpayer is a member with respect to legislation or proposed legislation of direct interest to the taxpayer and to such organization, and that portion of the dues so paid or incurred with respect to any organization of which the taxpayer is a member that is attributable to the expenses of the activities described in subparagraphs (A) and (B) carried on by such organization.

Section 162(e)(2)(B) of the Code provides that the provisions of 162(e)(1) shall not be construed as allowing the deduction of any amount paid or incurred (whether by way of contribution, gift, or otherwise) in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums.

Section 1.162-20(c)(4) of the Income Tax Regulations provides that no deduction shall be allowed under section 162(a) of the Code for any amount paid or incurred (whether by way of contribution, gift, or otherwise) in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums. For example, no deduction shall be allowed for any expenses incurred in connection with "grassroot" campaigns or any other attempts to urge or encourage the public to contact members of a legislative body for the purpose of proposing, supporting, or opposing legislation.

Rev. Rul. 74-407, 1974-2 C.B. 45, deals with expenses incurred by a corporation in preparing, printing, and distributing to its shareholders copies of a pamphlet that focused on proposed legislation and suggested that the shareholders contact their congressional representatives regarding the legislation. In that situation it was determined that the expenses were not deductible because they were the type of expenses described in section 162(e)(2)(B) of the Code.

In the instant situation, the text distributed to the shareholders is an attempt to influence the shareholders to oppose legislation that is of direct interest to the taxpayer. This situation is similar to the situation described in Rev. Rul. 74-407. While the facts of Rev. Rul. 74-407 stated that the pamphlet distributed to the shareholders suggested that they make their views known to their congressional representatives, it is not necessary that a taxpayer actually request its shareholders to contact their representatives in order for a pamphlet, advertisement, or other communication to constitute an attempt to influence the general public, or segments thereof, to propose, support, or oppose legislation.

Accordingly, the expenses incurred by the taxpayer in printing and distributing a pamphlet containing the president's remarks to the taxpayer's shareholders are the type of expenses described in section 162(e)(2)(B) of the Code. As such, the expenses are not includible within the class of expenditures described in section 162(e)(1) and, therefore they are not deductible under section 162(a).

Rev. Rul. 74-407 is amplified.

Exhibit 168: Revenue Rule 78–112

26 CFR 1.162-20: Expenditures attributable to lobbying, political campaigns, attempts to influence legislation, etc. and certain advertising.

Expenses incurred to influence legislation; newspaper and magazine advertising. No deduction is allowable under section 162(a) of the Code for expenses incurred by a corporation in preparing and placing advertisements in major state newspapers and regional magazines setting forth objections to proposed legislation of direct interest to the corporation.

Rev. Rul. 78-112

Advice has been requested whether, under the circumstances described below, expenses incurred by the taxpayer in preparing and placing advertisements in various newspapers and periodicals are deductible for Federal income tax purposes in view of section 162(e)(2)(B) of the Internal Revenue Code of 1954.

The taxpayer is a domestic corporation engaged in the business of developing residential and commercial properties. Pending before the state legislature is a series of bills of direct interest to the taxpayer involving land use planning.

The taxpayer has placed advertisements in all of the major newspapers of the state and many regional magazines setting forth objections to the proposed legislation in its present form. The advertisements maintain that the state government lacks sufficient expertise and knowledge to develop a workable land use plan and that the proposed legislation will have a devastating effect on the area's economy without enhancing the area's environment. The taxpayer also sets forth in the advertisements what it considers to be a more workable and beneficial program in developing a long range and progressive regional land use plan not only for the immediate future but for many generations to come. The taxpayer's plan places emphasis on maintaining existing jobs, creating new jobs, and broadening the tax base through moderate growth while preserving the existing environment.

Section 162(e)(1) of the Code provides that the deduction allowed by section 162(a) shall include all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business (A) in direct connection with appearances before, submission of statements to, or sending communications to, the committees, or individual members, of Congress or of any legislative body of a state, a possession of the United States, or a political subdivision of any of the foregoing with respect to legislation or proposed legislation of

direct interest to the taxpayer, or (B) in direct connection with communication of information between the taxpayer and an organization of which the taxpayer is a member with respect to legislation or proposed legislation of direct interest to the taxpayer and to such organization, and that portion of the dues so paid or incurred with respect to any organization of which the taxpayer is a member that is attributable to the expenses of the activities described in subparagraphs (A) and (B) carried on by such organization.

Section 162(e)(2)(B) of the Code provides that the provisions of 162(e)(1) shall not be construed as allowing the deduction of any amount paid or incurred (whether by way of contribution, gift, or otherwise) in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums.

Section 1.162-20(c)(4) of the regulations provides that no deduction shall be allowed under section 162(a) of the Code for any amount paid or incurred (whether by way of contribution, gift, or otherwise) in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums. For example, no deduction shall be allowed for any expenses incurred in connection with "grassroot" campaigns or any other attempts to urge or encourage the public to contact members of a legislative body for the purpose of proposing, supporting, or opposing legislation.

It is not necessary that an advertisement specifically request the general public or a segment thereof to contact their representatives in order for section 162(e)(2)(B) of the Code to apply. This section will apply if an advertisement through words, pictures, etc., is an attempt to develop a "grassroots" point of view by influencing the general public to propose, support, or oppose legislation.

The taxpayer's media campaign was a clear attempt to influence the general public to oppose the proposed land use planning legislation and to support the introduction of land use planning legislation embodying the taxpayer's views.

Accordingly, the expenses incurred by the taxpayer in preparing and placing the advertisements in various newspapers and periodicals are the type of expenses described in section 162(e)(2)(B) of the Code. As such, the expenses are not includible within the class of expenses described in section 162(e)(1) and therefore they are not deductible under section 162(a).

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Exhibit 169: Revenue Rule 78–113

26 CFR 1.162-20: Expenditures attributable to lobbying, political campaigns, attempts to influence legislation, etc., and certain advertising.

"Grassroot" lobbying; employees and customers of trade association members. A tax-exempt trade association that urges its members to contact their employees and customers to have them communicate with certain elected state representatives to support repeal of legislation considered detrimental to the association is engaging in "grassroot" lobbying within the scope of section 162(e)(2)(B) of the Code.

Rev. Rul. 78-113

Advice has been requested whether a trade association, in urging its members to contact their employees and customers, and have them communicate with certain elected state representatives to support repeal of legislation considered detrimental to the association and its members, is engaging in "grassroot" lobbying within the scope of section 162(e)(2)(B) of the Internal Revenue Code of 1954.

The trade association is exempt from tax under section 501(c)(6) of the Code. The association has taken a strong position before the legislature that recent amendments imposing a timetable for implementation of new occupational safety standards created an unrealistic schedule forcing layoffs and causing some businesses to cease operations.

The association has contacted its members to urge them to ask their employees and customers to support repeal of the legislation.

Section 162(e)(1) of the Code provides that the deduction allowed by section 162(a) shall include all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business (A) in direct connection with appearances before, submission of statements to, or sending communications to, the committees, or individual members, of Congress or of any legislative body of a state, a possession of the United States, or a political subdivision of any of the foregoing with respect to legislation or proposed legislation of direct interest to the taxpayer, or (B) in direct connection with communication of information between the taxpayer and an organization of which the taxpayer is a member with respect to legislation or proposed legislation of direct interest to the taxpayer and to such organization, and that portion of the dues so paid or incurred with respect to any organization of which the taxpayer is a member that is attributable to the expenses of the activities described in subparagraphs (A) and (B) carried on by such organization.

Section 162(e)(2)(B) of the Code provides that the provisions of section 162(e)(1) shall not be construed as allowing the deduction of any amount paid or incurred (whether by way of contribution, gift, or otherwise) in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums.

Section 1.162-20(c)(4) of the regulations provides that no deduction shall be allowed under section 162(a) of the Code for any amount paid or incurred (whether by way of contribution, gift, or otherwise) in connection with any attempt to influence the general public, or segments thereof with respect to legislative matters, elections, or referendums. For example, no deducion shall be allowed for any expenses incurred in connection with "grassroot" campaigns or any other attempt to urge or encourage the public to contact members of a legislative body for the purpose of proposing, supporting, or opposing legislation.

The limitation on a business expense deduction for lobbying expenses set forth above in section 162(e)(2)(B) of the Code provides that section 162(e)(1)(B) shall not apply to attempts to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums.

The employees and customers of members of the trade association either together or separately constitute a segment of the general public for the purpose of section 162(e)(2)(B) of the Code. If the communication from the trade association is intended to go beyond the members and is either directly, or through its membership, directed at a segment of the public, such as the employees or customers of members, it will constitute "grassroot" lobbying.

Accordingly, the appeal by the trade association to its members to contact segments of the general public to support repeal of the legislation imposing deadlines for institution of new occupational safety standards constitutes "grassroot" lobbying within the scope of section 162(e)(2)(B) of the Code.

Exhibit 170: Revenue Rule 78–114

26 CFR 1.162-20: Expenditures attributable to lobbying, political campaigns, attempts to influence legislation, etc., and certain advertising.

"Grassroot" lobbying; communication to members and prospective members. A tax-exempt trade association that contacts members to urge them to write or call their Congressmen to recommend support of legislation of direct interest to the association is not engaging in "grassroot" lobbying within the scope of section 162(e)(2)(B) of the Code. Such communication to prospective members, however, does constitute "grassroot" lobbying.

Rev. Rul. 78-114

Advice has been requested whether a trade association, in urging its members and prospective members to contact certain elected Federal legislators to influence public policy, is engaging in "grassroot" lobbying within the scope of section 162(e)(2)(B) of the Internal Revenue Code of 1954.

The trade association is exempt from tax under section 501(c)(6) of the Code. The association has taken a strong position that a certain provision should be added to the Internal Revenue Code. It contacted not only its members but also prospective members to urge them to write or call their Congressmen to recommend support of the legislation.

Section 162(e)(1) of the Code provides that the deduction allowed by section 162(a) shall include all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business (A) in direct connection with appearances before, submission of statements to, or sending communications to, the committees, or individual members, of Congress or of any legislative body of a state, a possession of the United States, or a political subdivision of any of the foregoing with respect to legislation or proposed legislation of direct interest to the taxpayer, or (B) in direct connection with communication of information between the taxpayer and an organization of which the taxpayer is a member with respect to legislation or proposed legislation of direct interest to the taxpayer and to such organization, and that portion of the dues so paid or incurred with respect to any organization of which the taxpayer is a member that is attributable to the expenses of the activities described in subparagraphs (A) and (B) carried on by such organization.

Section 1.162-20(c)(2)(ii)(b) of the Income Tax Regulations provides, in part, that legislation or proposed legislation is of direct interest to the taxpayer if it is of such a nature that it will, or may reasonably be expected to affect the trade or business of the taxpayer.

The House Report in connection with the enactment of section 162(e)(1)(B) of the Code (*H. Rep. No. 1447*, 87th Cong. 2d Sess (1962), 1962-3 C.B. 405, 442) provides that:

The second category of expenses which may be deducted are those in direct connection with the communication of information between the taxpayer and an organization of which he

is a member. This communication may be either from the organization to the taxpayer or vice versa.

Section 162(e)(2)(B) of the Code provides that the provisions of 162(e)(1) shall not be construed as allowing the deduction of any amount paid or incurred (whether by way of contribution, gift, or otherwise) in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums.

Section 1.162-20(c)(4) of the regulations provides that no deduction shall be allowed under section 162(a) of the Code for any amount paid or incurred (whether by way of contribution, gift, or otherwise) in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums. For example, no deduction shall be allowed for any expenses incurred in connection with "grassroot" campaigns or any other attempts to urge or encourage the public to contact members of a legislative body for the purpose of proposing, supporting, or opposing legislation.

When the communication from a trade association regarding legislation of a direct interest to it or its members does not extend beyond the member organization it does not constitute "grassroot" lobbying. However, when such communication has been extended to prospective members, who may or may not become members, an attempt to influence a segment of the general public is involved for purposes of section 162(e)(2)(B) of the Code.

Accordingly, notwithstanding the fact that the communication of the trade association to prospective members was with respect to legislation of a direct interest to the trade association, such communication constitutes "grassroot" lobbying within the scope of section 162(e)(2)(B) of the Code. However, the communication of the trade association to its members does not constitute "grassroot" lobbying within the scope of section 162(e)(2)(B).

Exhibit 171: Current Provisions of Section 162(e) of IRC of 1954

§ 162. Trade or business expenses

(a) In general.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; and

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000.

* * * *

(e) Appearances, etc., with respect to legislation.—

(1) In general.—The deduction allowed by subsection (a) shall include all the ordinary and necessary expenses (including, but not limited to, traveling expenses described in subsection (a)(2) and the cost of preparing testimony) paid or incurred during the taxable year in carrying on any trade or business—

(A) in direct connection with appearances before, submission of statements to, or sending communications to, the committees, or individual members, of Congress or of any legislative body of a State, a possession of the United States, or a political subdivision of any of the foregoing with respect to legislation or proposed legislation of direct interest to the taxpayer, or

(B) in direct connection with communication of information between the taxpayer and an organization of which he is a member with respect to legislation or proposed legislation of direct interest to the taxpayer and to such organization,

and that portion of the dues so paid or incurred with respect to any organization of which the taxpayer is a member which is attributable to the expenses of the activities described in subparagraphs (A) and (B) carried on by such organization.

(2) Limitation.—The provisions of paragraph (1) shall not be construed as allowing the deduction of any amount paid or incurred (whether by way of contribution, gift, or otherwise)—

(A) for participation in, or intervention in, any political campaign on behalf of any candidate for public office, or

(B) in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums.

Exhibit 172: Current IRS Regulations on Section 162(e) of IRC of 1954

ITEMIZED DEDUCTIONS FOR INDIVIDUALS AND CORPORATIONS

§ 1.161 Statutory provisions; allowance of deductions.

SEC. 161. *Allowance of deductions.* In computing taxable income under section 63(a), there shall be allowed as deductions the items specified in this part, subject to the exceptions provided in part IX (sec. 261 and following, relating to items not deductible).

§ 1.161-1 Allowance of deductions.

Section 161 provides for the allowance as deductions, in computing taxable income under section 63(a), of the items specified in part VI (section 161 and following), subchapter B, chapter 1 of the Code, subject to the exceptions provided in part IX (section 261 and following), of such subchapter B, relating to items not deductible. Double deductions are not permitted. Amounts deducted under one provision of the Internal Revenue Code of 1954 cannot again be deducted under any other provision thereof. See also section 7852(c), relating to the taking into account, both in computing a tax under subtitle A of the Internal Revenue Code of 1954 and a tax under chapter 1 or 2 of the Internal Revenue Code of 1939, of the same item of deduction.

§ 1.162 Statutory provisions; trade or business expenses.

SEC. 162. *Trade or business expenses*—(a) *In general.* There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

(1) A reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) Traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and

(3) Rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, Territory, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000.

(b) *Charitable contributions and gifts excepted.* No deduction shall be allowed under subsection (a) for any contribution or gift which would be allowable as a deduction under section 170 were it not for the percentage limitations, the dollar limitations, or the requirements as to the time of payment, set forth in such section.

(c) *Illegal bribes, kickbacks, and other payments*—(1) *Illegal payments to government officials or employees.* No deduction shall be allowed under subsection (a) for any payment made, directly or indirectly, to an official or employee of any government, or of any agency or instrumentality of any government, if the payment constitutes an illegal bribe or kickback or, if the payment is to an official or employee of a foreign government, the payment would be unlawful under the laws of the United States if such laws were applicable to such payment and to such official or employee. The burden of proof in respect of the issue, for the purposes of this paragraph, as to whether a payment constitutes an illegal bribe or kickback (or would be unlawful under the laws of the United States) shall be upon the Secretary or his delegate to the same extent as he bears the burden of proof under section 7454 (concerning the burden of proof when the issue relates to fraud).

(2) *Other illegal payments.* No deduction shall be allowed under subsection (a) for any payment (other than a payment described in paragraph (1)) made, directly or indirectly, to any person, if the payment constitutes an illegal bribe, illegal kickback, or other illegal payment under any law of the United States, or under any law of a State (but only if such state law is generally enforced), which subjects the payor to a criminal penalty or the loss of license or privilege to engage in a trade or business. For purposes of this paragraph, a kickback includes a payment in consideration of the referral of a client, patient, or customer. The burden of proof in respect of the issue, for purposes of this paragraph, as to whether a payment constitutes an illegal bribe, illegal kickback, or other illegal payment shall be upon the Secretary or his delegate to the same extent as he bears the burden of proof under section 7454 (concerning the burden of proof when the issue relates to fraud).

(3) *Kickbacks, rebates, and bribes under medicare and medicaid.* No deduction shall be allowed under subsection (a) for any kickback, rebate, or bribe made by any provider of services, supplier, physician, or other person who furnishes items or services for which payment is or may be made under the Social Security Act, or in whole or in part out of Federal funds under a State plan approved under such Act, if such kickback, rebate, or bribe is made in connection with the furnishing of such items or services or the making or receipt of such payments. For purposes of this paragraph, a kickback includes a payment in consideration of the referral of a client, patient, or customer.

(d) *Capital contributions to Federal National Mortgage Association.* For purposes of this subtitle, whenever the amount of capital contributions evidenced by a share of stock issued pursuant to section 303(c) of the Federal National Mortgage Association Charter Act (12 U.S.C., sec. 1718) exceeds the fair market value of the stock as of the issue date of such stock, the initial holder of the stock shall treat the excess as ordinary and necessary expenses paid or incurred during the taxable year in carrying on a trade or business.

(e) *Appearances, etc., with respect to legislation*—(1) *In general.* The deduction allowed by subsection (a) shall include all the ordinary and necessary expenses (including, but not limited to, traveling expenses described in subsection (a)(2) and the cost of preparing testimony) paid or incurred during the taxable year in carrying on any trade or business—

(A) In direct connection with appearances before, submission of statements to, or sending communications to, the committees, or individual members, of Congress or of any legislative body of a State, a possession of the United States, or a political subdivision of any of the foregoing with respect to legislation or proposed legislation of direct interest to the taxpayer, or

(B) In direct connection with communication of information between the taxpayer and an organization of which he is a member with respect to legislation or proposed legislation of direct interest to the taxpayer and to such organization,

and that portion of the dues so paid or incurred with respect to any organization of which the taxpayer is a member which is attributable to the expenses of the activities described in subparagraphs (A) and (B) carried on by such organization.

(2) *Limitation.* The provisions of paragraph (1) shall not be construed as allowing the deduction of any amount paid or incurred (whether by way of contribution, gift, or otherwise)—

(A) For participation in, or intervention in, any political campaign on behalf of any candidate for public office, or

(B) In connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums.

(f) *Fines and penalties.* No deduction shall be allowed under subsection (a) for any fine or similar penalty paid to a government for the violation of any law.

(g) *Treble damage payments under the antitrust laws.* If in a criminal proceeding a taxpayer is convicted of a violation of the antitrust laws, or his plea of guilty or nolo contendere to an indictment or information charging such a violation is entered or accepted in such a proceeding, no deduction shall be allowed under subsection (a) for two-thirds of any amount paid or incurred—

(1) On any judgment for damages entered against the taxpayer under section 4 of the act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (commonly known as the Clayton Act), on account of such violation or any related violation of the anti-trust laws which occurred prior to the date of the final judgment of such conviction, or

(2) In settlement of any action brought under section 4 on account of such violation or related violation.

The preceding sentence shall not apply with respect to any conviction or plea before January 1, 1970, or to any conviction or plea on or after such date in a new trial following an appeal of a conviction before such date.

(h) *Cross reference.* For special rule relating to expenses in connection with subdividing real property for sale, see section 1237.

[Sec. 162 as amended by sec. 5, Technical Amendments Act 1958 (72 Stat. 1608); secs. 7(b) and 8, Act of Sept. 14, 1960 (Public Law 86-779, 74 Stat. 1002, 1003); sec. 3(a), Revenue Act 1962 (76 Stat. 973); sec. 902, Tax Reform Act 1969 (83 Stat. 710); sec. 310, Revenue Act 1971 (85 Stat. 525)]

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6639, 28 FR 1763, Feb. 26, 1963; T.D. 6690, 28 FR 12253, Nov. 19, 1963; T.D. 6819, 30 FR 5580, Apr. 20, 1965; T.D. 7217, 37 FR 23916, Nov. 10, 1972; T.D. 7345, 40 FR 7437, Feb. 20, 1975]

§ 1.162-1 Business expenses.

(a) *In general.* Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except items which are used as the basis for a deduction or a credit under provisions of law other than section 162. The cost of goods purchased for resale, with proper adjustment for opening and closing inventories, is deducted from gross sales in computing gross income. See paragraph (a) of § 1.161-3. Among the items included in business expenses are management expenses, commissions (but see section 263 and the regulations thereunder), labor, supplies, incidental repairs, operating expenses of automobiles used in the trade or business, traveling expenses while away from home solely in the pursuit of a trade or business (see § 1.162-2), advertising and other selling expenses, together with insurance premiums against fire, storm, theft, accident, or other similar losses in the case of a business, and rental for the use of business property. No such item shall be included in business expenses, however, to the extent that it is used by the taxpayer in computing the cost of property included in its inventory or used in determining the gain or loss basis of its plant, equipment, or other property. See section 1054 and the regulations thereunder. A deduction for an expense paid or incurred after December 30, 1969, which would otherwise be allowable under section 162 shall not be denied on the grounds that allowance of such deduction would frustrate a sharply defined public policy. See section 162(c), (f), and (g) and the regulations thereunder. The full amount of the allowable deduction for ordinary and necessary expenses in carrying on a business is deductible, even though such expenses exceed the gross income derived during the taxable year from such business. In the case of any sports program to which section 114 (relating to sports programs conducted for the American National Red Cross) applies, expenses described in section 114(a)(2) shall be allowable as deductions under section 162(a) only to the extent that such expenses exceed the amount excluded from gross income under section 114(a).

(b) *Cross references.* (1) For charitable contributions by individuals and corporations not deductible under section 162, see § 1.162-15.

(2) For items not deductible, see sections 261-276, inclusive, and the regulations thereunder.

(3) For research and experimental expenditures, see section 174 and regulations thereunder.

(4) For soil and water conservation expenditures, see section 175 and regulations thereunder.

(5) For expenditures attributable to grant or loan by United States for encouragement of exploration for, or development or mining of, critical and strategic minerals or metals, see section 621 and regulations thereunder.

(6) For treatment of certain rental payments with respect to public utility property, see section 167(l) and § 1.167(l)-3.

[T.D. 6500, 25 FR 11402, Nov. 26, 1960, as amended by T.D. 6690, 28 FR 12253, Nov. 19, 1963; T.D. 6996, 34 FR 835, Jan. 18, 1969; T.D. 7315, 39 FR 20203, June 7, 1974; T.D. 7345, 40 FR 7437, Feb. 20, 1975]

§ 1.162-14 Expenditures for advertising or promotion of good will.

A corporation which has, for the purpose of computing its excess profits tax credit under subchapter E, chapter 2, or subchapter D, chapter 1 of the Internal Revenue Code of 1939, elected under section 733 or section 451 (applicable to the excess profits tax imposed by subchapter E of chapter 2, and subchapter D of chapter 1, respectively) to charge to capital account for taxable years in its base period expenditures for advertising or the promotion of good will which may be regarded as capital investments, may not deduct similar expenditures for the taxable year. See section 263(b). Such a taxpayer has the burden of proving that expenditures for advertising or the promotion of good will which it seeks to deduct in the taxable year may not be regarded as capital investments under the provisions of the regulations prescribed under section 733 or section 451 of the Internal Revenue Code of 1939. See 26 CFR, 1938 ed., 35.733-2 (Regulations 112) and 26 CFR (1939) 40.451-2 (Regulations 130). For the disallowance of deductions for the cost of advertising in programs of certain conventions of political parties, or in publications part of the proceeds of which directly or indirectly inures (or is intended to inure) to or for the use of a political party or political candidate, see § 1.276-1.

* * *

§ 1.162-20 Expenditures attributable to lobbying, political campaigns, attempts to influence legislation, etc., and certain advertising.

(a) *In general*—(1) *Scope of section.* This section contains rules governing the deductibility or nondeductibility of expenditures for lobbying purposes, for the promotion or defeat of legislation, for political campaign purposes (including the support of or opposition to any candidate for public office) or for carrying on propaganda (including advertising) related to any of the foregoing purposes. For rules applicable to such expenditures in respect of taxable years beginning before January 1, 1963, and for taxable years beginning after December 31, 1962, see paragraphs (b) and (c), respectively, of this section. This section also deals with expenditures for institutional or "good will" advertising.

(2) *Institutional or "good will" advertising.* Expenditures for institutional or "good will" advertising which keeps the taxpayer's name before the public are generally deductible as ordinary and necessary business expenses provided the expenditures are related to the patronage the taxpayer might reasonably expect in the future. For example, a deduction will ordinarily be allowed for the cost of advertising which keeps the taxpayer's name before the public in connection with encouraging contributions to such organizations as the Red Cross, the purchase of United States Savings Bonds, or participation in similar causes. In like fashion, expenditures for advertising which presents views on economic, financial, social, or other subjects of a general nature, but which does not involve any of the activities specified in paragraph (b) or (c) of this section for which a deduction is not allowable, are deductible if they otherwise meet the requirements of the regulations under section 162.

(b) *Taxable years beginning before January 1, 1963*—(1) *In general.* (i) For taxable years beginning before January 1, 1963, expenditures for lobbying purposes, for the promotion or defeat of legislation, for political campaign purposes (including the support of or opposition to any candidate for public office), or for carrying on propaganda (including advertising) related to any of the foregoing purposes are not deductible from gross income. For example, the cost of advertising to promote or defeat legislation or to influence the public with respect to the desirability or undesirability of proposed legislation is not deductible as a business expense, even though the legisla-

tion may directly affect the taxpayer's business.

(ii) If a substantial part of the activities of an organization, such as a labor union or a trade association, consists of one or more of the activities specified in the first sentence of this subparagraph, deduction will be allowed only for such portion of the dues or other payments to the organization as the taxpayer can clearly establish is attributable to activities other than those so specified. The determination of whether such specified activities constitute a substantial part of an organization's activities shall be based on all the facts and circumstances. In no event shall special assessments or similar payments (including an increase in dues) made to any organization for any of such specified purposes be deductible. For other provisions relating to the deductibility of dues and other payments to an organization, such as a labor union or a trade association, see paragraph (c) of § 1.162-15.

(2) *Expenditures for promotion or defeat of legislation.* For purposes of this paragraph, expenditures for the promotion or the defeat of legislation include, but shall not be limited to, expenditures for the purpose of attempting to—

(i) Influence members of a legislative body directly, or indirectly by urging or encouraging the public to contact such members for the purpose of proposing, supporting, or opposing legislation, or

(ii) Influence the public to approve or reject a measure in a referendum, initiative, vote on a constitutional amendment, or similar procedure.

(c) *Taxable years beginning after December 31, 1962*—(1) *In general.* For taxable years beginning after December 31, 1962, certain types of expenses incurred with respect to legislative matters are deductible under section 162(a) if they otherwise meet the requirements of the regulations under section 162. These deductible expenses are described in subparagraph (2) of this paragraph. All other expenditures for lobbying purposes, for the promotion or defeat of legislation (see paragraph (b)(2) of this section), for political campaign purposes (including the support of or opposition to any candidate for public office), or for carrying on propaganda (including advertising) relating to any of the foregoing purposes are not deductible from gross income for such taxable years. For the disallowance of deductions for bad debts and worthless securities of a political party, see § 1.271-1. For the disallowance of deductions for certain indirect political contributions, such as the cost of certain advertising and the cost of admission to certain dinners, programs, and inaugural events, see § 1.276-1.

(2) *Appearances, etc., with respect to legislation*—(i) *General rule.* Pursuant to the provisions of section 162(e), expenses incurred with respect to legislative matters which may be deductible are those ordinary and necessary expenses (including, but not limited to, traveling expenses described in section 162(a)(2) and the cost of preparing testimony) paid or incurred by the taxpayer during a taxable year beginning after December 31, 1962, in carrying on any trade or business which are in direct connection with—

(*a*) Appearances before, submission of statements to, or sending communications to, the committees, or individual members of Congress or of any legislative body of a State, a possession of the United States, or a political subdivision of any of the foregoing with respect to legislation or proposed legislation of direct interest to the taxpayer, or

(*b*) Communication of information between the taxpayer and an organization of which he is a member with respect to legislation or proposed legislation of direct interest to the taxpayer and to such organization.

For provisions relating to dues paid or incurred with respect to an organization of which the taxpayer is a member, see subparagraph (3) of this paragraph.

(ii) *Legislation or proposed legislation of direct interest to the taxpayer*—(*a*) *Legislation or proposed legislation.* The term "legislation or proposed legislation" includes bills and resolutions introduced by a member of Congress or other legislative body referred to in subdivision (i)(a) or this subparagraph for consideration by such body as well as oral or written proposals for

legislative action submitted to the legislative body or to a committee or member of such body.

(b) *Direct interest—(1) In general.* (i) Legislation or proposed legislation is of direct interest to a taxpayer if the legislation or proposed legislation is of such a nature that it will, or may reasonably be expected to, affect the trade or business of the taxpayer. It is immaterial whether the effect, or expected effect, on the trade or business will be beneficial or detrimental to the trade or business or whether it will be immediate. If legislation or proposed legislation has such a relationship to a trade or business that the expenses of any appearance or communication in connection with the legislation meets the ordinary and necessary test of section 162(a), then such legislation ordinarily meets the direct interest test of section 162(e). However, if the nature of the legislation or proposed legislation is such that the likelihood of its having an effect on the trade or business of the taxpayer is remote or speculative, the legislation or proposed legislation is not of direct interest to the taxpayer. Legislation or proposed legislation which will not affect the trade or business of the taxpayer is not of direct interest to the taxpayer even though such legislation will affect the personal, living, or family activities or expenses of the taxpayer. Legislation or proposed legislation is not of direct interest to a taxpayer merely because it may affect business in general; however, if the legislation or proposed legislation will, or may reasonably be expected to, affect the taxpayer's trade or business it will be of direct interest to the taxpayer even though it also will affect the trade or business of other taxpayers or business in general. To meet the direct interest test, it is not necessary that all provisions of the legislation or proposed legislation have an effect, or expected effect, on the taxpayer's trade or business. The test will be met if one of the provisions of the legislation has the specified effect. Legislation or proposed legislation will be considered to be of direct interest to a membership organization if it is of direct interest to the organization, as such, or if it is of direct interest to one or more of its members.

(ii) Legislation which would increase or decrease the taxes applicable to the trade or business, increase or decrease the operating costs or earnings of the trade or business, or increase or decrease the administrative burdens connected with the trade or business meets the direct interest test. Legislation which would increase the social security benefits or liberalize the right to such benefits meets the direct interest test because such changes in the social security benefits may reasonably be expected to affect the retirement benefits which the employer will be asked to provide his employees or to increase his taxes. Legislation which would impose a retailer's sales tax is of direct interest to a retailer because, although the tax may be passed on to his customers, collection of the tax will impose additional burdens on the retailer, and because the increased cost of his products to the consumer may reduce the demand for them. Legislation which would provide an income tax credit or exclusion for shareholders is of direct interest to a corporation, because those tax benefits may increase the sources of capital available to the corporation. Legislation which would favorably or adversely affect the business of a competitor so as to affect the taxpayer's competitive position is of direct interest to the taxpayer. Legislation which would improve the school system of a community is of direct interest to a membership organization comprised of employers in the community because the improved school system is likely to make the community more attractive to prospective employees of such employers. On the other hand, proposed legislation relating to Presidential succession in the event of the death of the President has only a remote and speculative effect on any trade or business and therefore does not meet the direct interest test. Similarly, if a corporation is represented before a congressional committee to oppose an appropriation bill merely because of a desire to bring increased Government economy with the hope that such economy will eventually cause a reduction in the Federal income tax, the legislation does not meet the direct interest test because any effect it may

have upon the corporation's trade or business is highly speculative.

(2) *Appearances, etc., by expert witnesses.* (i) An appearance or communication (of a type described in paragraph (c)(2)(i)(*a*) of this section) by an individual in connection with legislation or proposed legislation shall be considered to be with respect to legislation of direct interest to such individual if the legislation is in a field in which he specializes as an employee, if the appearance or communication is not on behalf of his employer, and if it is customary for individuals in his type of employment to publicly express their views in respect of matters in their field of competence. Expenses incurred by such an individual in connection with such an appearance of communication, including traveling expenses properly allocable thereto, represent ordinary and necessary business expenses and are, therefore, deductible under section 162. For example, if a university professor who teaches in the field of money and banking appears, on his own behalf, before a legislative committee to testify on proposed legislation regarding the banking system, his expenses incurred in connection with such appearance are deductible under section 162 since university professors customarily take an active part in the development of the law in their field of competence and publicly communicate the results of their work.

(*ii*) An appearance or communication (of a type described in paragraph (c)(2)(i)(*a*) of this section) by an employee or self-employed individual in connection with legislation or proposed legislation shall be considered to be with respect to legislation of direct interest to such person if the legislation is in the field in which he specializes in his business (or as an employee) and if the appearance or communication is made pursuant to an invitation extended to him individually for the purpose of receiving his expert testimony. Expenses incurred by an employee or self-employed individual in connection with such an appearance or communication, including traveling expenses properly allocable thereto, represent ordinary and necessary business expenses and are, therefore, deductible under section 162. For example, if a self-employed individual is personally invited by a congressional committee to testify on proposed legislation in the field in which he specializes in his business, his expenses incurred in connection with such appearance are deductible under section 162. If a self-employed individual makes an appearance, on his own behalf, before a legislative committee without having been extended an invitation his expenses will be deductible to the extent otherwise provided in this paragraph.

(3) *Nominations, etc.* A taxpayer does not have a direct interest in matters such as nominations, appointments, or the operation of the legislative body.

(iii) *Allowable expenses.* To be deductible under section 162(a), expenditures which meet the tests of deductibility under the provisions of this paragraph must also qualify as ordinary and necessary business expenses under section 162(a) and, in addition, be in direct connection with the carrying on of the activities specified in subdivision (i)(*a*) or (i)(*b*) of this subparagraph. For example, a taxpayer appearing before a committee of the Congress to present testimony concerning legislation or proposed legislation in which he has a direct interest may deduct the ordinary and necessary expenses directly connected with his appearance, such as traveling expenses described in section 162(a)(2), and the cost of preparing testimony.

(3) *Deductibility of dues and other payments to an organization.* If a substantial part of the activities of an organization, such as a labor union or a trade association, consists of one or more of the activities to which this paragraph relates (legislative matters, political campaigns, etc.), exclusive of any activity constituting an appearance or communication with respect to legislation or proposed legislation of direct interest to the organization (see subparagraph (2)(ii)(*b*)(*1*)), a deduction will be allowed only for such portion of the dues or other payments to the organization as the taxpayer can clearly establish is attributable to activities to which this paragraph does not relate and to any activity consti-

tuting an appearance or communication with respect to legislation or proposed legislation of direct interest to the organization. The determination of whether a substantial part of an organization's activities consists of one or more of the activities to which this paragraph relates (exclusive of appearances or communications with respect to legislation or proposed legislation of direct interest to the organization) shall be based on all the facts and circumstances. In no event shall a deduction be allowed for that portion of a special assessment or similar payment (including an increase in dues) made to any organization for any activity to which this paragraph relates if the activity does not constitute an appearance or communication with respect to legislation or proposed legislation of direct interest to the organization. If an organization pays or incurs expenses allocable to legislative activities which meet the tests of subdivisions (i) and (ii) of subparagraph (2) of this paragraph (appearances or communications with respect to legislation or proposed legislation of direct interest to the organization), on behalf of its members, the dues paid by a taxpayer are deductible to the extent used for such activities. Dues paid by a taxpayer will be considered to be used for such an activity, and thus deductible, although the legislation or proposed legislation involved is not of direct interest to the taxpayer, if, pursuant to the provisions of subparagraph (2)(ii)(*b*)(*1*) of this paragraph, the legislation or proposed legislation is of direct interest to the organization, as such, or is of direct interest to one or more members of the organization. For other provisions relating to the deductibility of dues and other payments to an organization, such as a labor union or a trade association, see paragraph (c) of § 1.162-15.

(4) *Limitations.* No deduction shall be allowed under section 162(a) for any amount paid or incurred (whether by way of contribution, gift, or otherwise) in connection with any attempt to influence the general public, or segments thereof, with respect to legislative matters, elections, or referendums. For example, no deduction shall be allowed for any expenses incurred in connection with "grassroot" campaigns or any other attempts to urge or encourage the public to contact members of a legislative body for the purpose of proposing, supporting, or opposing legislation.

[T.D. 6819, 30 FR 5581, Apr. 20, 1965, as amended by T.D. 6996, 34 FR 835, Jan. 18, 1969]

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